NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 0638

STATE OF LOUISIANA

VERSUS

BARRY DIGGS

Judgment rendered November 3, 2006.

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Appealed from the
22nd Judicial District Court
in and for the Parish of Washington, Louisiana
Trial Court No. 03 CR3 86929
Honorable Raymond Childress, Judge

* * * * * *

HON. WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA
KATHRYN LANDRY
SPECIAL APPEALS COUNSEL
BATON ROUGE, LA

ATTORNEYS FOR
THE STATE OF LOUISIANA

GWENDOLYN K. BROWN
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
BARRY DIGGS

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Hughes, J. dissents in part with reasons.

PETTIGREW, J.

The defendant, Barry Diggs, was charged by bill of information with fifth offense driving while intoxicated, a violation of La. R.S. 14:98. With counsel present, he initially pled not guilty. The predicate offenses were a guilty plea on September 20, 1993, under the Twenty-First Judicial District Court docket number 68335; a guilty plea on May 12, 1999, under the Twenty-Second Judicial District Court docket number 301747; a guilty plea on April 18, 2002, under the Twenty-Second Judicial District Court docket number 325416; and a guilty plea on September 23, 2002, under the Twenty-Second Judicial District Court docket number 347642. See **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The defendant filed a motion to quash and to suppress evidence of the predicate offenses. Following a hearing on the matter, the motion was denied. Thereafter, the defendant withdrew his prior plea of not guilty and, at the **Boykin** hearing, entered a plea of guilty pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving his right to challenge the ruling on the motion to quash and suppress evidence of the predicate offenses.[1] The defendant was sentenced to ten (10) years at hard labor without the benefit of probation, parole, or suspension of sentence. The sentence was ordered to run consecutively to the sentence the defendant was serving for his fourth offense DWI. The defendant now appeals, designating one assignment of error. For the reasons that follow, we affirm the conviction, vacate the sentence, and remand for resentencing.

FACTS

Because the defendant pled guilty, the facts of the instant offense were not developed. According to the bill of information, on November 16, 2002, the defendant was operating a motor vehicle while under the influence of alcoholic beverages.[2]

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in

[1] The minutes incorrectly reflect that the defendant entered an **Alford** plea rather than a **Crosby** plea.

[2] At the **Boykin** hearing, the prosecutor and defense counsel stipulated that there was a factual basis for the pleas being tendered. Thus, no facts were developed regarding the offense.

denying his motion to quash three of the four predicate offenses upon which the fifth offense DWI charge was based. We will address each challenged predicate offense separately.

The defendant first contends that his May 12, 1999 guilty plea (Docket No. 301747) is deficient because the plea was obtained and accepted in the Twenty-Second Judicial District Court before Commissioner James Gleason, III, who was not, according to the defendant, authorized to perform such juridical acts. In support of his position, the defendant cites **State v. O'Reilly**, 2000-2864, 2865, p. 8 (La. 5/15/01), 785 So.2d 768, 774, which declared unconstitutional the portion of La. R.S. 13:719 that allowed the commissioner for the Twenty-Second Judicial District Court to conduct trials, accept pleas, and impose sentences in misdemeanor cases.

While the **O'Reilly** court found that the commissioner, an unelected official, could not lawfully exercise the adjudicatory power of the state, the court further found that, pursuant to the *de facto* officer doctrine, Commissioner Gleason was a *de facto* officer sitting pursuant to an apparently valid statute whose unconstitutionality had not been attacked directly or declared at the time defendant O'Reilly pleaded guilty and was sentenced. **O'Reilly**, 2000-2864, 2865 at 8, 13-14, 785 So.2d at 774, 778. Similarly, in the instant matter, we find that Commissioner Gleason was a *de facto* officer in May of 1999 when he accepted the defendant's guilty plea.

We note that in an order dated October 8, 1999, this court consolidated the matters of defendants Scott B. Brewster and Robert J. O'Reilly for consideration of the constitutionality of La. R.S. 13:719. While neither party challenged the constitutionality of La. R.S. 13:719 or the jurisdiction of the commissioner's court, this court found it proper to review the statute and notice on its own motion the want of the commissioner's court's subject matter jurisdiction. See **State v. Brewster**, 99-1361, 1774, pp. 2-3 (La. App. 1 Cir. 2/18/00), 764 So.2d 969, 970-971. This court concluded that the provisions of La. R.S. 13:719 that confer to the commissioner for the Twenty-Second Judicial District all the powers of a district court judge were unconstitutional. **Brewster**, 99-1361, 1774 at 8, 764 So.2d at 975. The Louisiana Supreme Court found that this court erred in reaching

the constitutionality of La. R.S. 13:719 on its own motion and vacated and set aside this court's judgment. See **State v. Brewster**, 2000-1266, p. 4 (La. 6/30/00), 764 So.2d 945, 947 (per curiam).

Thus, since La. R.S. 13:719 was not declared unconstitutional until the Louisiana Supreme Court's decision in **O'Reilly**, which was rendered on May 15, 2001, the defendant's guilty plea before Commissioner Gleason on May 12, 1999, was constitutional.[3] As indicated by the **O'Reilly** court:

> This court has held that until a *de facto* officer's title to the office is attacked directly and held to be invalid, "the acts of a *de facto* official are as valid and effectual, when they concern the public or the rights of third parties, as though he were an officer de jure. . . ." **State v. Stripling**, 354 So.2d 1297, 1300-01 (La. 1978).

O'Reilly, 2000-2864, 2865 at 13, 785 So.2d at 777.[4] The trial court properly denied the defendant's motion to quash his May 12, 1999 guilty plea (Docket No. 301747).

The defendant next contends that his September 23, 2002 guilty plea (Docket No. 347642) was made without a knowing and intelligent waiver of his rights. Specifically, the defendant asserts that a review of the **Boykin** transcript indicates he did not waive each of the rights explained to him by the court.

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

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[3] In his assignment of error, the defendant does not raise the issue that there was no showing that his guilty plea before Commissioner Gleason was knowing and voluntary.

[4] We note that following this language from **Stripling**, the **O'Reilly** court concluded that Commissioner Gleason "was at minimum a *de facto* officer sitting pursuant to an apparently valid statute whose unconstitutionality had not been attacked directly *or* declared at the time defendant O'Reilly pleaded guilty." **O'Reilly**, 2000-2864, 2865 at 13-14, 785 So.2d at 778 (our emphasis). It is unclear what emphasis, if any, should be attached to the use of the disjunctive in this context. Regardless, whether the invalidity of the acts of a *de facto* official are triggered by the mere attack of the constitutionality of the statute or the declaration by a court of the unconstitutionality of the statute, the result would be the same in the instant matter. While La. R.S. 13:719 was declared unconstitutional by the Louisiana Supreme Court on May 15, 2001, the constitutionality of the statute was questioned as early as October 8, 1999, when this court, on its own motion, consolidated the matters for consideration of the constitutionality of the statute. See **Brewster**, 99-1361, 1774 at 2, 764 So.2d at 970-971. Also, following the supreme court's vacating and setting aside this court's judgment in **Brewster**, the supreme court stated, "we note that defendants have now raised the question of the statute's constitutionality." **Brewster**, 2000-1266 at 4, 764 So.2d at 947. Thus, the defendant's guilty plea before Commissioner Gleason on May 12, 1999, preceded both this court's consideration of the constitutionality of the statute on October 8, 1999, and the defendants' constitutional attack sometime subsequent to October 8, 1999.

applicable; and (c) his right to confront his accuser. **Boykin**, 395 U.S. at 243, 89 S.Ct. at 1712. 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 both 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 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** 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. Hardeman**, 2004-0760, p. 6 (La. App. 1 Cir. 2/18/05), 906 So.2d 616, 623.

The defendant's contention that he did not waive each of his **Boykin** rights is baseless. A review of the transcript of the defendant's guilty plea clearly reveals that the trial court explained to the defendant (along with two other defendants) his rights, the defendant indicated he understood those rights and, further, that he understood that by pleading guilty, he was waiving those rights. The relevant portions of the **Boykin** colloquy are as follows:

> The Court:
> All right. Before accepting your plea, I've got to make sure that your plea is voluntary, done without coercion, and that you have the intellectual ability to make that decision. And so I'll ask you to give me -- I'll go down alphabetically.
> Mr. Diggs.
>
> Mr. Diggs:
> Yes, sir.

The Court:
Give me your full name and age.

Mr. Diggs:
Barry Diggs; forty-five (45).

. . . .

The Court:
And how high did you go in school?

Mr. Diggs:
High school education.

The Court:
Pardon me.

Mr. Diggs:
High school education.

The Court:
Can you read and write the English language?

Mr. Diggs:
Yes, sir.

. . . .

The Court:
Before your plea will be accepted, I have to advise each of you of the nature of the charges and the possible consequences that you face.
Mr. Diggs, the crime of 4th offense DWI is defined as follows . . .

. . . .

The Court:
... And so do you understand the consequences of this plea that you're tendering to the Court?

Mr. Diggs:
Yes, sir.

The Court:
And the elements of the crime?

Mr. Diggs:
Yes, sir.

. . . .

The Court:
Everybody understand the consequences and the elements?

Mr. Diggs:
Yes, sir.

. . . .

The Court:

You have constitutional rights. You have the right to hire a lawyer of your choice to represent you. If you cannot afford one, one will be appointed to represent you without charge.

You will be entitled to trial in open court, with or without a jury. At that trial, you'd have the right to confront the witnesses who accuse you of having committed the crime; the State would be required to prove each and every element of the crime beyond a reasonable doubt; and you would have the right to subpoena witnesses to testify on your behalf; and you'd have the right to invoke the privilege against self-incrimination and remain silent.

If you were convicted at that trial, you would have the right to appeal to the First Circuit Court of Appeal; from there, the Louisiana Supreme Court; and from there, the United States federal courts systems.

. . . .

By pleading guilty, you're admitting that you have committed the crime, because, in fact, you have committed it. And you're giving up the constitutional rights that I've been discussing with you.

Do each of you understand the nature of the crime to which you're pleading guilty, the possible penalties you could receive, and the constitutional rights I've been discussing with you?

Mr. Diggs:

Yes, sir.

. . . .

The Court:

Do you understand that if you plead guilty, there will be no further trial of any kind, and you will be waiving your right to a trial?

Mr. Diggs:

Yes, sir.

. . . .

The Court:

Do you wish to give up your constitutional rights and plead guilty, because you have, in truth, in fact, committed this crime?

Mr. Diggs:

Yes, sir.

. . . .

The Court:

Has anyone forced or coerced you to plead guilty?

Mr. Diggs:

No, sir.

. . . .

The Court:

The Court understands that your willingness to plead guilty results from prior discussions between the district attorney, the Court, and you're

[sic] attorney. The substance of that plea agreement will be disclosed when I impose your sentence. If it's not in accord with your understanding, you will be allowed to withdraw your plea of guilty at that time.

Do you understand?

Mr. Diggs:

Yes, sir.

. . . .

The Court:

Has your lawyer explained your rights to you?

Mr. Diggs:

Yes, sir.

. . . .

The Court:

Are you satisfied with your lawyer's work?

Mr. Diggs:

Yes, sir.

. . . .

The Court:

Mr. Liberto [defense counsel], are you satisfied that these defendants knowingly, intelligently, voluntarily, and willingly wants [sic] to plead guilty to these crimes?

Mr. Liberto:

Yes, Your Honor.

The Court:

Mr. Diggs, do you plead guilty to fourth offense DWI?

Mr. Diggs:

Yes, I do.

During this guilty plea, the trial court personally addressed the defendant in assessing his competency and understanding before collectively advising all three defendants of the trial rights they would waive by entering a guilty plea. Moreover, the defendant, who was present with counsel, informed the trial court that his lawyer had explained his rights to him. While a personal colloquy between the trial court and the defendant is preferred, group guilty pleas are not automatically invalid. See **State v. Verdin**, 2002-2671, p. 6 (La. App. 1 Cir. 2/3/03), 845 So.2d 372, 376 (per curiam). See also **State v. Filer**, 2000-0073, p. 2 (La. 6/30/00), 762 So.2d 1080, 1081 (per curiam). The personal and individual portions of the **Boykin** colloquy between the trial judge and

the defendant placed the judge in a position to determine the knowing and voluntary nature of the defendant's waiver. After a thorough review of the record, we find that the State met its initial burden and that the defendant did not produce evidence that showed an infringement of his rights or a procedural irregularity in the taking of his plea. See **State v. Kreger**, 2000-0968, pp. 5-6 (La. App. 1 Cir. 12/22/00), 774 So.2d 1273, 1276-1277. The proceedings were adequate to establish that the defendant knowingly and expressly waived his **Boykin** rights. See **Verdin**, 2002-2671 at 6, 845 So.2d at 377. The trial court properly denied the defendant's motion to quash his September 23, 2002 guilty plea (Docket No. 347642).

Finally, the defendant contends that at his September 20, 1993 guilty plea (Docket No. 68335), the trial court failed to explain to him that should he choose to exercise his right to remain silent, no inference of guilt could permissibly be drawn from his invocation of that right. This contention is baseless.

The State may rely upon either the transcript of the plea of guilty or the minute entry. **State v. Carson**, 527 So.2d 1018, 1020-1021 (La. App. 1 Cir. 1988). The minutes from the defendant's guilty plea indicate that each of his **Boykin** rights were explained to him: "the right to a trial; the right to be confronted by his accusers and to cross examine [sic] them; and the right to remain silent and not to testify against himself or incriminate himself in any way." **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 that he may have. **Hardeman**, 2004-0760 at 6, 906 So.2d at 623. Therefore, the trial court, after having explained to the defendant his right to remain silent and his privilege not to incriminate himself, was under no further obligation to explain to the defendant that no inference of guilt could be made from exercising his right to remain silent. The trial court properly denied the defendant's motion to quash his September 20, 1993 guilty plea (Docket No. 68335). This assignment is without merit.

PATENT ERROR

We note an error patent in the sentencing of defendant. The trial court failed to impose the mandatory fine for a conviction of fourth or subsequent offense DWI. Louisiana Revised Statutes 14:98(E)(1)(a) states in pertinent part that "the offender shall be imprisoned with or without hard labor for not less than ten years nor more than thirty years and shall be fined five thousand dollars." This court will correct sentencing errors by a trial court that pertain to mandatory sentencing requirements by vacating the sentence and remanding for resentencing in accordance with law. **State v. Paoli**, 2001-1733, pp. 6-8 (La. App. 1 Cir. 4/11/02), 818 So.2d 795, 799-800 (en banc), writ denied, 2002-2137 (La. 2/21/03), 837 So.2d 628. Therefore, we vacate the sentence and remand to the trial court for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0638

STATE OF LOUISIANA

VERSUS

BARRY DIGGS

HUGHES, J., dissenting. I respectfully dissent as to the remand to impose a meaningless mandatory fine.

We have "considered" this patent sentencing error pursuant to the mandate of LSA-C.Cr.P. art 920 and this court's reasoning in **State v. Paoli**, 2001-1733 (La. App. 1 Cir. 4/11/02), 818 So.2d 795, writ denied, 2002-2137 (La. 2/21/03), 837 So.2d 628. I respectfully submit we should, in our discretion, decline to take further action, inasmuch as the issue was not raised on appeal and any action taken by this court at this juncture would be a vain and useless act, if not a counterproductive one, when the costs and security risks involved in transporting the defendant back and forth for resentencing are weighed into the equation. **Paoli** does not "require" remand.