

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1338

STATE OF LOUISIANA

VERSUS

MARY B. KORTZ

—
**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 481813, Division "B"
Honorable August J. Hand, Judge Presiding**
—

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and

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**Attorney for
Defendant-Appellant
Mary B. Kortz**

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered February 11, 2011

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PARRO, J.

The defendant, Mary B. Kortz, was charged by bill of information with one count of driving while intoxicated (DWI), third offense, a violation of LSA-R.S. 14:98. The offense allegedly occurred on October 4, 2009. The predicate offenses alleged were a February 21, 2002 Orleans Parish Traffic Court guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages under docket number S55861 (predicate number one) and a March 17, 2003 Second Parish Court of Jefferson Parish guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages under docket number S875659 (predicate number two). The defendant pled not guilty. The defendant moved to quash the bill of information, attacking the sufficiency of both predicates. A hearing was held on the motion, and the trial court denied the motion to quash. Following this ruling, the defendant withdrew her former plea and entered a plea of guilty to DWI, third offense, reserving her right to appeal the trial court's denial of the motion to quash. See State v. Crosby, 338 So.2d 584 (La. 1976). After accepting the defendant's guilty plea, the trial court sentenced her to imprisonment at hard labor for three years. The court suspended all but forty-five days of the term of imprisonment. The court ordered that the defendant serve a period of three years on supervised home incarceration upon completion of the forty-five days of imprisonment.¹

FACTS

Because the defendant pled guilty, the facts of the case were never fully developed for the record. The following factual basis was provided at the **Boykin** hearing:

On October 4, 2009, the State Police were notified of a traffic accident on I-10 near the Slidell community, and a trooper responded to the scene, came into contact with the defendant, who was in the driver's position of the wrecked vehicle, and the defendant identified herself as

¹ The court also ordered that the defendant pay a fine of \$2000; perform thirty (30) eight-hour days of community service activities; participate in the Twenty-Second Judicial District Court's DWI Program; install an ignition interlock device in the car she would be driving for a period of one (1) year; and enroll in a driver improvement program. The court also ordered the vehicle the defendant was driving at the time of the instant offense to be seized and sold at auction.

being the driver of the vehicle.

The officer, once he came in contact with the defendant, noted she had a strong odor of alcoholic beverage on [her] person, had bloodshot and watery eyes, had slurred speech, and difficulty moving about. The officer attempted to perform field sobriety tests and the defendant could not perform them, and at some point gave up and said, "Just take me to jail."

The trooper then transported the defendant to a location where there was an intoxilizer machine and the defendant submitted to that test and the results of that test yielded a .31 grams percent blood alcohol content. The defendant has two prior convictions for the same type crime.

DENIAL OF MOTION TO QUASH

In her sole assignment of error, the defendant asserts that the trial court erred in denying her motion to quash predicate number two² on the basis that the waiver-of-rights form submitted as proof of the Jefferson Parish conviction failed to fully advise the defendant of her right to remain silent "at trial."³ In response, the state asserts that the defendant failed to raise this particular issue in connection with her motion to quash filed in the trial court and, thus, she is precluded from raising the issue for the first time on appeal. Alternatively, the state contends that the evidence introduced at the hearing on the motion to quash was sufficient to prove that the defendant was advised of her **Boykin** rights, she understood the rights, and she voluntarily waived the rights in the predicate guilty plea.

When a trial court denies a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion. See **State v. Odom**, 02-2698 (La. App. 1st Cir. 6/27/03), 861 So.2d 187, 191, writ denied, 03-2142 (La. 10/17/03), 855 So.2d 765. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Smith**, 99-0606, 99-2094, 99-2015, 99-2019 (La. 7/6/00), 766 So.2d 501, 504.

Our review of the record in this matter reveals that the state is correct in its assertion that the defendant did not argue in the trial court, as she has on appeal, that

² The defendant does not appeal the court's ruling regarding the February 2002 Orleans Parish Traffic Court guilty plea (predicate number one).

³ The waiver-of-rights form provided, in pertinent part, "I understand that, by pleading guilty to this offense, I am giving up the following rights: ... [m]y right not to be compelled to incriminate myself."

the waiver-of-rights form failed to specifically advise her of her right against self-incrimination "at trial." In the motion to quash, the defendant generally stated that she was not "adequately and completely" advised of her constitutional rights. However, at the hearing on the motion, the defendant argued only that the self-incrimination advice contained in the waiver-of-rights form was inadequate because it did not explain that she would not be penalized if she chose to exercise her right against self-incrimination.

Defense counsel argued:

In other words, in order for a defendant to make a knowing waiver of the right against self-incrimination, I would argue that they need to know that they not only have a right not to testify, and by not testifying they have a right not to incriminate themselves, but should they exercise that right, then the Judge, the jury, or the Judge, whatever the case may be, would not infer any guilt on their part because they did not get on the stand and explain their side of the story and would not advert any guilt or penalize them in any way for not explaining their side of the story and for exercising that right.

And I think that's important, because I think a defendant in his own mind may think, well, I have a right not to incriminate myself, but if I don't get on the stand, then a judge or a jury may assume that I'm guilty because I didn't tell them my side of the story and that an innocent person would tell them their side of the story if they were truly innocent. So I think in order to really affirmatively weigh their right, they must understand that they cannot be penalized in any way if they exercise their right against self-incrimination. Therefore, I would argue that those, that the advice, those Boykin advice of rights are defective in that they failed to inform the defendant that they could not be penalized in any way for exercising their right.

The issue raised in this appeal, whether the waiver-of-rights form adequately advised that the right "not to be compelled to incriminate myself" applied to the defendant's "trial" (as opposed to other instances wherein a criminal defendant has the right to remain silent) was not articulated by the defendant or addressed by the state or the court during the hearing in the trial court. This new basis for the motion to quash has been raised for the first time on appeal. It is well settled that a new basis or ground for the motion to quash cannot be articulated for the first time on appeal. This is prohibited under the provisions of LSA-C.Cr.P. art. 841 since the trial court would not be afforded an opportunity to consider the merits of the particular claim. See State v. Williams, 02-1030, 02-898 (La. 10/15/02), 830 So.2d 984. The defendant is precluded from raising a new basis for her motion to quash on appeal.

Accordingly, we find no error in the trial court's denial of the motion to quash, and we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.