NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 2181

STATE OF LOUISIANA

VERSUS

HENRY M. WEEKS, JR.

Judgment Rendered: MAR 2 6 2008

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 391767

The Honorable William J. Burris, Judge Presiding

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Walter P. Reed District Attorney By: Kathryn Landry Special Appeals Counsel Baton Rouge, Louisiana	Counsel for Appellee State of Louisiana
Arthur A. Lemann, III New Orleans, Louisiana	Counsel for Defendant/Appellant Henry M. Weeks, Jr.

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BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.

GAIDRY, J.

The defendant, Henry M. Weeks, Jr., was charged by bill of information with driving while intoxicated (DWI), second fourth offense, a violation of La. R.S. 14:98. The offense was alleged to have occurred on January 8, 2005. The predicate offenses alleged were: a May 5, 1994, 22nd Judicial District Court, St. Tammany Parish, DWI conviction under docket number 217874 (fourth offense), a January 7, 2002, 22nd Judicial District Court, St. Tammany Parish, DWI guilty plea under docket number 336604, and a January 7, 2002, 22nd Judicial District Court, St. Tammany Parish, DWI guilty plea under docket number 343116. The defendant originally pled not guilty to the instant offense.

On February 14, 2005, counsel for the defendant filed a generic "Motion To Quash/Or Suppress." Thereafter, on November 3, 2005, a different defense counsel filed a second Motion to Quash and a supporting memorandum challenging, among other things, the use of each of the prior convictions alleged as predicates and an alleged inconsistency between the offense charged and the number of predicates alleged. He argued that a charge of "second fourth" offense DWI required four predicate convictions. The trial court denied the motion and provided written reasons for the denial. The defendant filed a supervisory writ application with this court seeking review of the district court's ruling on the motion to quash on various grounds. This court reviewed the defendant's claims and found no error in the district court's denial of the motions to quash. The writ application was denied in an unpublished decision. *State v. Weeks*, 2007-0241 (La. App. 1st Cir. 4/18/06). The defendant then filed a supervisory writ application with the supreme court, which also was denied. *State v. Weeks*, 2006-1110 (La. 11/3/06), 940 So.2d 661.

Thereafter, a jury trial commenced on February 14, 2007. On the second day of trial, counsel for the defendant re-urged the motion to quash. Again, the defendant argued there was no such offense as a "second fourth" without four supporting predicates and that the 1994 predicate conviction was time barred. In response, the state, relying on this court's opinion in *State v. Hardeman*, 2004-0760 (La. App. 1st Cir. 2/18/05), 906 So.2d 616, agreed to amend the bill of information to delete the term "second" from the charged fourth offense. As amended, the bill of information charged the defendant with fourth offense DWI and listed the same three prior convictions as predicates. Thereafter, the defendant withdrew his former not guilty plea and pled guilty as charged. The defendant reserved his right to appeal "all legal issues raised in various motions" heard and denied by the district court. See *State v. Crosby*, 338 So.2d 584 (La. 1976). After accepting the defendant's guilty plea, the district court sentenced him to imprisonment at hard labor for twenty years without the benefit of probation, parole, or suspension of sentence, and a $5,000.00 fine. The defendant now appeals, urging five assignments of error as follows:

1. The district court should have granted the motion to quash because the statute uses non-jury misdemeanor convictions to ground a felony sentence in violation of the Due Process Clause of the Fifth and Fourteenth Amendments and the jury trial guarantees of the Sixth Amendment.

2. The district court should have quashed the first predicate act as prescribed instead of tolling the statute's cleansing provision with jail time spent beyond the ten year period and on another prescribed conviction.

3. The district court erred when it failed to impose a suspended sentence with mandated treatment.

4. The district court erred when it allowed multiple convictions entered on the same date to serve as separate predicate acts.

5. The district court should have granted the motion to quash because the statute allows the district attorney to introduce

evidence of prior convictions in violation of due process, fair trial and self-incrimination guarantees.

Finding no merit in the assigned errors, we affirm.

FACTS

Because the defendant pled guilty, the facts of the offense were never fully developed at the trial. During the *Boykin* examination, the following factual basis was set forth by the prosecutor:

> January 8, 2005, Trooper Christian Chatellier was operating his marked state police unit on interstate I12 heading in an eastbound direction when he approached the exit number 65 at Highway 59. Trooper Chatellier observed the defendant's vehicle, a white pickup truck, ahead of him taking the same exit. The defendant's vehicle was weaving in its lane and at one stage even left the paved area of the exit ramp and drove briefly on the grass area. Based on these observations Trooper Chatellier then conducted a traffic stop of the defendant's vehicle which ultimately occurred on south bound Highway 59. The defendant exited his truck. At one point used [sic] his truck to momentarily regain his balance. The Trooper Chatellier noted that the defendant's speech was slurred and his responses were slow. He had glassy and red eyes. He had an odor of alcoholic beverages upon his breath. He was unsteady on his feet. The [t]rooper based on these observations administered the three standardized field sobriety test [sic]. The defendant's performance on those tests were [sic] poor. As a result of that Trooper Chatellier placed the defendant under arrest for DWI. In dealing with the defendant's vehicle on the scene Trooper Chatellier observed a vodka bottle on the front seat of the vehicle. The defendant was then transported to Troop L where an [I]ntoxilyzer 5000 was administered pursuant to proper regulations. The defendant's test result was 0.262.
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> The defendant, in addition to the events I have just described, he has three prior DWIs that the State alleges fall within the proper time period to designate him as a fourth offender.

ASSIGNMENT OF ERROR 1

In his first assignment of error, the defendant contends the district court erred in denying his motion to quash because the DWI statute, which utilizes non-jury misdemeanor convictions to enhance a felony sentence,

violates due process and constitutional jury trial guarantees.[1] In support of his argument against the use of non-jury misdemeanor convictions as predicates, the defendant cites *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *State v. Brown*, 2003-2788 (La. 7/6/04), 879 So.2d 1276, cert. denied, 543 U.S. 1177, 125 S.Ct. 1310, 161 L.Ed.2d 161 (2005). In *Apprendi*, the United States Supreme Court held that, other than convictions, facts which are used to support an increase in the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *Brown*, the Louisiana Supreme Court held that a prior juvenile adjudication of delinquency, in which the juvenile does not have the right to a jury trial, does not qualify as a "prior conviction" for purposes of the *Apprendi* exception and, thus, it is unconstitutional to adjudicate a defendant a habitual offender based upon a prior juvenile adjudication. The court in *Brown* further found that:

> "It would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer. To equate this adjudication with a conviction as a predicate offense for purposes of the Habitual Offender Law would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process."

State v. Brown, 2003-2788 at pp. 20-21, 879 So.2d at 1289.

As persuasive authority in further support of his position, the defendant also cites *Alaska v. Peel*, 843 P.2d 1249 (Alaska App. 1992),

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[1] In this assignment of error, the defendant again seeks review of the district court's ruling denying his motion to quash. This assignment of error was previously raised in the defendant's writ application and presents no new argument. Although the pretrial determination of an issue does not absolutely preclude a different decision on appeal, judicial efficiency demands that this court accord great deference to pretrial decisions unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result. See *State v. Johnson*, 438 So.2d 1091, 1105 (La. 1983). See also *State v. Humphrey*, 412 So.2d 507, 523 (La. 1982) (on rehearing). Upon review, we find that the record in this case fully supports our previous decision on this issue and is devoid of any additional circumstances and/or evidence that would lead us to change the conclusion we reached therein.

wherein the court held that a prior Louisiana non-jury DWI misdemeanor conviction would not be used to enhance a subsequent DWI sentence in the State of Alaska. The defendant argues that these cases make clear that any prior conviction not tried by a jury should not be used to enhance a sentence.

In denying the defendant's motion to quash in the instant case, the district court noted that the court in *Brown* did not address DWI enhancement, and the instant case, unlike *Brown*, does not deal with a prior juvenile adjudication. We agree with the district court's distinction and likewise find *Brown* inapplicable to the instant case. We note the *Apprendi* court specifically recognized that "prior convictions" are an exception to its general rule. In creating the prior conviction exception, the court in *Apprendi* did not distinguish between prior misdemeanor and/or felony convictions. Also, the holding in *Brown*, which was based upon the difference between a "prior conviction" and a "prior juvenile adjudication," does not govern adult misdemeanor convictions. We decline to extend the *Brown* holding. Therefore, contrary to the defendant's assertions, La. R.S. 14:98 does not violate any constitutional guarantees.

This court in *State v. Leblanc*, 2004-1032, p. 7 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 741, writ denied, 2005-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005), stated that in order to use a prior guilty plea to enhance a penalty under the habitual offender law, the state need only prove the fact of a conviction and that the defendant was represented by counsel or waived counsel at the time he entered the plea. Thereafter, the defendant must prove a significant procedural defect in the proceedings. The burden-shifting principles for multiple offender proceedings apply to the recidivist provisions of the driving while intoxicated (DWI) statute. See *State v.*

Naquin, 2000-0291, 2000-0296, p. 1 (La. 9/29/00), 769 So.2d 1170, 1171 (per curiam). In the instant case, the defendant did not meet his burden of proving a significant defect in the proceedings in which he pled guilty to the misdemeanor DWI charges in question. This assignment of error lacks merit.

ASSIGNMENT OF ERROR 2

In this assignment of error, the defendant contends the district court erred in failing to quash the first predicate (the May 5, 1994 fourth offense conviction) as prescribed.

La. R.S. 14:98(F)(2) provides, in pertinent part:

> [A] prior conviction shall not include a conviction for an offense under this Section... or under a comparable statute or ordinance of another jurisdiction, as described in Paragraph (1) of this Subsection, if committed more than ten years prior to the commission of the crime for which the defendant is being tried and such conviction shall not be considered in the assessment of penalties hereunder. However, periods of time during which the offender was incarcerated in a penal institution in this or any other state shall be excluded in computing the ten-year period.

In support of his argument that the May 5, 1994, fourth offense DWI conviction (offense committed November 11, 1992) is time barred, the defendant argues that the state and the trial court used incorrect calculations in determining that the conviction in question could be used as a predicate. He appears to assert that the only time to be considered should have been the ten years immediately preceding the commission of the instant offense. He argues that consideration of any time outside this particular period constitutes "tolling" and not "excluding" the relevant periods as provided by the statute.

Applying the language of La. R.S. 14:98(F)(2), the state argued that the analysis should begin by considering all of the time between the date of

commission of the instant offense and the date of the commission of the offense in the 1994 predicate conviction. The state noted that this period was approximately twelve years, one month, and twenty-six days in duration. From here, to determine whether the ten year cleansing period ever elapsed, the state considered the periods of time the defendant spent incarcerated in a penal institution. The state then excluded (subtracted) the incarceration time from the period in question as authorized by the statute. After excluding two periods of incarceration, totaling two years, two months, and twenty-seven days, the state concluded that the remaining time did not exceed ten years. The trial court agreed with the state's calculations as they related to periods of incarceration in connection with prior convictions, but not any period spent in detention pretrial.

Upon review, we find the state's application of the relevant time period under La. R.S. 14:98(F)(2) and its calculations to be correct. Incarceration time excluded, the defendant was never cleansed by an un-incarcerated period of ten years between the commission of the instant offense and the commission of the offense that led to the 1994 DWI conviction. Thus, the trial court did not err in allowing the 1994 DWI to be used as a predicate.

This assignment of error is without merit.

ASSIGNMENT OF ERROR 3

In his third assignment of error, the defendant argues the district court erred in failing to impose a suspended sentence with mandated substance abuse treatment. He argues that it was error for the district court to sentence him as a subsequent offender under La. R.S. 14:98(E)(4)(b) when he, in fact, pled guilty to a fourth offense (with a bill charging three prior convictions). Although he acknowledges that he previously received a mandatory

suspended sentence with substance abuse treatment as a third offender in 2002, the defendant argues that La. R.S. 14:98(E)(4)(b) is inapplicable as it applies only to "subsequent offenses" and not fourth offenses. The defendant argues that as a fourth DWI offender he could only be sentenced under Subsection E(1)(a) or E(4)(a). However, he further asserts that because there is an irreconcilable conflict between these two provisions, he should have been sentenced under Subsection E(1)(a), which requires a suspended sentence and treatment.

The sentencing provisions of La. R.S. 14:98 for DWI-fourth offense provide, in pertinent part, as follows:

> 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 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. If any portion of the sentence is suspended, the offender shall be placed on supervised probation with the Department of Public Safety and Corrections, division of probation and parole, for a period of time not to exceed five years, which probation shall commence on the day after the offender's release from custody.
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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.

In arguing that he was erroneously sentenced for a "subsequent" offense, as opposed to a "fourth" offense, the defendant makes a distinction between the sentences available for fourth or subsequent offenses that simply do not exist under the plain and unambiguous language of the statute. Contrary to the defendant's assertions, La. R.S. 14:98 creates only four categories of penalties for DWI: 1) first offense, 2) second offense, 3) third offense, and 4) fourth or subsequent offenses. Subsection E of the statute provides the penalties available for both fourth and subsequent offenses. Thus, the defendant's assertion that the penalty provision for a fourth offense is different than that for a subsequent offense is incorrect. The potential penalties for these offenses are the same. The penalty to be imposed (for either offense) is based upon whether the defendant was previously afforded a lenient sentence and mandated treatment on prior convictions, not upon whether the defendant was convicted as a "second" or "subsequent" fourth DWI offender. See La. R.S. 14:98(E)(4)(a) & (b).

In *State v. Corbitt*, 2004-2663 (La. App. 1st Cir. 6/10/05), 917 So.2d 29, writ denied, 2005-1656 (La. 2/3/06), 922 So.2d 1174, this court held that the defendant's sentence for fourth offense DWI of ten years imprisonment without the benefit of parole, probation, or suspension of sentence was not illegal. In *Corbitt*, the defendant contended that the sentence imposed was illegal because he had not received a substance abuse evaluation, treatment for substance abuse at an inpatient facility, or the benefits of home incarceration prior to his sentencing for the instant offense. He argued that he should have been sentenced under La. R.S. 14:98(E)(1)(a), rather than

(E)(4)(a). Trial of the offense was held on June 23, 2004. The defense indicated that on June 17, 2004, the defendant had pled guilty to DWI, third offense, and the district court had imposed a partly suspended sentence, home incarceration, a $2,000.00 fine, thirty days in parish jail, and four to six weeks of rehabilitation. The defense argued that La. R.S. 14:98(E)(4)(a) was limited in application to those circumstances where, unlike the defendant's situation, a defendant is given the benefit of treatment and then commits a subsequent DWI offense. The district court rejected the defense argument and sentenced the defendant under Subsection (E)(4)(a). This court held that the district court correctly rejected the defense argument. This court stated that by its express terms, (E)(4)(a) is triggered when the offender has previously been ordered to participate in substance abuse treatment and home incarceration. This court rejected the defendant's argument that the treatment had to be completed before he could be sentenced for a new DWI under Subsection (E)(4)(a). This court stated that the intention of the statute was to allow the defendant only one opportunity for a lenient sentence in exchange for obtaining treatment. The defendant in *Corbitt* was provided his opportunity for a lenient sentence on June 17, 2004, in connection with his guilty plea to DWI, third offense. That opportunity precluded sentencing under (E)(1)(a) for his most recent offense.

The defendant argues that this court was mistaken in its holding in *Corbitt*. He asserts that criminal statutes are subject to strict construction under the rule of lenity and that any ambiguity in the statute is resolved in favor of the accused. The defendant argues that pursuant to these guiding principles, Subsection (E)(4)(a) and the references in Subsection (E)(1)(a) to a "subsequent offense" and the phrase "regardless of whether the fourth

offense occurred before or after an earlier conviction..." should be considered implicitly repealed. The defendant argues that, otherwise, the entire sentencing protocol would be irreconcilable.

The record reflects that the defendant was previously required to participate in substance abuse treatment and home incarceration pursuant to Subsection D of La. R.S. 14:98, as a third offender and under Subsection E as a fourth offender. Contrary to the defendant's assertions, we find our holding in *Corbitt* to be sound and controlling herein. This court's holding in *Corbitt* is based on the plain and unambiguous language of La. R.S. 14:98(E)(4)(a).

As previously noted, the purpose of the sentencing scheme provided in the DWI statute is to allow an offender (third, fourth or subsequent) only one opportunity for a lenient sentence in exchange for obtaining treatment. *Corbitt*, 2004-2663 at p. 6, 917 So.2d at 33. We do not find a conflict in the statute. Sentencing under La. R.S. 14:98(E)(1) is unavailable to defendants who have previously been required to participate in substance abuse treatment and home incarceration as third offenders or who have previously received the benefit of suspension of sentence, probation, or parole as fourth offenders. See *State v. Curry*, 39,153 (La. App. 2nd Cir. 12/15/04), 889 So.2d 1202, writ denied, 2005-1678 (La. 3/17/06), 925 So.2d 532; *State v. Corbitt*, 2004-2664 at p. 6, 917 So.2d at 33. The defendant in this case was properly sentenced, as a fourth DWI offender, under Subsection (E)(4)(b), which statutorily mandates that the sentence must be imposed without benefit of suspension of sentence, probation, or parole and the sentence must be imposed consecutively with the remaining balance of the sentence for the revoked probation. This assignment of error lacks merit.

ASSIGNMENT OF ERROR 4

In his fourth assignment of error, the defendant argues that the district court erred in allowing multiple convictions entered on the same date to serve as separate predicate acts. Specifically, he asserts the two January 7, 2002 DWI convictions can serve only as one predicate act.

The Louisiana Supreme Court has held that the language of La. R.S. 14:98 evidences the Legislature's "clear intent" that all prior DWI convictions be considered in determining the applicable penalty. *State v. Woods*, 402 So.2d 680, 683 (La. 1981). The number of offenses, not the sequence, is determinative of the appropriate designation of the subsequent DWI offense. In this case, since the defendant had three prior DWI offenses, the current offense was appropriately designated DWI, fourth offense. Additionally, where the offenses occurred on three different dates, it is of no moment that the predicate convictions occurred on the same date. *State v. Vu*, 2002-1243, p. 9 (La. App. 5th Cir. 4/8/03), 846 So.2d 67, 72-73. Therefore, the trial judge did not err in considering the January 7, 2002 DWI convictions as separate predicates. This assignment of error lacks merit.

ASSIGNMENT OF ERROR 5

In his fifth and final assignment of error, the defendant contends the trial court should have granted the motion to quash because the DWI statute allows the district attorney to introduce evidence of prior convictions in violation of the constitutional guarantees of due process, a fair trial, and protection against self-incrimination. While the defendant acknowledges the need to include prior offenses in the bill of information when charging a third DWI offense, since the charge of the subsequent offense raises the offense from a misdemeanor to a felony, he argues that no rational basis exists for listing prior convictions in the bill of information when charging

fourth or subsequent offenses. He suggests the unfair prejudice created by allowing the jury to hear evidence of the predicates in fourth or subsequent offenses can be avoided by bifurcating the matter into separate guilt and sentencing enhancement phases.

In a recidivist DWI prosecution, the state bears the burden of proving the fact of the prior DWI convictions to the jury. See *State v. Naquin*, 2000-0291, 2000-0296, pp. 1-2 (La. 9/29/00), 769 So.2d 1170, 1171 (per curiam); *State v. Rolen*, 95-0347, p. 2 (La. 9/15/95), 662 So.2d 446, 447 (per curiam). This court has consistently rejected claims that it is error to charge prior DWI convictions in the bill of information, read the information to the jury, and prove the prior convictions to the jury at trial. See *State v. Lugar*, 99-0142 (La. App. 1st Cir. 1/26/99), 734 So.2d 14, 15 (per curiam), writ denied, 99-0221 (La. 1/26/99), 736 So.2d 217. In *Lugar*, the defendant was charged with DWI, third offense, and filed a motion in limine to exclude evidence of his prior DWI convictions until after the jury had determined whether or not he was guilty of the charged offense. The trial court denied the motion. In affirming that denial, this court explained its rationale as follows:

> The Louisiana Supreme Court repeatedly has written that prior DWI convictions used by the state in a repeat offender prosecution under La. R.S. 14:98 are essential matters of proof at the trial. Where an accused is charged as second, third, or fourth DWI offender, the information or indictment must allege the prior convictions. If trial is by jury, the indictment charging the multiple offenses must be read to the jury. Furthermore, prior offenses must be proved as part of the state's case. Otherwise the conviction would be set aside.

Lugar, 99-0142, 734 So.2d at 15. (Citations omitted.)

This assignment of error lacks merit.

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

CONVICTION AND SENTENCE AFFIRMED.