NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0986

STATE OF LOUISIANA

VERSUS

PETE DOMINGUEZ

Judgment Rendered: December 21, 2011

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Appealed from the
17th Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Case No. 478560

The Honorable Ashly Bruce Simpson, Judge Presiding

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Counsel for Defendant/Appellant
Pete Dominguez

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents with reasons.

GAIDRY, J.

The defendant, Pete Dominguez, was charged by bill of information with operating a vehicle while intoxicated, fourth offense, a violation of La. R.S. 14:98. He pled not guilty. During pretrial proceedings, counsel advised the court that the defendant was waiving his right to a trial by jury. At the conclusion of a bench trial, the defendant was convicted as charged. Thereafter, the defendant filed a motion to arrest judgment claiming the waiver of his right to a jury trial was not knowingly and intelligently made. See La. Code Crim. P. arts. 780 & 859(4). Following an evidentiary hearing, the trial court denied the motion. The defendant was sentenced to imprisonment at hard labor for twenty years. The court ordered that the first two years of the sentence be served without the benefit of parole. The defendant now appeals, urging in a single assignment of error that the trial court erred in denying his motion in arrest of judgment. Finding no merit in the assigned error, we affirm the defendant's conviction and sentence.

FACTS

On November 20, 2009, Luke Adams, a field agent with the Louisiana Department of Probation and Parole, was at Jordan's Mini Store on East 123rd Street in Lafourche Parish when he observed the defendant drive up in a white Ford Explorer. Adams immediately recognized the defendant because he previously supervised the defendant in connection with his probation on a forgery conviction. Because he was aware that the defendant had been arrested for D.W.I and should not have been driving, Adams decided to stop the defendant. Once the defendant exited the vehicle, Adams observed that the defendant was uneasy on his feet and his breath smelled of alcoholic beverages. The defendant's speech was also slightly

slurred. The defendant eventually admitted that he had consumed between five and six beers.

The defendant was arrested and charged with D.W.I., fourth offense. Several opened beer cans, an opened, half-empty bottle of Grey Goose vodka, a twenty-four pack of Natural Light beer and a twenty-four pack of Bud Light were found inside the vehicle the defendant was driving.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends the trial court erred in denying his motion in arrest of judgment because the state failed to prove that the waiver of his right to a jury trial was knowingly and intelligently entered.

The right to trial by jury in felony and certain misdemeanor cases is protected by both the federal and state constitutions. U.S. Const. amend. VI; La. Const. art. I, §§ 16, 17; *State v. Muller*, 351 So.2d 143, 145 (La. 1977). Article I, § 17 of the Louisiana Constitution requires that any waiver of this right be "knowingly and intelligently" made. Courts must indulge every reasonable presumption against waiver of this fundamental right. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); La. Code Crim. P. art. 780.

Article 780(A) of the Code of Criminal Procedure provides that a defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. At the time of arraignment, the trial court is required to inform the defendant of the right to waive trial by jury.

A valid waiver of the right to a jury trial must be established by a contemporaneous record setting forth an apprisal of that right followed by a

knowing and intelligent waiver by the accused. Waiver of this right is never presumed. *State v. Brooks*, 2001-1138 (La. App. 1st Cir. 3/28/02), 814 So.2d 72, 76, writ denied, 2002-1215 (La. 11/22/02), 829 So.2d 1037. The preferred method of ensuring the right is for the trial judge to advise the defendant personally on the record of his right to a trial by jury and to require that the defendant waive that right personally either in writing or by oral statement in open court on the record. However, a *Boykin*-like colloquy is not required, and it is not essential for the record to contain evidence of such advice by the trial court and a personal waiver by the defendant, provided the defendant's decision to waive the right to trial by jury was made knowingly and intelligently. *Brooks*, 814 So.2d at 78.

When the record does not clearly indicate a valid waiver of the right to a jury trial, the recent trend has not been to reverse, but rather to remand the case to the trial court for an evidentiary hearing on the issue of whether a valid jury waiver was obtained. See *State v. Goodwin*, 2005-51 (La. App. 5th Cir. 6/28/05), 908 So.2d 56, 59. See also *State v. Nanlal*, 97-0786 (La. 9/26/97), 701 So.2d 963. In *State v. Cappel,* 525 So.2d 335, 337 n.3 (La. App. 1st Cir.), writ denied, 531 So.2d 468 (La. 1988), this Court noted that when the record is insufficient to determine whether the defendant knowingly and intelligently waived his right to a jury trial, the testimony by defendant and defense counsel at an evidentiary hearing would certainly be relevant, if not dispositive of the issue.

The record in this case reflects that on January 19, 2010, at a pretrial conference, counsel for the defendant advised the court that the defendant would be waiving his right to a jury trial. The trial court stated that the waiver of the defendant's right to trial by jury would be more fully discussed on the morning of the trial. However, the trial transcript is devoid of any

further discussion of the waiver. The matter proceeded with a bench trial without any objection by the defendant.

Following his conviction, the defendant filed a motion in arrest of judgment requesting that his conviction be set aside because the trial court failed to advise him of his right to a jury trial and the ramifications of waiving the right. In response to the defendant's motion in arrest of judgment, on February 17, 2011, the district court held an evidentiary hearing on the issue of whether the defendant knowingly and intelligently waived his right to a jury trial. At the hearing, the court heard testimony from the defendant and his trial attorney, Damon Stentz. The trial court found Mr. Stentz's testimony to be credible. The court ruled that the defendant understood the waiver of the jury trial and knowingly and intelligently waived his right to a jury trial.

Mr. Stentz testified that he represented the defendant in the instant case and he also previously represented him in other D.W.I. cases. Mr. Stentz further testified that he spoke extensively with defendant regarding his right to have a jury decide his case. He also advised the defendant that he could waive a jury trial and have the judge decide the case. According to Mr. Stentz, he explained to the defendant that since he had prior D.W.I. convictions, which the jury would be made aware of, he thought the defendant stood a better chance with a judge hearing the case as opposed to a jury, so he suggested defendant waive his right to a jury trial. The defendant never indicated he did not understand the waiver of jury trial. Mr. Stentz further testified that based upon his conversations with the defendant regarding the right to a jury trial and waiver of that right, he was confident the defendant understood the right and he voluntarily made a decision to waive the right and proceed with a bench trial.

The defendant testified that Mr. Stentz did not discuss the jury trial waiver with him in detail. He claimed that although Mr. Stentz mentioned he had a right to a jury trial, he did not understand what Mr. Stentz was referring to. He claimed he just went along with Mr. Stentz's advice because he was his lawyer.

In denying the defendant's motion, the trial court found that Mr. Stentz's testimony was the only credible testimony, and it was evident Mr. Stentz had discussed the waiver of the jury trial with defendant prior to trial. As a result of this finding, the trial court specifically found that defendant knowingly and intelligently waived his right to a jury trial.

Reviewing the record, we find no error in the district court's determination that defendant knowingly and intelligently waived his right to a jury trial. Mr. Stentz's testimony indicates that the defendant was informed of his right to a trial by jury and that defendant decided to waive that right in light of advice given by Mr. Stentz. Credibility determinations are within the sound discretion of the trier of fact and will not be disturbed unless clearly contrary to the evidence. See *State v. Marshall,* 2004-3139, (La. 11/29/06), 943 So.2d 362, 369, cert. denied, 522 U.S. 905, 128 S.Ct. 239, 169 L.Ed.2d 179 (2007).

This assignment of error lacks merit.

SENTENCING ERROR

Under La. Code Crim. P. art. 920(2), we routinely review the record for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we note the following sentencing error. In imposing the sentence, the trial court failed to impose the mandatory fine of

five thousand dollars. See La. R.S. 14:98(E)(1)(a). Thus, the sentence is illegally lenient.

An illegal sentence may be corrected at any time by the court that imposed the sentence, or by an appellate court on review. La. Code Crim. P. art. 882(A). Nevertheless, although the trial court erred in imposing an illegally lenient sentence, this court will not correct the sentence as the error is not inherently prejudicial, but in the defendant's favor, and the state has not appealed the illegal sentence. *State v. Price,* 2005-2514 (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.

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

CONVICTION AND SENTENCE AFFIRMED.

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HUGHES, J., dissenting.

I respectfully dissent.

The waiver may have been discussed. The defendant may have been informed. The defendant may have understood. But when, and to whom, did he express his desire to waive a jury? I would submit that only the court, not an attorney, is empowered to grant the waiver. As noted, the trial transcript is devoid of any further discussion of the waiver.

Waivers of constitutional rights should be express and on the record, not dependant upon "credibility determinations."