

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1627

STATE OF LOUISIANA

VERSUS

WAYNE MICHAEL SIMMS

Judgment rendered **MAR 21 2014**

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Appealed from the  
22<sup>nd</sup> Judicial District Court  
in and for the Parish of St. Tammany, Louisiana  
Trial Court No. 494508  
Honorable Raymond S. Childress, Judge

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WAYNE MICHAEL SIMMS

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**BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.**

*JM McClelland, J. concurs and assigns reasons.*

**PETTIGREW, J.**

The defendant, Wayne Michael Simms, was charged by amended felony bill of information with failure to register as a sex offender, second offense, a violation of La. R.S. 15:542.1.4. He initially pled not guilty, but later withdrew his not guilty plea and entered a plea of guilty to the charged offense. The district court sentenced the defendant to five years at hard labor without the benefit of probation, parole, or suspension of sentence. He did not appeal in a timely manner, but was granted an out-of-time appeal. For the following reasons, we affirm the defendant's conviction and sentence.

**FACTS**

The facts of the case were not fully developed because the defendant entered a plea of guilty. According to the bill of information and **Boykin** colloquy, between June 5, 2010, and July 16, 2010, the defendant failed to register as a sex offender. He was previously convicted of failing to register on April 21, 2003.

**DISCUSSION**

In his sole assignment of error, the defendant contends that his plea was not freely and voluntarily entered and was in violation of La. Code Crim. P. art. 556.1(A)(1) because the record does not indicate whether he understood the nature of the charge against him or the mandatory minimum sentence.<sup>1</sup> The defendant argues that when the district court explained the nature of the charge and the mandatory minimum sentence, and then asked if he understood, Hannah Morley, another accused entering a guilty plea that same day, responded for him.

When the defendant entered his guilty plea on February 2, 2012, he was among five other accused persons also entering pleas that day. All six were represented by the

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<sup>1</sup> Article 556.1, in pertinent part, states:

A. In a felony case, the court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and informing him of, and determining that he understands, all of the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

same counsel and were advised of their constitutional rights (as set forth in **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)) at the same time. The defendant was informed of his privilege against self-incrimination, his right to a jury trial, and his right to confront his accusers.<sup>2</sup> The defendant stated that he understood those rights and wished to waive them. The following exchange transpired between the defendant and the district court judge:

The Court: You want to enter a plea in Case 494508, which is failure to register as a sex offender; June 5, 2010 through July 16, 2010; is that correct?

Defendant Simms: Yes, sir.

The Court: And this has been billed as a second offense failure to register. Is that your understanding?

Defendant Simms: Yes, sir.

The Court: And [your] understanding is if I accept your plea, I'm going to sentence you to five (5) years with the Department of Corrections, to be served without benefit of probation, parole or suspension of sentence. Is that your understanding?

Defendant Simms: Yes, sir.

Addressing each accused individually, the district court explained the definition of the charged crimes. Immediately before addressing the defendant, the court addressed Hannah Morley, who was charged with theft. The court read the definition of theft and the possible sentences under that statute to Morley. When asked if she understood the definition of the crime and range of sentences, Morley responded, "[y]es, sir." The court then stated, "[t]hat brings us to Mr. Simms" and read the definition of failing to register as a sex offender and the penalties for violation of that statute to the defendant. The court asked, "[s]o do you understand the definition of that crime and the range of sentences on it?" The record indicates that "Defendant Morley" rather than "Defendant Simms" answered, "[y]es, sir." The court responded, "[a]ll right," and asked if any of the

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<sup>2</sup> **Boykin** only requires that a defendant be informed of the three rights enumerated above. Its scope has not been expanded to include advising the defendant of any other rights that he may have, nor of the possible consequences of his actions. See **State v. Nuccio**, 454 So.2d 93, 104 (La. 1984).

accused had been threatened, coerced, intimidated, or pressured to enter a plea of guilty in any way. Each of the accused responded that they had not.

After a thorough review of the record, it appears that the portion of the record stating that "Defendant Morley" answered the question presented to the defendant is a typographical error. Morley had just responded that she understood the nature of the charge against her (theft). The court specifically addressed the defendant before reading the nature of the charge against him and the related penalties. The court asked the defendant if he understood, and after receiving a response, immediately moved on to its next inquiry. Moreover, the record contains a "Plea of Guilty and Waiver of Rights" form signed by the district court judge, the defendant, and defense counsel, in open court, on the day the defendant entered his guilty plea. A written form containing a waiver of rights is part of the record, and can be examined to determine the free and knowing nature of the plea. See State v. Dunn, 390 So.2d 525, 527 (La. 1980). The defendant wrote his initials next to the provision of the form stating, "I understand the nature, elements and sentence range of the crime(s) I am charged with committing. By pleading guilty, I will be convicted of these offenses and I understand they can be used to enhance the sentences of future criminal convictions." Our review of the record reveals that the defendant was informed of and understood the nature of the charge against him and the sentence range.

Furthermore, even if the district court had failed to inform the defendant of the nature of the charge and the mandatory minimum penalty, that failure would be subject to harmless-error analysis. The proper inquiry is whether the defendant's knowledge and comprehension of the full and correct information would have likely affected his willingness to plead guilty. State v. Guzman, 99-1528, 99-1753, pp. 11-12 (La. 5/16/00), 769 So.2d 1158, 1165-1166. The defendant's sentence was arrived at as part of a plea bargain to a minimum sentence, and the district court clearly advised the defendant that he would receive a five-year sentence if he pled guilty. The defendant received a sentence considerably below the statutory maximum. See La. R.S. 15:542.1.4(A)(2). The definition of "failure to register as a sex offender" is

straightforward, and the defendant failed to allege that he did not understand the nature of the charge against him. Thus, even if the district court failed to inform the defendant of the nature of the charge and the mandatory minimum penalty, it would be harmless and would not render the defendant's plea of guilty invalid. Accordingly, this assignment of error has no merit.

#### **REVIEW FOR ERROR**

Under La. Code Crim. 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. See State v. Price, 2005-2514, p. 18 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. After a careful review of the record, we have found a sentencing error.

The defendant was sentenced to five years at hard labor without the benefit of probation, parole, or suspension of sentence. Whoever is found guilty of failure to register as a sex offender, second offense, shall be fined three thousand dollars and imprisoned with hard labor for not less than five nor more than twenty years without the benefit of parole, probation, or suspension of sentence. See La. R.S. 15:542.1.4(A)(2). The district court failed to impose the mandatory fine. Accordingly, the defendant's sentence 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 21-22, 952 So.2d at 124-125.

**CONVICTION AND SENTENCE AFFIRMED.**

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**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.