NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 0841

STATE OF LOUISIANA

VERSUS

RANDEAN HENRY

Judgment Rendered: DEC 21 2012

TMH
WEW

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On Appeal from the
17th Judicial District Court,
In and for the Parish of Lafourche,
State of Louisiana
Trial Court No. 481765

Honorable Jerome J. Barbera, III, Judge Presiding

* * * * *

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BEFORE: WHIPPLE, McCLENDON, AND HIGGINBOTHAM, JJ.

M McClendon, J. concurs and assigns reasons

HIGGINBOTHAM, J.

The defendant, Randean Henry, was charged by bill of information with fourth offense driving while intoxicated (DWI), a violation of La. R.S. 14:98. The defendant initially entered a plea of not guilty. Subsequently, the trial court denied the defendant's motion to quash. The defendant withdrew his former plea and pled guilty as charged pursuant to **State v. Crosby**, 338 So.2d 584, 591 (La. 1976), reserving the right to appeal the trial court's ruling on his motion to quash. The defendant was sentenced to twenty years imprisonment at hard labor. The trial court denied the defendant's motion to reconsider sentence.

The defendant now appeals, assigning error to the trial court's denial of the motion to quash in a counseled brief and in a *pro se* brief. In his *pro se* brief, the defendant further assigns error to the trial court's acceptance of his guilty plea, the constitutionality of La. R.S. 14:98(F)(2), the trial court's denial of his motion to reconsider sentence, and the trial court's failure to grant him a speedy trial. For the following reasons, we affirm the conviction and the sentence.

STATEMENT OF FACTS

While the defendant pled guilty to the instant offense, the following facts are in accordance with the testimony presented at the **Boykin** hearing, in part based on the police report. On or about January 23, 2010, while standing outside of a bar in Bayou Blue (in Lafourche Parish) smoking a cigarette, the bar owner, David Daigle, observed a red Mustang recklessly heading north on LA Highway 316. Deputy Dain Prejean of the Lafourche Parish Sheriff's Office was dispatched to the scene. According to Daigle, the vehicle was brought to a stop while partially on the road and partially in the parking lot. The vehicle was then accelerated as the back end swerved from side to side, nearly striking a vehicle which was parked in the parking lot. Additionally, the vehicle nearly struck Daigle as the driver accelerated again before parking the vehicle and stumbling into the bar.

Daigle followed the driver into the bar and advised the bartender not to serve him. The driver became upset and by the time he stumbled out of the bar, Deputy Prejean had arrived at the scene. The driver, identified as the defendant, admitted to the deputy that he had consumed methamphetamine and cocaine earlier that day. The deputy detected an odor of alcohol from the defendant's body, and he noticed that the defendant's speech was slightly slurred. The defendant performed poorly on a field sobriety test and he was subsequently arrested for DWI.[1] The defendant refused any chemical testing.

COUNSELED ASSIGNMENT OF ERROR AND *PRO SE* ASSIGNMENT OF ERROR NUMBER TWO

In the sole counseled assignment of error, the defendant contends that any statutory ambiguity involving the State's burden of proof should be resolved in favor of the defendant such that the State had the burden of proving beyond a reasonable doubt that the prior DWI offenses fell within the ten-year cleansing period provided in La. R.S. 14:98(F)(2). The defendant notes that the date of the commission of the offense is used in computing the ten-year period, and further contends that the State failed to prove the date of commission for the 1997 DWI predicate convictions. The defendant argues that proof of the date of the arrest does not constitute proof of the date of commission of an offense as an offense may be committed well before the offender is arrested. Thus, the defendant concludes that the trial court erred in denying the motion to quash as to the two 1997 convictions.

In assignment of error number two of his *pro se* brief, the defendant contends that the State only proved that he was incarcerated from June 23, 2003 until June 29, 2007, approximately four years. The defendant further contends that

[1] The defendant has three previous DWI arrests in Lafourche Parish that resulted in convictions on June 23, 2003, August 19, 1997, and May 14, 1997. The May 14, 1997 conviction (docket number 286250) is based on a January 7, 1996 arrest, the August 19, 1997 conviction (docket number 248871) is based on a December 12, 1992 arrest, and the June 23, 2003 conviction (docket number 336456) is based on a January 29, 1999 arrest.

the documentation presented by the State at the hearing did not show any time served on the May 14, 1997 conviction, and that there was insufficient evidence to calculate the cleansing periods for the 1997 predicate convictions.[2]

The DWI statute provides for a so-called cleansing period for remote former DWI offenses. Specifically, the version of La. R.S. 14:98(F)(2) that was in effect at the time of the instant offense provides, in pertinent part:

> For purposes of this Section, a prior conviction shall not include a conviction for an offense under this Section ... if committed more than ten years prior to the commission of the crime for which the defendant is being tried.... **However, periods of time** during which the offender was awaiting trial, on probation for an offense described in Paragraph (1) of this Subsection, under an order of attachment for failure to appear, or incarcerated in a penal institution in this or any other state **shall be excluded in computing the ten-year period.** [Emphasis added.]

In accordance with La. R.S. 14:98(F)(2), an initial ten-year cleansing period determined on a strictly calendar basis would comprise the period of time beginning with the date of commission of the offense for which the defendant is being tried and ending with the same month and day ten years earlier. However, applicable periods of time designated in La. R.S. 14:98(F)(2) shall be excluded in computing the ten-year period. **State v. Warren**, 2011-1262 (La. App. 1st Cir. 2/10/12), 91 So.3d 981, 982.

Therefore, the total period of time attributed to all of the applicable, excludable periods of time cannot be counted in calculating the ten-year cleansing period. For example, if a defendant was incarcerated for five years, the five years of incarceration cannot be counted in determining the ten-year cleansing period. In such an example, the cleansing period would begin with the date of the offense for which the defendant is being tried and, after excluding five years attributable to incarceration and tacking on ten years for the cleansing period, would end with a calendar date fifteen years preceding the beginning date. Accordingly, in this

[2] The defendant did not contest the use of the June 23, 2003 conviction below or on appeal in the counseled and *pro se* assignments. Thus, only the use of the 1997 predicate convictions is at issue.

example, a predicate offense must fall outside the ending date of the cleansing period in order for the relevant conviction to be cleansed. **Warren**, 91 So.3d at 982. The periods of time that shall be excluded in computing the cleansing period must be determined by examining the relevant periods of time associated with all of the predicate convictions. The time the defendant was actually incarcerated, as well as the time he was awaiting trial or on probation, must be supported by competent evidence. **Warren**, 91 So.3d at 984.

Herein, the defendant filed counseled and *pro se* motions to quash arguing that the ten-year cleansing period is applicable to the 1997 predicate offenses and/or that the State failed to present sufficient information to determine the applicable cleansing period. At the hearing held September 22, 2010 on the defendant's motions to quash, Misty Montgomery of the Office of Probation and Parole of the Louisiana Department of Public Safety and Corrections reviewed the penitentiary pack (pen pack) including all of the department's records for the defendant. Montgomery confirmed that the department kept thorough records as to inmates serving time in the Department of Corrections. Montgomery noted that the defendant was arrested for the instant offense on January 25, 2010. In reviewing the ten-year period prior to that arrest (from January 25, 2000 to January 25, 2010), she testified that the defendant had been incarcerated from January 19, 2000 to June 29, 2007, a total of eighty-nine months (approximately seven years and five months; having been free from incarceration for approximately thirty-one months). According to further testimony by Montgomery, before 2000, the defendant was incarcerated for additional time periods including March 12, 1996 to December 28, 1997 (approximately one year and nine months) and again from January 20, 1993 to June 21, 1995 (approximately two years and five months). Thus, prior to the year 2000, the defendant was incarcerated for approximately fifty additional months.

The defendant testified at the hearing, noting in pertinent part that he was contesting the 1997 DWI predicate convictions. The defendant contended that the information in the pen pack was inaccurate as to the years of incarceration before 2000. The defendant initially claimed that records included years of incarceration between 1992 and 1998, when he had actually been released due to a sentence being vacated. The defendant later clarified that after 1992, he supposedly served four years in prison that should not have been served and that those four years should not be considered in computing the cleansing period.

Noting that there was a nearly five-year period between the date of the arrest for the first predicate at issue, December 12, 1992, and the date of conviction for that offense, August 19, 1997, the trial court inquired as to whether there were any disputes regarding date of the arrest. The defense attorney stated that the date of the arrest was not disputed and also agreed that there were no disputes as to the minutes for the contested predicates. Then, the following colloquy took place:

> THE COURT:
> So, that would be, those two convictions would be the offense of December 12, '92, and the offense of 1/7/96?
>
> MR. WALLIS (the defense attorney):
> That's correct.
>
> THE COURT:
> So, the minutes of those two cases -- can you identify those? We already know what the 12/12/92 is. What is the docket number of the predicate offense that was committed, or alleged to be committed on January 7, '96?
>
> MR. SOIGNET (the assistant district attorney):
> That's 286250.
>
> THE COURT:
> Ok. So, the minutes of that offense for that case will also be in evidence ...

The trial court then took the matter under advisement. In subsequently denying the motion to quash, the trial court specifically concluded:

> The evidence presented at the hearing, the testimony of the defendant's former parole officer and the documents from the

> Department of Public Safety & Corrections, show that between December 12, 1992, the date of the first predicate offense, and January 24, 2010, the date of the current offense, the defendant, Randean Henry, was incarcerated except for approximately four years.

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 (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. See **State v. Smith**, 99-0606 (La. 7/6/00), 766 So.2d 501, 504.

Regarding the date of the contested DWI predicate offenses, on December 12, 1992, the defendant was arrested for DWI, driving under a suspended license, and driving left of center on a divided highway; and on January 7, 1996, the defendant was arrested for careless operation, DWI fifth offense, and driving under a suspended license. The dates of the arrests for the predicate DWI offenses were presumed by the trial court and the parties below to correspond with the date of the commission of the offenses. The defendant did not argue below that the offenses were not committed on the date of the arrests and did not object to the trial court's presumption in that regard. Louisiana Code of Criminal Procedure article 536 requires a motion to quash to be in writing and to specify the grounds upon which it is based. It is well established in our law that a new basis for an objection cannot be raised for the first time on appeal. La. Code Crim. P. art. 841; **State v. Cressy**, 440 So.2d 141, 142-43 (La. 1983). Further, in **State v. Pelas**, 99-0150 (La. App. 1st Cir. 11/5/99), 745 So.2d 1215, 1217, this Court held that the defendant was precluded from raising a new basis for his motion to quash on appeal.

The cleansing period in this case would begin on or about January 23, 2010, the date of the instant offense. By merely excluding the seven years and five months of imprisonment during the first ten-year period examined by Montgomery (from the date of the instant offense back to January of 2000) and tacking on ten

years for the cleansing period, the cleansing period would end, on or about August 23, 1992, approximately seventeen years and five months preceding the beginning date. Even without considering any additional excludable time periods including the defendant's years of incarceration prior to 2000, it is evident that the predicates at issue, the December 12, 1992 and January 7, 1996 offenses, were not committed outside of the cleansing period and were properly used to enhance the instant offense pursuant to La. R.S. 14:98(F)(2). Thus, the counseled assignment of error and *pro se* assignment of error number two are without merit.

***PRO SE* ASSIGNMENT OF ERROR NUMBER ONE**

In *pro se* assignment of error number one, the defendant contends that the trial court accepted his guilty plea despite his assertion that he was not intoxicated while operating his vehicle and the lack of a significant factual basis in support of the plea. The defendant further contends that the recitation of facts by the prosecution made no mention of intoxication by alcohol or drugs, but only mentioned that he was impaired without supporting the necessary elements of the offense. The defendant further contends that trial court did not discuss the elements of the offense prior to accepting his plea. While noting that he and the defense attorney did not specifically label his plea an "**Alford** plea," the defendant contends that he protested his innocence and pled guilty in his "best interest," and that the trial court never asked him if he agreed with the State's recitation of the facts. The defendant further contends that he made statements that raised the issue of whether a valid **Alford** plea was entered or whether his plea should have instead been considered a *nolo contendere* plea, placing the trial court on notice of the necessity of a strong factual basis. The defendant concludes that his conviction should be reversed and the matter remanded to allow him to withdraw his guilty plea.

We note that the defendant did not claim his innocence to the trial court during the guilty plea proceeding. However, the defendant confirmed that he consulted his attorney and concluded that pleading guilty was in his best interest, adding that he believed that he would not prevail if there were a trial. The defendant also specifically stated that he was entering a "**Crosby** plea" reserving the right to appeal the trial court's ruling on the motion to quash.

A guilty plea is a conviction and, therefore, should be afforded a great measure of finality. **State v. Jackson**, 597 So.2d 526, 529 (La. App. 1st Cir.), writ denied, 599 So.2d 315 (La. 1992). An express admission of guilt is not a constitutional requirement for the imposition of a criminal penalty. The fact that a defendant believes he is innocent, even if he makes such belief known to the court, does not preclude him from entering a guilty plea. **State v. Castaneda**, 94-1118 (La. App. 1st Cir. 6/23/95), 658 So.2d 297, 303. The "best interest" or **Alford** plea, which derives from the United States Supreme Court case of **North Carolina v. Alford**, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), is one in which the defendant pled guilty while maintaining his innocence. In that case, the Supreme Court ruled that a defendant may plead guilty, without forgoing his protestations of innocence, if "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant[,] ... especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." **Alford**, 400 U.S. at 31, 91 S.Ct. at 164. In a case involving an **Alford** plea, the record must contain a "strong factual basis for the plea." **Alford**, 400 U.S. at 38, 91 S.Ct. at 168.

At the **Boykin** hearing in this case, the trial court informed the defendant of the definition of the offense, and recited the factual basis for the offense which included a lengthy oral review of the police report and evidence that would be presented at trial regarding the instant offense and the predicate offenses. (The

statements from Deputy Prejean's police report included Daigle's observations and Deputy Prejean's observations once he arrived at the scene. The State indicated that it was prepared to call Daigle and the investigating officers as trial witnesses, including those who heard the defendant make incriminating statements. The State would also call Sergeant Angie Wintzel, who was prepared to perform the Intoxilyzer test.

Daigle observed the defendant driving recklessly, swerving and nearly striking him and a parked vehicle before parking his vehicle and stumbling into the bar. Daigle further observed an altercation between the defendant and the bartender when he refused to serve the defendant. After the defendant stumbled out of the bar, he told Deputy Prejean that he consumed methamphetamine and cocaine earlier that day and the deputy detected the odor of alcohol from the defendant's body. The deputy noted that the defendant's speech was slightly slurred, he performed poorly on a field sobriety test, and he refused chemical testing after his arrest.

We find that the record contains a strong factual basis in support of the guilty plea. Further, the **Boykin** transcript clearly shows that the defendant was carefully informed of his rights and the consequences of his plea, and that the plea was entered into knowingly and voluntarily. Thus, we find no merit in *pro se* assignment of error number one.

***PRO SE* ASSIGNMENT OF ERROR NUMBER THREE**

In *pro se* assignment of error number three, the defendant argues that La. R.S. 14:98(F)(2) is unconstitutionally vague on its face because the "awaiting trial" exception to the time used to compute the ten-year cleansing period does not address periods in which the offender is out on bond and conflicts with the "incarcerated in a penal institution" exception. The defendant then, by contrast, states that the words of the statute are "very clear and easy to interpret,"

concluding that the legislature did not intend to exclude periods of time of incarceration for other convictions in computing the cleansing period for a particular conviction.

Statutes are presumed to be valid; whenever possible, the constitutionality of a statute should be upheld. Because a statute is presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality. Attacks on the constitutionality of a statute may be made by two methods. The statute itself can be challenged, or the statute's application to a particular defendant can be the basis of the attack. **State v. Gamberella**, 633 So.2d 595, 601-02 (La. App. 1st Cir. 1993), writ denied, 94-0200 (La. 6/24/94), 640 So.2d 1341. Constitutional challenges may be based upon vagueness. **State v. Griffin**, 495 So.2d 1306, 1308 (La. 1986). A statute is vague if its meaning is not clear to the average citizen or if an ordinary person of reasonable intelligence is incapable of discerning its meaning and conforming his conduct to it. **State v. Barthelemy**, 545 So.2d 531, 532-33 (La. 1989); **State v. Thomas**, 2005-2210 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 175-76, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683; **Gamberella**, 633 So.2d at 602.

The defendant specifically contends that La. R.S. 14:98(F)(2) is unconstitutionally vague. We disagree. We find that the "awaiting trial" exception to the time used to compute the ten-year cleansing period clearly includes periods in which the offender is out on bond. Further, there is no conflict among the "awaiting trial" exception and the periods that are to be excluded from the computation like any period the offender is "incarcerated in a penal institution." The language at issue is clear and unambiguous and it embraces the Legislature's desire for the cleansing period to include only time during which the accused is not under any legal restraints. See **State v. Hoerner**, 2011-659 (La. App. 5th Cir.

2/28/12), 88 So.3d 1128, 1130. Based on the foregoing, we find no merit in *pro se* assignment of error number three.

***PRO SE* ASSIGNMENT OF ERROR NUMBER FOUR**

In *pro se* assignment of error number four, the defendant contends that the trial court imposed an unconstitutional sentence. The defendant argues that the sentence subjects him to cruel, excessive, and unusual punishment and serves no other purpose than to cause him needless pain and suffering. The defendant also argues that the trial court failed to consider the sentencing guidelines set forth in La. Code Crim. P. art. 894.1. The defendant specifically claims that the trial court did not consider that he is a hard working, law-abiding citizen who paid taxes, provided for his family, and stayed out of trouble for over two and one-half years. The defendant claims that a presentence investigation report (PSI) would have revealed several other mitigating factors. Finally, the defendant contends that he has never been given the benefit of treatment or home incarceration for any of his prior offenses.

Louisiana Code of Criminal Procedure article 881.2(A)(2) provides that "[t]he defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea." See **State v. Young**, 96-0195 (La. 10/15/96), 680 So.2d 1171, 1174; **State v. Johnson**, 99-2371 (La. App. 1st Cir. 9/22/00), 768 So.2d 234, 236. In this case the defendant's sentence was agreed to as part of a plea agreement and is not subject to review by this court.

***PRO SE* ASSIGNMENT OF ERROR NUMBER FIVE**

In *pro se* assignment of error number five, the defendant argues that the trial court erred by not granting his motion for a fast and speedy trial. The defendant notes that the trial court did not have a hearing on his requests, though the trial court and the State were aware of his motions. The defendant further contends

that, despite objections, he was not brought to trial within the two-year time period required by statute.

The record clearly indicates that the defendant was advised of his rights by the trial court; waived his rights knowingly and voluntarily; and, pled guilty without reserving his right to appeal this issue pursuant to **Crosby**. Moreover, La. Code Crim. P. art. 701, which provides the statutory right to a speedy trial, merely authorizes pre-trial relief. The remedy for a speedy trial violation under Article 701 is limited to release from incarceration without bail or release of the bail obligation for one not incarcerated. Once a defendant has been convicted, any allegation of a violation is moot. **State v. Odom**, 2003-1772 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 593, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026.

In addition to the Article 701 limitations, La. Code Crim. P. art. 578(A)(2) provides for a two-year time limitation from the date of institution of the prosecution within which the trial of a defendant accused of a non-capital felony must be commenced. In this case the bill of information was filed on March 18, 2010, and the **Boykin** hearing and guilty plea took place on January 25, 2012. Thus, to the extent that the defendant's claim is based on Article 578(A)(2), it has no merit as he pled guilty before the two-year period lapsed.

Besides these statutory provisions, the right to a speedy trial is guaranteed by both the federal (U.S. Const. amend. VI) and state (La. Const. art. I, § 16) constitutions, and the proper method for raising the claim of a denial of the constitutional right to a speedy trial is by a motion to quash. **State v. Gordon**, 2004-0633 (La. App. 1st Cir. 10/29/04), 896 So.2d 1053, 1063, writ denied, 2004-3144 (La. 4/1/05), 897 So.2d 600. The defendant's counseled and *pro se* motions to quash, filed May 4, 2010, July 22, 2010, and August 17, 2010, were not based on any claim that the State violated his constitutional right to a speedy trial.

Therefore, the defendant failed to preserve for appeal his claim that the State violated his constitutional right to a speedy trial. See **Gordon**, 896 So.2d at 1063. Further, a review of the defendant's claim, out of an abundance of caution, reveals that the defendant's constitutional speedy trial rights were not violated.

In **Barker v. Wingo**, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), the United States Supreme Court identified four factors to determine whether a particular defendant had been deprived of his right to a speedy trial, namely: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. The Louisiana Supreme Court has explained:

> The first of the *Barker* factors, the length of the delay, is a threshold requirement for courts reviewing speedy trial claims. This factor serves as a "triggering mechanism." Unless the delay in a given case is "presumptively prejudicial," further inquiry into the other *Barker* factors is unnecessary. However, when a court finds that the delay was "presumptively prejudicial," the court must then consider the other three factors. [Citations omitted.]

State v. Love, 2000–3347 (La. 5/23/03), 847 So.2d 1198, 1210.

In this case the length of the delay from the institution of prosecution to the date of the guilty plea was about one year and ten months. The record shows that the trial court denied the defendant's motions to quash two of the predicate offenses on November 12, 2010, and the defendant filed a motion for a speedy trial on December 29, 2010. Subsequently, on January 5, 2011, the defendant filed *pro se* motions, including a motion to recuse the judge and a motion for preliminary examination transcripts. As noted, the defendant failed to file in the trial court a motion to quash on speedy trial grounds. Further, the defendant does not allege prejudice to his case. Thus, applying the **Barker** analysis to the present case, we find no violation of the defendant's constitutional speedy trial rights. *Pro se* assignment of error number five lacks merit.

SENTENCING ERROR

In conducting our review of the record as required by La. Code Crim. P. art. 920(2), we note the existence of a sentencing error. The penalty provision for driving while intoxicated fourth or subsequent offense includes a mandatory fine of five thousand dollars. La. R.S. 14:98(E)(1)(a). The record reflects the trial court failed to impose a fine. Under the general provisions of La. Code Crim. P. art. 882(A), an illegal sentence "may" be corrected at any time by an appellate court on review. Because the trial court's failure to impose the fine was not raised by the State in either the trial court or on appeal, and the defendant is not prejudiced by the trial court's failure to impose the mandatory fine, we decline to amend the sentence imposed by the trial court. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 0841

STATE OF LOUISIANA

VERSUS

RANDEAN HENRY

****

McCLENDON, J., concurs and assigns reasons.

While I am concerned about the failure of the trial court to impose the legislatively mandated fine, given the state's failure to object and in the interest of judicial economy, I concur with the majority opinion.