

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 KA 1330**

*RHP*

**STATE OF LOUISIANA**

**VERSUS**

**BRUCE EDWARD EPPERLEY**

*TMH*

—  
**On Appeal from the 22nd Judicial District Court  
Parish of St. Tammany, Louisiana  
Docket No. 502457, Division "A"  
Honorable Raymond S. Childress, Judge Presiding**  
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**Walter P. Reed  
District Attorney  
Covington, LA**

**Attorneys for Appellee  
State of Louisiana**

**and**

**Kathryn Landry  
Special Appeals Counsel  
Baton Rouge, LA**

**Gwendolyn K. Brown  
Louisiana Appellate Project  
Baton Rouge, LA**

**Attorney for  
Defendant-Appellant  
Bruce Edward Epperley**

**BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.**

**Judgment rendered February 10, 2012**

**PARRO, J.**

The defendant, Bruce Edward Epperley, was charged by bill of information with one count of driving while intoxicated (DWI), fourth offense, a violation of LSA-R.S. 14:98(E). The defendant initially pled not guilty and subsequently moved to quash the first and second predicate DWI convictions, which the trial court denied. Thereafter, the defendant withdrew his prior plea of not guilty and, at a **Boykin** hearing, entered a plea of guilty under **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving his right to seek review of the ruling on the motion to quash. The trial court sentenced the defendant to ten years of imprisonment with the Department of Public Safety and Corrections, with the first two years to be served without benefit of probation, parole, or suspension of sentence. The trial court also ordered the defendant to pay a \$5,000 fine and court costs.

The defendant now appeals, urging that the trial court erred in denying his motion to quash the first and second predicate DWI convictions listed on the bill of information. For the reasons set forth below, we remand this matter to the trial court for the purpose of reopening the hearing on the motion to quash, and we conditionally affirm the conviction and sentence.

**ASSIGNMENTS OF ERROR**

Essentially, the defendant urges two assignments of error. First, the defendant contends the state failed to produce evidence that the offense for the first predicate DWI conviction was committed within ten years of the date of the instant DWI offense. Second, the defendant urges that the state failed to carry its initial burden of proving the constitutionality of his guilty pleas in the first and second predicate DWI convictions.

**FACTS**

Because the defendant pled guilty, the facts of the case were never fully developed for the record. At the May 26, 2011 **Boykin** hearing, the state and the defendant stipulated that there was a factual basis for a guilty plea to the current

offense, but not as to the predicate convictions. The defendant then pled guilty to driving while intoxicated, fourth offense, committed on January 23, 2011.

### **DISCUSSION**

One of the issues in this case is the computation of the ten-year cleansing period as it applies to an offender with multiple DWI convictions. In pertinent part, LSA-R.S. 14:98(F)(2) provides:

For purposes of this Section, a prior conviction shall not include a conviction for an offense under this Section . . . if committed more than ten years prior to the commission of the crime for which the defendant is being tried ... . **However, periods of time** during which the offender was awaiting trial, on probation for an offense described in Paragraph (1) of this Subsection, under an order of attachment for failure to appear, or incarcerated in a penal institution in this or any other state **shall be excluded in computing the ten-year period.** (Emphasis added.)

In accordance with LSA-R.S. 14:98(F)(2), an initial ten-year cleansing period determined on a strictly calendar basis would comprise the period of time beginning with the date of commission of the offense for which the defendant is being tried and ending with the same month and day ten years earlier. However, applicable periods of time designated in LSA-R.S. 14:98(F)(2) shall be excluded in computing the ten-year period. Therefore, the total period of time attributed to all of the applicable, excludable periods of time cannot be counted in calculating the ten-year cleansing period. For example, if a defendant was incarcerated for five years, the five years of incarceration cannot be counted in determining the ten-year cleansing period (cleansing period). In such an example, the cleansing period would begin with the date of the offense for which the defendant is being tried and, after excluding five years attributable to incarceration and tacking on ten years for the cleansing period, would end with a calendar date fifteen years preceding the beginning date. Accordingly, in this example, a predicate **offense** must fall outside the ending date of the cleansing period in order for the relevant **conviction** to be cleansed.

In the instant matter, the bill of information charged the defendant with DWI, fourth offense, committed on January 23, 2011. The bill of information lists the following three predicate DWI convictions: 1) February 15, 1996 DWI conviction;<sup>1</sup> 2) April 18, 2002 DWI conviction;<sup>2</sup> and 3) February 10, 2003 DWI conviction.<sup>3</sup>

In his motion to quash, the defendant alleged that the date of the offense for the February 15, 1996 DWI guilty plea occurred on August 26, 1995. The defendant argued that this DWI offense is outside the cleansing period provided in LSA-R.S. 14:98(F)(2). Therefore, the defendant urged that the state cannot use his prior February 15, 1996 DWI conviction as a predicate conviction for the instant DWI charge.

From the record before us, it appears that the defendant attached to his motion to quash an uncertified copy of the **Boykin** and sentencing transcript for his February 15, 1996 guilty plea. The February 15, 1996 **Boykin** transcript reveals that the defendant was sentenced to ten years at hard labor with the Department of Public Safety and Corrections, with the last five years of the sentence suspended, and the defendant was placed on supervised probation for that five-year period of time. The motion to quash also alleged that the offenses that resulted in the defendant's April 18, 2002 and February 10, 2003 guilty pleas occurred, respectively, on February 14, 2001, and March 31, 2002. Furthermore, it appears that the defendant alleged that the **Boykin** "process" for the first and second predicate DWI convictions was not complete, and therefore, these convictions could not be used as predicates.

In its memorandum in opposition to the motion to quash, the state asserted that five years of incarceration, followed by five years of probation,

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<sup>1</sup> This conviction was obtained in the Twenty-Second Judicial District Court (22nd JDC) in St. Tammany Parish under Docket No. 247696.

<sup>2</sup> This conviction was obtained in the 22nd JDC in St. Tammany Parish under Docket No. 332990.

<sup>3</sup> This conviction was obtained in the 22nd JDC in St. Tammany Parish under Docket No. 350776.

would extend the "expiration period" for the February 15, 1996 conviction to February 15, 2006. The state pointed out that this February 15, 2006 date was within ten years of the current DWI offense, which occurred on January 23, 2011. The state also noted that the February 14, 2001 and March 31, 2002 DWI offenses, as well as the related convictions, were within the ten-year cleansing period.

At the May 23, 2011 hearing on the motion to quash, it appears that the trial court did not have a copy of the February 15, 1996 **Boykin** transcript. Apparently referencing the state's opposition memorandum, the trial court stated "that the State indicates that ... [the defendant] was arrested on August 26, '95. Pled guilty on February 15, '96, and was given a 10 year sentence at that time." The trial court then instructed the state, for the benefit of the record, to submit a copy of the February 15, 1996 **Boykin** transcript with its opposition memorandum. The state explained to the trial court that it "got this information" from the clerk's files and that all of the information was "in the clerk's original files." However, it appears the state did not have the pertinent records for the predicate DWI convictions at the hearing, as the transcript shows the state asked out loud, "Where [are] the clerk's original files?" After suggesting that "[m]aybe the clerk can make us a copy of that so it's in this record[,]," the trial court denied the motion to quash. Defense counsel objected, and the trial court noted the objection.

While it is not clear if the trial court actually considered the February 15, 1996 **Boykin** and sentencing transcript when it denied the motion to quash, this transcript does not provide any information regarding the actual amount of time the defendant served on the sentence for his February 15, 1996 DWI conviction or how many months the defendant was actually on probation. Moreover, the record does not contain any information on the sentences imposed for the defendant's April 18, 2002 and February 10, 2003 DWI convictions or how many months the

defendant was actually incarcerated and/or on probation for these prior DWI convictions. Without this information, we cannot calculate the cleansing period for the instant DWI charge, nor can we determine if the first predicate conviction falls within or outside that cleansing period.

We further note that it appears that the trial court and the state based their calculations of the cleansing period on the "sentence" the defendant received for his February 15, 1996 DWI conviction and on the dates of the defendant's second and third DWI convictions, without regard to the time the defendant was actually incarcerated or awaiting trial or on probation for these prior DWI convictions. This approach is incorrect. Louisiana Revised Statute 14:98(F)(2) specifically provides that the periods of time to be excluded in computing the ten-year cleansing period are those periods of time the defendant was "awaiting trial," "on probation for an offense described in Paragraph (1) of this Subsection," or "incarcerated in a penal institution." Thus, this information is critical, as it pertains to the proper calculation of the cleansing period. Accordingly, the time the defendant was actually incarcerated, as well as the time he was awaiting trial or on probation for these prior DWI convictions, must be supported by competent evidence.

From the record before us on appeal, it appears that evidence that establishes the time the defendant was actually incarcerated or on probation or awaiting trial can be submitted for the predicate DWI convictions. Accordingly, we remand this matter for the purpose of reopening the hearing on the motion to quash to allow the state and the defendant to introduce evidence on this issue and for the trial court to determine and rule on whether the offense committed on August 26, 1995 falls within or falls outside the cleansing period for the instant DWI charge.<sup>4</sup>

The other issue in this matter concerns the validity of a multiple DWI

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<sup>4</sup> The periods of time that "shall be excluded" in computing the cleansing period must be determined by examining the relevant "periods of time" associated with all three predicate convictions.

offender's prior guilty plea for use as a predicate offense to enhance the sentence of a subsequent DWI conviction. In **State v. Carlos**, 98-1366 (La. 7/7/99), 738 So.2d 556, the Louisiana Supreme Court eased the state's burden of proving the validity of a prior DWI guilty plea as a predicate offense for sentence enhancement purposes in a subsequent DWI charge. In **Carlos**, the Louisiana Supreme Court held that the burden-shifting principles of **State v. Shelton**, 621 So.2d 769 (La. 1993), are applicable to the recidivist portions of LSA-R.S. 14:98. **Carlos**, 738 So.2d at 558-59; see also **State v. Vaughn**, 03-1585 (La. App. 1st Cir. 5/14/04), 879 So.2d 772, 776. Under this burden-shifting scheme, if the defendant denies the allegations of a bill of information, the state has the initial burden to prove the existence of a prior guilty plea and that the defendant was represented by counsel when the plea was taken. If the state meets this initial burden, the defendant must produce affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant carries this burden, then the burden reverts to the state to prove the constitutionality of the plea. **Vaughn**, 879 So.2d at 776.

In the defendant's motion to quash, he alleged that the "**Boykin** process on the convictions in [the first and second predicate DWI cases] was incomplete." The motion to quash is silent as to the specific constitutional deficiencies that allegedly occurred in these prior **Boykin** proceedings. In response to the defendant's constitutional attack on his first and second DWI guilty pleas, the state's opposition memorandum represented that "[a]ll **Boykins** in these cases will be established at the time of hearing with the appropriate Clerk files and documents." The record before us on appeal indicates that the defendant and the state were not afforded an opportunity to present arguments or evidence on this issue at the hearing on the motion to quash.

The transcript of the hearing on the motion to quash implies that after the

trial court denied the defendant's motion to quash the first predicate DWI conviction on the cleansing-period issue, defense counsel brought to the trial court's attention that an issue remained as to the guilty pleas in the first and second predicate DWI cases. The trial court pretermitted argument on this issue, stating:

I noted that you indicated that you thought the **Boykin** was bad. Nobody submitted me a copy of the **Boykins**. You didn't state with any particularity what was wrong with the **Boykins** for me to have a chance to look at them. So based upon that, I don't have any reason to grant that motion. So I deny it.

Louisiana Code of Criminal Procedure article 536 provides that a motion to quash "shall specify distinctly the grounds on which it is based." The appellate record before us reveals that the defendant moved to quash the first predicate DWI conviction based on his contention that the date of commission of the underlying offense for that predicate fell outside the cleansing period for the instant DWI offense. Additionally, the defendant moved to quash the first and second predicate DWI offenses, urging the **Boykin** proceedings were incomplete. The record also reveals that, in its opposition memorandum, the state represented its intent to meet its initial burden of proving the validity of the prior DWI guilty pleas by producing appropriate documentation from the clerk's records at the hearing on the motion to quash. Under these particular circumstances, we find that remanding the matter for the purpose of allowing the state to introduce evidence to meet its initial burden of proof and thereby shift, if it can, the burden of proof to the defendant to produce affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas, is warranted. As previously noted, if the defendant carries this burden, then the burden reverts to the state to prove the constitutionality of the pleas.

### **CONCLUSION**

For all of the reasons set forth above, we conditionally affirm the conviction and sentence. Since the record can likely be made complete by another hearing

on the motion to quash, we remand the matter to the trial court for a reopened hearing. See **State v. Green**, 96-0256 (La. App. 1st Cir. 12/10/96), 687 So.2d 109, 113-14. The trial court is to receive evidence at the reopened hearing that establishes the periods of time the defendant was awaiting trial, incarcerated, and/or on probation for the three convictions listed in the instant bill of information. Such evidence may include, for example, documentation of discharge dates from incarceration or probation resulting from the defendant's predicate convictions. In addition, the trial court is to receive evidence at the reopened hearing pertinent to the burden-shifting scheme as set forth by the Louisiana Supreme Court in **State v. Carlos**, 738 So.2d 556. If, upon remand, the trial court grants the motion to quash as to any of the predicates, the defendant must be afforded an opportunity to withdraw his guilty plea. In the event the trial court denies the motion to quash, the right to timely appeal the adverse ruling within thirty days of that ruling is reserved to the defendant. See **Green**, 687 So.2d at 114.

**CONVICTION AND SENTENCE CONDITIONALLY AFFIRMED;  
REMANDED WITH INSTRUCTIONS.**