UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 4-13-B-W
	)	
ROLAND WOODWARD,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO DISMISS THE INDICTMENT

Defendant Roland Woodward has filed a motion seeking dismissal of the indictment against him or, in the alternative, for findings on the affirmative defense of waiver of counsel. (Docket No. 19.) I held a hearing on June 8, 2004, and, on the Government's request, recessed the matter for further testimony due to the unavailability of a witness. The Government subsequently notified the Court that it did not intend to offer further testimony. Both sides requested leave to submit post-hearing written argument, which I received on June 21, 2004. I now recommend that the Court adopt the following proposed findings of fact and I further recommend that the Court **GRANT** the motion to dismiss.

Proposed Findings of Fact

Roland Woodward is thirty-seven years of age. He was raised in Maine and attended Maine schools, but he did not graduate from high school nor has he ever received his GED. He attended school through the twelfth grade, but was denied a diploma because he did not have the necessary credits for graduation. His only other formal education or training involved his work in the military where he served from 1985

through1988 working as a tank driver. He had classroom training for that specialty during boot camp. Woodward is able to read and write. He has earned a supervisory position as a foreman at Corinth Products where he has been employed for some years. Corinth Products manufactures pallets. In the fall of 2000 when he pled guilty to the domestic violence offense, Woodward earned $260 per week take-home pay and received an additional $96 per month in the form of some type of governmental stipend.[1] He has no children, but his income provides the sole support for him and his wife.

Woodward had contact with the criminal justice system prior to August 2000 when the underlying conviction challenged by this motion arose in the Maine District Court, Newport, Maine. On one prior occasion Woodward was charged with night hunting, an offense that carries a mandatory minimum sentence under Maine law of three days imprisonment and a $1,000.00 fine. See 12 M.R.S.A. § 7406. Woodward also had a prior charge of operating under the influence. On the two prior occasions, Woodward went to court and pled guilty, without the advice of counsel. Woodward said, and I believe him, the reason he pled guilty to the two earlier charges was because he believed he was guilty.

In the present case, when summonsed to court for his second operating under the influence charge and the charge of domestic assault against his wife, Woodward pled not guilty at his initial appearance on August 9, 2000. The district court judge informed him that there was "definitely a possibility of a jail sentence" but did not inform him of the maximum penalty for either offense nor did he inform him of the existence of any mandatory minimum period of incarceration that might apply. The judge also did not

[1] (Sept. 13, 2000, Plea & Sentencing Tr. at 5, Docket No. 19 Ex. B.) In his affidavit in this criminal case Woodward indicates he makes $1200 a month.

inform Woodward of anything regarding the nature of the charges. The transcript of the August 2000 arraignment is part of the record. Woodward was also advised of his right to counsel and his right to a jury trial and he was given the necessary forms to complete. Woodward indicated to the judge that he wanted an attorney to represent him. (Aug. 9, 2004, Arraignment Tr., Docket No. 19, Ex. A.) Woodward apparently believed then, and still believes today, that he had a viable defense to the assault charge: he hit his wife by accident.[2]

After he completed the indigency affidavit someone connected to the court mistakenly informed Woodward that attorney Randy Day had been appointed to represent him. The actual written order on the indigency application indicated that the district court judge found that Woodward was not indigent and that he would have to hire his attorney. Woodward, not informed of the judge's finding, made an appointment and went to Dover, Maine to consult with Day. When Woodward arrived at Day's office, Day reviewed the court documents and determined that the district court judge had declined to appoint counsel. Day called the Newport courthouse and confirmed that he had not been appointed. This meeting occurred approximately two weeks before the matter was scheduled for hearing in Newport. In the meantime Woodward had been

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[2] At the hearing on his motion to dismiss Woodward was questioned on this:

> Q: So they charged you with assault and OUI?
> A: Yes, they did.
> Q: Did you feel as if you were guilty of the assault?
> A: No, I did not.
> Q: Why?
> A: Because I did not mean to -- for my wife to get a bloody nose, and she was --
> Q: Explain it briefly.
> A: Explain it briefly was, left the neighbor's house, was headed home. My wife was upset. I can't remember what about. She went to throw a drink on me. I just automatically put my arm up, and my elbow caught her on the nose, and she got a bloody nose.

(June 8, 2004, Partial Tr. at 11.)

charged with a new offense of violating a bail condition and had been arraigned on that charge in the Bangor district court. On that occasion the judge in Bangor did find Woodward indigent and Day was appointed to that case. However, Day clearly advised Woodward that he could not represent him on a court appointed basis in the Newport case. Their conversation was very brief. The parties have stipulated that "Attorney Day has no specific memory of his conversation with the Defendant, however his practice when meeting with indigent criminal defendants is to inform them of the potential penalties that they face." (Joint Ex. 2.)

After learning that he did not have court appointed counsel Woodward made one attempt to contact a law firm and arrange for counsel but was unable to pay the fee requested. The firm advised him that his court appearance was too close in time for them to set up any sort of payment plan. Woodward never sought a loan to pay for counsel. In the past Woodward has been turned down when he has applied for loans for other purposes. Woodward did not know that he could have asked the court for a continuance so that he would have had more time to get the money together to pay the attorney fees. Woodward continued to believe that he could not afford an attorney, in spite of the court's finding to the contrary.

On September 13, 2000, Woodward appeared as required in the Newport district court. Assistant District Attorney James Diehl represented the State at proceedings on that day. According to the stipulation, Diehl believes he had a conversation with Attorney Day, who happened to be at the courthouse on other matters, about Woodward's case prior to the time Woodward changed his plea. (See Joint Ex. 2; Sept. 13, 2000, Plea & Sentencing Tr. at 5.) The parameters of the Diehl/Day conversation are not set forth

on this record and I am unable to find that there were "plea negotiations" between the two of them. The record indicates that Diehl told the court the following: "[T]here is a Bangor case that Mr. Day was appointed on that had occurred, and Mr. Day, I had hoped, was going to stick around so he and I could discuss that case, but Mr. Day must have misunderstood and left." (Id. at 5, emphasis added.) I cannot conclude from this evidence that Woodward actually had the advice of counsel or any conversation with Day regarding the proposed plea bargain.

However, Woodward's own testimony is that Diehl told him that he would offer to recommend to the court that Woodward's sentence be sixty days with all but eight days suspended.[3] (June 8, 2004, Partial Tr. at 34.) Apparently Woodward knew that would be the recommendation before he went in front of the judge. As to whether the bargain was struck between Day and Diehl and conveyed by Day to Woodward prior to Day's leaving the courthouse or between Diehl and Woodward prior to the plea it appears to have been the latter. The testimony on this issue in front of me is the following:

> Q: Okay. Now, you mentioned that you had this conversation with the assistant district attorney named Jim Diehl; is that correct?
> A: Yes.
> Q: And Assistant District Attorney Diehl and you discussed a deal; is that correct?
> A: He said, this is what I'm offering, and that was the deal, yes.
> Q: Diehl's deal. And you were, under that deal, going to be required to spend eight days in jail; is that correct?
> A: Yes.
> Q: And that the rest of the time would be suspended. It was going to be a 60-day sentence with eight days -- all but eight days suspended; is that correct? Do you remember that terminology?
> A: Yes.

[3] The alleged sixty day sentence arose as an affirmative response to a leading question on cross-examination. The September 13 transcript indicates that the actual sentence imposed on the assault charge was six months with all but eight days suspended and two years probation. (September 13 Transcript at p. 6).

> Q: I believe it was your testimony that you took the deal because -- well, tell us, why did you take that deal?
> A: As I said before, I didn't feel I had -- excuse me -- any other alternatives.

(Id. at 34.)

The stipulation signed by the parties corroborates Woodward's testimony in that the parties have stipulated that the Diehl/Woodward conversation "would have been extremely limited" and that Diehl would not have advised the defendant of the maximum penalties that he faced.

The transcript of the proceeding before the judge in Newport on September 13, 2000, is twelve and one-half pages long. At the beginning of the proceedings Attorney Day is present and explains to the court the "mistake" involving Woodward, followed by the court's consideration of apparently five unrelated untranscribed cases of unknown duration. Sometime later the court returns to Woodward's case and Day is no longer present. (Sept. 13, 2000, Plea & Sentencing Tr. at 2-3.) The transcript does not indicate that the court explained the nature of the assault charge to Woodward, advised him of the maximum penalties, or had any colloquy regarding the waiver of counsel. The court did ask Woodward if it was his desire to proceed without an attorney, to which Woodward responded, "Yes. I can't afford a lawyer." (Id. at 5.) The court then reminded Woodward that it found that he was not indigent and then said to him, "and you've decided not to hire an attorney, is that right?" Woodward responded, "Yes. I couldn't afford one." (Id.) There is nothing in the transcript that suggests that Woodward requested a continuance to have more time to hire an attorney nor is there any suggestion that the court explored with the defendant the possibility that the matter could be postponed in order to hire an attorney. According to Woodward, he did not know that he

could have asked for more time and no one explained that possibility to him. In front of me he testified:

> Q: On the day you went to court, did you still want a lawyer?
> A: Yes, I did, but I didn't -- I didn't see how there's any way possible that it'd happen.
> Q: And explain to the judge why you didn't see that there was any way possible.
> A: The reason I didn't see there was any way possible is I thought I had a court-appointed lawyer, and then myself I felt like everything was just dumped in my lap and that I would -- didn't have a leg to stand on or a chance for an attorney.
> ....
>
> Q: So on the day you went to court, did you tell the judge that you wanted a lawyer? Do you remember?
> A: On the -- the day I went for sentencing?
> Q: Yes.
> A: No, I don't believe I did.
> Q: Did -- did you speak with -- did you see Mr. Day there?
> A: Yes, I did.
> Q: Did you speak with him at all?
> A: Very briefly.
> Q: And what was -- what did you talk to him about?
> A: I can't remember.
> Q: Was it about the case?
> A: I -- honestly I can't remember what it was about.
> Q: And when you say you spoke with him briefly, how long did you speak with him? How long did you speak with him?
> A: Possibly a minute or two.
> Q: Was it outside the courthouse or outside the courtroom, or was it in the courtroom?
> A: I believe it was outside the courtroom.
> Q: And did you talk to him about him trying to help you, even though he wasn't court appointed?
> A: No. He had mentioned that in that meeting before --
> Q: Yeah.
> A: -- the very first meeting. When he gave me the folder and everything, he asked me -- I asked him how much it would cost for him to be able to represent me. And he asked me if I had any money at all, and I said -- I told him, no, that I didn't. I would have to make payments or something like that, and there was nothing he could do, I guess.
> Q: All right. Did you talk to the DA on the day you went to court in September?
> A: Yes.

Q: All right. And that was Mr. Diehl?
A: Yes.
Q: And what did you talk to him about?
A: We went in, and he offered me a deal there, I guess they call it.
Q: Yeah.
A: This is what I'm going to recommend, and I didn't feel I had any other alternative, and --
Q: Did you tell him, hey, I have a defense here?
A: No, I did not. I didn't see what good I could – I could do, just me against the state. I don't -- I didn't believe -- I didn't feel I'd stand a chance.
Q: All right. So he said, well, this is what I'm going to offer you. It was eight days on both charges, right? Eight days on both charges?
A: Yes.
Q: And you decided to go ahead and take that?
A: Yes, I did. I didn't feel I had any other alternative.
Q: Why didn't you just tell the judge, I don't have a lawyer, but I want a trial?
A: As I've said before, I didn't feel by myself what good I could possibly do. I don't know the legal system as well as somebody that's been schooled in it. I don't see what good a blue-collar worker is going to do all by himself going up against the state. I just didn't feel I stood a chance.
Q: Now, did you feel any different about your guilt on September 13th as you had in August when you went there?
A: What do you mean by that?
Q: Well, on the day you went for sentencing, did you feel like you were guilty on that day?
A: No.
Q: But you decided to take the offer anyway?
A: Yes.
Q: Now, the judge asked you if you were willing to go forward without a lawyer, and you said, yes, I can't afford one?
A: Yes.
Q: Why didn't you ask the judge for more time to try to get one?
A: I didn't know you could do that.
Q: Did the judge, on that day or any other day, ever explain to you what assault meant under the legal terms?
A: Not that I can remember. . . .
Q: How about the penalties for assault, did anyone ever tell you what the penalties were or could have been?
A: No.
Q: Did you have an idea that they might have included jail?
A: Yes, I thought they might.
Q: Do you know how much jail?
A: No.
Q: How about probation, anyone talk to you about probation?
A: No, not until James Diehl with the deal.

Q: All right. And did anyone explain to you how long probation could be or might be?
A: Just that it came with the deal.
Q: So this is the deal, eight days, probation, take it or leave it?
A: There was -- I believe it was two years' probation.
Q: Did you have anyone explain to you that it might have been less probation than two years?
A: No.
Q: And you entered guilty pleas to both of these offenses?
A: Yes.
Q: Even though you didn't feel you were guilty?
A: Yes, that's correct.
Q: And that's because you didn't feel like you had any option?
A: Yes.
Q: Did anyone explain to you about not being able to have any guns after you entered that plea?
A: No.
Q: Did you know that there was any issue about guns?
A: No, I did not. Had I known, this wouldn't be an issue.

(June 8, 2004, Partial Tr. at 18-23.)

During the plea and sentencing hearing, Diehl dismissed a third charge of refusing to sign a ticket (Sept. 13, 2000, Plea & Sentencing Tr. at 4) and the Bangor charge of violation of a bail condition (id. at 5) in exchange for Woodward's plea to the second OUI and the domestic assault offense. He recommended a six month jail sentence with all but eight days suspended, instead of the "usual" ten day sentence, giving Woodward two days of "a superficial type of credit" for the weekend he spent in jail on the alleged bail violation. (Id. at 6.) Diehl also told the court, "there's no history of violence here, but it is a domestic violence situation." (Id. at 7.) Contrary to Woodward's current assertion, there was some discussion about firearms, in that it was made a specific condition of the two year probationary period that Woodward not use or possess firearms. (Id. at 8.) The possession of the handgun at issue in this case allegedly occurred after the

end of that two-year probationary period. (Indictment, Docket No. 4.) There is no indication in the record that Woodward ever violated probation on this conviction.

Discussion

The facts surrounding the entry of this guilty plea are largely undisputed. This court must determine the significance of those facts. In my mind the defendant, Roland Woodward, has met his burden of persuasion and I conclude that he is entitled to the affirmative defense of the absence of a waiver of his right to counsel as set forth in 18 U.S.C. § 921 (a)(33)(B)(i). See United States v. Hartsock, 347 F.3d 1, 6-9 (1st Cir. 2003) (concluding that the defendant bears both the burden of production and burden of persuasion). Therefore I recommend that the court dismiss this indictment.[4]

In Iowa v. Tovar the United States Supreme Court set forth the mandatory minimum requirement in order to establish that a defendant has knowingly and intelligently waived his right to the assistance of counsel under the Sixth Amendment: "The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." __U.S.__, 124 S.Ct. 1379, 1383 (2004).

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[4] As the First Circuit noted in a footnote, it is not a trivial question whether this determination should be made by a judge in a pretrial context or a jury during trial. See cf. Blakely v. Washington, __ U.S. __, 2004 WL 1402697 (June 24, 2004). Fortunately neither side has raised that issue in this motion. Determining whether there was a waiver of counsel or whether any waiver was knowing and intelligent turns on the perceived credibility of witnesses. United States v. Hartsock, 347 F.3d at 4 n.3. In making this recommendation I have determined to resolve credibility determinations in Woodward's favor, accepting his assertion, for instance, that he did not understand that he could have asked for more time to hire an attorney. Simply put, I believed him. In order to conclude that Woodward waived an attorney by failing to hire one in the brief time available for him to do so, I would have to disbelieve Woodward's testimony that he did not have the funds on hand to retain an attorney and knew of no way to get those funds prior to his September 13, 2000, court appearance. Of course the State court judge's conclusion that Woodward was not indigent is not subject to challenge in this court. The question for this court is whether Woodward knowingly and intelligently waived counsel for purposes of § 921(a)(33)(B)(i) and that finding depends on the facts and circumstances of each particular case. See United States v. Pfeifer, 371 F.3d 430,at __, 2004 WL 1274342, *3 (8th Cir. Mar. 13, 2004).

The Government contends that the State trial court met each of these requirements. Under the facts and circumstances of this particular case, I conclude that the State trial court did not satisfy any of the three requirements. However, for purposes of this recommended decision, I also accept that the Tovar factors merely prescribe one method of presumptively determining that a valid waiver occurred and that under § 921(a)(33)(b)(i) it is entirely a matter of proof for Woodward to establish that he did not waive counsel, even in the absence of the trial court following the Tovar constitutional minimum standards. I have discussed the evidence in the context of those standards because the Government framed its response in that manner and it does provide a convenient framework.

1. Informing the Accused of the Nature of the Charges Against Him

The Government cites to pages six and seven of the transcript of Woodward's August 9, 2000, arraignment in support of its argument that the State trial court sufficiently informed Woodward of the nature of the charges against him. After citing to those pages of the transcript, the Government makes the following terse argument:

> The language used by the Court to describe the charges was understandable by anyone of even minimal intelligence. Maine's assault statute is not complex. Contrary to the Defendant's contention, the Court was not required to do a[n] element by element analysis of the counts. The Court's description of the charges at the arraignment sufficiently informed the Defendant of the nature of the charges.

(Gov't Resp. Mot. Dismiss at 8, footnote omitted.)

Turning to the cited portion[5] of the transcript of the August 9, 2000, arraignment, the entire discussion of the assault charge consisted of the following:

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[5] My independent search could find no other mention of the nature of a charge of assault in either the arraignment or the plea and sentencing transcript.

> COURT: Okay. The second is a charge of assault, and this is a charge which also allegedly occurred on or about August 8th in the Town of Corinth alleging a—an assault upon a Penny Woodward. How do you wish to plead to that charge?
>
> MR. WOODWARD: Not guilty.

(August 9, 2000, Arraignment Tr. at 6.) A defendant in Woodward's position would come away from the arraignment knowing that he was charged with "assaulting" Penny Woodward on August 8, 2000, in Corinth. He would have no reason to know that the State had to prove that he acted "intentionally, knowingly, or recklessly" to cause either bodily injury or offensive physical contact to Penny Woodward. Yet 17-A M.R.S.A. § 207, the simple assault statute referenced by the Government, does have as an essential element the fact that the State must prove a culpable state of mind.[6] A person with a higher I.Q. than the "minimal intelligence" described by the Government might well come away from such an arraignment with the impression that he had been charged with hitting his wife, period.

While I agree with the Government that the assault charge is not a complex one, under the facts and circumstances of the defense of this case, the necessity of proving a culpable state of mind would have been crucial knowledge. After all, Woodward believes that he accidentally hit his wife with his elbow as he attempted to fend off a drink that she tossed at him. The court had a minimal obligation to make sure that the defendant knew the nature of an assault charge. See United States v. Ramirez-Benitez, 292 F.3d 22, 27 (1st Cir. 2002) (describing an instruction as to the nature of charges as a "core concern" and noting that in cases "with charges lacking in complexity, simply reading the indictment to a defendant" can satisfy those requirements). The complaint in

[6] As relevant, the statute provides: "The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person. Violation of this paragraph is a Class D crime." 17-A M.R.S.A. § 207(1)(A).

this case was never read to Woodward nor was there any discussion at all about what the State would have to prove, either at the initial arraignment or at the plea and sentencing. Furthermore, at no time after the plea of guilty did the court inquire about what was alleged to have happened in this case so the defendant never got a chance to hear what the State said he did. While the State does not have a Rule 11 procedure applicable to Class D crimes such as assault, compare Me. R. Crim P. 11 (entitled "Acceptance of a Plea to a Charge of a Class C or Higher Crime"), it does provide by rule that at the initial appearance on any charge the district court judge has an obligation to "inform the person of the substance of the charges against the person." Me. R. Crim. P. 5(b)(1)(emphasis added). In this instance the court met neither the requirements of the Maine rule (assuming, but certainly not deciding, that "substance of the charges" is intended to mean something more than "nature of the charges") nor the constitutionally minimal guarantee of Tovar.

As the Tovar Court pointed out, assessing a waiver determination must be done in the context in which it occurs and asking "'what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage,' in order to 'determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.'" 124 S.Ct at 1388 (quoting Patterson v. Illinois, 487 U.S. 285, 298 (1988)). Here Woodward believed he had a valid defense to the assault charge because it was an "accident" that his arm made contact with his wife. Had the "nature of the charges" been fully explained to him Woodward certainly might have made a more knowing and intelligent decision about proceeding without a lawyer when he returned to

court on September 13, 2000. It is true that Woodward had prior experience with the criminal justice system, having been to court before for an OUI charge and on another occasion for night hunting. In neither case did Woodward harbor a belief of his innocence and he pled guilty. In this case, without even the benefit of having the nature of an assault charge explained to him, Woodward believed he was innocent of the charges. I am not in a position to conclude that the assistance of an attorney would have had no bearing on the outcome of this proceeding.

2. Informing the Defendant of His Right to be Counseled Regarding His Plea

There is no question but that Woodward was fully informed about his right to counsel in this case. Nor can there be any doubt but that he invoked his right to counsel at the time of his arraignment and when he completed the necessary financial affidavit information to file with the court. Furthermore, Woodward promptly made an appointment to speak with the attorney he believed had been assigned to his case and when he learned that the attorney would not be representing him, he attempted to retain both him and, in the alternative, other counsel. I find on these facts that Woodward acted diligently in his attempts to secure counsel.

However, the Government argues that Woodward waived his right to counsel on September 13 when he responded to the Court's inquiry as to whether he wanted to proceed without an attorney. After obtaining a plea of guilty from Woodward, the Court said, "Okay. Mr. Woodward, it's your desire to proceed without an attorney, is that accurate?" Mr. Woodward responded, "Yes. I can't afford a lawyer." The court then said, "I think what happened is this is the one in which you weren't – you weren't found to be indigent, and you've decided not to hire an attorney, is that right?" To which

Woodward responded for the second time, "Yes. I couldn't afford one." (Sept. 13, 2000, Plea & Sentencing Tr. at 5.) Leaving aside that this brief exchange regarding Woodward's claim that he still could not afford an attorney did not occur until after he had already entered his guilty plea, the brevity of the conversation supports Woodward's claim that he had no idea that he could have asked the Court for more time to hire an attorney. After all, he was called upon to change his plea prior to any mention at all of his right to counsel.

Rule 5(b)(2) of the Maine Rules of Criminal Procedure is again instructive about the district court judge's obligation in regard to a defendant's right to retain counsel and be allowed a reasonable time and opportunity to consult with counsel. Me. R. Crim. P. 5(b)(2)(emphasis added). The right to consult with counsel in the case of nonindigent defendants such as Woodward has to be conditioned on this reasonable time and opportunity standard if the right is to have any meaning at all. In this case Woodward had just about one month from his arraignment to his trial date. He did not learn that he was ineligible for court appointed counsel until two weeks prior to trial. Both Day and the law firm Woodward consulted had indicated to him that they were unwilling to agree to a payment plan because of the shortened time period. If the trial judge had indicated to Woodward that he could have an extension to make those arrangements to retain counsel, and Woodward had declined the opportunity, I would be inclined to agree with the Government's assertion that "[h]is decision was based on his unwillingness to spend his own money on counsel" and that "[h]is decision was a knowing and intelligent waiver of his right to counsel." (Govt. Resp. Mot. Dismiss at 9-10.) Again, turning to the particular facts and circumstances of this case, Woodward's modest income apparently gave

reasonable jurists in the Maine district court reason to disagree about his eligibility for court appointed counsel under applicable State guidelines because counsel was appointed in the Bangor case. All the more reason to believe Woodward's assertion that he felt as though the entire situation had been dropped in his lap and that he had no alternative but to accept "Diehl's deal." A defendant who does not know that he can request more time to hire an attorney cannot be said to have knowingly and intelligently waived his right to counsel in these circumstances. Thus even though the Court properly informed Woodward of his right to consult with counsel at the time of his initial appearance, Woodward never had a meaningful opportunity to do so and therefore he cannot be said to have intelligently and knowingly waived that right.

I do note that at the conclusion of the September 13, 2000, sentencing proceeding Woodward asked the Court for time to pay the fine and fees amounting to between $650 and $700, indicating to the Court that he would try to have it paid within the week. (Tr. Sept. 13, 2000 Plea & Sentencing Tr. at 11-12.) The Government might suggest that if Woodward were able to beg, borrow, or otherwise obtain the money to pay his fine, he could have done the same within the two week period prior to September 13 to obtain funds to get an attorney and that he made a knowing and intelligent choice not to use "his own hard-earned money on counsel." (Gov't. Resp. Mot. Dismiss at 11.) However, the fact that he had large fines to pay on the OUI charge in my mind buttresses the credibility of his statement that he did not have the ability to borrow funds to hire an attorney on this charge of assault within the short time frame available to him. While I find from this record that Woodward was fully informed of his right to obtain counsel, I cannot find that

he was given a reasonable time and opportunity to consult with counsel under the particular and unique circumstances of this case.

3. Informing the Accused of the Range of Allowable Punishments Attendant Upon a Plea of Guilty

Even the Government has to concede that this record is silent about Woodward receiving any information about the range of allowable punishments. They make a half-hearted attempt to argue that Day "believes that it is more likely than not that he reviewed the penalties with the Defendant." (Gov't Resp. Mot. Dismiss at 11.) Day did not testify and the stipulation I have before me is that it is Day's normal practice to review the range of penalties with indigent defendants. We know that Woodward was not found to be indigent and that their meeting was brief. Certainly the court never informed Woodward of the minimum or maximum penalties he could receive and it is the mere speculation to conclude that it is more likely true than not, as the Government urges in its response (id. at 10-11) that Day reviewed the penalties with Woodward.

That being said, it is true that Woodward knew the penalty he would receive before he entered his plea of guilty because the Assistant District Attorney explained the sentence to him. There appears to have been absolutely no issue regarding the court's acceptance of that negotiated plea. The circumstances surrounding potential penalties alone would not, in my view, be enough to render this plea involuntary if the court had adequately explained the nature of the charges and if Woodward had been given a reasonable time and opportunity to consult with counsel or if the court had taken some additional time to make sure that Woodward's decision to proceed without counsel was done knowingly and intelligently. In the context of a motion such as this one, where the entire burden of the affirmative defense is on Woodward, the court's noncompliance with

one of the Tovar constitutional minimums does not in and of itself render the purported waiver of counsel invalid.

Conclusion

Based upon the foregoing, I recommend that the court adopt these proposed findings of fact and **DISMISS** this indictment.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated July 12, 2004.

Case title: USA v. WOODWARD
Other court case number(s): None
Magistrate judge case number(s): None
Date Filed: 02/11/04

Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to:

Defendant(s)

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Designation: CJA Appointment

Pending Counts	**Disposition**
18:922G.F - POSSESSION OF FIREARM BY A PERSON CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE - 18:922(g)(9) (1)	

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Plaintiff

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