NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 2228

STATE OF LOUISIANA

VERSUS

RICHARD E. LADNER, JR.

Judgment Rendered: May 2, 2008

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 404,981

Honorable Martin E. Coady, Judge

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Walter P. Reed, District Attorney
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and
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State – Appellee

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Defendant – Appellant
Richard E. Ladner, Jr.

* * * * * *

BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

WELCH, J.

The defendant, Richard E. Ladner, Jr., was charged by bill of information with one count of fourth offense operating a vehicle while intoxicated (DWI), a violation of La. R.S. 14:98, and initially pled not guilty.[1] He moved to quash and/or suppress the bill of information and the use of the predicate offenses, but the motions were denied. Thereafter, he withdrew his former plea and pled guilty pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving his right to challenge the trial court's rulings on the motion to quash and/or suppress, and pursuant to **North Carolina v. Alford**, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970). He was fined $5,000 and was sentenced to twenty years at hard labor, with all but sixty days of the sentence suspended, five years probation, in-house evaluation by the Louisiana Department of Health and Hospitals for four to six weeks, and outpatient evaluation for up to twelve months. The court also ordered that upon release from prison, the defendant would be subject to home incarceration for five years, subject to electronic monitoring and curfew restrictions; that his car would be seized and sold in accordance with the provisions of La. R.S. 14:98; and that he would be required to complete any substance abuse and driver improvement programs offered by his probation officer. He now appeals, designating two assignments of error. We affirm the conviction and sentence.

ASSIGNMENTS OF ERROR

1. The trial court erred by denying the defendant's motion to quash and/or suppress the bill of information because La. R.S. 14:98 was clearly inapplicable to

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[1] Predicate #1 was set forth as the defendant's January 28, 1999 conviction for DWI under Twenty-second Judicial District Court Docket #285494. Predicate #2 was set forth as the defendant's April 17, 1990 conviction for DWI under Twenty-second Judicial District Court Docket #179514. Predicate #3 was set forth as the defendant's April 17, 1990 conviction for DWI under Twenty-second Judicial District Court Docket #183747. Predicate #4 was set forth as the defendant's November 26, 1990 conviction for DWI under Twenty-second Judicial District Court Docket #188809.

the defendant and is unconstitutionally vague and ambiguous.

2. The trial court erred by denying the defendant's motion to quash and/or suppress predicate convictions which were not knowingly and voluntarily obtained.

FACTS

Due to the defendant's guilty plea, there was no trial, and thus, no trial testimony concerning the facts of the offense. At the hearing on the defense motions, however, the State set forth that the defendant drove to Daiquiris and Creams, parked his car, got out, drank, got into a scuffle, and backed into someone's car as he was attempting to leave. After the police arrived and placed the defendant into a police car, he kicked out the back window of the car, and ran into the woods. The defense accepted the factual statement set forth by the State. The bill of information charged that the offense occurred on October 22, 2005.

MOTION TO QUASH

In assignment of error number one, the defendant argues the trial court erred in denying the motion to quash the bill of information. The defendant maintains that he could not be prosecuted under La. R.S. 14:98 because that provision applies only to acts committed on public roads and highways and not to acts committed on private property. He submits that La. R.S. 14:98 must be read *in pari materia* with the provisions of Title 32, particularly, La. R.S. 32:1(44), which defines an operator as a person who drives on a highway, and La. R.S. 32:661(A)(1), which provides that any person operating a motor vehicle upon public highways of this State is deemed to have given consent to chemical testing to determine the alcohol content of his blood. Additionally, the defendant claims that La. R.S. 14:98 is unconstitutionally vague and ambiguous because when the statute is properly read *in pari materia* with the provisions of Title 32, any reasonable person would be confused as to whether the proscribed conduct applies only to public roads.

Statutes are presumed to be valid and must be upheld as constitutional

whenever possible. A statute is unconstitutionally vague if a person of ordinary intelligence is not capable of discerning its meaning and conforming his conduct thereto. A penal statute must give adequate notice that certain contemplated conduct is proscribed and punishable by law and must provide adequate standards for those charged with determining the guilt or innocence of an accused. In interpreting criminal statutes, La. R.S. 14:3 requires that the provisions thereof "be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." The title of the act, while not part of the statute, may be used to determine legislative intent. As a general rule, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters in which case the intention of the drafters, rather than the strict language, controls. **State v. Holmes**, 2001-0955, p. 5 (La. App. 1st Cir. 2/15/02), 811 So.2d 955, 958.

Louisiana Revised Statutes 14:98, in pertinent part, provides:

> **§ 98. Operating a vehicle while intoxicated**
>
> A. (1) The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, . . . when:
>
> (a) The operator is under the influence of alcoholic beverages

Louisiana Revised Statutes 32:1, in pertinent part, provides:

> When used in this Chapter, the following words and phrases have the meaning ascribed to them in this Section, unless the context clearly indicates a different meaning:
>
> . . . .
>
> (25) "Highway" means the entire width between the boundary lines of every way or place of whatever nature publicly maintained and open to the use of the public for the purpose of vehicular travel, including bridges, causeways, tunnels and ferries; synonymous with the word "street."
>
> . . . .

(44) "Operator" means every person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle.

Louisiana Revised Statutes 32:661, in pertinent part, provides:

§ 661. Operating a vehicle under the influence of alcoholic beverages or illegal substance or controlled dangerous substances; implied consent to chemical tests; administering of test and presumptions

A. (1) Any person, regardless of age, who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of R.S. 32:662, to a chemical test or tests of his blood, breath, urine, or other bodily substance for the purpose of determining the alcoholic content of his blood, and the presence of any abused substance or controlled dangerous substance as set forth in R.S. 40:964 in his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while believed to be under the influence of alcoholic beverages or any abused substance or controlled dangerous substance as set forth in R.S. 40:964.

(2)(a) The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person, regardless of age, to have been driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of either alcoholic beverages or any abused substance or controlled dangerous substance as set forth in R.S. 40:964....

. . . .

(3) If the person is under twenty-one years of age, the test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of this state after having consumed alcoholic beverages....

. . . .

C. (1) When a law enforcement officer requests that a person submit to a chemical test as provided for above, he shall first read to the person a standardized form approved by the Department of Public Safety and Corrections. The department is authorized to use such language in the form as it, in its sole discretion, deems proper, provided that the form does inform the person of the following:

. . . .

(f) That refusal to submit to a chemical test after an arrest for an offense of driving while intoxicated if he has refused to submit to such

test on two previous and separate occasions of any previous such violation is a crime under the provisions of R.S. 14:98.2 and the penalties for such crime are the same as the penalties for first conviction of driving while intoxicated.

Louisiana Revised Statutes 14:98.2, in pertinent part, provides:

§ 98.2 Unlawful refusal to submit to chemical tests; arrests for driving while intoxicated

A. No person under arrest for a violation of R.S. 14:98, 98.1, or any other law or ordinance which prohibits operating a vehicle while intoxicated may refuse to submit to a chemical test when requested to do so by a law enforcement officer if he has refused to submit to such test on two previous and separate occasions of any previous such violation.

In his motion to quash and/or suppress, the defendant argued, among other things, that he could not be prosecuted under La. R.S. 14:98 because he did not fall within the definition of an "operator" under the statute. He further argued he could not be billed under La. R.S. 14:98 because there was no evidence he was operating a motor vehicle upon a public road or highway as required under Louisiana law. He also argued La. R.S. 14:98 is unconstitutionally vague and ambiguous. Following a hearing, the trial court denied the defense motions, finding that although the defendant was in a parking lot, he was operating his vehicle on a public road within the meaning of La. R.S. 14:98.

The defendant concedes that, contrary to his position, the jurisprudence has held that La. R.S. 14:98 is not limited in application to public highways. See **State v. Layssard**, 310 So.2d 107, 110 (La. 1975) ("[La. R.S. 14:98] does not limit the prohibition of drunk driving to highways, and evidence of driving while intoxicated, even in the neighbor's yard, would constitute some evidence of the offense"); **State v. Smith**, 93-1490, pp. 5-6 (La. App. 1st Cir. 6/24/94), 638 So.2d 1212, 1215 ("[La. R.S. 14:98] does not limit the prohibition of driving while intoxicated to driving on state highways, and evidence of operating a vehicle while intoxicated, even in the ditch, constitutes evidence of the offense"); **State v. Landeche**, 447 So.2d 1201,

1202 (La. App. 5th Cir. 1984) ("The fact that appellant drove his automobile in the parking lot [of the Pier 2 lounge] and not on a public street or highway *can* sustain a drunk driving conviction, assuming that other necessary elements are proven beyond a reasonable doubt"). (Emphasis in original). He contends, however, that the above referenced jurisprudence and La. R.S. 14:98 must be read *in pari materia* with: La. R.S. 32:1(44), defining "operator" as every person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle "upon a highway;" La. R.S. 32:1(25) defining "highway" as the entire width between the boundary lines of every way or place of whatever nature, "publicly maintained" and open to the use of the public, for the purpose of vehicular travel; the reference in La. R.S. 32:661(A)(1) to "public highways;" and La. R.S. 14:98.2, which criminalizes refusal to submit to chemical testing of bodily substances for alcoholic content pursuant to La. R.S. 32:661.

In **State v. Zachary**, 601 So.2d 27 (La. App. 1st Cir. 1992), this court addressed the issue of whether the trial court correctly suppressed the Intoxilyzer 5000 results of a driver who was driving in a private parking lot. In concluding that La. R.S. 32:661 was not applicable to a driver in a private parking lot, we refused to read La. R.S. 14:98 and La. R.S. 32:661 *in pari materia* to expand the scope of La. R.S. 32:661, but instead decided the issue on the basis of the definitions provided in La. R.S. 32:1.

The record indicates that the defendant refused to submit to a breath test in this matter, but was not charged with violating La. R.S. 14:98.2. Thus, the instant case does not involve blood or breath test results, but rather presents the issue of whether La. R.S. 14:98 should be limited in application to operating a vehicle while intoxicated "upon a highway." The applicable law is La. R.S. 14:98 and not La. R.S. 32:661 or La. R.S. 14:98.2. The text of La. R.S. 14:98 does not limit application of the article to operating a vehicle while intoxicated "upon a highway," and if it had

been the intent of the legislature to so limit the application of the article, it could have easily placed such a limitation in the article. We note that La. R.S. 32:1 expressly states that the definitions set forth therein are for the statutes contained in the Louisiana Highway Regulatory Act ("When used in this Chapter,"), and La. R.S. 14:98 is not contained in that Act. Further, the purpose of La. R.S. 14:98 is to criminalize the operation of a vehicle while intoxicated. Limiting the application of the article to operating a vehicle while intoxicated "upon a highway" would not effect the object of the law. See La. R.S. 14:3. We also note that a person of ordinary intelligence is capable of discerning the meaning of La. R.S. 14:98 and conforming his conduct thereto. Accordingly, La. R.S. 14:98 is not unconstitutionally vague.

This assignment of error is without merit.

MOTION TO SUPPRESS

In assignment of error number two, the defendant argues the trial court erred in denying the motion to quash and/or suppress predicate convictions. He claims predicates #2 and #3 should have been suppressed because the trial court therein failed to inform him that he had the right to have an attorney appointed to represent him. He also claims that he entered the predicate guilty pleas only after being assured that they would be enhanceable for five years. The defendant further asserts that the court taking the predicate pleas failed to determine whether he was capable of understanding the proceedings and entering knowing and voluntary pleas. Lastly, he claims the court taking the predicate pleas failed to explain to him that the appellate process was one in which the defendant could contest the decision of the trial court, argue his points to an appellate court, and do so with the assistance of counsel.

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 trial and jury trial where applicable; and (c) his right to confront his accuser. The judge must also ascertain that the accused understands what the plea connotes and its consequences. If the defendant denies the allegations of the bill of information, 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. 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, 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 a knowing and intelligent waiver of rights occurred. **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**, 2000-2250, pp. 8-9 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791.

In his motions to quash and/or suppress, in regard to predicates #2 and #3, the defendant argued he had not been informed of his right to an attorney appointed to represent him at trial if he could not afford one and an attorney upon appeal. He further argued these two predicate pleas were not knowingly and voluntarily entered as they were based on an inaccurate statement of law and/or an agreement which was not adhered to subsequently. He also argued the court taking these predicate pleas did not make a meaningful inquiry or finding of his ability to understand the

proceedings or his decision. Lastly, he argued the court taking these predicate pleas did not properly inform him of his right to appeal his convictions to a higher court. Following a hearing, the trial court denied the defense motions.

In regard to predicates #2 and #3, the record contains: a March 6, 2000 transcript; an April 17, 1990 transcript; two April 17, 1990 minute entries; an amended bill of information for predicate #2 reflecting dismissal of one count of violation of La. R.S. 32:232 and charging one count of violation of La. R.S. 14:98; and an amended bill of information for predicate #3 reflecting reduction of one count of second offense violation of La. R.S. 14:98 to one count of first offense violation of La. R.S. 14:98.

The April 17, 1990 transcript indicates that the defendant, while represented by counsel, pled guilty under docket #179514, and under amended bill of information #183747. The court advised the defendant that he was "entitled to a trial before [the court] with the assistance of [the defendant's] attorney," and that by pleading guilty, he would be waiving that right. The defendant indicated he understood. The court also advised the defendant that if he were to go to trial, he would have the right to confront his accusers, to require testimony on his behalf from his witnesses, to be present in court and see and hear everything that takes place, and to have his attorneys cross-examine the witnesses against him, but by entering his guilty pleas he would be waiving these rights. The defendant again indicated he understood. The court also advised the defendant that if he went to trial, he would have the right against self-incrimination or the right to remain perfectly silent throughout trial and not to be forced to take the stand. The defendant indicated he understood. Additionally, in response to the court's inquiry, the defendant indicated he was twenty-two years old; he had not been forced, coerced, or intimidated into entering his guilty plea, and no one had done anything to make him plead guilty; and other than the State's agreement not to prosecute some counts and amend the bill of

information, no other promises or inducements had been made to him in exchange for his guilty pleas. The court advised the defendant that DWI was an enhancement offense, and that in pleading to two first offense DWI offenses, if he thereafter committed DWI, he could be charged with third offense DWI. Lastly, the court advised the defendant that "this conviction today can be used against you throughout the next five years, out in the future, if you get arrested, charged, and convicted of driving while intoxicated again." In response to the court's inquiry, the defendant's attorney indicated he felt the defendant was knowingly, willingly, voluntarily, and intelligently entering his guilty pleas with knowledge of the consequences.

The March 6, 2000 transcript concerns an evidentiary hearing ordered by this court on the issue of whether, in regard to predicates #2 and #3, a plea bargain existed between the defendant and the State or whether the defendant justifiably believed that a plea bargain existed and pled guilty in part because of that justifiable belief. **State ex rel. Ladner v. State**, 99-2041 (La. App. 1st Cir. 12/02/99) (unpublished). At the hearing, the defendant claimed he had intended to go to trial, but agreed to plead guilty after his attorney, Wendell Tanner,[2] made a deal with Assistant District Attorney Charles Collins that predicates #2 and #3 "would both be dropped to a first offense D.W.I. and all the misdemeanors would be dropped." The defendant also claimed that Tanner advised him that the district attorney's office agreed that the defendant would not be held responsible for predicates #2 and #3 after five years. The defendant also claimed that Tanner told him that it would cost an additional $1,000 per DWI to go to trial on the offenses. The defendant conceded no promises were made to him concerning the use of predicates #2 and #3 in the event that the cleansing period provision of the law changed.

Jeanette Ladner, the defendant's mother, also testified at the March 6, 2000 hearing. She claimed that Tanner stated he would charge $1,000 per case to take

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[2] The State and the defense stipulated that Tanner died in June of 1993.

predicates #2 and #3 to a judge trial, but if the defendant pled guilty "it would be just on his record for five years." Jeanette Ladner indicated that Tanner never discussed or made any promises to the defendant concerning how the defendant would be treated if the cleansing period law changed so that the cleansing period would no longer be five years.

Assistant District Attorney Charles Collins also testified at the March 6, 2000 hearing. He did not have any independent recollection of the events concerning the defendant's guilty pleas in connection with predicates #2 and #3. He indicated he was not authorized to enter into any plea agreements at the time of the defendant's guilty pleas, but would have taken a defendant's offer to plead guilty to first offense DWI to his (Collins's) supervisor. Collins had been involved in approximately one thousand misdemeanor DWI pleas and had never promised any defendant that, regardless of subsequent changes in the cleansing period provision of the law, he would only be held to a certain number of years cleansing period.

The trial court found that the plea bargain between the defendant and the State concerned the reduction of one of the charges the defendant was facing and a *nolle prosequi* as to another charge of running a red light. The court noted the defendant had given self-serving testimony, his mother had also testified that predicates #2 and #3 would be used for enhancement purposes for only five years, and Tanner probably advised the defendant and his mother concerning the state of the law at that time. The court did not find, however, that absent the statements concerning the five-year cleansing period, the defendant would not have entered into the plea bargain or that the plea bargain was made in anything other than a voluntary and intelligent manner. Accordingly, the court denied the defendant's request to withdraw the guilty pleas in predicates #2 and #3.

The trial court correctly denied the defense motions. Consideration of everything that appears in the entire record, as well as the opportunity of the trial

judge to observe the defendant's appearance, demeanor, and responses in court, convinces us that the defendant knowingly and intelligently waived his **Boykin** rights in connection with predicates #2 and #3. The State discharged its initial burden of proving the existence of the guilty pleas in predicates #2 and #3 and that the defendant was represented by counsel when the pleas were taken. Thereafter, the defendant failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. The defendant produces no affirmative evidence that he would not have pled guilty to predicates #2 and #3 if the trial court would have specifically told him that, even though he had retained counsel, he had a right to appointed counsel. At the March 6, 2000 hearing, the defendant stated that the "main reason" he entered his guilty pleas in predicates #2 and #3 was because of the five-year cleansing period. There was no abuse of discretion in the determination of the trial court at the March 6, 2000 hearing that the defendant's guilty pleas in predicates #2 and #3 were voluntary and intelligent. We reject the defendant's argument that, in connection with predicates #2 and #3, the trial court's statement concerning the cleansing period incorrectly advised him of the penalties for subsequent offenses in violation of La. C.Cr.P. art. 556.1(E). The defendant cites the language of La. C.Cr.P. art. 556.1(E) prior to its amendment by 2001 La. Acts No. 243, § 1, which removed the requirement that the court advise the defendant regarding penalties for subsequent offenses. To the extent, if any, that La. C.Cr.P. art. 556(B)(1) would support the defendant's position, we note that article's requirements do not apply retroactively to predicate guilty pleas entered prior to the 2001 amendment of the article. **State v. Verdin**, 2002-2671, p. 6 (La. App. 1st Cir. 2/3/03), 845 So.2d 372, 377 (per curiam); see also **State v. Pelas**, 99-0150, p. 4 (La. App. 1st Cir. 11/5/99), 745 So.2d 1215, 1217-1218 (trial judge's notice to defendant of five-year cleansing period insufficient to create contract concerning cleansing period; moreover, any

such contract would have been an absolute nullity). Additionally, we note that explanation of the right to judicial review of a conviction is not part of the three-right articulation rule of **Boykin**. **State v. Smith**, 97-2849, p. 3 (La. App. 1st Cir. 11/6/98), 722 So.2d 1048, 1049. Lastly, there was no error in the trial court's failure to advise the defendant as to his right to counsel on appeal. See **State v. Anderson**, 2000-1737, p. 17 (La. App. 1st Cir. 3/28/01), 784 So.2d 666, 680-81, writ denied, 2001-1558 (La. 4/19/02), 813 So.2d 421.

This assignment of error is without merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.