NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1687

STATE OF LOUISIANA

VERSUS

BRENT G. THOMPSON

On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, Louisiana
Docket No. 600577, Division "F"
Honorable Elizabeth P. Wolfe, Judge Presiding

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Brent G. Thompson

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered March 23, 2007

M McClendon J. concurs and Assigns Reasons.

PARRO, J.

The defendant, Brent G. Thompson, was charged by bill of information with one count of fourth or subsequent offense driving while intoxicated (DWI), a violation of LSA-R.S. 14:98, and initially pled not guilty.[1] Thereafter, he pled nolo contendere as charged, reserving his right to challenge the court's ruling concerning certain sentencing issues. See **State v. Crosby**, 338 So.2d 584 (La. 1976). He was sentenced to ten years of imprisonment at hard labor. He now appeals, designating two assignments of error. We affirm the conviction and sentence.

ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing the defendant to ten years in prison for a fourth offense DWI under LSA-R.S. 14:98, without suspension of sentence, when he was arrested on August 14, 2005, one day in advance of the amended guidelines under LSA-R.S. 14:98.

2. The trial court erred in determining that the defendant was on probation, and therefore, did not qualify for the suspension of sentence under LSA-R.S. 14:98.

FACTS

Due to the defendant's nolo contendere plea, there was no trial, and thus, no trial testimony concerning the facts of the instant offense. At the **Boykin** hearing, however, without objection from the defense, the state entered the discovery responses as the factual basis.

The arrest report indicates that on August 14, 2005, at approximately 6:27 p.m., Sergeant Blaine Sanders of the Tangipahoa Parish Sheriff's Office, observed the defendant run a stop sign at the intersection of U.S. Highway 51 and West Olive Street, and he made the initial stop. Moments later, Louisiana State Police Trooper Brad Tate took over the

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[1] Predicate #1 was set forth as the defendant's July 9, 1990 guilty plea, under Denham Springs City Court docket #100723, to DWI. Predicate #2 was set forth as the defendant's July 7, 1993 guilty plea, under Twenty-First Judicial District Court docket #66063, to DWI. Predicate #3 was set forth as the defendant's January 4, 1995 guilty plea, under Twenty-Second Judicial District Court docket #232282, to DWI. Predicate #4 was set forth as the defendant's October 22, 1998 guilty plea, under Twenty-First Judicial District Court docket #79527, to DWI. Predicate #5 was set forth as the defendant's October 17, 2005 guilty plea, under Nineteenth Judicial District Court docket #03040264, to DWI.

stop and asked the defendant to exit his vehicle. Trooper Tate observed that the defendant's eyes were extremely glassy and bloodshot, his speech was slurred, he swayed from side-to-side, and he had poor balance. He also detected an extremely strong odor of alcohol on the defendant's breath and noticed an open can of beer on the floor of defendant's vehicle. After the defendant failed field sobriety tests, Trooper Tate arrested him and advised him of his **Miranda**[2] rights.

The defendant was taken to the Tangipahoa Parish jail and advised of his rights relating to the chemical test for intoxication. He refused to submit to the chemical test for intoxication, indicating he was on probation for DWI and was not going to give evidence "that would give him another one."

APPLICABLE PENALTY

In his assignments of error, the defendant argues he never previously entered a plea as a fourth offender, and therefore, the trial court was required to suspend all but sixty days of his sentence. The state argues the trial court acted within its discretion under LSA-R.S. 14:98(E)(1)(a).

At the **Boykin** hearing in the instant case, the defense assigned error to the sentence imposed, arguing: the defendant's August 14, 2005 arrest date placed him under the pre-2005 La. Acts, No. 497, § 1 version of LSA-R.S. 14:98; and the defendant had not previously received the benefit of probation. The trial court rejected the defense arguments.

The applicable penalty for violation of LSA-R.S. 14:98 is the penalty in effect at the time of conviction. **State v. Mayeux**, 01-3195 (La. 6/21/02), 820 So.2d 526. Since the defendant entered a nolo contendere plea on June 13, 2006, under **Crosby**, and was sentenced that same day, the penalty in effect on June 13, 2006, controls. Accordingly, the applicable version of LSA-R.S. 14:98, in pertinent part, provides:

> E(1)(a). Except as otherwise provided in Subparagraph (4)(b) of this Subsection, on a conviction of a fourth or subsequent offense, notwithstanding any other provision of law to the contrary and regardless

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

> of whether the fourth offense occurred before or after an earlier conviction, the offender shall be imprisoned with or without hard labor for not less than ten years nor more than thirty years and shall be fined five thousand dollars. Sixty days of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence. The court, in its discretion, may suspend all or any part of the remainder of the sentence of imprisonment.
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> * * *
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> (4)(a) If the offender has previously been required to participate in substance abuse treatment and home incarceration pursuant to Subsection D of this Section, the offender shall not be sentenced to substance abuse treatment and home incarceration for a fourth or subsequent offense, but shall be imprisoned at hard labor for not less than ten nor more than thirty years, and at least three years of the sentence shall be imposed without benefit of suspension of sentence, probation, or parole.
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> (b) If the offender has previously received the benefit of suspension of sentence, probation, or parole as a fourth offender, no part of the sentence may be imposed with benefit of suspension of sentence, probation, or parole, and no portion of the sentence shall be imposed concurrently with the remaining balance of any sentence to be served for a prior conviction for any offense.

Pursuant to LSA-R.S. 14:98(E)(1)(a), beyond a sixty-day period required to be imposed without benefit of probation, parole, or suspension of sentence, the trial court has discretion to suspend all or any part of the remainder of the sentence of imprisonment "[e]xcept as otherwise provided in" LSA-R.S. 14:98(E)(4)(b). We note the record indicates that in connection with predicate #4, on October 22, 1998, the defendant pled nolo contendere to fourth offense DWI and received the benefit of suspension of sentence and probation. Therefore, under the provisions of LSA-R.S. 14:98(E)(4)(b), the defendant was ineligible for a suspended sentence, probation, or parole for the instant offense,[3] and the minimum sentence mandated by LSA-R.S. 14:98(E)(1)(a) was ten years.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated

[3] Accordingly, the sentence in this case is deemed to be without the benefit of probation, parole, or suspension of sentence. See LSA-R.S. 15:301.1(A).

in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2).

The trial court failed to impose the mandatory fine of $5,000 in this matter. See LSA-R.S. 14:98(E)(1)(a). Although the failure to impose the fine is error under LSA-C.Cr.P. art. 920(2), it is certainly harmless error since the defendant was not inherently prejudiced in any way by the court's failure to impose the fine. Because the trial court's failure to impose the fine was not raised by the state in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), ___ So.2d ___, 2006 WL 3805138 (en banc).

CONVICTION AND SENTENCE AFFIRMED.

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McCLENDON, J., concurs, and assigns reasons.

Although we are not required to take any action, I would have corrected the illegally lenient sentence by imposing the mandatory fine of $5,000. See **State v. Price**, 05-2514 (La.App. 1 Cir. 12/28/06), ___ So.2d ___ (en banc).