

**NOT DESIGNATED FOR PUBLICATION**

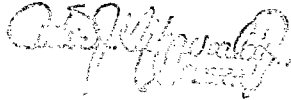
STATE OF LOUISIANA

VERSUS

IVORY JORDAN

COURT OF APPEALS  
FIFTH CIRCUIT

FILED JAN 15 2002



COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

01-KA-938

APPEAL FROM  
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,  
PARISH OF JEFFERSON, STATE OF LOUISIANA,  
NUMBER 01-1465, DIVISION "I,"  
HONORABLE JO ELLEN GRANT, PRESIDING.

JANUARY 15, 2002

**WALTER J. ROTHSCHILD  
JUDGE**

Panel composed of Judges Edward A. Dufresne, Jr.,  
Thomas F. Daley and Walter J. Rothschild.

**PAUL D. CONNICK, JR.**

District Attorney  
24<sup>th</sup> Judicial District  
Parish of Jefferson  
State of Louisiana

**TERRY M. BOUDREAUX**

**CHURITA H. HANSELL**

**RICHARD R. PICKENS, II**

Assistant District Attorneys  
Courthouse Annex  
Gretna, Louisiana 70053  
Counsel for State of Louisiana, Plaintiff-Appellee.

**JANE L. BEEBE**

P.O. Box 1193  
Gretna, Louisiana 70005  
Counsel for Ivory Jordan, Defendant-Appellant.

**JUDGMENT RENDERED;**  
**REVERSED IN PART, AFFIRMED IN PART;**  
**REMANDED FOR SENTENCING.**

WJR  
EAD  
T.D.

On March 21, 2001, the defendant, Ivory Jordan, was charged by bill of information with driving while intoxicated (DWI), third offense, in violation of LSA-R.S. 14:98(D). He was arraigned and pled not guilty on May 1, 2001. On June 8, 2001, the defendant filed a "Motion to Quash the Bill of Information." The trial judge issued a judgment on July 6, 2001 in which she denied the motion to quash.

On July 13, 2001, the defendant withdrew his plea of not guilty and entered a plea of guilty as charged to the crime of DWI, third offense. However, he reserved his right to appeal the trial court's denial of the motion to quash, pursuant to State v. Crosby, 338 So. 2d 584 (La. 1976). That same day, the trial court sentenced the defendant to three years at hard labor. The trial court suspended the sentence with the provision that the defendant serve six months in parish prison without benefit of parole, probation, or suspension of sentence. The defendant was further ordered to be placed on active probation for two and one-half years upon his release from prison. The trial court imposed a \$2,000.00 fine and various court fees, and the defendant was ordered to attend an alcohol abuse program and a driver's education program. The defendant was further ordered to forfeit his vehicle

and to have an interlock device put on any vehicle that he drives.

The defendant made an oral motion for appeal on July 13, 2001, and he filed a written motion for appeal on July 18, 2001, which was granted by the trial court on July 25, 2001.

### **LAW AND DISCUSSION**

On appeal, the defendant asserts that the trial court erred in failing to grant his motion to quash. We agree.

The first prior DWI conviction alleged in the bill of information occurred as a result of the defendant's guilty plea in case number S538681 in Second Parish Court for the Parish of Jefferson, on December 19, 1994. The second predicate conviction occurred as a result of the defendant's plea of guilty/nolo contendere in case number S726424 in Second Parish Court for the Parish of Jefferson on February 17, 2000.<sup>1</sup> In his "Motion to Quash the Bill of Information," the defendant challenged the constitutional validity of these prior DWI convictions and argued that they could not be used to enhance the underlying offense to a third offense DWI, because the State's evidence was insufficient to prove that the prior guilty pleas were knowing and voluntary. The defendant reasserts this claim on appeal.

The record of any guilty plea must show that the defendant was informed of his privilege against self-incrimination and his rights to a trial and confrontation. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). The record must also show that the defendant understood his Boykin rights and that he knowingly and voluntarily waived them. State v. Casse, 00-235 (La. App. 5 Cir. 10/18/00), 772 So. 2d 801, 803. In order for a misdemeanor guilty plea to be used as a basis for imprisonment, enhancement of imprisonment, or conversion of a subsequent misdemeanor to a felony, it is incumbent upon the trial judge to inform the defendant that he waives his Boykin rights

---

<sup>1</sup>The bill of information in the present case sets forth the dates of commission of the alleged prior offenses, not the conviction dates.

by pleading guilty. State v. Jones, 404 So. 2d 1192, 1196 (La. 1981). The trial judge must further insure that the accused has a full understanding of the consequences of his plea. Id.

In State v. Carlos, 98-1366 (La. 7/7/99), 738 So. 2d 556, 559, the Louisiana Supreme Court decided that the burden-shifting principles set forth in State v. Shelton, 621 So. 2d 769 (La. 1993), as applied to habitual offender proceedings, should be extended to the recidivist portions of the DWI statute. When a defendant challenges the validity of a prior DWI guilty plea through a motion to quash, the State bears the initial burden of submitting sufficient evidence to prove: 1) the existence of the prior guilty plea; and 2) that the defendant was represented by counsel at the time that the prior guilty plea was entered. State v. Carlos, *supra*. If the record reveals that the defendant was not represented by counsel during the prior guilty plea, the State must prove that the defendant knowingly and intelligently waived the right to counsel before entering his plea. State v. Pendleton, 00-1158 (La. App. 5 Cir. 11/28/00), 776 So. 2d 1234, 1237; State v. Boudreaux, 99-1017 (La. App. 5 Cir. 2/16/00), 756 So. 2d 505, 508. The determination of the validity of the accused's waiver of counsel rests on the totality of circumstances in each case. State v. Stevison, 97-3122 (La. 10/30/98), 721 So. 2d 843, 844-845.

With regard to the defendant's first predicate guilty plea, the evidence in the record before us includes certified copies of the bill of information, a docket master containing minute entries from the court proceedings, a guilty plea form, and a commitment. The bill of information charges the defendant with one count of DWI,<sup>2</sup> and the defendant's signature is present on the guilty plea form. The commitment, which was signed by the trial judge, indicates that the defendant entered a guilty plea to a violation of LSA-R.S. 14:98 and that he received a 15-day suspended sentence and was placed on six months of

---

<sup>2</sup>This bill of information also charges the defendant with one count of failure to maintain control of a vehicle. However, a notation on the docket master indicates that this charge was dismissed.

inactive probation. The documentation contained in the record is clearly sufficient to satisfy the first prong of the State's initial burden, because it establishes the existence of the prior guilty plea.

The record does not indicate that the defendant was represented by counsel at the time of this guilty plea. As stated above, when the record reveals that the defendant was not represented by an attorney during a guilty plea, the State must show that the defendant knowingly and intelligently waived his right to counsel. The guilty plea form states, "I UNDERSTAND MY RIGHT TO THE ASSISTANCE OF A LAWYER AND WISH TO WAIVE THAT RIGHT AND ENTER A GUILTY PLEA WITHOUT THE ASSISTANCE OF A LAWYER." However, the record before us does not show that the trial judge verbally advised the defendant of his right to an attorney or made any other inquiries to determine whether the defendant knowingly and intelligently waived his right to counsel. Moreover, the guilty plea form did not disclose that if the defendant chose to go to trial, he would have the right to counsel during every stage of the proceedings.

In State v. Garrity, 97-958 (La. App. 5 Cir. 1/27/98), 708 So. 2d 1096, this Court held that the defendant had not made an intelligent and voluntary waiver of his right to counsel when he pled guilty to a predicate DWI where the transcript indicated that the defendant was not represented by counsel and the record revealed that the trial judge had not inquired into the defendant's ability to understand the proceedings. In State v. Deroche, 96-1376 (La. 11/8/96), 682 So. 2d 1251, 1252, the Louisiana Supreme Court held that the record of a prior DWI guilty plea did not reveal a valid waiver of counsel, because the record did not show that the trial judge had inquired into the defendant's capacity to waive his right to counsel.

Considering the record before us, we find that the totality of the circumstances in the present case does not support a finding that the defendant knowingly and intelligently waived his right to counsel with regard to the defendant's first predicate DWI conviction. Therefore, the State has failed to satisfy the second prong of its initial burden, which

requires a showing that the defendant was represented by counsel or knowingly and intelligently waived that right. Accordingly, we find that the trial court erroneously denied the defendant's motion to quash as it pertains to the defendant's first predicate conviction, and we reverse this ruling of the trial court.

With regard to the second predicate conviction, the documentation contained in the record includes certified copies of the bill of information, a docket master containing minute entries, a waiver of rights form, and documentation of the defendant's completion of certain court-ordered programs. A minute entry dated February 17, 2000 states that the defendant withdrew his plea of not guilty and entered a guilty plea to the charge of second offense DWI. He was sentenced to serve six months in parish prison. This sentence was suspended and the trial court placed him on one year of active probation. The foregoing evidence in the record is clearly sufficient to prove the existence of the defendant's second predicate DWI conviction, which is the first prong of the State's initial burden. The State has also proven the second prong of its initial burden because the waiver of rights form, which bears the signatures of the defendant, his attorney, and the trial judge, proves that the defendant was represented by counsel at the time of the guilty plea. Accordingly, the State has met its initial burden with regard to the second predicate conviction.

When the State meets its initial burden, the defendant must produce affirmative evidence to show a constitutional deficiency or a procedural irregularity in the taking of the plea. State v. Pickett, 99-532 (La. App. 5th Cir. 10/26/99), 746 So.2d 185, 187; State v. Stevison, *supra*. If the defendant meets this requirement, then the burden reverts back to the State to prove the constitutionality of the plea. Id. The State can meet this burden by producing a "perfect" transcript of the guilty plea colloquy. State v. Shelton, *supra* at 780; State v. Carlos, *supra* at 559. If the State produces anything less than a "perfect" transcript, such as a minute entry or guilty plea form, the trial judge must weigh the evidence and determine whether the defendant's constitutional rights were prejudiced.

Id.

The defendant asserts that the second predicate guilty plea was constitutionally deficient based on the following: 1) the record does not show that the trial judge made a determination on the record as to whether he validly waived his Boykin rights; 2) there is no indication that the trial court inquired into his educational background; and 3) the guilty plea form does not disclose the sentence to be imposed and is not dated by the trial judge.

The waiver of rights form states, in part:

I understand that, by pleading to this offense, I am giving up the following rights:

My right to plead not guilty or to pursue the not guilty plea previously entered, and go forward with a trial.

My right to a Judge trial.

My right to require the State to prove my guilt beyond a reasonable doubt.

My right to confront my accuser and cross-examine witnesses called to testify against me.

My right not to be compelled to incriminate myself.

My right to appellate review.

This form clearly lists the defendant's Boykin rights. The defendant signed the form, acknowledging that he understood and waived his rights. The defendant was represented by counsel, and defense counsel and the trial judge also signed the document, acknowledging the validity of its contents. Although the form does not set forth the sentence that the defendant would receive, the nature of the offense and the possible penalties are set out in great detail. The document further states that the defendant's current DWI conviction could be used to enhance any future DWI conviction. There is a space on the form for the defendant to indicate his level of education, and "12<sup>th</sup> GRADE (GRADUATE)" is the handwritten response, which indicates that there was an inquiry into the defendant's educational background. Although the trial judge's signature on the form is not dated, this is not an omission of constitutional magnitude. The date of the guilty plea, "2-17-2000," is written on the date line beside the defendant's signature and

this is sufficient to prove the date of the plea.

Based on the foregoing, the defendant has failed to meet his burden of showing a constitutional deficiency or irregularity in the taking of the guilty plea for the second predicate conviction. Therefore, the burden of proof does not revert to the State. Accordingly, we find that the second predicate guilty plea was properly used to enhance defendant's DWI charge, and the trial court's ruling with regard to the second conviction is affirmed.

In his brief to this Court, the defendant requests a review of the record for errors patent. In accordance with LSA-C.Cr.P. art. 920, State v. Oliveaux, 312 So. 2d 337 (La. 1975), and State v. Weiland, 556 So. 2d 175 (La. App. 5 Cir. 1990), the record was reviewed for errors patent. However, no patent errors were revealed in this case.

Accordingly, for the reasons set forth above, we reverse the ruling of the trial court denying the defendant's motion to quash with regard to the first predicate DWI conviction, affirm the trial court's ruling with regard to the second predicate DWI conviction, and vacate the defendant's sentence. Further, we find that the record supports the defendant's conviction as a second DWI offender and we uphold that conviction. Accordingly, we remand to the trial court to re-sentence the defendant as a second DWI offender.

**JUDGMENT RENDERED;**  
**REVERSED IN PART, AFFIRMED IN PART;**  
**REMANDED FOR SENTENCING.**