

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0734

STATE OF LOUISIANA

VERSUS

SAMSON L. MONTOYA

Judgment rendered November 2, 2007.

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Appealed from the
16th Judicial District Court
in and for the Parish of St. Mary, Louisiana
Trial Court No. 170,610
Honorable Edward M. Leonard, Judge

* * * * *

HON. J. PHIL HANEY
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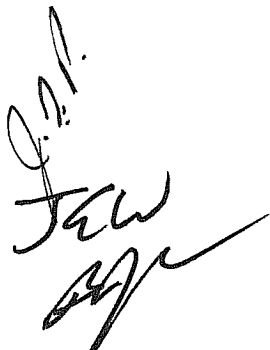
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ATTORNEYS FOR
STATE OF LOUISIANA

ATTORNEY FOR
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SAMSON L. MONTOYA

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.



PETTIGREW, J.

The defendant, Samson L. Montoya, was charged by bill of information with driving while intoxicated (DWI), third offense, a violation of La. R.S. 14:98(D), driving under suspension, a violation of La. R.S. 32:415, and careless operation of a motor vehicle, a violation of La. R.S. 32:58. The offenses occurred on June 18, 2006. The predicate offenses alleged for the DWI charge were: an October 9, 1996, 14th Circuit Court, Randolph County, Missouri guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages under docket number CR596512M (predicate number one) and a May 18, 1998, 14th Circuit Court, Randolph County, Missouri guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages under docket number CR598415M (predicate number two). The defendant originally pled not guilty.

The defendant moved to quash the bill of information attacking the sufficiency of each of the predicates to enhance the DWI offense. Following a hearing, the trial court denied the defendant's motion to quash. Thereafter, pursuant to a plea agreement, the defendant withdrew his former plea and entered a plea of guilty to DWI, third offense.¹ He specifically reserved the right to appeal the trial court's denial of the motion to quash the predicates.² See State v. Crosby, 338 So.2d 584 (La. 1976). After accepting the defendant's guilty plea, the trial court sentenced him to imprisonment at hard labor for five years. The court suspended all but thirty days in the parish jail.³ The trial court placed the defendant on supervised probation for five years subject to various general and special conditions including requirements that the defendant undergo a substance abuse evaluation, attend a court approved inpatient substance abuse treatment facility, and undergo subsequent home incarceration. The trial court also ordered the defendant to pay a \$2000.00 fine. The defendant now appeals, urging in a single assignment of error

¹ The record does not reflect the final disposition of the driving under suspension and careless operation of a motor vehicle charges.

² The defendant also pled guilty to DWI third offense in St. Mary Parish docket number 06-170140 (based upon the two Missouri predicate convictions). See State v. Montoya, 2007-0725 (La. App. 1 Cir. 11/2/07) (unpublished), also decided this date.

³ The trial court ordered that the thirty-day sentence in this case be served consecutively to the thirty-day sentence imposed in docket number 06-170140.

that the trial court erred in denying the motion to quash. Finding no merit in the assigned error, we affirm the conviction. However, for the reasons set forth below, we vacate the sentence and remand for resentencing.

FACTS

Because the defendant pled guilty, there was no trial testimony concerning the facts of the instant offense. The following factual basis was recited by the prosecutor at the **Boykin** hearing:

Your Honor, in Docket Number 06-170610, the State would intend to prove at trial that on June 18th of 2006, officers with the Patterson Police Department in St. Mary Parish, Louisiana, observed a vehicle in the ditch near Clark Street, near [its] intersection with Highway 90, officers came to determine that Mr. Montoya was the operator of that vehicle. During the course of the stop or the course of their investigation to stop the vehicle they determined that Mr. Montoya, it was their belief that he was operating the vehicle while under the influence of alcoholic beverages. They asked that he perform a field sobriety test which he submitted. The results of the test lead [*sic*] the officers to believe that he was driving while impaired. He was asked to submit to a chemical intoxilyzer to which he refused and was arrested for DWI at that time. Mr. Montoya had two prior convictions out of Randolph County, Missouri the first conviction on May 18th of '98 under Docket Number CRS98415M. The second on October 9th, 1996 under CRS96512M....

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends the trial court erred in denying his motion to quash the two Missouri guilty pleas alleged as predicates in this case. He argues the evidence presented by the State in support of these predicates revealed that the Missouri judge failed to inform him of the potential for enhanced penalties for subsequent DWI offenses. Specifically noting the absence of transcripts of the Missouri proceedings, the defendant further argues the guilty pleas from the State of Missouri do "not spell out all of the rights that are required under Louisiana law." Thus, he asserts there was no knowing and voluntary waiver of his rights in the Missouri 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 applicable; and (c) his right to confront his accuser. See **Boykin v. Alabama**, 395 U.S.

238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). The judge must also ascertain that the accused understands what the plea connotes and its consequences.

In **State v. Carlos**, 98-1366 (La. 7/7/99), 738 So.2d 556, the Louisiana Supreme Court eased the State's burden of proving a prior DWI guilty plea as a predicate offense for enhancement purposes. In **Carlos**, the court held that the burden-shifting principles of **State v. Shelton**, 621 So.2d 769 (La. 1993), are applicable to multiple offense DWI cases. Under this burden-shifting scheme, when a defendant challenges the constitutionality of a conviction being used to enhance a present DWI offense, the State has the initial burden of proving the existence of the prior guilty plea and that the defendant was represented by counsel at the time of the plea. If the State meets this initial burden, the burden shifts to the defendant to produce affirmative evidence of an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant carries this burden, then the burden reverts to the State to prove the constitutionality of the plea. **Carlos**, 98-1366 at 6-7, 738 So.2d at 559. The State will meet this burden by producing a "perfect transcript" of the guilty plea colloquy. A "perfect transcript" is one that reflects a voluntary, informed, and articulated waiver of the three specific rights discussed in **Boykin**: 1) the right to trial by jury, 2) defendant's privilege against self-incrimination, and 3) his right to confront his accusers. **Shelton**, 621 So.2d at 775 n.12 and 779-80. Anything less than a "perfect" transcript, such as a minute entry or a guilty plea form, will require the trial judge to weigh the evidence submitted by both sides and determine whether defendant's **Boykin** rights were prejudiced. **Carlos**, 98-1366 at 7, 738 So.2d at 559.

In the instant case, as proof of each of the Missouri guilty pleas alleged as a predicate, the State introduced certified copies of the Uniform Complaint and Summons; the Misdemeanor Information; the Judge's Judgment, Orders, Minutes and Docket Sheet; and the Circuit Court Criminal Docket Sheet. This evidence reflects that on each occasion the defendant was represented by counsel and entered a guilty plea to DWI. Thus, contrary to the defendant's assertions in his brief, the State satisfied its initial burden pursuant to **Carlos**. The State was not required to prove the constitutionality of the pleas

at this point, only that they existed and that the defendant was represented by counsel when they were entered. The documents submitted were sufficient to meet this initial burden. The burden then shifted to the defendant to show an infringement of his rights or a procedural irregularity in the taking of the pleas. The defendant could have attempted to meet this burden by introducing testimony regarding the taking of the pleas or any other affirmative evidence.

The record before us is devoid of any attempt by the defendant to produce any such affirmative evidence as to either of the Missouri predicates. Instead, at the hearing on the motion to quash, counsel for the defendant did not present any evidence. Counsel only argued that the State failed to produce evidence that the Missouri judge explained that a subsequent conviction of DWI would result in harsher penalties for a felony. Because the defendant failed to produce affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas, the burden never shifted back to the State to prove the constitutionality of the prior guilty pleas.

Furthermore, with regard to the defendant's argument that he was not advised of the potential for enhancement of subsequent offenses, it is well settled that **Boykin** only requires that a defendant be informed of three enumerated rights; namely, his constitutional privilege against self-incrimination, right to trial by jury, and right to confrontation of his accuser. See **State v. Longo**, 560 So.2d 530, 531-532 (La. App. 1 Cir. 1990). The jurisprudence has been unwilling to extend the scope of **Boykin** to include advising the defendant of any other rights that he may have. See **State v. Wright**, 517 So.2d 458, 460 (La. App. 1 Cir. 1987), writ denied, 522 So.2d 1093 (La. 1988). Thus, the Missouri judge was not required to advise the defendant of the potential for enhancement of subsequent offenses. The trial court did not err in denying the defendant's motion to quash the predicate convictions. This assignment of error is without merit.

REVIEW FOR ERROR

In accordance with our review for error pursuant to La. Code Crim. P. art. 920(2), we note as follows. The trial court imposed an illegal, indeterminate sentence when it failed to specify the term for the defendant's home incarceration. The pertinent sentencing provision, La. R.S. 14:98(D)(1)(c), requires that any offender placed on probation for a third offense DWI "shall be placed in a home incarceration program approved by the division of probation and parole for a period of time not less than six months and not more than the remainder of the sentence of imprisonment." Thus, the trial court may order all or a portion of the suspended sentence of imprisonment be served on home incarceration, but it must specify the term. See La. Code Crim. P. art. 879. In this case, the trial court only noted that the defendant would be subject to home incarceration. The court did not specify a term for the home incarceration.

The record also reflects that the trial court erred in imposing the period of probation. After suspending all but thirty days of the five-year sentence of imprisonment, the trial court ordered that the defendant serve a period of five years on supervised probation. Louisiana Revised Statutes 14:98(D)(1)(a) provides that, "[i]f any portion of the sentence is suspended, the offender shall be placed on supervised probation with the Department of Public Safety and Corrections, division of probation and parole, **for a period of time equal to the remainder of the sentence of imprisonment.**" (Emphasis added.) Because thirty days of the sentence of imprisonment were not suspended, the defendant's probation period should not have been the full five years. Probation should have been limited to the four years and eleven months remainder of the sentence of imprisonment. Accordingly, we must vacate the sentence and remand the case for resentencing.⁴

For the foregoing reasons, the defendant's conviction is affirmed. The sentence is vacated and the matter remanded to the trial court for resentencing in accordance with the law.

⁴ Because the matter is being remanded for resentencing, we also note that the trial court failed to follow the procedure set forth in La. R.S. 14:98(D)(2) in regard to seizure, impoundment, and sale of the vehicle being driven at the time of the offense.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.