

concerning his right to a jury trial, his lack of understanding of the proceedings in state court and his reasons for pleading no contest. Motion at [2]-[3].

None of the case law cited by the defendant supports his claim of entitlement to an evidentiary hearing under these circumstances. In *United States v. Hartsock*, 347 F.3d 1 (1st Cir. 2003), the First Circuit held that the defendant bears the burden of proving that the exception to 18 U.S.C. § 922(g)(9), which is set forth at 18 U.S.C. § 921(a)(33)(B)(i)(I) and is invoked by the defendant in this case, is applicable to the charge against him, 347 F.3d at 9. No transcript of the state proceeding at which Hartsock had waived his right to counsel was available and the government submitted deposition and affidavit testimony on this point. *Id.* at 3. In a footnote, the First Circuit noted that “[d]etermining whether there was a waiver of counsel or whether any waiver was knowing and intelligent will, in the absence of documentation, turn on the testimony of witnesses whose credibility will be at stake.” *Id.* at 4 n.3. Magistrate Judge Kravchuk held an evidentiary hearing on the matter after remand. *United States v. Hartsock*, 2004 WL 114984 (D. Me. Jan. 21, 2004), at *1.

In *United States v. Kinney*, 2003 WL 23004995 (D. Me. Dec. 19, 2003), Magistrate Judge Kravchuk issued an order requiring counsel to notify the court by a certain date if an evidentiary hearing on the same issue was sought. *Id.* at *1. It was not. *Id.* A transcript of the state-court arraignment was available. *Id.* at *2. In *United States v. Woodward*, 2004 WL 1572694 (D. Me. July 12, 2004), where this issue again was raised, the transcript of the state-court arraignment was part of the record and an evidentiary hearing was held, *id.* at *1. There is no indication in the opinion of the reason why an evidentiary hearing was held.¹ Neither *Kinney* nor *Woodward* lends any support to the defendant’s

¹ Defense counsel’s quotation, Motion at [4], of Magistrate Judge Kravchuk’s reference to *Hartsock* in a footnote in (*continued on next page*)

contention that he is entitled to an evidentiary hearing in this case despite the presence of an admittedly accurate transcript of the state-court plea proceeding.

The affirmative defense invoked by the defendant in this case provides that

[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] for purposes of this chapter, unless —

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

18 U.S.C. § 921(a)(33)(B)(i).

The transcript of the state-court proceeding at issue in this case records the following statements made by the presiding judge to the defendant.

The third right and the last right that I want to explain to everybody is your right to an attorney. If any of you are here and there is a probability or a possibility that you could be facing jail if you are convicted of the crime that you are being charged with here, I would advise you to get a lawyer or get legal advice. Also, if you can't afford a lawyer, depending on your financial circumstances, you can ask me to appoint a lawyer at the State expense for you. Here's how that happens. You let me know. I'm obviously going to let you know how serious the offense is and you are going to be asked about whether you are going to represent yourself, hire a lawyer, or ask for a court appointed lawyer. If you ask for a court appointed lawyer, you're gonna be screened this morning by a financial screening officer who will interview you and decide whether you meet the guidelines for a court appointed lawyer. IF you meet the guidelines, a lawyer will be appointed who practices within our jurisdiction here. It's a private attorney. If you don't qualify, that means you will have to hire your

which she states that “[d]etermining whether there was a waiver of counsel or whether any waiver was knowing and intelligent turns on the perceived credibility of witnesses,” *Woodward*, 2004 WL 1572694 at *6 n.4, is inapposite. Judge Kravchuk had already held an evidentiary hearing when she wrote the *Woodward* opinion and therefore had no reason to include the qualifying language from *Hartsock*, which limits the circumstances in which credibility is a issue to those cases in which documentation — like a transcript — is not available, 347 F.3d at 4 n.3.

own lawyer or represent yourself. Please understand the case doesn't go away because you don't get a court appointed lawyer. You still have to face the charges.

* * *

Those of you who plead Guilty and those of you who plead No Contest waive your right to a trial. Obviously, you're not going to have a trial. You waive your right also to get the advice of a lawyer, so please understand those consequences before you decide to plead Guilty.

* * *

Now if you plead Not Guilty you'll get a date for trial — I told you that. Then we're going to hand you three pieces of paper, okay — I am going to go over that very quickly. Page One is your ticket to a jury trial. Since it's a criminal offense, you have a right to say, "I want a jury trial instead of a judge trial." . . . If you want a jury trial, you take the first piece of paper that is handed to you this morning and within three weeks of today's date, sign it and bring it to the clerk in the lobby. That means "I want a jury trial, not a judge trial." If that happens, your case is transferred across the river and goes to the Superior Court in Auburn and you'll be notified by that court of the time and date of your trial by jury.

* * *

Court: All right, Mr. Frechette, you have already pled Not Guilty. This was a bench warrant for not showing up to your trial and you have a right to either ask for a new court date if you want to do so.

Frechette: No.

Court: Do you want to change your plea?

Frechette: No contest.

Court: Do you want to change your plea to No Contest? DO you understand by doing that you waive your right to trial. Right?

Frechette: Yes.

Court: Your right to the advice of a lawyer? Does he get a court appointed lawyer? No, he didn't qualify. Okay. Do you understand that by pleading No Contest that you waive your right to trial and the advice of a lawyer? All right?

Frechette: Yup.

Court: Okay. Do you want to have him waived, please?

Court Officer: This is a waiver of counsel I'm going to read to you.

I am the person charged in this proceeding. I am fully aware of my right to have my attorney of my own choosing or, if I am unable to afford an attorney, to have an attorney appointed by the court at public expense. I do not desire an attorney and hereby waive my right to be represented by an attorney.

Do you understand what I read to you, sir? Having read that to you, you can sign right here, please.

Arraignment Session — Lewiston District Court — 10/16/96 (Exh. 1 to Docket No. 15). This colloquy appears to meet the requirements of the statute.

The defendant states that he “was never told that he could re-apply for court appointed counsel, as his financial abilities had changed,” that he “was never told that he could ask for more time to secure a loan from family or friends,” and that he “knew he could not afford counsel at the time of his conviction,” Motion at [3]. He cites no authority to support his implication that being told these things is a necessary part of a knowing and intelligent waiver of counsel, and I am not aware of any such authority. He states that he “believes he had no choice but to plead nolo, due to his lack of sophistication, his unlawful arrest, the Court’s denial of his invocation of the right to counsel, and other factors to be addressed at hearing.” *Id.* If there are “other factors to be addressed at hearing,” it behooves the defendant to mention them in his motion. He does not explain why he cannot attack his arrest on the underlying charge as unlawful — if he can do so at all in this proceeding — without an evidentiary hearing. From all that appears, the state court’s “denial of his invocation of the right to counsel” was based on the defendant’s financial ability and was not in any way wrongful. Finally, if lack of sophistication were sufficient reason to void a state-court conviction for purposes of 18 U.S.C. § 921(a)(33)(B), most individuals convicted of misdemeanor crimes of domestic violence could not be charged under 18 U.S.C. § 922(g)(9); the exception would swallow up the crime.

The motion for an evidentiary hearing is **DENIED**.

Dated this 24th day of March, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Defendant

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