NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

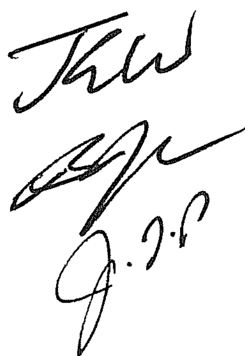
FIRST CIRCUIT

NUMBER 2007 KA 0804

STATE OF LOUISIANA

VERSUS

ANTHONY J. TABB



Judgment Rendered: November 2, 2007

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Appealed from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary, Louisiana
Trial Court Number 05-168,754

Honorable Edward M. Leonard, Jr., Judge

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Defendant – Appellant
Anthony J. Tabb

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

WELCH, J.

The defendant, Anthony Joseph Tabb, was charged by bill of information with one count of driving while intoxicated (DWI), third offense, a violation of La. R.S. 14:98. He initially pled not guilty and moved to quash the use for enhancement purposes of his August 27, 1997 DWI guilty plea, under City Court of Abbeville Docket # CT-60834 (predicate #1), and his August 23, 2000 DWI no contest plea, under City Court of New Iberia Docket #20004563 (predicate #2). Following a hearing, the motion to quash was denied. Thereafter, he withdrew his former plea and pled guilty reserving his right to seek review of the court's ruling on the motion to quash. See **State v. Crosby**, 338 So.2d 584 (La. 1976). He was sentenced to five years at hard labor, with all but thirty days of the sentence suspended, and five years probation upon release subject to general and special conditions of probation. The court also imposed a $2,000 fine. He now appeals, designating three assignments of error. We affirm the defendant's conviction and sentence.

ASSIGNMENTS OF ERROR

The defendant urges three assignments of error as follows:

> 1. The trial court erred in denying the motion to quash because the transcript of the predicate #1 guilty plea does not establish that the defendant waived his right to counsel.
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> 2. In the event it is determined that the trial court obtained a waiver of counsel, the trial court erred in denying the motion to quash because the transcript of the predicate #1 guilty plea does not establish that the defendant made a knowing and intelligent waiver of his right to counsel as required by **State v. Deroche**, 96-1376 (La. 11/8/96), 682 So.2d 1251, 1252 (per curiam).
>
> 3. The defendant requests a review for "errors patent."

FACTS

Due to the defendant's guilty plea, there was no trial and, thus, no trial testimony concerning the facts of the offense. At the **Boykin** hearing, however, the

State set forth that on October 30, 2005, the defendant was observed operating a vehicle while under the influence of alcohol and, prior to that date, had twice been convicted of DWI. The defendant indicated that the factual basis was accurate.

MOTION TO QUASH

In assignment of error number 1, the defendant argues, while he was advised of his right to counsel at the predicate #1 guilty plea and executed a waiver of rights form, the trial court failed to obtain a verbal waiver of counsel from him. In assignment of error number 2, the defendant argues, in the event that this court determines he waived his right to counsel in connection with predicate #1, the record does not establish that the counsel waiver was knowing and intelligent.

In **State v. Henry**, 2000-2250, pp. 8-9 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791, this court set forth the following requirements to use a predicate offense for enhancement purposes:

> In order for a guilty plea to be used as a basis for actual imprisonment, enhancement of actual imprisonment, or conversion of a subsequent misdemeanor into a felony, the trial judge must inform the defendant that by pleading guilty he waives: (a) is privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront his accuser. The judge must also ascertain that the accused understands what the plea connotes and its consequences. If the defendant denies the allegations of the bill of information, the State has the initial burden to prove the existence of the prior guilty plea and that the defendant was represented by counsel when it was taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. To meet this requirement, the State may rely on a contemporaneous record of the guilty plea proceeding, i.e., either the transcript of the plea or the minute entry. Everything that appears in the entire record concerning the predicate, as well as the trial judge's opportunity to observe the defendant's appearance, demeanor, and responses in court, should be considered in determining whether or not a knowing and intelligent waiver of rights occurred. **Boykin** only requires that a defendant be informed of the three rights enumerated above. The jurisprudence has been unwilling to extend the scope of **Boykin** to include advising the defendant of any other rights which he may have. (Citations omitted).

Additionally, an uncounseled DWI conviction may not be used to enhance

punishment of a subsequent offense, absent a knowing and intelligent waiver of counsel. **State v. Cadiere**, 99-0970, p. 3 (La. App. 1st Cir. 2/18/00), 754 So.2d 294, 297, writ denied, 2000-0815 (La. 11/13/00), 774 So.2d 971. When an accused waives his right to counsel in pleading guilty to a misdemeanor, the trial court should expressly advise him of his right to counsel and to appointed counsel if he is indigent. The court should further determine on the record that the waiver is made knowingly and intelligently under the circumstances. Factors bearing on the validity of this determination include the age, education, experience, background, competency, and conduct of the accused, as well as the nature, complexity, and seriousness of the charge. Determining the defendant's understanding of the waiver of counsel in a guilty plea to an uncomplicated misdemeanor requires less judicial inquiry than determining his understanding of his waiver of counsel for a felony trial. Generally, the court is not required to advise a defendant who is pleading guilty to a misdemeanor of the dangers and disadvantages of self-representation. The critical issue on review of the waiver of the right to counsel is whether the accused understood the waiver. What the accused understood is determined in terms of the entire record and not just by certain magic words used by the judge. Whether an accused has knowingly and intelligently waived his right to counsel is a question that depends on the facts and circumstances of each case. **Cadiere**, 99-0970 at pp. 3-4, 754 So.2d at 297.

The defendant's signature on a printed waiver form advising him of his right to counsel and warning him of the dangers of self-representation and the signature of the trial judge on the same form that he is satisfied the accused understood the nature of his plea and its consequences, do not discharge the duty of the trial judge to advise the defendant expressly of his right to counsel and to determine "on the record that the waiver is made knowingly and intelligently under the circumstances," taking into account such factors as the defendant's age, background, and education. **Cadiere**,

99-0970 at p. 4, 754 So.2d at 297 (<u>citing</u> **State v. Deroche**, 96-1376, p. 1 (La. 11/8/96), 682 So.2d 1251, 1252 (per curiam)).

However, while the use of a printed form alone is not sufficient to establish a knowing and intelligent waiver of the right to the assistance of counsel, the use of such a form in conjunction with other matters, which appear in the record viewed as a whole, may establish that the waiver was valid. *Id.*

Prior to trial, the defendant timely moved to quash the information charging the instant offense, arguing that the guilty pleas relied upon by the State to enhance the instant offense were entered by the defendant alone and without intelligent waiver of counsel. He also argued the minutes of court from the prior guilty pleas failed to reflect that he was apprised of all of his constitutional rights. He also argued more than two years had elapsed since institution of prosecution.[1] In denying the motion to quash, the trial court noted:

> I find that the Court in [predicate #1] fully advised [the defendant] of all of his constitutional rights. [The defendant] indicated that he understood those. There was some discussion between the Judge and [the defendant] from which the Court in observing [the defendant] observed that [the defendant] had sufficient knowledge to understand the nature of the proceedings and for that reason I will deny the Motion to Quash.

To establish waiver of counsel in connection with the defendant's guilty plea in predicate #1, the State introduced a minute entry, transcript, and an August 27, 1997 rights-waiver form from the City Court of Abbeville. The minute entry reflects that the defendant appeared in court without counsel. The court explained his right to be represented by counsel of choice or, if he could not afford counsel, the right to be represented by court-appointed counsel at no cost to him. Thereafter, the minutes state, "[t]he Court was convinced that the Defendant understood the nature and seriousness of the charge, as well as the consequences of plea, and that the

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[1] The defendant limits his argument on appeal to whether the State established a knowing and intelligent waiver of counsel in connection with predicate #1. Accordingly, we address only the waiver of counsel issue.

Defendant's waiver of said right was made intelligently."

The transcript of the defendant's guilty plea in predicate #1 indicates that prior to advising the nine defendants in court, including the instant defendant, of their rights, the court indicated that if any of the defendants did not understand the advice of rights, they should stop the court because it was the court's obligation to make sure that the defendants understood what the court was going to be telling them and that they would be asked to sign a rights-waiver form at the end of the proceeding. Thereafter, the court stated:

> All of you have the right to be represented by an Attorney, this is a very sacred right. If you can afford an Attorney you have the obligation of making the financial arrangements to employ an Attorney and pay his or her fee, if however you are poor or what the law says is an indigent defendant, then I have the obligation to appoint an Attorney for you and generally I appoint the Indigent Defender Organization we call that the IDO. The IDO is an organization that has probably four (4) or five (5) Attorneys employed and paid by the State whose job is to represent people who are indigent. You can waive that right, that is to say you can give up the right, you don't have to have an Attorney with you if you say well I don't want an Attorney and that is what you would really be saying if you say well I want to finish this today, you would be giving up the right to have an Attorney, but again it is such a sacred right that I am going to call each individual who is up here and ask if you understand that you have that right and whether you want an Attorney or if you waive it. Now if you want an Attorney then we would not be able to finish this today because the law says the Attorney has to be with you at every stage of the prosecution which means even today this is the arraignment day and that is the first (1st) stage in the prosecution.

Thereafter, the court asked the first of the nine defendants, "Alright, Mr. Colomb, Jr., you understand Mr. Colomb you have a right to an Attorney, you can give up that right but I have to establish today whether you want that right or not. You understand that you have a right to an Attorney?" Mr. Colomb answered, "Yes sir." The defendant was the seventh defendant the court addressed. The court asked the defendant, "Ok, and is it Mr. Tabb?" The defendant replied, "Yes sir." The court also explained that there had to be a factual basis for a guilty plea and asked each DWI defendant whether they had anything alcoholic to drink on the day or the night

they were stopped. In response to the court's inquiry, the defendant stated, "Yeah I had drank earlier."

The rights-waiver form, signed by the defendant in connection with predicate #1, in pertinent part, provides:

> DOB *1-9-57*[2]
> PLEA OF *Guilty*
>
> I *Anthony Tabb* on my plea of *guilty* to the charge of DWI having been informed and understand the charge to which I am pleading *guilty*, as well as the following rights:
>
> 1. My right to be represented by counsel of my choice, or if I cannot afford one, my right to be represented by court-appointed counsel at no cost to me.
>
> . . . .
>
> I realize that by pleading *guilty* I stand convicted of the crime charged and waive my priviledge [*sic*] against self incrimination, my right to trial, my right to confront and cross-examine witnesses, my right of compulsory process, and my right to appeal. I further state that my plea in this matter is free and voluntary and that it has been made without any threats or inducements whatsoever from any one [*sic*] associated with the City of Abbeville or the state of Louisiana and that the only reason I am pleading *guilty* is that I am.

There was no error in the denial of the motion to quash predicate #1. The record concerning predicate #1, viewed as a whole, establishes that the defendant knowingly and intelligently waived counsel. Predicate #1, a first offense DWI, was an uncomplicated misdemeanor. The defendant was forty years old and had a number of prior arrests, including three prior DWI arrests, at the time of this plea. The court meticulously described the right to counsel, gave the defendant the opportunity to ask questions, and gave the defendant the opportunity to invoke his right to counsel. The defendant failed to invoke his right to counsel, did not ask questions or express hesitation during the **Boykin** hearing, and subsequently signed a rights-waiver/guilty plea form, which also advised him of his right to counsel.

The defendant's reliance upon **State v. Deroche**, 95-0376 (La. App. 1st Cir.

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2 We place the handwritten portions of the form in italics.

4/10/96), 674 So.2d 291, vacated in part, 96-1376 (La. 11/8/96), 682 So.2d 1251, and **State v. Nabak**, 2003-919 (La. App. 5th Cir. 12/30/03), 864 So.2d 758, is misplaced. The court in **Deroche** reversed a conviction and sentence for third-offense DWI. In that case, however, the printed rights-waiver form did not require anything of the defendant other than to check several blocks and affix his signature. **Deroche**, 95-0376 at p. 8, 674 So.2d at 297. Further, in **Deroche**, 95-0376 at p. 7, 674 So.2d at 296-297, the minutes did not show that the defendant was informed of his right to counsel or if the trial court entered into a colloquy with the defendant to ascertain if he knowingly and intelligently understood his rights and the effect of a waiver of those rights. See **State v. Snider**, 30,568, pp. 6-7 (La. App. 2nd Cir. 10/21/97), 707 So.2d 1262, 1265-66, writ denied, 97-3025 (La. 2/13/98), 709 So.2d 748.

Nabak involved a **Crosby** guilty plea to third-offense DWI following the denial of a motion to quash two uncounseled predicate DWI offenses. **Nabak**, 2003-919 at p. 2, 864 So.2d at 760. The State offered a single-page waiver of rights form in support of the first predicate and a certified copy of the bill of information, a minute entry reflecting the charges and disposition, and a waiver of rights form in support of the second predicate. **Nabak**, 2003-919 at pp. 3-4, 864 So.2d at 760. The court in **Nabak** concluded that the record did not indicate that the trial judge made a determination on the record that the defendant had knowingly and intelligently waived his right to counsel. **Nabak**, 2003-919 at p. 7, 864 So.2d at 762-63. The court specifically distinguished cases such as **State v. Theriot**, 2000-870 (La. App. 5th Cir. 1/30/01), 782 So.2d 1078, wherein the defendant signed a rights-waiver form acknowledging his right to ask questions and the transcript of the plea indicated the defendant did not ask questions or hesitate in pleading guilty. **Nabak**, 2003-919 at pp. 7-8, 864 So.2d at 763; see also **State v. Barron**, 32,960 (La. App. 2nd Cir. 4/5/00), 758 So.2d 965, writ denied, 2000-1224 (La. 2/2/01), 783 So.2d 381.

These assignments of error are without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr.P. art. 920(2).

Louisiana Revised Statutes 14:98(D)(2) provides a specific procedure for the trial court to follow in regard to seizure, impoundment, and sale of the vehicle being driven at the time of the offense. The trial court failed to follow that procedure in this case. Although the failure to follow La. R.S. 14:98(D)(2) is error under La. C.Cr.P. art. 920(2), it is certainly harmless error. The defendant is not prejudiced in any way by the court's failure to follow La. R.S. 14:98(D)(2).

Additionally, the sentencing transcript does not reflect that the trial court required the defendant to participate in a court-approved driver improvement program at his expense. See La. R.S. 14:98(D)(3)(b). Because the trial court's failure to follow La. R.S. 14:98(D)(3)(b) and La. R.S. 14:98(D)(2) was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to remand for correction of the error. See **State v. Price**, 2005-2514, p. 22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-125 (en banc).

CONCLUSION

For the foregoing reasons, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.