NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0913

STATE OF LOUISIANA

VERSUS

RONALD J. BLAKE

WJK concurs

DATE OF JUDGMENT: DEC 2 2 2010

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 478846, DIVISION J, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

* * * * * *

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Ronald J. Blake

* * * * * *

BEFORE: KUHN, PETTIGREW, AND KLINE, JJ,[1]

Disposition: CONVICTION AND SENTENCE AFFIRMED.

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[1] The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

GJP Pettigrew, J. concurs

KUHN, J.

The defendant, Ronald J. Blake, was charged by bill of information with one count of third offense operating a vehicle while intoxicated (DWI), a violation of La. R.S. 14:98(D). He initially pled not guilty, and he filed a motion to quash, contending predicate offenses numbers one and two had been obtained in violation of his constitutional rights.[2] Following a hearing, the motion was denied. Thereafter, he entered a guilty plea pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving the right to challenge the ruling on the motion to quash. He was sentenced to thirty months at hard labor. He now appeals, contending the trial court erred in denying the motion to quash and misinformed him of his right to confront the witnesses against him. 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. At the hearing on the motion to quash, however, the defense stipulated to the bill of information as a factual basis for the plea. The bill of information charged that the defendant committed the instant offense on December 8, 2008, by operating a motor vehicle while under the influence of alcohol or any scheduled controlled dangerous substance or while under the influence of alcohol and one or more drugs which are not scheduled controlled dangerous substances.

[2] Predicate number one was set forth as the defendant's December 9, 1998 DWI conviction under First Parish Court of Jefferson Parish, docket number F1206079. Predicate number two was set forth as the defendant's June 2, 1999 DWI conviction under Slidell City Court in St. Tammany Parish, docket number 99KS2144.

MOTION TO QUASH

In assignment of error number 1, the defendant argues the trial court erred in denying the motion to quash predicate number one because the minute entry and signed rights form relied upon by the State in connection therewith are "woefully inadequate" to establish a waiver of counsel under **State v. White**, 98-0343 (La. App. 1st Cir. 12/28/98), 727 So.2d 574. He also argues the documentation concerning the predicate offenses was "never introduced into evidence by either the State or the Defense." He makes no additional argument concerning predicate number two.

Initially, we address the defendant's claim concerning the introduction into evidence of the documents concerning the predicate offenses. The defendant relies on the following exchange at the hearing on the motion to quash:

> [Defense counsel]: Your Honor, for purposes of the record, I would mark the Jefferson Parish conviction as Defense Exhibit 1, for identification purposes. And the Slidell conviction as Defense Exhibit 2, for identification purposes. I don't think I have to introduce those right now, they will be introduced at trial.
>
> [Court]: For purposes of the motion, I'll allow that. I have reviewed them in the back with counsel. The Court will allow them to be marked but withheld from filing into evidence until during the trial.

As noted by the trial court, the documents at issue were reviewed by the court and counsel at the hearing on the defendant's motion to quash the predicate offenses. The defendant never objected to the use of the documents at the hearing. To the contrary, the defense marked the documents for identification (and use) at the hearing. Furthermore, during defendant's testimony, he identified and referenced these same documents, while testifying regarding his waiver of rights in connection with his prior guilty pleas pertaining to these predicate offenses. Accordingly, the

defendant failed to preserve any error regarding the lack of formal introduction of the documents into the record during the hearing.[3] An irregularity or error cannot be availed of after verdict, unless it was objected to at the time of occurrence. La. Code Crim. P. art. 841(A).

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, then 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. **State v. Henry**, 2000-2250, p. 8 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. Everything that appears in the entire record concerning the predicate, as well as the trial judge's opportunity to observe the defendant's

[3] Because the documents at issue are part of the appellate record, there is no reason to remand for their introduction into evidence.

appearance, demeanor, and responses in court, should be considered in determining whether or not 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 at pp. 8-9, 788 So.2d at 541.

Additionally, an uncounseled DWI conviction may not be used to enhance punishment of a subsequent offense, absent a knowing and intelligent waiver of counsel. When an accused waives his right to counsel in pleading guilty to a misdemeanor, the trial court should expressly advise him of his right to counsel and to appointed counsel if he is indigent. The court should further determine on the record that the waiver is made knowingly and intelligently under the circumstances. Factors bearing on the validity of this determination include the age, education, experience, background, competency, and conduct of the accused, as well as the nature, complexity, and seriousness of the charge. Determining the defendant's understanding of the waiver of counsel in a guilty plea to an uncomplicated misdemeanor requires less judicial inquiry than determining his understanding of his waiver of counsel for a felony trial. Generally, the court is not required to advise a defendant who is pleading guilty to a misdemeanor of the dangers and disadvantages of self-representation. The critical issue on review of the waiver of the right to counsel is whether the accused understood the waiver. What the accused understood is determined in terms of the entire record and not just by certain magic words used by the judge. Whether an accused has knowingly and intelligently waived his right to counsel is a question which depends on the facts and

circumstances of each case. **State v. Cadiere**, 99-0970, pp. 3-4 (La. App. 1st Cir. 2/18/00), 754 So.2d 294, 297, writ denied, 2000-0815 (La. 11/13/00), 774 So.2d 971.

When a trial court denies a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion. See **State v. Odom**, 2002-2698, p. 6 (La. App. 1st Cir. 6/27/03), 861 So.2d 187, 191, writ denied, 2003-2142 (La. 10/17/03), 855 So.2d 765. However, a trial court's legal findings are subject to a de novo standard of review. See **State v. Smith**, 99-2094, 99-2015, 99-2019, 99-0606, p. 3 (La. 7/6/00), 766 So.2d 501, 504.

In **White**, 98-0343 at p. 5, 727 So.2d at 578, this court found the State's evidence of a predicate DWI offense inadequate to establish a valid waiver of counsel. The State relied on a minute entry and a rights-waiver/guilty-plea form to establish counsel waiver. We held, "[W]ithout a transcript, we can only conclude from the documents submitted into evidence that there was no inquiry on the record as to the defendant's education, experience, background, or competency, nor can we assume that this information was in the record. At the hearing on the motion to quash, the defendant testified that the judge did not ask him if the defendant understood what was happening to him." **White**, 98-0343 at p. 5, 727 So.2d at 577-78.

However, in **State v. Deville**, 2004-1401, pp. 1-2 (La. 7/2/04), 879 So.2d 689, 689-90 (per curiam), the Louisiana Supreme Court held that a form acknowledging that the defendant had been advised of his right to counsel and waived that right in connection with a guilty plea to driving under the influence revealed a

presumptively valid conviction as to which the defendant offered no countervailing evidence. The court explained:

> Our decision in [**State v. Carlos**, 98-1366 (La. 7/7/99), 738 So.2d 556] entitled the state to rely on this waiver form in discharging its initial burden of proving a prior valid conviction for D.W.I. If a court may, in the context of a collateral attack on a prior conviction used in recidivist proceedings, presume from the fact of conviction alone, *i.e.*, from a silent record, that the defendant knowingly and intelligently waived his right to trial, then a court may also presume from a record which is *not* silent with respect to the waiver of counsel that the defendant made a knowing and intelligent decision to proceed without the guiding hand of an attorney and that the trial court would not have accepted the waiver if the contrary had appeared. See [**Parke v. Raley**, 506 U.S. 20, 30, 113 S.Ct. 517, 524, 121 L.Ed.2d 391 (1992)] ("'[T]here is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears.'")(quoting **Voorhees v. Jackson**, 35 U.S. (10 Pet.) 449, 472, 9 L.Ed. 490 (1836)). It remains for the defendant to show otherwise if he is able to do so and for the trial court ultimately to resolve the question in light of all of the circumstances surrounding entry of the guilty plea. See, *e.g.*, **State v. Couture**, 289 Mont. 215, 959 P.2d 948, 950-51 (1998) (although defendant executed affidavits that he was not advised of his right to counsel in prior D.U.I. guilty pleas, trial court did not abuse its discretion in finding on the basis of waiver forms executed contemporaneously with the pleas that the defendant was advised of his right to counsel and waived that right).

Deville, 2004-1401, at pp. 5-6, 879 So.2d at 691-92.

In the instant case, in connection with predicate number one, the State relied upon certified true copies of a "WAIVER OF CONSTITUTIONAL RIGHTS: PLEA OF GUILTY" form, court minutes, and a commitment order. See State Exhibit #1/D-1. In pertinent part, the waiver/guilty plea form set forth:

> I RONALD J. BLAKE, before my plea of GUILTY to the crime of OPERATING A VEHICLE WHILE INTOXICATED (La. R.S. 14:98), have been informed of and understand the charge to which I am pleading GUILTY. I waive the following rights:
>
> (1) I understand I have a right to a trial by a judge and if convicted a right to appeal;

(2) To face and cross-examine the witnesses who accuse me of the crime charged;

(3) The privilege against self-incrimination, of having to take the stand and testify; and

(4) The right to compulsory process of the Court to require witnesses to appear and testify for me.

By entering this plea of GUILTY, I am waiving all of those rights. I am entering this plea of GUILTY because I am, in fact, guilty. I have not been forced, threatened or intimidated to make this plea.

The acts and elements constituting the offense to which I am pleading GUILTY have been explained to me, as well as the fact that for this crime, I WILL receive a sentence of:

[Applicable penalties for first and second offense operating a vehicle while intoxicated set forth].

I fully understand that this conviction may be used against me in the future to enhance or increase the sentence or penalties I will receive for any subsequent conviction of the crime of DRIVING WHILE INTOXICATED.

If I elect to have a trial, I have a right to have a competent counsel represent me at the trial and if I am unable to pay for counsel the Court will appoint a competent counsel to represent me. If convicted after trial, I have a right to appeal with competent counsel and by pleading GUILTY I am waiving these rights.

I am fully satisfied with the way the court has handled my case.

I fully understand that this GUILTY plea I am entering may result in a suspension of my driver's license for a minimum of 60 days.

No promises have been made to me by anyone in connection with this plea of GUILTY.

12/9/98
DATE

Ronald J. Blake
DEFENDANT

George Giacobbe
JUDGE

003206604
DRIVER'S LICENSE NO.

12/29/49 *[XXX-XX-XXXX]*
DATE OF BIRTH SOCIAL SECURITY #

NONE

DEFENSE COUNSEL

CERTIFICATE:

I hereby certify that the above rights have been read and explained to me to my full satisfaction ... and that I have no further questions to ask concerning by [sic] rights and that this acknowledgment by me will become part of these proceedings.

Metairie, Louisiana, this 9th day of Dec., 1998

Ronald J. Blake
Signature of Defendant

The minutes of December 9, 1998 indicated, "Defendant advised of Boykin rights by the Court. Defendant plead guilty under Art. 894 as charged and sentenced as follows: Docket Court Cost - $261.50, Fine Amount - $300.00, Active Probation – 12 Months."

The defendant testified at the hearing on the motion to quash. He indicated he was unrepresented by counsel when he entered his guilty plea to predicate number one. He denied that anyone went over any rights with him at that time. He claimed that although he had signed the waiver/guilty plea form, the trial judge had not gone over the form with him. He indicated he did not recall waiving his right to counsel. He also claimed the trial judge failed to explain his rights to trial, to confront his accusers, and against self-incrimination. He claimed he did not waive any of those rights.

On cross-examination, the defendant indicated he was forty-eight years old at the time of his guilty plea to predicate number one. He indicated his educational level was "12th grade," and he had no problem reading. He indicated he could read at the time of his guilty plea to predicate number one, and identified his signatures on the waiver/guilty plea form. When asked if he had fraudulently signed the form stating that he understood the rights, that they had been explained to him, and that

he waived them, he replied, "No. I'm just saying, I don't remember me signing and the Judge signing. I don't recall that."

The trial court held predicate number one was an "appropriately obtained conviction." The court noted it had been presented with the minutes of December 9, 1998, which indicated the defendant was advised of his **Boykin** rights and pled guilty as charged and the waiver/guilty plea form, which "very clearly goes through the Boykin rights and is entitled very clearly, 'Waiver of Constitutional Rights.'" The court found the defendant had filled out the portions of the form with handwriting and signed the form with a knowing and voluntary waiver of his rights.

The trial court did not err or abuse its discretion in denying the motion to quash predicate number one on the basis that the waiver form executed contemporaneously with the plea indicated that the defendant was advised of his right to counsel and waived that right. See **Deville, Id.**

This assignment of error is without merit.

INSTANT OFFENSE ADVICE OF RIGHTS

In assignment of error number 2, the defendant argues the trial court incorrectly advised him of his right to confront his accusers in connection with the instant offense because he never advised him he had the right to cross-examine his accusers.

A plea of guilty normally waives all non-jurisdictional defects in the proceedings prior to the plea. **Crosby**, 338 So.2d at 586. In **Crosby**, the court held it was not barred from reviewing the assignments of error specifically reserved at the time of the plea of guilty, where the trial court accepted the plea of guilty so conditioned (which the court had discretion to refuse, if proffered upon

such reservation). **Crosby**, 338 So.2d at 588. The court noted, analogously, a defendant will also waive his right to review of a non-jurisdictional pre-plea trial ruling unless, at the time of his plea, he expressly stipulates that he does not waive his right to review of it, the normal consequence of a guilty plea. **Crosby**, 338 So.2d at 591.

In the instant case, following the denial of his motion to quash predicates numbers one and two, the defendant pled guilty "pursuant to **State v. Crosby**." He raised no objection to the subsequent advice of rights, including the advice of the right to confront his accusers. The trial court specifically explained, "Since I'm allowing the plea under Crosby, the one issue you would be able to appeal, even entering a plea, is whether or not the Motion to Quash was handled properly. Do you understand by entering these pleas of guilty you're actually doing two things: you're waiving or giving up those constitutional rights and admitting to me you're in fact guilty?" The defendant answered affirmatively. He also answered affirmatively when the court inquired, "And you choose to do that?" The defendant then pled guilty. Accordingly, the defendant waived his right to review of the instant assignment of error. He failed to expressly stipulate that his guilty plea did not waive his right to review of the alleged error.

Moreover, the defendant was sufficiently advised of his right to confront his accusers and the record reflects a knowing and voluntary waiver of his rights and compliance with the constitutional requirements for the taking of voluntary guilty pleas in Louisiana. The trial court advised the defendant, "You have the right to confrontation. That means you can be right there at this table; see and hear everybody who comes to the witness stand to testify. So it's not done in secret."

The defendant's reliance on La. Code Crim. P. art. 556.1(A)(3) is misplaced. Article 556.1 does not provide an independent basis for upsetting a guilty plea. Violations of Article 556.1 that do not rise to the level of **Boykin** violations are not exempt from the broad scope of La. Code Crim. P. art. 921. **State v. Guzman**, 99-1528, 99-1753, p. 10 (La. 5/16/00), 769 So.2d 1158, 1164. As noted supra, 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**, 2000-2250 at pp. 8-9, 788 So.2d at 541. See also **State v. Juniors**, 2003-2425, pp. 60-61 (La. 6/29/05), 915 So.2d 291, 334-35, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006) ("When a defendant is represented by counsel, the trial court accepting his guilty plea may presume that counsel has explained the nature of the charge in sufficient detail that the defendant has notice of what his plea asks him to admit. The ultimate inquiry under **Boykin** is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant (citations omitted)."). At the time of his guilty plea to the instant offense, the defendant was sixty years old, had completed the 12th grade, and was experienced with the criminal justice system. He was represented by counsel, stated he was satisfied with the services of counsel, and indicated counsel had given him a full explanation of his constitutional rights, the elements of the crime, and the possible penalties.

This assignment of error is also without merit.

REVIEW FOR ERROR

Initially, we note that 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."

The trial court failed to impose the mandatory fine of two thousand dollars. See La. R.S. 14:98(D)(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, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

DECREE

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

CONVICTION AND SENTENCE AFFIRMED.