NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 KA 0704

STATE OF LOUISIANA

VERSUS

BRYAN NOAH CARPENTER

Judgment Rendered: DEC 2 3 2015

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
No. 29736

The Honorable Robert H. Morrison, III, Judge Presiding

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* * * * *

BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

HOLDRIDGE, J.

The defendant, Bryan Carpenter, was charged by bill of information with driving while intoxicated ("DWI"), third offense, a violation of Louisiana Revised Statutes 14:98A (prior to revision by 2014 La. Acts No. 385, § 1). He entered a plea of not guilty and filed a motion to quash, alleging that his two prior DWI convictions were insufficient for enhancement purposes. Following a hearing, the district court denied the motion. The defendant then withdrew his previously entered plea of not guilty and entered into a plea agreement, reserving his right to appeal the denial of his motion to quash pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976). He was sentenced to one year at hard labor, and the district court recommended placement in the Steve Hoyle Rehabilitation Program. The defendant now appeals the denial of his motion to quash. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

Because the defendant entered a plea of nolo contendere, the facts surrounding the instant offense were not fully developed. Based on the information contained in the defendant's arrest report and the transcript of his **Boykin**[1] examination, the defendant was involved in a motor vehicle crash on July 7, 2013. Louisiana State Trooper Jeremy Ballard responded to the scene on George White Road in Livingston Parish around 7:50 p.m. Based on Trooper Ballard's investigation, the defendant was traveling eastbound when he crossed the opposite lane of travel, left the roadway, and struck a utility pole and several mailboxes. When Trooper Ballard came into contact with the defendant, he detected a strong odor of alcohol. The defendant was advised of his **Miranda**[2]

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[1] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

rights and admitted to consuming vodka prior to the crash. The defendant showed signs of nystagmus during his field sobriety test and was placed under arrest and transported to the Livingston Parish Jail. The results of the defendant's Intoxilyzer 5000 breath test revealed that he had a blood alcohol content of 0.254 grams percent.

The State filed a bill of information charging the defendant with DWI, third offense, and listing the following offenses as his predicates: (1) December 9, 2004, guilty plea to DWI (first offense) in the Twenty-First Judicial District Court (21st JDC), Parish of Livingston, under docket number 04-084104; and (2) July 23, 2010, plea of no contest to DWI (second offense) in the 21st JDC, Parish of St. Helena, under docket number 17999.

The defendant filed a motion to quash, asserting that his convictions entered on December 9, 2004, and July 23, 2010, were insufficient to be used as predicate convictions to enhance his current conviction. He complained that his December 9, 2004, predicate conviction was insufficient because he was not represented by counsel, and the district court did not make a sufficient inquiry into his understanding of his rights. He further complained that his July 23, 2010, predicate conviction was insufficient because his public defender did not discuss the case or any defenses with him, and the minute entry from that date did not reflect that he was advised of any of his constitutional rights.

At the June 16, 2014, hearing on the motion to quash, the defendant presented argument only as related to his December 9, 2004, conviction. He complained that he was not represented by counsel and was not questioned about his understanding of his plea. He further argued that although the minute entry indicated that he was advised of his right to counsel, he was not advised as to his right to "appointed" counsel. After the hearing, the district court denied the motion

based on information in the minute entry, but indicated that the defendant could re-urge his motion if he provided a copy of the transcript.

The defendant re-urged his motion to quash on September 11, 2014. Prior to this hearing, the district court was provided with a copy of the transcript. It denied the motion to quash, finding that the necessary elements under **Boykin** were met. Defense counsel then stated that the defendant was ready to enter into a **Crosby** plea, reserving his right to file an application for writs or to appeal the district court's ruling on the motion to quash. The district court accepted the defendant's plea but delayed sentencing. The defendant subsequently filed a writ application with this court, which was not considered due to the defendant's failure to submit a transcript of the September 11, 2014, hearing. See **State v. Carpenter**, 2014-1812 (La. App. 1st Cir. 2/23/15) (unpublished). After this court's ruling on the defendant's writ application, he was sentenced by the district court.

MOTION TO QUASH

In his sole assignment of error, the defendant argues that the district court erred in denying his motion to quash. Specifically, the defendant contends that the district court judge who accepted his guilty plea on December 9, 2004, did not make an adequate determination that he knowingly and intelligently waived his rights, nor did the judge adequately advise him of his right to counsel.

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, a district court 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. **Boykin**, 395 U.S. at 243, 89 S.Ct. at 1712. The court must also ascertain that the accused understands what the plea connotes and its consequences. In a subsequent

proceeding, if a defendant denies the allegations of a bill of information setting forth a prior guilty plea to be used for enhancement purposes, 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. 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 district court'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** 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. **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.

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 district 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 court. 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 (La. App. 1st Cir. 2/18/00), 754 So.2d 294, 297, writ denied, 2000-0815 (La. 11/13/00), 774 So.2d 971.

The minute entry from the defendant's December 9, 2004, conviction indicates that the district court advised the defendant of his right to counsel, and the defendant knowingly and intelligently waived that right. The transcript of the December 9, 2004, guilty plea reflects that the district court took guilty pleas from multiple defendants. Addressing all of the DWI offenders, the court read the elements and penalties of DWI first, second, third, and fourth offenses. The court explained that each of them had the right to plead not guilty, the right to a trial, the right to confront and cross-examine their accusers, the right to remain silent, the right against self-incrimination, and the right to call witnesses on their own behalf. Then, the court addressed the defendant and asked for his name and address. The defendant responded to the district court's questions and stated that he completed twelfth grade. The defendant confirmed that he understood the law on DWI that

was read to him as well as his rights. The court asked whether the defendant had any questions, and he stated, "No." The following exchange then occurred:

> [The court]: And I had previously advised you on this but let me make sure that you understand. You have the right to represent [sic] if you want to. Do you understand that?
>
> [The defendant]: Yes.
>
> [The court]: If you cannot afford an attorney I will appoint the public defender to represent you or you could hire your own attorney if you want to, anybody that you want to. Do you understand that?
>
> [The defendant]: Yes, sir.
>
> [The court]: And your choice is to --
>
> [The defendant]: Plead guilty.
>
> [The court]: I know, but as far as an attorney.
>
> [The defendant]: No, I don't want one.
>
> [The court]: You want to represent yourself?
>
> [The defendant]: Yes.
>
> [The court]: Let the record reflect that you've made a knowing and intelligent waiver of counsel.

Based on our review of the record, we find no error in the district court's denial of the defendant's motion to quash. The minutes and transcript clearly indicate that the defendant was informed of his right to an attorney, understood that right, and knowingly and intelligently waived that right, as well as his **Boykin** rights.

This assignment of error is without merit.

REVIEW FOR ERROR

In accordance with Louisiana Code of Criminal Procedure article 920(2), all appeals are reviewed for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. **State v. Price**, 2005-2514

(La. App. 1st 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 discovered a sentencing error. In addition to the sentencing provisions provided in La. R.S. 14:98D(1)(a) (prior to its revision), the statute mandates that a person who is convicted of a third DWI offense shall be fined two thousand dollars. The sentencing transcript indicates that the district court failed to impose the mandatory fine. The minutes also reflect that no fine was imposed. Accordingly, the defendant's sentence, which did not include the fine, 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**, 952 So.2d at 123-25.

CONVICTION AND SENTENCE AFFIRMED.