

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 KA 1159

STATE OF LOUISIANA

VERSUS

RICHARD T. PENA

Judgment Rendered: December 23, 2009.

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On Appeal from the
22nd Judicial District Court,
in and for the Parish of St. Tammany
State of Louisiana
District Court No. 446757

The Honorable August J. Hand, Judge Presiding

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Richard T. Pena

* * * * *

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

Handwritten signatures and initials in black ink, including what appears to be 'SJR', 'JJD', and 'SJR'.

CARTER, C.J.

The defendant, Richard T. Pena, was charged by bill of information with one count of fourth-offense driving while intoxicated (DWI), a violation of La. R.S. 14:98, and initially entered a plea of not guilty.¹ He moved to quash and suppress the use of predicate no. 2 against him, but the motion was denied. Thereafter, he withdrew his guilty plea and entered a plea of guilty as charged, reserving his right to seek review of the ruling on the motion to quash/suppress pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976). He was sentenced to twenty years at hard labor without benefit of suspension of sentence, probation, or parole. He now appeals, contending that the trial court erred in failing to grant the motion to quash/suppress. For the following reasons, we affirm the conviction and sentence.

FACTS

Due to the defendant's guilty plea, there was no trial and, thus, no trial testimony concerning the facts in this matter. Further, at the **Boykin**² hearing, a factual basis for the plea was not set forth because the State and the defense stipulated to the existence of a factual basis. The bill of information charged that the offense was committed on April 3, 2008.

MOTION TO QUASH PREDICATE NO. 2

In his sole assignment of error, the defendant argues the trial court erred in refusing to quash the use of predicate no. 2 in the instant case. Citing

¹ Predicate no. 1 was set forth as the defendant's October 25, 1999, conviction for DWI under Twenty-second Judicial District Court docket no. 305279. Predicate no. 2 was set forth as the defendant's September 25, 1996, conviction for DWI under Twenty-second Judicial District Court docket no. 257725. Predicate no. 3 was set forth as the defendant's June 29, 2005, conviction for DWI, under Twenty-second Judicial District Court docket no. 397688.

² See **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the defendant argues the court presiding over predicate no. 2 insufficiently advised him of his right against self-incrimination because it failed to tell him that his silence could not be used against him.

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. **State v. Henry**, 2000-2250 (La. App. 1 Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. The judge must also ascertain that the accused understands what the plea connotes and its consequences. **Henry**, 788 So.2d at 541. 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. **Id.** 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. **Id.** If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. **Id.** 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. **Id.** 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. **Id.** **Boykin** only requires that a defendant be informed of the three rights enumerated above. **Henry**, 788 So.2d at 541; see **Boykin**, 395 U.S. at 243, 89 S.Ct. 1712. The jurisprudence has been unwilling to extend the scope of **Boykin** to include advising the defendant of any other rights which he may have. **Henry**, 788 So.2d at 541.

In **Griffin**, the United States Supreme Court reversed a first-degree murder conviction and death sentence because, in violation of the Fifth Amendment applicable to the States by reason of the Fourteenth Amendment, the trial court had instructed the jury:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

Griffin, 380 U.S. at 610, 85 S.Ct. at 1230.

In support of the use of predicate no. 2 to enhance the penalty for the instant offense, the State introduced the transcript of the guilty plea. The defendant appeared at the predicate no. 2 guilty plea hearing with counsel. Counsel indicated that, in accordance with a sentencing agreement, the defendant would withdraw his previously entered plea of not guilty and plead guilty as charged to fourth-offense DWI. The court questioned the defendant concerning his age (thirty-two years), education (8th grade), and whether he could read and write (affirmative response). The court then read the definition of the offense to the defendant and he indicated he understood. Thereafter, the court advised the defendant:

You do have a right to be tried in open court before a jury. You could waive the jury trial and be tried by the judge alone, if you so elected.

At your trial, you'd have the right to cross examine and confront any witnesses that would be called to testify against you accusing you of committing this crime. The state would also be required to prove each and every element of the crime beyond a reasonable doubt before you could be convicted. You'd have the right to subpoena witnesses to testify on your behalf at your trial. You would also have the right to invoke the privilege against self incrimination and remain silent. In other words, nobody could make you get up here and testify against yourself, okay.

The trial court denied the motion to quash, finding that the jurisprudence did not require any "magical language" in setting forth the rights delineated in **Boykin** prior to a knowing and voluntary waiver of those rights. There was no error in the trial court's ruling. The defendant knowingly and intelligently waived his rights in pleading guilty to predicate no. 2. The State not only met its initial burden to prove the existence of the prior guilty plea and that the defendant was represented by counsel when the plea was taken, it also produced a contemporaneous record of the guilty plea proceedings indicating the defendant knowingly and intelligently waived his **Boykin** rights. The defendant did not testify at the motion to quash hearing and failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea in question. Due to the guilty plea, there was no trial in this case and, thus, no possibility of a **Griffin** instruction. Further, we find no support for the defendant's argument that **Griffin**, which was rendered four years prior to **Boykin**, expanded the requirements of **Boykin**. Additionally, in the context of predicate no. 2, the court explained the privilege against self-incrimination made clear that it was explaining the privilege against self-incrimination at

trial. See State v. Foy, 2000-2521 (La. App. 1 Cir. 6/22/01), 808 So.2d 735, 738.

This assignment of error is without merit.

REVIEW FOR ERROR

Our review for error is pursuant to La. Code Crim. P. art. 920, which provides that the only matters to be considered on appeal are errors designated 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.” La. Code Crim. P. art. 920(2).

The trial court failed to impose the mandatory fine of five thousand dollars. See La. R.S. 14:98E(1)(a). Although the failure to impose the fine is error under Article 920(2), it certainly is not inherently prejudicial to the defendant. 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, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-125 (*en banc*), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.