

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1977

STATE OF LOUISIANA

VERSUS

MARLIN DAVID CARPENTER



**DATE OF JUDGMENT:** JUN 07 2013

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
NUMBER 520,162, DIV. D, PARISH OF ST. TAMMANY  
STATE OF LOUISIANA

HONORABLE PETER J. GARCIA, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

**Disposition: CONVICTION AFFIRMED. SENTENCE AMENDED AND, AS AMENDED, AFFIRMED.**

KUHN, J.

Defendant, Marlin David Carpenter, was charged by bill of information with third-offense driving while intoxicated (“DWI”), a violation of La. R.S. 14:98(D)(1)(a).<sup>1</sup> He pled not guilty and, after a jury trial, was found guilty as charged. Defendant waived sentencing delays. The trial court imposed the mandatory \$2000.00 fine and sentenced him to serve a period of five years at hard labor, suspending four years of that sentence and ordering one year to be served without benefit of parole, probation, or suspension of sentence. The trial court also ordered defendant placed on five years probation with special conditions upon his release. Defendant subsequently filed motions for new trial, postverdict judgment of acquittal, and reconsideration of sentence all of which were denied by the trial court. He now appeals, alleging one assignment of error. We affirm defendant’s conviction, amend his sentence, and affirm his sentence as amended.

### FACTS

On March 27, 2012, Officer Justin Stokes of the Slidell Police Department stopped defendant on Front Street after having observed his vehicle swerve out of his lane of travel, both into the opposing lane of travel and onto the shoulder of the road. According to Officer Stokes, defendant appeared to have dilated pupils and was breathing rapidly and sweating profusely. Officer Stokes also noted that defendant was twitching and fidgeting with his body and limbs, and he detected a faint odor of alcoholic beverages on defendant’s breath. After he was read his *Miranda*<sup>2</sup> rights, defendant admitted to Officer Stokes that he had prescriptions for Subutex, Ultram, Neurontin, Celexa, and Soma, all of which he had taken earlier

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<sup>1</sup> The predicate convictions were alleged in the bill of information as follows: (1) a conviction on September 9, 2004, for operating a motor vehicle while under the influence of alcoholic beverages in the county court of Conroe, Texas, under docket number 04197600; and (2) a conviction on November 4, 2011, for operating a motor vehicle while under the influence of alcoholic beverages in the 22nd Judicial District Court of St. Tammany Parish, under docket number 501879.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

that day. However, defendant was unable to say with certainty when he had taken any of those medications or in what dosages he had consumed them.

As Officer Stokes continued to question defendant, he noticed what appeared to be track marks on defendant's inner elbows. Officer Stokes asked for, and received, defendant's permission to search his vehicle. Underneath the driver's seat cushion, Officer Stokes found a plastic storage bag containing one used syringe, an opened Kool-Aid package containing a blue-and-white powder substance, and a glass pipe or tube with a plastic rose inside of it. Defendant was immediately placed under arrest for possession of suspected narcotics and drug paraphernalia. He was transported to the Slidell Police Department.

At the police station, defendant submitted to standard field sobriety testing, on which he performed poorly. After he had been informed of his rights related to chemical testing for intoxication, defendant refused to submit to any further testing. He was then arrested and charged with DWI.

### **ASSIGNMENT OF ERROR**

In his sole assignment of error, defendant asserts that the evidence presented at trial was insufficient to support his conviction of third-offense DWI. Specifically, he contends that the State presented inadequate evidence of his predicate convictions.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821(B); *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305,

1308-09 (La. 1988). The *Jackson* standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *State v. Patorno*, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

To convict an accused of driving while intoxicated, the State need only prove that the defendant was operating a vehicle and that he was under the influence of alcohol or drugs. See La. R.S. 14:98(A); see also *State v. Parry*, 2007-1972 (La. App. 1st Cir. 3/26/08), 985 So.2d 771, 775. To convict an accused of a third-offense driving while intoxicated, the State must also show that the defendant had two other valid convictions. See La. R.S. 14:98(D) & (F). Whether an offender's predicate convictions in a multiple offender DWI prosecution are considered essential elements of the offense or essential averments of the bill of information, the State bears the burden of establishing their constitutional validity, if they came by way of guilty pleas, and of proving the convictions at trial. *State v. Mobley*, 592 So.2d 1282 (La. 1992) (per curiam).

In the instant case, defendant does not dispute on appeal that he was operating a vehicle, or that he was under the influence of alcohol or drugs at the time he was operating the vehicle. Thus, we are only concerned with whether the State proved that defendant had been validly convicted of the two predicate offenses used by the state to enhance the instant DWI to a third offense.

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

also must ascertain that the accused understands what the plea connotes and its consequences. See *State v. Cadriere*, 99-0970 (La. App. 1st Cir. 2/18/00), 754 So.2d 294, 296, writ denied, 2000-0815 (La. 11/13/00), 774 So.2d 971. 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. Picard*, 2003-2422 (La. App. 1st Cir. 9/17/04), 897 So.2d 49, 53. 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 a knowing and intelligent waiver of rights occurred. *Boykin*<sup>3</sup> 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 that he may have. *State v. Henry*, 2000-2250 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791.

In the instant case, the State and the defense entered into the following stipulation immediately prior to the calling of the first witness:

**State:** Judge, the defense would offer a stipulation that the defendant Marlin David Carpenter is one and the same who was convicted in Conroe, Texas, September 9, 2004, in docket number 04197600 for operating a motor vehicle while under the influence, and he's one and the same who was convicted on November 4, 2011, under docket

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<sup>3</sup> *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

number 501879 in the Twenty-Second Judicial District Court of St. Tammany Parish, and offer, file, and introduce into evidence both of those convictions to support those two priors.

**Defense:** No objection, Your Honor.

**Court:** No objection and you agree to the stipulation?

**Defense:** I agree to the stipulation.

In support of predicate number one (04197600), the State introduced the judgment from Montgomery County, Texas, in which defendant pled guilty to DWI. The judgment reflected that defendant waived his right to trial by jury and that he was represented by counsel at the time his plea was accepted. In support of predicate number two (501879), the State introduced a minute entry in which defendant pled guilty to first-offense DWI. The minute entry reflects that defendant was informed of his rights against self-incrimination, to a trial by a judge, and to confront his accusers. Further, the minute entry shows that defendant was represented by counsel at the time his plea was accepted.

Upon reviewing the record in this case, we find that by introducing the aforementioned stipulation and documents, the State adequately satisfied its initial burden of proof. The stipulation and documentation sufficiently showed that defendant had been charged with and pled guilty to the offenses and that he was represented by counsel when the guilty pleas were accepted. The State did not, at this juncture, bear the burden of proving the constitutionality of the prior guilty pleas.

Once the State met its initial burden of proof, it was then incumbent upon the defendant to produce some affirmative evidence of an infringement of his rights or a procedural irregularity in the taking of the predicate guilty pleas. Defendant could have attempted to meet this burden by introducing a certified copy of the transcript from the prior pleas, testimony about the taking of the pleas, or any other affirmative evidence. If defendant had met this burden, the burden of

proof would have shifted back to the State to prove the constitutionality of the prior guilty pleas. However, the record is devoid of any evidence introduced by defendant even attempting to meet this burden on either predicate. At trial, defense counsel's strategy centered upon calling into doubt whether defendant was intoxicated on the night of the incident. Moreover, after his stipulation to defendant's identity as the person who committed the predicate offenses, defense counsel never raised that particular issue again.<sup>4</sup> Consequently, the burden of proving the constitutionality of the prior guilty pleas never shifted back to the State. It is in this situation that the presumption of regularity attaching to a final judgment of conviction is intended to operate. *Picard*, 897 So.2d at 54.

As stated above, defendant does not raise on appeal the issue of whether the evidence presented at trial was sufficient to show that he was intoxicated while operating a vehicle. Viewing the evidence in the light most favorable to the prosecution, we find that the evidence of defendant's predicate convictions presented through defendant's stipulation and the State's documentary evidence was sufficient to allow any rational trier of fact to conclude that defendant was guilty of third-offense DWI. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to it. See *Ordodi*, 946 So.2d at 662.

This assignment of error is without merit.

#### **REVIEW FOR ERROR**

Initially, we point out 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, without inspection of the evidence.

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<sup>4</sup> We also note that defendant did not file a motion to quash alleging the constitutional invalidity of his alleged predicate convictions.

We note an error in defendant's sentence which may be corrected by this court, without need for remand to the trial court. For his conviction of third-offense DWI, defendant was sentenced to five years imprisonment at hard labor, with all but the first year suspended, and with that first year to be served without benefit of parole, probation, or suspension of sentence. The trial court also ordered that upon his release, defendant would be placed on five years probation, with special conditions. However, the sentencing provision for third-offense DWI states that if any portion of a defendant's sentence is suspended, he shall be placed on supervised probation for a period of time equal to the remainder of the sentence of imprisonment, which probation shall commence on the day after the offender's release from custody. See La. R.S. 14:98(D)(1)(a). Therefore, the imposed five-year probation term after defendant's release from custody exceeds the statutory authority by one year.

An appellate court is authorized to correct an illegal sentence pursuant to La. C.Cr.P. art. 882(A), when the sentence does not involve the exercise of sentencing discretion by the trial court. See *State v. Haynes*, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). The correction of this error does not involve sentencing discretion, as defendant's term of probation is mandatory based upon the term of his suspended sentence. Therefore, we amend defendant's sentence to reflect that his term of probation is four years, with the same special conditions imposed by the trial court, and we affirm this sentence as amended.



**DECREE**

For these reasons, we affirm the conviction. Because we noted an error in sentencing that this court is authorized to correct, we amend the sentence to show a four-year term of probation with the same special conditions imposed by the trial court, and with this amendment, the sentence is affirmed.

**CONVICTION AFFIRMED. SENTENCE AMENDED AND, AS AMENDED, AFFIRMED.**