NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 0420

STATE OF LOUISIANA

VERSUS

ALVIN BETTS

Judgment Rendered: September 10, 2010

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 03-08-0420

Honorable Louis Daniel, Judge Presiding

* * * * * * * * * *

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* * * * * * * * * *

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

The defendant, Alvin Betts, was charged by bill of information with fourth offense DWI, a violation of LSA-R.S. 14:98(E). He pled not guilty. The defendant filed a motion to quash the bill of information based on an allegedly invalid predicate DWI conviction listed therein. The trial court denied the motion to quash. Subsequently, the defendant withdrew his not guilty plea and entered a Crosby plea of guilty to fourth offense DWI, reserving his right to challenge the court's ruling on the motion to quash. See State v. Crosby, 338 So. 2d 584, 588 (La. 1976). The defendant was sentenced to ten years at hard labor with the first sixty days of the sentence to be served without benefit of probation, parole, or suspension of sentence. The trial court further ordered that the defendant be sentenced to home incarceration for the last four years of his sentence. The trial court also imposed a $5,000.00 fine. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS / PROCEDURAL HISTORY

The defendant was charged by bill of information with fourth offense DWI committed on or about December 1, 2007.[1] The defendant filed a Motion to Quash and a Supplemental Motion to Quash attacking his October 25, 2006 predicate DWI conviction on the grounds that he was not advised of his Boykin rights at the April 16, 2007 hearing at which he reentered his guilty plea. See Boykin v. Alabama, 395 U.S. 238, 242-244, 89 S. Ct. 1709, 1711-1713, 23 L. Ed. 2d 274 (1969). The particular circumstances surrounding the defendant withdrawing his guilty plea and subsequently, reentering that same guilty plea are as follows.

On October 25, 2006, the defendant, pro se, pled guilty to second offense DWI (No. BR00303968, Baton Rouge City Court). Subsequently, on January 3,

[1]The three DWI predicate convictions were No. BR0082493 on July 15, 1998 (Baton Rouge City Court); No. BR00303968 on October 25, 2006 (Baton Rouge City Court); and No. 3-07-0359 on April 25, 2007 (19th Judicial District Court).

2007, the defendant, pro se, withdrew his October 25, 2006 guilty plea and entered a not guilty plea. Then, on April 16, 2007, the defendant, pro se, reentered his October 25, 2006 guilty plea. However, no Boykin colloquy was conducted at this hearing.[2]

On April 21, 2009, a hearing was held on the motion to quash the bill of information based on the defendant's allegedly invalid October 25, 2006 predicate DWI conviction. The trial court denied the motion. On June 19, 2009, the defendant filed an application for supervisory writs with this court, based on the trial court's denial of the motion to quash. On August 17, 2009, the defendant entered a Crosby guilty plea to fourth offense DWI, reserving his right to challenge the court's ruling on the motion to quash. On September 24, 2009, this court denied the defendant's writ application as moot holding that in light of the Crosby reservation, the proper method for review of the matter was by appeal.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying his motion to quash his October 25, 2006 predicate DWI conviction. Specifically, the defendant contends that when he withdrew his October 25, 2006 guilty plea at the January 3, 2007 hearing, his constitutional rights were restored. Thus, he contends, when he later reentered his guilty plea at the April 16, 2007 hearing, he should have been advised again of his Boykin rights and should have entered another valid waiver of counsel.

When a trial court denies a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion. See State v. Odom, 2002-2698, p. 6 (La. App. 1st Cir. 6/27/03), 861 So. 2d 187, 191, writ denied, 2003-2142 (La. 10/17/03), 855 So. 2d 765. However, a trial court's legal findings are subject to a *de novo* standard of review.

[2]Nine days later, on April 25, 2007, the defendant pled guilty to his third DWI offense.

See State v. Smith, 99-0606, 99-2094, 99-2015, 99-2019, p. 3 (La. 7/6/00), 766 So. 2d 501, 504.

In denying the motion to quash the bill of information urged on the basis of the allegedly invalid predicate offense, the trial court stated in pertinent part:

> For whatever reason, Mr. Betts came back into court on April 16th after having previously been allowed by Judge Alexander to withdraw his guilty plea. He came back in and again, apparently unrepresented, and apparently expressed the interest to re-enter that guilty plea. . . . Well, one way you can look at it is it's just a withdrawal of the withdrawal of the guilty plea, so to speak. . . . [T]he next statement by the court, Judge Alexander, is; okay, so -- and the -- you have already gone over all your rights and everything, so -- and the defendant, Mr. Betts, replies; yes, ma'am. Which is the court's exact reference as to the fact that the defendant has already been -- has already gone over all of his rights previously, referring back, obviously, to both the previous guilty plea form and the colloquy between Judge White and Mr. Betts at that time. Okay. So, let me . . . go back to the original guilty plea and discuss it for a second. . . . And so, we have, again, where the State has shown a guilty plea in this case, uncounseled, with a . . . properly executed waiver of rights form. There is also a **Boykin** examination which Judge White, at length, goes over the defendant's constitutional rights with the defendant. The court determined that it's a knowingly, voluntarily entered and intelligently entered plea. . . . In January the court allows the defendant to withdraw the guilty plea and then the court comes back in April and allows the defendant to re-enter the guilty plea. Whether the court must go through all of the constitutional rights again and do another waiver of rights form and/or colloquy with the defendant, and that's the issue that I am presented with squarely in this case. What the court simply did, as I pointed out, the court acknowledges the defendant simply wants to go back to where he was before. And the court said, do you want to go back to the guilty plea that you previously entered. The defendant says . . . yes, ma'am. . . . The court says; okay, and you have already gone over your rights and everything and so -- and the defendant says . . . yes, ma'am, to that. And that's exactly what the court did. And I can't say that there is anything improper about that. I'm not saying it's the way I would do it. . . . But I don't find that the trial court had to go back over all of those rights again. I find that the court could, from the record in that case, find that the defendant was, had been, advised of and was advised of and made a knowing and voluntary, intelligent waiver of his constitutional rights and re-entered the guilty plea.
>
> * * *
>
> I left one thing out of my ruling. . . . The finishing of the analysis is that under **State versus Carlos** I think the State has borne the initial burden. The defendant has not shown any procedural irregularity in this case. Therefore, the defense motion to quash is

denied and the state has borne it's [sic] burden of proof.

In his brief, the defendant indicates that at the April 16, 2007 hearing, he was not advised of his right to counsel or of his Boykin rights. He contends that the invalid waivers of counsel and constitutional rights "constitute the infringement of rights or procedural irregularities that reverts [sic] the burden back upon the State to prove the constitutionality of the plea by producing a perfect transcript of the April 16, 2007 plea colloquy."

We do not agree. The April 16, 2007 hearing did not constitute a defective Boykin colloquy, because it was not the Boykin colloquy at all. At this brief hearing, prior to the defendant being sentenced to a six-month suspended sentence, the colloquy between the court and the defendant was as follows:

> THE COURT: On the traffic ticket it's already -- it already has a date. It's July 12, 2007. Okay, I previously allowed you to withdraw your guilty plea, and enter a not guilty plea, and we set it for status. You're going to -- you want to go back to the guilty plea that you previously entered?
>
> MR. BETTS: Yes. Yes, ma'am.
>
> THE COURT: Okay. So...and the -- you've already gone over all your rights, and everything, so --
>
> MR. BETTS: Yes, ma'am.

The defendant pled guilty at the October 25, 2006 hearing. He then withdrew his guilty plea at the January 3, 2007 hearing. At the April 16, 2007 hearing, the defendant indicated to the court that he wanted to "go back to the guilty plea" he previously entered. Thus, the defendant withdrew the withdrawal of his guilty plea, which put him in the same position he had been when he entered his guilty plea at the October 25, 2006 hearing. Accordingly, the court at the April 17, 2007 hearing was not required to re-Boykinize the defendant for a guilty plea for which he had already been Boykinized.

Our review of the jurisprudence has revealed little regarding the narrow

issue in this case, namely the validity of a guilty plea that has been reinstated by a court over five months after that initial guilty plea was made. While not directly on point, State v. Gonsoulin, 2003-2473 (La. App. 1st Cir. 6/25/04), 886 So. 2d 499 (en banc), writ denied, 2004-1917 (La. 12/10/04), 888 So. 2d 835, nonetheless provides some support for our decision. At a habitual offender hearing, the defendant was not informed of his rights, namely the right to remain silent. However, a month earlier, the defendant had been fully advised of his rights at his arraignment on the habitual offender bill of information. This court, in finding the trial court did not err in not advising the defendant of his rights a second time at the habitual offender hearing, stated:

> [T]he defendant was sufficiently advised of his rights at his arraignment and that advice of rights was sufficient to comply with the requirements of LSA- R.S. 15:529.1 D(1) and (3). The defendant, who was represented by counsel, clearly understood those rights by choosing to remain silent at the arraignment hearing, which prompted the setting of the hearing concerning the habitual offender allegations. It would be unnecessarily redundant to advise him again of his right to remain silent at the second hearing, particularly because the only reason he was there was because he had exercised his right to remain silent, after being advised he had this right. The law does not expressly state that the court is required to inform the defendant of his rights at each phase of the habitual offender proceeding. The law requires that the record demonstrate that *the proceedings as a whole* were fundamentally fair and accorded the defendant due process of law.

Gonsoulin, 2003-2473 at p. 5, 886 So. 2d at 502.

Another factor in support of our conclusion that a valid guilty plea resulted from the April 16, 2007 hearing is the defendant's own extensive criminal history, as noted by the trial court during sentencing for the instant offense. Our review of the presentence investigation report confirms the trial court's finding that the defendant has been engaged in criminal activity for twenty years since 1990. Aside from his four DWI convictions spread out over a decade, the defendant has had various drug convictions, has received probation many times during his life, and is classified by the Department of Public Safety and Corrections as a third-

felony offender. The defendant is no stranger to the criminal justice system and his constitutional rights. Given his repeated encounters with the courts in this state, we are convinced that he clearly understood that at the April 16, 2007 hearing, he was merely reentering his original guilty plea for which he had already been properly Boykinized. See State v. Hart, 472 So. 2d 280, 282 (La. App. 1st Cir. 1985). See also State v. Leger, 2005-0011, p. 29 (La. 7/10/06), 936 So. 2d 108, 134, cert. denied, 549 U.S. 1221, 127 S. Ct. 1279, 167 L. Ed. 2d 100 (2007); State v. Hardesty, 93-1280, pp. 3-4 (La. App. 1st Cir. 4/8/94), 635 So. 2d 755, 757. The issue to be resolved, therefore, is whether the defendant's October 25, 2006 guilty plea was valid.

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) his 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. State v. Henry, 2000-2250, p. 8 (La. App. 1st Cir. 5/11/01), 788 So. 2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So. 2d 791. The State will meet this burden by producing a "perfect" transcript of the guilty plea colloquy. Anything less than a "perfect" transcript, such as a guilty plea form or minute entry, will require the trial judge to weigh the evidence

submitted by both sides and determine whether the defendant's Boykin rights were prejudiced. State v. Carlos, 98-1366, p. 7 (La. 7/7/99), 738 So. 2d 556, 559. 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. Henry, 2000-2250 at pp. 8-9, 788 So.2d at 541.

Additionally, an uncounseled DWI conviction may not be used to enhance punishment of a subsequent offense, absent a knowing and intelligent waiver of counsel. 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 which depends on the

facts and circumstances of each case. State v. Cadiere, 99-0970, pp. 3-4 (La. App. 1st Cir. 2/18/00), 754 So. 2d 294, 297, writ denied, 2000-0815 (La. 11/13/00), 774 So. 2d 971.

At the October 25, 2006 Boykin hearing, the defendant was unrepresented by counsel. However, after the court ascertained the defendant's address and date of birth, the following colloquy, in pertinent part, took place between the court and the defendant:

> Q. Mr. Betts, as I appreciated you and Mr. Bell, the prosecutor, have worked out an agreement where you will be accepting responsibility for a DWI Second Offense, ah, on August 26, 2006[.]
>
> A. Yes, sir.
>
> Q. --um, and in consideration, therefore, the government will be dismissing certain other charges against you. Is that correct?
>
> A. Yes, sir.
>
> * * * * *
>
> Q. Well, sir when you plead guilty to . . . DWI Second Offense . . . you give up certain important legal rights that I have going [sic] over in details earlier this morning. Were you in the courtroom for that explanation?
>
> A. Yes, sir.
>
> Q. Did you hear and understand what was said?
>
> A. Yes, sir.
>
> Q. Do you have any questions about your legal rights then?
>
> A. No, sir.
>
> Q. What I went over in more detail sir was the right to a . . . trial . . . while conducting your trial you would have the right to be represented by a licensed attorney at that time. And if unable to hire one to have one appointed by the Court to defend you. You'd have the right to confront and cross-examine your accusers, the right to compulsory process of witnesses, the right against self-incrimination, the presumption of innocence, and the right to insist that the government prove . . . beyond all reasonable doubt all the elements of the offense to which you are pleading guilty. . . . Do you understand that?
>
> A. Yes, sir.
>
> Q. So . . . your exposure for punishment, sir, is a fine of up to One

> Thousand Dollars . . . or six months imprisonment either or both[.]. . . Do you understand that?
>
> A. Yes, sir.
>
> Q. Furthermore . . . the DWI is an escalating punishment or stepladder type of offense, such that, if you repeat this conduct again you would be subject to prosecution as a felon[.]. . . Do you understand that?
>
> A. Yes, sir.
>
> Q. Okay. So do you still plead guilty to the ah, DWI Second Offense . . . in consideration for the dismissal of the other charges mindful of the legal rights that you're giving up, and your exposure for punishment?
>
> A. Yes, sir.
>
> THE COURT: The Court declares that Mr. Alvin Earl Betts, Jr., has knowledgeable, voluntary [sic] and intelligently waived the legal, and constitutional rights applicable to the case[.]

Notably, the defendant also signed a "Waiver of Rights Acknowledgment and Acceptance of Plea" form. The rights-waiver form, signed by the court and the defendant, indicated the defendant understood that he was pleading guilty and giving up the "[r]ight to an attorney and, if unable to afford an attorney's service, right to a court-appointed attorney at no cost to [defendant.]" The form also stated, "I further understand that self-representation has the disadvantage that I may not know as much about the criminal justice system as an attorney would[.]" Additionally, the box on the form stating "I AM WAIVING RIGHT TO COUNSEL" was checked.

In Carlos, the defendant had been represented by counsel at the time he entered his prior guilty plea. Our supreme court, therefore, had no occasion to discuss how the presumption of regularity would apply to a case in which the defendant entered his prior guilty plea while unrepresented by counsel, but after executing a waiver of his right to counsel recorded in the contemporaneous documents of the guilty plea, as in the instant matter. See State v. Deville, 2004-

1401, p. 4 (La. 7/2/04), 879 So. 2d 689, 691 (per curiam). In Deville, the Supreme court noted that its decision in Carlos entitled the State to rely on the waiver form in discharging its initial burden of proving a prior valid DWI conviction. Deville, 2004-1401 at p. 5, 879 So. 2d at 691. The Supreme court then found:

> If a court may, in the context of a collateral attack on a prior conviction used in recidivist proceedings, presume from the fact of conviction alone, *i.e.,* from a silent record, that the defendant knowingly and intelligently waived his right to trial, then a court may also presume from a record which is *not* silent with respect to the waiver of counsel that the defendant made a knowing and intelligent decision to proceed without the guiding hand of an attorney and that the trial court would not have accepted the waiver if the contrary had appeared.

Deville, 2004-1401 at p. 5, 879 So. 2d at 691-92.

The transcript of the October 25, 2006 Boykin hearing indicates the defendant was informed of his constitutional rights and that he would be waiving those rights by pleading guilty. A well-executed waiver-of-rights form, including the waiver of the right to counsel, was signed by the court and the defendant on the same day as the October 25, 2006 hearing. The defendant has failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. Accordingly, the State proved a valid guilty plea and a valid waiver of counsel at the defendant's October 25, 2006 guilty plea hearing.

Thus, the trial court did not abuse its discretion in denying the motion to quash.

The assignment of error is without merit.

SENTENCING ERROR

Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error. See State v. Price, 2005-2514, pp. 18-25 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123-125 (en banc), writ denied, 2007-0130 (La.

2/22/08), 976 So. 2d 1277.

As part of the defendant's ten-year sentence at hard labor, the trial court ordered that the defendant be sentenced to home incarceration for the last four years of his sentence. Louisiana Revised Statutes 14:98(E)(3)(c) provides that offenders sentenced to home incarceration shall be subject to all other applicable provisions of LSA-C.Cr.P. art. 894.2. The trial court erroneously relied on the recently amended LSA-C.Cr.P. art. 894.2(G), by 2009 La. Acts No. 159, § 1, which provides that the sentence for home incarceration shall be for a period of not more than four years in felony cases. The defendant committed the instant offense on December 1, 2007. A defendant must be sentenced according to sentencing provisions in effect at the time of the commission of the offense. State v. Sugasti, 2001-3407, p. 4 (La. 6/21/02), 820 So. 2d 518, 520. Prior to the change in 2009, Article 894.2 provided that the portion of a sentence allowed to be served by home incarceration shall be for a period of not more than two years in felony cases. Under the applicable law, therefore, the portion of the defendant's sentence imposed as home incarceration should not have exceeded two years. Accordingly, the sentence of four years for home incarceration is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See Price, 2005-2514 at pp. 21-22, 952 So. 2d at 124-25.

For the above and foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.