NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0143

STATE OF LOUISIANA

VERSUS

BEAU CHRISTIAN MANNING

On Appeal from the 16th Judicial District Court
Parish of St. Mary, Louisiana
Docket No. 06-170,872
Honorable Edward M. Leonard, Jr., Judge Presiding

J. Phil Haney
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Jeffrey J. Trosclair
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Defendant-Appellant
Beau Christian Manning

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered June 8, 2007

PARRO, J.

The defendant, Beau Christian Manning, was charged by bill of information with driving while intoxicated (fourth offense), in violation of LSA-R.S. 14:98. The defendant originally entered a plea of not guilty. The trial court denied the defendant's motion to quash. Subsequently, the defendant withdrew his plea of not guilty and entered a plea of guilty as charged, reserving his right to contest the ruling on his motion to quash pursuant to ***State v. Crosby***, 338 So.2d 584 (La. 1976). The defendant was sentenced to twenty-five years of imprisonment at hard labor, provided that upon the service of sixty days of imprisonment in the parish jail and the completion of a treatment program, the balance of the sentence would be suspended, and the defendant would be placed on supervised probation (with general and specific conditions) for five years. The trial court also imposed a $5000 fine. The defendant now appeals, alleging error as to the trial court's denial of his motion to quash. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

Because the defendant entered a guilty plea, the facts for the instant offense were not fully developed. The following factual basis was presented during the ***Boykin*** proceeding:

> Your Honor, on the date alleged in the Bill of Information the St. Mary Parish Sheriff's office was investigating a two-vehicle crash. The defendant was the driver of one of the vehicles involved. During the investigation the officer noted that Mr. Manning had an odor of alcoholic beverage on his breath, he staggered when he was walking, had admitted to having five or six beers and failed the horizontal gage [sic] and nystagmus test. He refused to submit [to] [another] field sobriety test and an officer took a Breathalyzer 5000[.] [H]e was operating the vehicle while intoxicated or operating a vehicle under the influence of alcoholic beverages. He had three prior convictions at that time. One on September 27th [of 01] in Thibodeaux [sic] City Court under 01-87153, one on March 18th of 02 [in] the 16th Judicial District Court [in] St. Mary 01-158725 and lastly on July 25th of 02 in the 32nd JDC in Terrebonne Parish 03-79553 thereby making him a fourth offender.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that the trial court erred in denying his motion to quash. On appeal and during the hearing on the motion to quash, the defendant's argument focuses solely on his September 27, 2001 predicate

guilty plea (Docket Number 01-87153 of the Thibodaux City Court). The defendant specifically argues that the first-offense uncounseled DWI guilty plea cannot be used as a predicate because the Thibodaux City Court judge did not properly advise the defendant of his right to counsel, including court-appointed counsel, if he could not afford one. The defendant contends that he did not have an attorney for the proceeding because he could not afford one. The defendant argues that the guilty plea for the predicate offense at issue was not knowingly, intelligently, and voluntarily made. Thus, the defendant argues that the trial court erred in denying his motion to quash.

A defendant has the right to counsel under the Sixth Amendment of the United States Constitution only where a sentence of imprisonment is imposed. See ***Scott v. Illinois***, 440 U.S. 367, 373-74, 99 S.Ct. 1158, 1162, 59 L.Ed.2d 383 (1979). However, Article I, Section 13 of the Louisiana Constitution guarantees a defendant the right to counsel in any case punishable by a term of imprisonment. See ***State v. Deville***, 04-1401 (La. 7/2/04), 879 So.2d 689, 690 (per curiam). For his 2001 predicate offense, the defendant was sentenced to six months of imprisonment in the parish jail, which sentence was suspended upon the payment of a $350 fine and court costs. The defendant was also placed on unsupervised probation for two years.

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 a trial, and a jury trial where applicable; and (c) his right to confront his accuser. ***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. ***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 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 01-2299 (La. 6/21/02), 818 So.2d 791.

If the defendant denies the allegations of the bill of information involving the enhancement of a DWI offense, 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. ***State v. Carlos***, 98-1366 (La. 7/7/99), 738 So.2d 556, 559. However, when the plea is uncounseled, the state must also show a valid waiver of counsel. ***Deville***, 879 So.2d at 690 (and the citations therein) (uncounseled misdemeanor DWI convictions may not serve as the predicate for enhancement of a subsequent DWI offense in the absence of a valid waiver of counsel). 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.

While a colloquy between the judge and the 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 a proper waiver. ***State v. Nuccio***, 454 So.2d 93, 104 (La. 1984). When an accused waives his right to counsel in pleading guilty to a misdemeanor, the trial judge should expressly advise him of his right to counsel and to appointed counsel if he is indigent. ***State v. Strain***, 585 So.2d 540, 543 (La. 1991); see also LSA-C.Cr.P. art. 556(B)(2). Determining the defendant's understanding of his 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. See ***Strain***, 585 So.2d at 544. In ***Deville***, the Louisiana Supreme Court held that the state is entitled to rely on a well-executed waiver form in discharging its initial burden of proving a prior valid conviction for DWI. ***Deville***, 879 So.2d at 691.

In the present case, it appears that the state met the first prong of its initial burden by providing proof of the existence of a guilty plea for the defendant's 2001 predicate conviction.[1] However, the record reflects that the defendant was not represented by counsel at the time he pled guilty to this predicate offense. Because the plea was uncounseled, the state had the burden of proving a valid waiver of counsel.

Before withdrawing his prior plea of not guilty and entering a plea of guilty as charged in this case, the defendant moved to quash the bill of information, contesting the validity of the predicate convictions. As stated, the defendant only contested the validity of the predicate conviction in question (the September 27, 2001 guilty plea) during the hearing on the motion to quash. At the hearing, the defendant testified that he was twenty-one years of age at the time of the contested guilty plea. The defendant further testified that he was nervous and scared and did not have an attorney at the time, because he could not afford one. When asked whether he was informed that he was entitled to a court-appointed lawyer for free if he could not afford one, the defendant stated, "No, sir, not that I remember." The defendant further stated that no one went over the advice of rights form with him. The defendant stated that he was not aware of his right to a free attorney.

During cross-examination at the hearing on the motion to quash, the defendant stated that he was working and attending college at the time of the guilty plea in question. The defendant was majoring in education and was somewhere between his second or third year of collegiate studies.

After reviewing the transcript for the guilty plea in question, the trial court denied the defendant's motion to quash. In its written reasons, the trial court noted the language of the advice of rights form executed prior to the plea and the Thibodaux City Court judge's line of questioning prior to his acceptance of the defendant's predicate guilty plea. As noted by the trial court, the advice of rights form in part attests to the advising of the defendant's ***Boykin*** rights and the right to an attorney, including one

[1] The record contains the final disposition report, police report, advice of rights form, an affidavit, and the transcript for the predicate conviction at issue. The defendant does not contest the evidence of the existence of the plea.

appointed at no cost.[2] The trial court then noted that the defendant had signed the advice of rights form.[3]

In its written reasons, the trial court observed that during the ***Boykin*** for the predicate offense, the Thibodaux City Court judge asked the defendant if he understood the rights that were advised to the prior defendant. The defendant responded positively. The court further inquired, "Do you want to proceed in this matter with or without a lawyer?" The defendant stated, "Without." The defendant was questioned as to his ability to read and write, and he responded positively. The defendant stated that he was in college at the time. The charge was fully explained to the defendant along with his ***Boykin*** rights and his right to have an attorney in the matter. The trial court found the defendant was fully informed of his constitutional rights and knowingly and intelligently waived them.

We conclude that the state met the initial burden of proving the existence of the prior guilty plea and a valid waiver of counsel. At the motion to quash hearing, the burden shifted to the defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. The trial court did not abuse its discretion in finding that the defendant did not meet this burden. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

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[2] We note that the form specifically states, in pertinent part:

> I, further acknowledge that I have been advised that I have the following rights:
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> * * *
>
> 3. The right to an attorney, and if I am unable to afford an attorney that one will be appointed by the Court to represent me at no cost to myself.

[3] We note the last sentence of the form specifically states, "I wish to proceed in *this* matter with/without an attorney present." (Emphasis added). The word "with" was marked through with an "X," and the defendant admittedly signed the form.