NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 2227

STATE OF LOUISIANA

VERSUS

MICHAEL GUITREAU

Judgment Rendered: SEP 19 2008

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On Appeal from the Twenty-Third Judicial District Court
In and For the Parish of Ascension
State of Louisiana
Docket No. 12584

Honorable John L. Peytavin, Jr., Judge Presiding

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

Defendant, Michael Guitreau, was charged by bill of information with one count of driving while intoxicated (DWI), fourth offense, a violation of LSA-R.S. 14:98.[1] He initially pled not guilty and moved to quash the use for enhancement purposes of all three predicate offenses. Thereafter, the defense withdrew its challenge to predicate #2. The defense then filed a second motion to quash, challenging predicate #3, and the motion was granted. Thereafter, the court denied the outstanding motion to quash. Subsequently, defendant withdrew his former plea and pled guilty to DWI, third offense, reserving his right to seek review of the court's ruling on the motion to quash. See **State v. Crosby**, 338 So.2d 584 (La. 1976). He was sentenced to eighteen months at hard labor, with the first thirty days to be served without benefit of probation, parole, or suspension of sentence, and the balance of the sentence was suspended subject to general and special conditions of probation, including a $2,000 fine, and otherwise in compliance with LSA-R.S. 14:98(D). He now appeals, contending the trial court erred in denying the motion to quash as to predicate #1, because the colloquy between the trial court and defendant in the Baton Rouge City Court failed to inquire whether defendant was present in the courtroom when the legal rights were given, failed to inquire whether he had graduated from high school, failed to inquire whether he could read and write the English language, and failed to inquire whether he was mentally competent. We affirm the conviction and sentence.

FACTS

Due to defendant's guilty plea, there was no trial, and thus, no trial testimony concerning the facts of the offense. Further, the record does not contain any transcripts concerning the instant offense due to the loss of the court reporter's

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[1] Predicate #1 was set forth as defendant's August 14, 1992 conviction in the Parish of East Baton Rouge for DWI. Documentation introduced at the **Boykin** hearing indicated predicate #1 was under Baton Rouge City Court Docket Numbers BR817901-0 and BR817950-0.

Predicate #2 was set forth as the defendant's August 19, 1993 conviction in the Parish of East Baton Rouge for DWI. The guilty plea form for the instant offense indicated predicate #2 was under Baton Rouge City Court Docket Number BR864843-0. Predicate #3 was set forth as defendant's November 6, 1995 conviction in the Parish of Ascension for DWI. Documentation introduced at the **Boykin** hearing indicated predicate #3 was under Ascension Parish Court Docket Number 221523.

notes during Hurricane Katrina. The minutes of the **Boykin** hearing do not reflect that the state set forth a factual basis for the charge at that hearing. A guilty plea form for the instant offense, however, reflects that, subject to his challenge to the validity of the predicate offenses, defendant agreed with the district attorney's statement of facts, i.e., on or about April 16, 2000, in the Parish of Ascension, defendant operated a motor vehicle while under the influence of alcohol and after being twice convicted of DWI, namely, under predicate #1 and predicate #2.

MOTION TO QUASH

In his sole assignment of error, defendant argues the transcript of predicate #1 is inadequate to enhance the instant offense, because it fails to show that the court made a determination of his education, experience, background and competency to waive counsel and it fails to show that he was individually advised of his rights.

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. 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. **State v. Henry**, 00-2250, pp. 8-9 (La.App. 1 Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 01-2299 (La. 6/21/02), 818 So.2d 791.

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 which 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 defendant's signature on a printed waiver form advising him of his right to counsel and warning him of the dangers of self-representation, and the signature of the trial judge on the same form that he is satisfied the accused

understood the nature of his plea and its consequences, do not discharge the duty of the trial judge to advise the defendant expressly of his right to counsel and to determine "on the record that the waiver is made knowingly and intelligently under the circumstances," taking into account such factors as the defendant's age, background, and education. **Cadiere**, 99-0970 at p. 4, 754 So.2d at 297.

However, while the use of a printed form alone is not sufficient to establish a knowing and intelligent waiver of the right to the assistance of counsel, the use of such a form in conjunction with other matters which appear in the record viewed as a whole may establish that the waiver was valid. **Cadiere**, 99-0970 at p. 4, 754 So.2d at 297.

In the instant case, the state introduced a transcript, misdemeanor affidavit, waiver of rights acknowledgement and acceptance of guilty plea form, and extract of minutes in support of the use of predicate #1 to enhance the instant offense. The transcript reflected that "[i]n a general oration given by the Court to the entire courtroom, defendants were advised of their constitutional rights." The court indicated it would advise the defendants of their rights and the possible penalties, first as a group, and then individually. The court advised all of the defendants that they had a right to have an attorney to represent them if they wanted one, and if they could not afford to hire one, they could let the court know and the public defender would be appointed to represent them if the court determined they could not afford a lawyer on the basis of their income, financial status, and family obligations. The court then entered into an individual colloquy with defendant. In response to questioning from the court, defendant set forth his name, address, and date of birth. The court advised defendant of the charges against him (first-offense DWI and speeding[2]), and defendant indicated he understood. Defendant indicated that he wanted "to plead guilty and be able to get Article 894." The court asked defendant if he understood that by pleading guilty, he would be waiving all of his rights, and defendant replied affirmatively. The court asked defendant if he

[2] The predicate #1 transcript reflects that, in exchange for defendant entering a guilty plea to the DWI charge, the state submitted the speeding charge to the court without evidence, and the court found defendant not guilty on that charge.

had any questions concerning any of his rights, and defendant answered negatively. Defendant answered the court's questions concerning his age (twenty-six), education (twelfth grade), and employment (welder). The court then asked defendant if he understood the advantages and disadvantages of representing himself, as opposed to being represented by an attorney. Defendant answered affirmatively. He also indicated that he did not have any questions.

The rights-waiver form, signed by the trial judge and defendant, indicated that defendant understood that he was pleading guilty and giving up the "[r]ight to an attorney and, if unable to afford an attorney's service, right to a court-appointed attorney at no cost to [defendant.]" Additionally, the box on the form stating "WAIVING RIGHT TO COUNSEL" was checked.

The trial court denied the motion to quash predicate #1, noting that: advisement of **Boykin** rights to a group of defendants was permissible, citing **State v. Hight**, 35,621, p. 7 (La.App. 2 Cir. 3/1/02), 810 So.2d 1250, 1257, writ denied, 02-1181 (La. 11/22/02), 829 So.2d 1036; the fact that defendant was present was evident from the transcript (wherein the bailiff noted that defendant was before the court during his individual questioning by the court); the predicate transcript reflected proper advice of rights for a misdemeanor plea; and inquiry into defendant's age, education, background and type of work was evident from the transcript.

Defendant concedes it is permissible to **Boykinize** groups. He argues, however, that the fact that the predicate #1 transcript indicates that he was present when individually questioned, does not establish that he was present moments earlier when the court conducted a group **Boykinization** of all of the defendants present in court. The law provides a rebuttable presumption of regularity of judicial proceedings. See LSA-R.S. 15:432. Defendant fails to rebut that presumption in this case. Defendant offers no evidence, and we find none, to indicate that he was not present at the beginning of the predicate #1 **Boykin** hearing, moments before he was individually questioned by the court.

Defendant also argues that the instant conviction should be reversed under **State v. White**, 98-0343 (La.App. 1 Cir. 12/28/98), 727 So.2d 574, and **State v. Gable**, 614 So.2d 808 (La.App. 2 Cir. 1993).

In **White**, this court found the state's evidence of a predicate DWI offense inadequate to establish a valid waiver of counsel. **White**, 98-0343 at p. 5, 727 So.2d at 578. However, in **White**, the state relied on only a minute entry and a rights-waiver/guilty-plea form to establish counsel waiver. We held that "without a transcript, we can only conclude from the documents submitted into evidence that there was no inquiry on the record as to the defendant's education, experience, background, or competency, nor can we assume that this information was in the record. At the hearing on the motion to quash, the defendant testified that the judge did not ask him if the defendant understood what was happening to him." **White**, 98-0343 at p. 5, 727 So.2d at 577-78.

White is distinguishable on its facts from the instant case. In this matter, the state did produce a transcript in support of the use of the predicate to enhance the instant offense. Further, the documents produced concerning predicate #1 indicate that the court determined on the record that defendant's waiver of counsel was made knowingly and intelligently after considering defendant's age, education, experience, background, and conduct, as well as the nature and complexity of the charges. Defendant did not place his competency at issue at the time of predicate #1 and nothing in the record indicates that he was anything less than competent.

In **Gable**, the court rejected the use of two uncounseled predicate DWI guilty pleas to enhance a current DWI offense. The court found the transcript of the first plea reflected that the trial judge failed to adequately determine the defendant's literacy, competency, understanding and volition, noting that there was no showing that Gable had previously been convicted of a crime or was familiar with legal proceedings. **Gable**, 614 So.2d at 810. The court found the transcript of the second plea less comprehensive than the first plea, noting that the defendant had not been asked if he could read and write or if he understood the charge. **Gable**, 614 So.2d at 810.

In order to establish a valid counsel waiver, there is no requirement that a transcript reflect that the defendant has previously been convicted of a crime or that he is familiar with legal proceedings. Further, **Gable**, in addition to being a second circuit case, is distinguishable on its facts. In the instant case, the trial judge taking defendant's plea specifically inquired into defendant's education, employment, and whether the defendant understood the advantages and disadvantages of representing himself.

There was no error in the denial of the motion to quash predicate #1. The record concerning predicate #1, viewed as a whole, establishes that defendant knowingly and intelligently waived counsel and understood that waiver. Predicate #1, a first-offense DWI, was an uncomplicated misdemeanor. Defendant was twenty-six years old, had a twelfth-grade education, and was employed as a welder. He pled guilty to obtain favorable treatment under LSA-C.Cr.P. art. 894 and to have another charge he was facing dismissed. The court carefully questioned him concerning his waiver of counsel, and defendant indicated he understood the advantages and disadvantages of representing himself, as opposed to being represented by an attorney. Defendant never invoked his right to counsel, did not ask questions or express hesitation during the **Boykin** hearing, and subsequently signed a rights-waiver/guilty-plea form which also advised him of his right to counsel.

This assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.