**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1129

STATE OF LOUISIANA

VERSUS

ANDREW D. WETZEL

**Judgment rendered December 21, 2011.**

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 472552
Honorable Richard A. Swartz, Judge

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**BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.**

**PETTIGREW, J.**

Defendant, Andrew D. Wetzel, was charged by bill of information with simple arson causing damage greater than $500.00, in violation of La. R.S. 14:52.[1] He pled not guilty and, after trial by jury, was found guilty as charged. Subsequently, the State filed a habitual offender bill of information. The trial court adjudicated defendant a fourth-felony habitual offender and imposed a sentence of thirty-five years at hard labor, without the benefit of probation or suspension of sentence.[2] Defendant now appeals, alleging one counseled and eleven pro se assignments of error. Finding no merit in the assigned errors, we affirm defendant's conviction, habitual offender adjudication, and sentence.

**FACTS**

Defendant detailed most of the facts of his offense in two statements given to Slidell police officers on April 20, 2009. Both of these statements were played for the jury at trial. Defendant stated that in the early morning hours of April 20, 2009, he found an unoccupied school bus in the parking lot of Alex's Body Shop in Slidell. Defendant entered the bus and located its keys. He then drove the bus to an undisclosed location on "Second Street," where he loaded some computers into the bus. Defendant subsequently drove the bus to a parking lot containing a Home Depot and an Applebee's, where his own car was apparently parked. Defendant remarked that he believed his vehicle was under surveillance by law enforcement, so he entered the Home Depot store and attempted to purchase a lighter.

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[1] Defendant was originally charged by bill of information with seventeen separate offenses, but the State severed Count 11 and proceeded to trial on that count only.

[2] Defendant's predicate convictions all occurred in the 22nd Judicial District Court: 1) Case number 437719: theft (La. R.S. 14:67) and bank fraud (La. R.S. 14:71.1); 2) Case number 439156: bank fraud (La. R.S. 14:71.1); 3) Case number 440180: theft (La. R.S. 14:67), unauthorized use of an access card (La. R.S. 14:67.3), and bank fraud (La. R.S. 14:71.1); 4) Case number 446758: unauthorized use of a motor vehicle (La. R.S. 14:68.4) and attempted simple escape (La. R.S. 14:(27)110); 5) Case number 448399: injuring public records (La. R.S. 14:132); 6) Case number 450459: simple burglary (La. R.S. 14:62), simple burglary (La. R.S. 14:62), and injuring public records (La. R.S. 14:132); and 7) Case number 455768: issuing worthless checks (La. R.S. 14:71). Therefore, defendant's adjudication as a fourth-felony habitual offender did not mandate a life sentence under La. R.S. 15:529.1(A)(4)(b).

When defendant was unable to purchase a lighter at Home Depot, he reentered the bus and drove it to a gas station, where he successfully obtained a lighter. Upon returning to the Home Depot parking lot, defendant felt that his own vehicle was no longer under surveillance, so he moved it to an undisclosed location. Defendant then returned to the school bus and moved it to the side of the Home Depot parking lot. Defendant stated that he attempted to light the bus on fire by placing a towel soaked with WD-40 into the opening of the gas tank of the bus and igniting it. However, the bus failed to explode as defendant intended, and he witnessed the flaming portion of the towel burn itself off and fall to the ground. Defendant stated at that time, he called 911 to report the fire, and he fled the scene.

The State also introduced photographic evidence compiled by Debbie McCormick, a crime scene technician, at defendant's trial. This evidence demonstrated that the school bus had sustained fire damage to its exterior surface near the gas tank and to its interior surface near the rear of the bus, including damage to several of the rear seats of the bus. Through the testimony of Lillian Gonzalez, the owner of the bus, the State introduced evidence that the fire damage necessitated repairs in the amount of $3015.06.

**COUNSELED ASSIGNMENT OF ERROR**

In his only counseled assignment of error, defendant contends that the trial court erred in leaving the ultimate decision of whether he was competent to proceed to trial to the determination of a medical expert.

On September 17, 2009, the trial court held a hearing to determine defendant's competency to proceed to trial. At this hearing, defendant's attorney, Melissa Brink, stipulated to the contents of competency evaluation reports prepared for the purposes of the hearing, including the conclusion that defendant was competent to proceed to trial. In light of this stipulation, the trial court found that defendant was competent to proceed to trial. Defendant now argues that the trial court erred in finding defendant competent to proceed to trial on the basis of these reports alone.

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. La. Code Crim. P. art. 641. The law presumes the defendant's sanity. La. R.S. 15:432. The defendant bears the burden of proving by a preponderance of the evidence that, as a result of his mental infirmity, he is incompetent to stand trial. **State v. Rogers**, 419 So.2d 840, 843 (La. 1982). While a court is permitted to receive the aid of expert medical testimony on the issue of a defendant's mental capacity to proceed, the ultimate decision of competency is the court's alone. La. Code Crim. P. art. 647; **State v. Pravata**, 522 So.2d 606, 610 (La. App. 1 Cir.), writ denied, 531 So.2d 261 (La. 1988). The ruling of the district court on a defendant's mental capacity to proceed is entitled to great weight on appellate review and will not be overturned absent an abuse of discretion. **State v. Dorsey**, 447 So.2d 636, 638 (La. App. 1 Cir. 1984).

After reviewing the record, we find no abuse of discretion in the trial court's determination that defendant had the necessary mental capacity to understand the proceedings against him and to assist in his defense. Given that the evaluation reports indicated that defendant was competent and that defendant's counsel stipulated to the contents of these reports, defendant failed to prove by a preponderance of the evidence that he lacked the capacity to understand the proceedings against him or to assist in his defense. We further note that this issue was not preserved for appeal. Neither defendant nor his counsel objected to the trial court's finding of competency. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action that he desired the court to take, or of his objections to the action of the court, and the grounds therefor. La. Code Crim. P. art. 841(A).

This assignment of error lacks merit.

## PRO SE ASSIGNMENT OF ERROR #1

In his first pro se assignment of error, defendant contends that the trial court erred when it failed to order the fingerprinting of defendant after his trial and sentencing.

Article 871(B)(1)(a) of the Code of Criminal Procedure requires that "[i]n every judgment of guilty of a felony ... the sheriff shall cause to be attached to the bill of information or indictment the fingerprints of the defendant against whom such judgment is rendered." Beneath such fingerprints shall be appended a certificate signed by the sheriff or law enforcement officer who has custody of the defendant certifying that the fingerprints belong to the defendant. La. Code Crim. P. art. 871(B)(1)(b)(i)-(ii). This certificate "shall be admissible in evidence in the courts of this state as prima facie evidence that the fingerprints appearing thereon are the fingerprints of the defendant against whom the judgment of guilty of a felony ... was rendered." La. Code Crim. P. art. 871(C).

After reviewing the record, we have found no evidence that defendant's fingerprints were attached to his bill of information in compliance with this provision. However, we find that even in the event defendant was not fingerprinted as required by Article 871, such an irregularity would not affect any of his substantial rights. See La. Code Crim. P. art. 921. We further note that defendant does not assert that the alleged failure to fingerprint him caused any prejudice to him at his habitual offender hearing, where he admitted to the allegations in his habitual offender bill of information.

This assignment of error is without merit.

## PRO SE ASSIGNMENTS OF ERROR #2 AND #11

In his second pro se assignment of error, defendant contends that his trial counsel, John Lindner, II, was ineffective in failing to call any alibi witnesses at defendant's trial.[3] In his eleventh pro se assignment of error, defendant argues that his

[3] We note that in support of this and several other assignments of error, defendant attached to his pro se brief several affidavits from persons who did not testify at his trial. Because these affidavits are not a part of the record, we cannot consider their contents on appeal.

initial trial counsel, Melissa Brink, was ineffective for failing "to raise mental issues" before the trial court.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that defendant was deprived of a fair trial; defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

With respect to his second pro se assignment of error, defendant asserts in his pro se brief that his trial counsel failed to call more than twenty witnesses subpoenaed by the defendant who allegedly would have testified that defendant was beaten and threatened by the police and who allegedly would have provided defendant with an alibi for the time of the offense. In arguing this assignment of error, defendant points this court to page 457 of the record as evidence that his trial counsel told defendant's subpoenaed witnesses to exit the courtroom and then to leave the courthouse because

defendant was going to accept a plea bargain. However, our review of the record indicates that the section of the record relied upon by defendant is actually a transcript from defendant's motion to suppress hearing where his attorney performed cross-examination of a State witness. This transcript offers no evidence of any facts supporting this assignment of error. Further, we are unable to find evidence of any such statement made by defendant's attorney anywhere in the record. For this assignment of error, defendant has not made a showing of deficient performance, as required by **Strickland**.

In his eleventh assignment of error, defendant asserts that his original trial counsel was ineffective in failing "to raise mental issues" before the trial court. As we noted above, Ms. Brink stipulated at defendant's competency hearing to the contents of defendant's medical evaluations and to his competency to stand trial. Although defendant asserts in his pro se brief that he was prejudiced by Ms. Brink's failure "to raise mental issues," he offers no evidence of either deficient performance or actual prejudice.

In the present case, the record, standing alone, does not establish ineffective assistance of counsel. For this reason, defendant will probably require a postconviction evidentiary hearing to present evidence relevant to his contentions in these assignments of error.[4]

These assignments of error are not subject to review on appeal.

**PRO SE ASSIGNMENT OF ERROR #3**

In his third pro se assignment of error, defendant contends that the State violated **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and La. Code Crim. P. art. 718 by failing to provide defendant with a copy of the results from DNA testing performed on the crime scene.

[4] Defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, *et seq.*, in order to receive such a hearing.

Due process requires that the State provide a defendant with any exculpatory evidence in its possession which is material to the defendant's guilt or punishment, irrespective of the good faith or bad faith of the prosecution. **Brady**, 373 U.S. at 87, 83 S.Ct. at 1196-1197. Article 718 of the Code of Criminal Procedure requires the trial court to order, on motion of the defendant, the district attorney "to permit or authorize the defendant to inspect ... or otherwise reproduce books, papers, [or] documents ... which are within the possession, custody, or control of the state, and which: (1) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment ...."

At defendant's trial, Debbie McCormick, a crime scene technician, testified that she had collected DNA samples from various interior surfaces of the school bus and that these samples had been sent away for testing. On cross-examination by defendant's attorney, McCormick answered that she had received the results of this testing. At that time, defendant's attorney stated at a sidebar conference that he had not been provided with the results of these tests. At the same sidebar conference, defendant admitted that he had previously received the results of the DNA testing. The transcript of a hearing held on January 21, 2010, confirms that defendant had been provided with the DNA testing results at that earlier time. Ultimately, the results of the DNA testing were not introduced at trial, and the State and the defense agreed to a stipulation that these DNA results neither implicated nor excluded defendant. Defendant's contention that the State failed to provide him with the results of the DNA testing is contradicted by his own admission at trial.

This assignment of error is without merit.

**PRO SE ASSIGNMENTS OF ERROR #4 AND #5**

In his fourth and fifth pro se assignments of error, defendant contends that the State failed to provide him with exculpatory witness statements and police reports, in violation of **Brady**.

In his pro se brief on appeal, defendant alleges that the State failed to provide him with a copy of an allegedly exculpatory affidavit from an individual identified as

"Ronald Carver," and with all of the pertinent police reports from the Slidell Police Department referencing his case. After trial, defendant filed two pro se motions for new trial, which alleged various grounds for relief between them. At defendant's sentencing hearing on February 4, 2011, defendant's attorney characterized these pro se motions as alleging "newly discovered evidence" and "some **Brady** violations." Defendant's attorney stated that he had reviewed the record and determined that there was no evidence that the State was in possession of any statement by Mr. Carver prior to trial or that the State had failed to turn over all of the police reports and evidence in their possession at the time of trial. The State responded by averring that it had never been in the possession of affidavits from any lay witnesses, including at the time of this hearing, and the State further confirmed that it had provided defendant with all relevant police reports from all law enforcement agencies involved in defendant's case. Considering the above, along with the fact that defendant failed to introduce any evidence that the State failed to provide evidence in its possession that was material to his guilt or punishment, we cannot conclude from the record that the State committed a **Brady** violation.

These assignments of error are without merit.

**ASSIGNMENTS OF ERROR #6, #7, #8, AND #9**

In his sixth pro se assignment of error, defendant alleges that police officers beat him in order to secure a confession. In his seventh pro se assignment of error, defendant contends that his confessions were invalid because he was not advised of his **Miranda**[5] rights prior to giving his statements. In his eighth pro se assignment of error, defendant contends that he signed a form waiving his **Miranda** rights only after he was beaten and coerced into confessing. In his ninth pro se assignment of error, defendant contends that he was coerced into confessing when police held his wife in custody and threatened to arrest her unless defendant confessed.

[5] **Miranda v. Arizona**, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

Before a purported confession or inculpatory statement can be introduced into evidence, La. R.S 15:451 provides that it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. Further, the State must show that an accused who makes a statement or confession during custodial interrogation was first advised of his **Miranda** rights. **State v. Plain**, 99-1112, p. 5 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 342. See also La. Const. art. I, § 13; La. Code Crim. P. art. 218.1.

Detective Robert Chadwick, III and Detective Ralph Morel, III testified at defendant's September 15, 2010 suppression hearing that they had taken defendant's first and second statements, respectively, on April 20, 2009. Both detectives testified that defendant read, acknowledged, and signed three **Miranda** waiver forms prior to his statements to the police. Detective Chadwick testified that defendant signed both a standard **Miranda** waiver form and a taped-statement **Miranda** waiver form before he made his first statement to the police. Detective Morel testified that defendant signed a taped-statement **Miranda** waiver form before he made his second statement to the police, but he did not have defendant sign a standard **Miranda** waiver form until after defendant made this second statement. Further, both detectives stated that defendant made each of his respective statements without force, coercion, threats, promises, or inducements. Detectives Chadwick and Morel confirmed these facts when they testified at trial.[6]

In defendant's pro se brief, he alleges in his sixth pro se assignment of error that a "Capt. Swann" beat him in order to secure this confession. However, defendant introduced no evidence related to this allegation either at his motion to suppress hearing or at trial. The trial court reviewed Captain Swann's personnel files for any complaints or disciplinary action against Captain Swann that would potentially constitute **Brady** material for defendant, but it found none. Moreover, defendant failed to

[6] In determining whether the ruling on the motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may also consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

contradict the testimony of the detectives that he was read his **Miranda** rights before each statement. Thus, the only evidence introduced on these issues came through the testimony of Detectives Chadwick and Morel. In denying the motion to suppress, the trial court obviously accepted the testimony of Detectives Chadwick and Morel that defendant was advised of his **Miranda** rights before questioning and that defendant's confessions were freely and voluntarily given. We further note that, with respect to his ninth pro se assignment of error, defendant's own trial testimony indicates that his wife had not been in custody during defendant's interrogation, nor has she ever been arrested for any offense related to this case.

When a motion to suppress is denied, the trial court's factual and credibility determinations will not be reversed on appeal in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

Based on our review of the record, we find no error or abuse of discretion in the trial court's ruling denying defendant's motion to suppress. We further find that defendant failed to introduce any evidence at trial that would support these assignments of error on appeal.

These assignments of error lack merit.

**PRO SE ASSIGNMENT OF ERROR #10**

In his tenth pro se assignment of error, defendant contends that the trial court violated his Sixth Amendment right to self-representation by ordering that his trial counsel continue to represent him through his sentencing.

An accused has the right to choose between the right to counsel, guaranteed in the state and federal constitutions, and the right to self-representation. U.S. Const. amend. VI; La. Const. art I, § 13. However, the choice to represent one's self must be clear and unequivocal. Requests that vacillate between self-representation and representation by counsel are equivocal. Whether a defendant has knowingly,

intelligently, and unequivocally asserted the right to self-representation must be determined on a case-by-case basis, considering the facts and circumstances of each. **State v. Leger**, 2005-0011, p. 53 (La. 7/10/06), 936 So.2d 108, 147-148, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007).

At a competency hearing on September 17, 2009, defendant was represented by Melissa Brink of the public defender's office. Ms. Brink also represented defendant at his arraignment on October 8, 2009, where he entered a not guilty plea.

At some point prior to a hearing held on December 2, 2009, defendant filed a federal lawsuit alleging civil rights violations against his appointed counsel, the trial judge, and the district attorney's office. Prior to this hearing, defendant also filed a motion for self-representation, which sought to dismiss the public defender's office as his counsel.

On December 10, 2009, the trial court granted defendant's motion for self-representation and dismissed Ms. Brink as defendant's counsel.

At a January 21, 2010 status hearing, the trial court asked defendant whether he still wished to represent himself, and the defendant expressed at that time that he again wished to be represented by counsel. The trial court granted defendant's request to be appointed counsel, but admonished him, "[O]nce I appoint counsel for you, if you make any further objections or wish to represent yourself again, there will be no further appointment of counsel."

On March 31, 2010, John Lindner, II was appointed to represent defendant. Mr. Lindner represented defendant from that date through the end of defendant's trial on September 16, 2010.

On September 22, 2010, defendant filed a new motion for self-representation.

At a hearing on November 5, 2010, the trial court denied defendant's motion for self-representation, stating, "I'm going to maintain Mr. Lindner as Mr. Wetzel's attorney through sentencing, and then Mr. Wetzel can represent himself or we will appoint the Appellate Project to represent him."

In the instant case, defendant was not denied his right to self-representation. Rather, his oscillations between desiring to be represented by appointed counsel and desiring to represent himself evince a failure to clearly and unequivocally invoke his right to self-representation. The trial court's decision to maintain Mr. Lindner as defendant's counsel through sentencing was within its inherent authority to ensure that defendant's proceedings continued in an orderly and expeditious manner. See La. Code Crim. P. art. 17.

This assignment of error is without merit.

For the foregoing reasons, defendant's conviction, habitual offender adjudication, and sentence are affirmed.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.**