NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0642

STATE OF LOUISIANA

VERSUS

THOMAS STEWART

Judgment rendered October 29, 2010.

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Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 532,773
Honorable Randall Bethancourt, Judge

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HON. JOSEPH WAITZ
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LAWRENCE WARD
ELLEN DAIGLE DOSKEY
ASSISTANT DISTRICT ATTORNEYS
HOUMA, LA

ATTORNEYS FOR
STATE OF LOUISIANA

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THIBODAUX, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
THOMAS STEWART

* * * * * *

BEFORE: KUHN, PETTIGREW, JJ., and KLINE, J. *pro tempore.*[1]

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

The defendant, Thomas Stewart, was charged by bill of information with driving while intoxicated, third offense, a violation of La. R.S. 14:98. The defendant pled not guilty. The defendant filed a motion to quash, challenging two predicate DWI offenses wherein, according to the bill of information, the defendant entered guilty pleas. A hearing was held, and the motion to quash was denied.[2] The defendant was rearraigned at a **Boykin** hearing and entered a plea of guilty under **State v. Crosby**, 338 So.2d 584 (La. 1976), to preserve his right to appeal the court's denial of the motion to quash. The court sentenced the defendant to one year imprisonment at hard labor and imposed a $2,000.00 fine. The defendant now appeals, designating one assignment of error.[3] We affirm the conviction and sentence.

FACTS

Because the defendant pled guilty, the facts were not developed. At the **Boykin** hearing on October 5, 2009, the defendant pled guilty to driving while intoxicated, third offense, committed on January 24, 2009.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the court erred in denying his motion to quash. Specifically, the defendant contends the State, in failing to introduce any evidence into the record at the hearing on the motion to quash, did not establish the existence of his two prior guilty pleas. The defendant also contends that at the hearing on the motion to quash, the court established he did not have an attorney present for his March 22, 2005 guilty plea.

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[2] The two predicate offenses listed in the motion to quash are Docket Number 332,008, 32nd JDC, Terrebonne Parish; and Docket Number 411,722, 17th JDC, Lafourche Parish. At the motion to quash hearing, Docket Number 411,722 was the only predicate offense attacked by the defendant. However, in this appeal, the defendant attacks both predicate offenses.

[3] At the hearing on the motion to quash, the defendant challenged the March 22, 2005 predicate offense (Docket Number 411,722). Both the court and defense counsel referenced the transcript of that **Boykin** colloquy. However, neither of the two **Boykin** colloquy transcripts was introduced into evidence. Moreover, no documentary evidence was introduced by either party at the hearing on the motion to quash. By order of this court, the appellate record in this matter was supplemented with the exhibits considered by the court at the hearing on the motion to quash.

The predicate offenses at issue are a November 8, 1999 guilty plea for driving while intoxicated, second offense, committed on July 22, 1999 (Docket Number 332,008, 32nd JDC, Terrebonne Parish); and a March 22, 2005 guilty plea for driving while intoxicated, second offense, committed on November 5, 2004 (Docket Number 411,722, 17th JDC, Lafourche Parish).

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 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 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. **State v. Henry**, 2000-2250, p. 8 (La. App. 1 Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. See **State v. Carlos**, 98-1366, pp. 6-7 (La. 7/7/99), 738 So.2d 556, 559. While a colloquy between the judge and defendant is the preferred method of proof of a free and voluntary waiver, the colloquy is not indispensable when the record contains some other affirmative showing of proper waiver. **State v. Carson**, 527 So.2d 1018, 1020 (La. App. 1 Cir. 1988). 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 or not 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. **Henry**, 2000-2250 at 8-9, 788 So.2d at 541. See **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Additionally, 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 trial 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 judge. Whether an accused has knowingly and intelligently waived his right to counsel is a question that depends on the facts and circumstances of each case. **State v. Cadiere,** 99-0970, pp. 3-4 (La. App. 1 Cir. 2/18/00), 754 So.2d 294, 297, writ denied, 2000-0815 (La. 11/13/00), 774 So.2d 971.

The transcript of the November 8, 1999 **Boykin** hearing (for the July 22, 1999 offense) indicates the court informed the defendant of his constitutional rights and that he would be waiving those rights by pleading guilty. The court also discussed with the defendant the danger in representing himself. The court advised the defendant that an attorney, because of special training and education, would be in a better position to raise technical defenses to the pending charges. However, it was still the defendant's decision to represent himself. Further, a well-executed waiver of rights form, including the waiver

of the right to counsel, was signed by the court and the defendant on the same day as the November 8, 1999 **Boykin** hearing. Thus, there was a knowing and intelligent waiver of counsel by the defendant. See **State v. Deville**, 2004-1401, pp. 4-5 (La. 7/2/04), 879 So.2d 689, 691-692 (per curiam).

Similarly, the transcript of the March 22, 2005 **Boykin** hearing (for the November 5, 2004 offense) indicates the court informed the defendant of his constitutional rights and that he would be waiving those rights by pleading guilty. The court also discussed with the defendant his right to speak with an attorney. The defendant informed the court that he was comfortable with pleading guilty without the presence of an attorney. Further, a well-executed waiver of rights form, including the waiver of the right to counsel, was signed by the court and the defendant on the same day as the March 22, 2005 **Boykin** hearing. Thus, there was a knowing and intelligent waiver of counsel by the defendant. See **State v. Deville**, 2004-1401 at 4-5, 879 So.2d at 691-692.

Based on the supplemented record, we find that the State met its initial burden of proof at the hearing on the motion to quash by proving that valid guilty pleas and valid waivers of counsel occurred at the defendant's November 8, 1999, and March 22, 2005 guilty plea hearings. The burden then shifted to the defendant, who failed to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. Accordingly, the court did not abuse its discretion in denying the motion to quash.

The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.