

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1241

STATE OF LOUISIANA

VERSUS

KEVIN BRIAN HAYES

*JRW*  
*JWB*  
*JME*

Judgment Rendered: February 13, 2012

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Appealed from the  
Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Trial Court Number 498,383

Honorable Raymond S. Childress, Judge

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Walter P. Reed, District Attorney  
Covington, LA  
and  
Kathryn W. Landry  
Baton Rouge, LA

Attorneys for  
State – Appellee

Mary E. Roper  
Baton Rouge, LA

Attorney for  
Defendant – Appellant  
Kevin Brian Hayes

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

The defendant, Kevin Brian Hayes, was charged by bill of information, under Twenty-Second Judicial District Court Docket #498383, with one count of forcible rape (count I), a violation of La. R.S. 14:42.1; one count of unauthorized entry of an inhabited dwelling (count II), a violation of La. R.S. 14:62.3; and one count of second degree kidnapping (count III), a violation of La. R.S. 14:44.1, and initially pled not guilty. He moved for the dismissal of defense counsel and the appointment of new counsel who was not employed by the public defender's office. Thereafter, pursuant to a plea agreement for certain sentences for the instant charges, for certain sentences for additional charges under Twenty-Second Judicial District Court Docket #493665 and #490758, and in exchange for the State foregoing filing a habitual offender bill of information against him, the defendant withdrew his former pleas and pled guilty as charged on all counts. On count I, he was sentenced to twenty years at hard labor, with the first two years to be served without the benefit of probation, parole, or suspension of sentence. On count II, he was sentenced to six years at hard labor to run concurrently with the sentence imposed on count I. On count III, he was sentenced to twenty years at hard labor, with the first two years to be served without the benefit of probation, parole, or suspension of sentence, to run concurrently with the sentences imposed on counts I and II. Thereafter, the court imposed sentences for the offenses under Twenty-Second Judicial District Court Docket #493665 and #490758 to run concurrently with the sentences imposed on counts I, II, and III. He now appeals, contending the trial court denied him due process of law by failing to hold a hearing or rule on his motion to dismiss appointed counsel and appoint new counsel. For the following reasons, we affirm the convictions and sentences.

#### **FACTS**

Due to the defendant's guilty pleas, there was no trial, and thus, no trial

testimony concerning the facts of the offenses. Further, at the **Boykin**<sup>1</sup> hearing, the State and the defense stipulated to the factual basis for the defendant's guilty pleas. The bill of information charged the defendant committed counts I and II on August 3, 2010, and count III on August 5, 2010.

### **DENIAL OF DUE PROCESS**

In his sole assignment of error, the defendant contends the trial court denied him due process of law by failing to hold a hearing or rule on his motion to dismiss appointed counsel and appoint new counsel. He argues the case should be remanded to the trial court for a hearing to allow him to establish ineffective assistance of counsel, and thereafter, to withdraw his guilty pleas. The State argues the issue was waived when the defendant failed to object or reserve the issue for review. The State is correct.

Initially, we note, in his reply brief, the defendant claims trial defense counsel failed to properly investigate the charges against the defendant. Specifically, the reply brief suggests there was no factual basis for a completed act of rape, only an attempt. The argument is not strictly confined to rebuttal of points urged in the appellee's brief, and thus, will not be considered.<sup>2</sup> See Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.6.

The reply brief also references a police report which was "not made a part of the record." Only matters contained in the record can be reviewed on appeal. **State v. Vampran**, 491 So.2d 1356, 1364 (La. App. 1<sup>st</sup> Cir.), writ denied, 496 So.2d 347 (La. 1986).

The defendant was arrested on counts I, II, and III on August 17, 2010. On December 13, 2010, attended by counsel, the defendant waived reading of the bill of

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<sup>1</sup> **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

<sup>2</sup> Moreover, decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. **State v. Lockhart**, 629 So.2d 1195, 1208 (La. App. 1<sup>st</sup> Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. In order to receive an evidentiary hearing on his claim, the defendant would have to satisfy the requirements of La. C.Cr.P. art. 924 *et seq.*

information and pled not guilty. On January 11, 2011, the defendant moved for the dismissal of defense counsel and the appointment of new counsel who was not employed by the public defender's office. The *pro se* motion alleged: counsel failed to consult with the defendant "properly" on legal strategy; inefficient assistance of counsel; counsel failed to visit the defendant until ten days or less prior to pretrial; counsel deprived the defendant of due process; and counsel failed to respond to letters or jail requests.

On February 17, 2011, the defendant appeared with counsel at a **Boykin** hearing. The court asked the defendant if counsel's indications that the defendant wished to plead guilty to counts I, II, and III, as well as additional counts under docket #493665 and #490758, were correct. The defendant answered affirmatively. The court asked the defendant if it was his understanding that in the event the court accepted the defendant's guilty pleas, it would sentence him to different sentences, "but it's going to amount to 20 years with the Department of Corrections," and the State would not pursue habitual offender proceedings against him. The defendant answered affirmatively. The court asked the defendant if, with the exception of the sentencing agreement, anyone had threatened, coerced, intimidated, or pressured him to enter his guilty pleas. The defendant answered negatively.

Thereafter, for counts I, II, and III, the court read the definitions of the offenses and their possible penalties. The defendant indicated he understood the definitions and the possible penalties. The court advised the defendant of his **Boykin** rights, and the defendant indicated he understood those rights. The court asked the defendant if he understood that by pleading guilty he would be giving up the constitutional rights the court had explained to him, and, unless he wished to do so, he did not have to give up those rights. The defendant indicated he understood. The court asked the defendant if he was pleading guilty because he was in fact guilty. The defendant answered affirmatively. The court asked the defendant if he wished to waive his

constitutional rights and plead guilty. The defendant answered affirmatively. The court asked the defendant if he was satisfied with the representation of his attorney. The defendant answered affirmatively. The court asked the defendant if counsel had explained all of the defendant's rights to him. The defendant answered affirmatively.

The court asked counsel if he was satisfied that the defendant knowingly, intelligently, voluntarily, and willingly wanted to plead guilty to the charges. Counsel indicated he was satisfied. The defendant, his counsel, the State, and the trial court then reviewed and signed a written plea of guilty and waiver of rights form. The State and the defense stipulated a factual basis existed for all of the guilty pleas. Subsequently, the court accepted the defendant's guilty pleas and sentenced him in accordance with the plea agreement.

The defendant waived his motion to dismiss defense counsel and appoint new counsel. A defendant waives all pending motions by proceeding to trial without raising the issue that his pretrial motions were neither heard nor ruled upon. **State v. Maten**, 2004-1718 (La. App. 1<sup>st</sup> Cir. 3/24/05), 899 So.2d 711, 719, writ denied, 2005-1570 (La. 1/27/06), 922 So.2d 544; **State v. Thomas**, 39,648 (La. App. 2<sup>nd</sup> Cir. 5/11/05), 902 So.2d 1166, 1172, writs denied, 2005-2047, 2005-1959 (La. 3/23/07), 951 So.2d 1094, 1101.

This assignment of error is without merit.

### **CONCLUSION**

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

**CONVICTIONS AND SENTENCES AFFIRMED.**