

STATE OF LOUISIANA

NO. 18-KP-658

VERSUS

FIFTH CIRCUIT

EDWON SPEARS

COURT OF APPEAL

STATE OF LOUISIANA

November 16, 2018

Susan Buchholz

First Deputy Clerk

IN RE EDWON SPEARS

APPLYING FOR SUPERVISORY WRIT FROM THE FORTIETH JUDICIAL DISTRICT COURT, PARISH OF ST JOHN THE BAPTIST, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE EDWARD J. GAIDRY, PRO TEMPORE, DIVISION "B", NUMBER 62,823

Panel composed of Judges Fredericka Homberg Wicker,
Robert A. Chaisson, and Stephen J. Windhorst

WRIT GRANTED; GUILTY PLEA VACATED

This application is before us on supervisory review and request for expedited consideration of a sentence imposed upon relator on November 5, 2018, by the Fortieth Judicial District Court.

On October 14, 2018, relator was arrested and imprisoned for simple assault in violation of LSA R.S. 14:38 with bail set at \$750. Relator was also held on a detainer from the Kenner Police Department. On October 15, 2018, the duty judge made a preliminary determination of indigency and appointed a Public Defender.¹ A bill of information was filed on October 30, 2018. On November 5, 2018, relator pled guilty and was sentenced to imprisonment in the Parish Jail for ninety days and ordered to pay a fine and court cost totaling \$269.00.²

On November 9, 2018, relator filed a *Motion to Reconsider Sentence* which has been set for hearing on December 3, 2018 and a *Notice of Intent to Apply for Writ to Review* of the November 5, 2018, decision of the trial court. Relator argues that the trial court erred by sentencing an indigent defendant to incarceration in lieu of payment of fine and court costs; in denying the requested Stay of Incarceration and request for release pending appellate review; and by imposing the maximum

¹ Representation by a Public Defender is presumptive evidence of indigence. *See State v. Morales*, 17-131 (La. App. 3 Cir. 5/17/17); 221 So. 3d 257, 258.

² We take judicial notice that according to the transcript, relator was to pay a fine of \$100.00 and court cost of \$169.00; the sum total of which is \$296.00. However, the minute entry reflects that relator was ordered to pay fines totaling \$100.00 and court cost of \$169.50, the sum total of which is \$269.50. When a discrepancy exists between the transcript and the minute entry, the transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983). Therefore, the number reflected is that in the transcript.

jail time. Relator seeks reconsideration of the November 5, 2018 sentence by the trial court, a stay of incarceration, and release pending review.

For the following reasons, we grant relator's writ application and vacate his guilty plea and sentence.

Lack of *Boykin* Colloquy

A guilty plea is constitutionally infirm if it is not entered into freely and voluntarily, if the *Boykin* colloquy is inadequate, or when a defendant is induced to enter the plea by a plea bargain or what he justifiably believes was a plea bargain and that bargain is not kept. *State v. McCoil*, 05-658 (La. App. 5 Cir. 2/27/06), 924 So.2d 1120, 1124. For a guilty plea to be valid, there must be a showing that the defendant was informed of and waived his constitutional rights of trial by jury and confrontation and the right against compulsory self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State ex rel. Jackson v. Henderson*, 260 La. 90, 255 So. 2d 85 (1971).

Based upon the transcript of the November 5, 2018, guilty plea and proceeding provided to this Court, no *Boykin* colloquy occurred between the trial judge and relator before the relator pled guilty. The transcript indicates that the following exchange occurred prior to the relator's guilty plea:

MR. JASMIN: Your Honor, we're going to briefly skip Mr. Shane Scallan. And we're going to move on to Edwon Spears, docket number 2018-MM-62823.

THE COURT: Ms. Lee, you're going to stand in for Mr. Ortiz?

MS. LEE: Yes, sir, I'll stand in for him, Your Honor.

THE COURT: Okay. Mr. Thomas, you're here, no, it's Mr. Spears. Excuse me. Mr. Spears, you're here for an arraignment to plead guilty or not guilty to the charge of simple assault. We're going to have the Clerk read those charges to you.

THE CLERK: Edwon Spears, docket number 62823, Division "A". On or about the Fourteenth day of October, 2018, you were charged with R.S. 14:38, simple assault, how do you plead?

THE DEFENDANT: Guilty.

As evidenced in this exchange, no discussion of relator's sentence occurred between the trial judge and relator before he pled guilty; the trial judge discussed relator's sentence with him for the first time, after relator pled guilty. After the relator's guilty plea, the following exchange occurred:

THE COURT: You want a fine or you want a jail sentence?

THE DEFENDANT: Huh?

THE COURT: You want a fine or a jail sentence?

THE DEFENDANT: Fine.

THE COURT: Okay. In connection with the guilty plea, it's going to be the sentence of the Court that he be imprisoned in the Parish Jail for a period of ninety days and pay a fine of one hundred dollars plus costs of court of one sixty-nine. Upon the payment of fine and costs he can be released. Two sixty-nine is what you owe the Court, and you can be released. Okay. While you got to spend ninety days in jail. Okay. You have a question?

THE DEFENDANT: Uh-uh

THE COURT: Okay. Good luck to you.

In an examination of the above exchange and the subsequent minute entry, this Court takes judicial notice of the ambiguity in the trial court's sentence and the apparent imposition of imprisonment based on relator's ability to pay fines and court costs. The issue of sentence ambiguity was noted by the trial court and evidenced in the minute entries for November 5, 2018, and November 9, 2018. On November 5th, the minute clerk created the following entry:

Defendant given two options for sentence: Fined \$100, Court Cost of \$169.50 to be paid for release or 90 days parish jail to be served.
Given credit for all time served. Item 18-7666.

A subsequent entry was ordered by the trial court on November 9, 2018. This entry reads, in part:

The Court ordered the Clerk to correct minute entry to read:

The defendant shall serve 90 days in parish jail and pay a fine of \$100.00, plus \$169.50 court cost, on payment of fine and cost the jail sentence is suspended. Per Judge Gaidry”

While no evidence was introduced regarding the parameters of the plea agreement, it appears that the sentence imposed at the trial court was clear only to the trial judge in that the minute entry and/or the transcript of the proceedings were inaccurate. The Louisiana Supreme Court has long held that a transcript prevails when there exists discrepancies between minute entries and transcripts. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983). The trial court's failure to conduct a *Boykin* colloquy invalidated relator's guilty plea.

Furthermore, we find that the trial court erred in incarcerating relator as a result of his inability to pay fines and court costs associated with his plea. An indigent person may not be incarcerated simply because he is unable to pay a fine which is part of his sentence. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221(1983); *State v. Monson*, 576 So.2d 517 (La. 1991); *State v. Cox*, 2002-0333 (La. App. 5 Cir. 9/30/02); 829 So.2d 521, 524. Relator's sentence, wherein release from incarceration is conditioned on full payments of fines, fees, and court costs in the face of his presumed indigent status does not comport with either the United States or the Louisiana Constitution.

Relator's plea of guilty and sentence is vacated. Relator remains held pending transport to Kenner on its detainer.

Gretna, Louisiana, this 16th day of November, 2018.

FHW
RAC
SJW

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



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MARY E. LEGNON
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SUSAN BUCHHOLZ
FIRST DEPUTY CLERK

MELISSA C. LEDET
DIRECTOR OF CENTRAL STAFF

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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **11/16/2018** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY

CHERYL Q. LANDRIEU
CLERK OF COURT

18-KP-658

E-NOTIFIED

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MAILED

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