

Judgment rendered May 17, 2006.
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C. Cr. P.

No. 40,989-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

DAVID DISOTELL

Appellant

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Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Webster, Louisiana
Trial Court No. 70739

Honorable Jeff Cox, Judge

* * * * *

INDIGENT DEFENDER BOARD
By: Jack "Buddy" Slaid

Counsel for
Appellant

LOUISIANA APPELLATE PROJECT
By: Peggy Sullivan

J. SCHUYLER MARVIN
District Attorney

Counsel for
Appellee

MARCUS PATILLO
CHARLES SMITH
JOHN M. LAWRENCE
Assistant District Attorneys

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Before STEWART, CARAWAY and MOORE, JJ.

MOORE, J.

The defendant, David Disotell, pled guilty to attempted possession of a Schedule I CDS with intent to distribute, reduced from the original charge of possession with intent. He was sentenced to three years at hard labor. He now appeals alleging the sentence is excessive. Our review of the record reveals a constitutionally defective plea. Accordingly we vacate and set aside the conviction and sentence, and remand to the trial court for further proceedings.

FACTS

On June 10, 2004, the defendant knowingly and intentionally attempted to distribute marijuana, a Schedule I CDS. The defendant pled guilty to this charge and the facts recited in court constituting the crime. He was subsequently sentenced to three years at hard labor. He appeals the sentence as excessive.

DISCUSSION

In order for a guilty plea to be valid, the accused must make a knowing and intelligent waiver of three constitutionally guaranteed fundamental rights. Those rights are the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Nuccio*, 454 So. 2d 93 (La. 1984); *State v. Jones*, 28,929 (La. App. 2 Cir. 4/2/97), 691 So. 2d 858. A guilty plea will not be considered free and voluntary unless the court advises the defendant of the triad of these rights as explained in *Boykin, supra*, and Louisiana jurisprudence.

In this instance, the transcript of the guilty plea hearing reveals that, although the defendant was informed of his right to a trial, he was not informed of his right to trial *by jury*, in violation of *Boykin, supra*. For this reason, the conviction and sentence must be vacated and set aside. *State v. Feaster*, 33,879 (La. App. 2 Cir. 11/1/00), 779 So. 2d 761; *State v. Kunzman*, 31,976 (La. App. 2 Cir. 5/5/99), 741 So. 2d 112; *see also State v. Walker*, 32,342 (La. App. 2 Cir. 9/24/99), 747 So. 2d 133, *writ denied*, 00-0999 (La. 11/13/00). (Following *Kunzman, supra*, the court vacated habitual offender adjudication when the minute entry from a prior plea showed that the defendant had merely been informed of his “right to trial.”)

Because the conviction and sentence is invalid, we pretermitted discussion of the assigned errors.

CONCLUSION

The failure to advise the defendant of his right to a trial by jury is fatal to the conviction in this case and the sentence based thereon. Accordingly, we vacate and set aside the conviction and sentence, and remand to the trial court for further proceedings.

**CONVICTION AND SENTENCE VACATED AND SET ASIDE;
REMANDED.**