

STATE OF LOUISIANA

NO. 15-KA-500

VERSUS

FIFTH CIRCUIT

TORI L. JONES

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 14-5703, DIVISION "F"
HONORABLE MICHAEL P. MENTZ, JUDGE PRESIDING

December 23, 2015

COURT OF APPEALS
FIFTH CIRCUIT

FILED

HANS J. LILJEBERG
JUDGE

CLERK
Cheryl G. ...

Panel composed of Judges Fredericka Homberg Wicker,
Robert M. Murphy, and Hans J. Liljeberg

WICKER, J., DISSENTS WITH REASONS

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AFFIRMED

Defendant, Tori L. Jones, appeals the trial court's denial of his motion to quash, in which alleged that the statute under which he was prosecuted, La. R.S. 15:542, is unconstitutional. For the following reasons, we affirm.

PROCEDURAL BACKGROUND

Defendant was charged with failure to maintain his registration as a sex offender by failing to provide community notification, in violation of La. R.S. 15:542. He was arraigned and pled not guilty. Defendant filed a motion to quash, arguing that the provisions of Louisiana law requiring sex offenders to register and providing penalties for sex offenders who fail to register are unconstitutional because they fail to account for the possibility of indigent sex offenders.¹ After a hearing, the trial court denied defendant's motion to quash.

¹ Defendant subsequently filed an amended motion to quash. However, the amendment only added instructions to serve the Louisiana Attorney General; the substance of this motion is the same as the original motion to quash.

Thereafter, on the same date as the motion hearing, defendant withdrew his not guilty plea and entered a guilty plea pursuant to the provisions of *State v. Crosby*,² specifically reserving his right to appeal the trial court's ruling on his motion to quash. Pursuant to the terms of the plea agreement, defendant was sentenced to two years imprisonment at hard labor, to run concurrently with his sentences in case number 488-068 in Orleans Parish and case number 99-1283 in Jefferson Parish. Defendant now appeals, challenging the ruling on his motion to quash.

FACTS

Defendant pleaded guilty to failure to maintain his registration as a sex offender, instead of proceeding to trial. During the plea colloquy, the State provided the following factual basis for the plea:

...if the State would proceed to trial it would prove beyond a reasonable doubt that in the Parish of Jefferson, Tori L. Jones on September 5, 2014 and September 30, 2014 violated Louisiana Revised Statute 15:542, and that he did fail to maintain his registration as a sex offender by failing to make his community notification.

At the hearing on the motion to quash, defendant testified and admitted that he did not comply with the sex offender registration requirements provided by law. He stated that he "never had a problem with complying" with the registration requirements but that he "didn't physically have the money to pay for the community notification" and was told that he "couldn't get an extension of time and they didn't want to take partial payment."

LAW AND DISCUSSION

In his sole assignment of error on appeal, defendant asserts that the trial court erred by denying his motion to quash, in which he alleged that the statute

² See *State v. Crosby*, 338 So.2d 584, 586 (La. 1976), which allows a defendant to plead guilty while reserving the right to appeal a pre-trial ruling.

under which he was prosecuted is unconstitutional. He contends that the motion to quash should have been granted, because he is indigent and thus, it was impossible for him to comply with the sex offender registration requirements. Defendant avers that he tried to follow the dictates of the law and that he should not be made to serve additional time in prison because he could not pay the entirety of the registration fee and the costs associated with community notification.

In his motion to quash filed in the trial court, defendant argued that Louisiana law requiring sex offenders to register and providing penalties for sex offenders who fail to register is facially unconstitutional because it fails to account for the possibility of indigent sex offenders. He argued that the registration requirements are a financial burden and that Louisiana should provide exceptions for indigent sex offenders, like some other states do. He further argued that it is unconstitutional to place someone in prison based on the fact that he is indigent.

The State responded that defendant's indigent status does not make him immune to the requirements of the law. In support of its position, the State cited *State ex rel. Olivieri v. State*, 00-0172 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001), and *Smith v. State*, 10-1140 (La. 1/24/12), 84 So.3d 487, wherein the Louisiana Supreme Court examined and upheld the requirements and obligations of sex offenders. The State also cited this Court's decision in *State v. Muth*, 13-1003 (La. App. 5 Cir. 6/24/14), 145 So.3d 495, which affirmed the defendant's conviction for failure to register as a sex offender by failing to provide community notification after reviewing the defendant's sentence for unconstitutional excessiveness.

After a hearing, the trial court denied defendant's motion to quash, stating:

...the Court is bound by the *State v. Muth* decision, the *Olivieri v. State* decision, and the *Smith v. State* decision cited in the State's Memorandum and Opposition to the

motion. The Court is cognizant of the situation, not unsympathetic, but bound by the law. So the Court is going to deny the motion.

A motion to quash is essentially a mechanism by which to raise pre-trial pleas of defense, i.e., those matters which do not go to the merits of the charge. La. C.Cr.P. art. 531-534; *State v. Lewis*, 10-1022 (La. App. 5 Cir. 9/27/11), 75 So.3d 495, 500. It is treated much like an exception of no cause of action in a civil suit. *State v. Dufrene*, 02-1083 (La. App. 5 Cir. 4/8/03), 846 So.2d 46, 48. In considering a motion to quash, a court must accept as true the facts contained in the bill of information, and determine as a matter of law and from the face of the pleadings, whether a crime has been charged. *Lewis*, 10-1022 at 6, 75 So.3d at 500. Generally, the trial judge's denial of a motion to quash should not be reversed in the absence of a clear abuse of the trial court's discretion. *State v. Lommasson*, 11-536 (La. App. 5 Cir. 11/29/11), 81 So.3d 796, 799.

In his motion to quash, defendant raised the constitutionality of La. R.S. 15:542. Statutes are presumed valid and their constitutionality should be upheld whenever possible. *State v. Griffin*, 495 So.2d 1306, 1308 (La. 1986). The burden of clearly establishing unconstitutionality rests upon the party who attacks the statute. *State v. Hair*, 00-2694 (La. 5/15/01), 784 So.2d 1269, 1274. In determining the constitutionality of a statute, courts must follow the basic rules of statutory construction. *Id.* Louisiana criminal statutes must be "given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." La. R.S. 14:3. Moreover, the Louisiana Legislature has sole authority under the Louisiana Constitution to define conduct as criminal and to provide penalties for such conduct. La. Const. art. 3, § I; *State v. Granier*, 99-3511 (La. 7/6/00), 765 So.2d 998, 1000.

In the present case, defendant was charged under the statutory scheme, La. R.S. 15:540, *et seq.*, requiring sex offenders, sexually violent predators, and child sexual predators to register with state and local law enforcement agencies. Defendant pleaded guilty to failure to maintain his registration as a sex offender, as required by La. R.S. 15:542, having been previously convicted of carnal knowledge of a juvenile in violation of La. R.S. 14:80.³

In *Olivieri, supra*, the Louisiana Supreme Court considered an *ex post facto* challenge to the sex offender registration provisions and addressed the issue of costs associated with sex offender registration. After evaluating the provisions of the sex offender statutes, the Court first noted that the legislative intent behind the statutes was to alert the public for the purpose of public safety, a remedial intent, and not to punish convicted sex offenders. *Olivieri*, 00-0172 at 19, 779 So.2d at 747. The Court found that although the registration requirements impose the burden of community notification on convicted sex offenders and the costs of compliance are “weighty,” the costs were a necessary part of the regulatory scheme of the legislation at the time of the offender’s release. *Id.* at 749. Accordingly, the Louisiana Supreme Court held that the provisions did not violate the constitutional prohibition against the enactment of *ex post facto* laws. *Olivieri*, 00-0172 at 21-25, 779 So.2d at 748-50.

In *Smith, supra*, the Louisiana Supreme Court considered another *ex post facto* challenge to the sex offender registration provisions. The Court found that the sex offender statutes are “not so obtrusive as to deem them punitive rather than remedial or regulatory,” and that while the requirements “may be harsh” and “may impact a sex offender’s life in a long-lived and intense manner, and also be quite

³ See *State v. Jones*, 13-0098 (La. App. 5 Cir. 9/4/13), 125 So.3d 1169.

burdensome to the sex offender,” the Court did not find them to constitute an infringement on the principles of *ex post facto*. *Smith*, 84 So.3d at 499.

In *State v. Flores*, 14-642 (La. App. 5 Cir. 12/23/14), 167 So.3d 801, the defendant challenged the sufficiency of his conviction for failure to register as a sex offender, arguing that it was illegal “to convict someone of a felony offense and incarcerate them for a violation of the sex offender registration requirements when they simply can’t pay the costs of the registration.” This Court found no merit in the defendant’s argument and stated that the “economically harsh results of [the] well justified system of public notification is not the result of governmental action, but as a consequence of the sex offenders’ crimes.” *Flores*, 14-642 at 8,167 So.3d at 807 (citing *Olivieri*, 00-0172 at 24, 779 So.2d at 749).

In the present case, defendant asserts that an indigent person may not be incarcerated because he is unable to pay a fine which is part of his sentence, citing *State v. Jones*, 588 So.2d 805 (La. App. 2 Cir. 1991). While we agree that the law provides that an indigent person may not be incarcerated because he is unable to pay a fine which is part of his sentence, we note that the costs and fees associated with complying with the sex offender registration statutes are not fines that are part of a sentence. The Louisiana Supreme Court has consistently held that the provisions of the sex offender registration statutes are not punitive and the financial burden of the public notification process is not a separate punishment for an offense but, rather, a condition of an offender’s release on parole or probation. *See Olivieri, supra*; *State v. Golston*, 10-2804 (La. 7/1/11), 67 So.3d 452; *State v. I.C.S.*, 13-1023 (La. 7/1/14) 145 So.3d 350.

Considering the record before us, along with the applicable law, we find that defendant has not shown that La. R.S. 15:524 is unconstitutional, and the trial court

did not abuse its discretion in denying defendant's motion to quash. Accordingly, this assignment of error is without merit.

ERRORS PATENT

The record was reviewed for errors patent, according to La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990). Our review reveals that defendant received an illegally lenient sentence, because the trial court did not impose the mandatory fine provided by La. R.S. 15:542.1.4(A)(1), which states:

A person who ... fails to provide community notification as required by the provisions of this Chapter...shall, upon first conviction, be fined not more than one thousand dollars and imprisoned with hard labor for not less than two years nor more than ten years without benefit of parole, probation, or suspension of sentence.

This Court has, as a matter of discretion pursuant to La. C.Cr.P. art. 882, routinely declined to correct an illegally lenient sentence for failure to impose a fine when the defendant is indigent. *See State v. Campbell*, 08-1226, p. 8 (La. App. 5 Cir. 5/26/09), 15 So.3d 1076, 1081, *writ denied*, 09-1385 (La. 2/12/10), 27 So.3d 842. In the present case, defendant is represented by the Louisiana Appellate Project, which provides appellate services for indigent criminal defendants in non-capital felony cases. Due to defendant's indigent status, we decline to remand this matter for imposition of the mandatory fine.

DECREE

For the foregoing reasons, we affirm defendant's conviction and sentence.

AFFIRMED

STATE OF LOUISIANA

NO. 15-KA-500

VERSUS

FIFTH CIRCUIT

TORI L. JONES

COURT OF APPEAL

STATE OF LOUISIANA

FNW

WICKER, J., DISSENTS WITH REASONS

I respectfully dissent. For the following reasons, it is my opinion that Mr. Jones' conviction and sentence are unconstitutional under the facts of this case and that the trial court erred in denying Mr. Jones' motion to quash.

In my opinion, the following uncontroverted facts are relevant to our analysis of the question presented. On August 16, 1999, Mr. Jones was convicted of carnal knowledge of a juvenile in violation of La. R.S. 14:80 and sentenced to four years imprisonment at hard labor. Upon his release, Mr. Jones registered as a sex offender and paid all of the requisite fees for registration and community notification in Orleans Parish. Thereafter, Mr. Jones was incarcerated on charges unrelated to the instant proceedings. Upon his release, Mr. Jones again registered in Orleans Parish and paid the registration and community notification fees. After he was unable to pay his rent in Orleans Parish, Mr. Jones moved to Jefferson Parish, where he timely reported to the Jefferson Parish Sheriff's Office, registered his new address, and paid the fees for registering in Jefferson Parish. The Jefferson Parish Sheriff's Office then notified Mr. Jones that the cost of making community notifications, required by the sex offender registration statute, was approximately \$580.00. Mr. Jones attempted to make a partial payment of \$300.00 and requested an extension of time to

pay the remaining amount, but he was told that the office would not accept partial payment and would not grant him an extension of time within which to make full payment.

On October 17, 2014, the Jefferson Parish District Attorney filed a bill of information charging Mr. Jones with failure to maintain his registration as a sex offender by failing to make his community notification in violation of La. R.S. 15:542. At his arraignment, Mr. Jones pled not guilty and, on March 23, 2015, he filed a motion to quash the bill of information, arguing that La. R.S. 15:542 was unconstitutional as applied to him because it punished him for his indigency by failing to make an exception for sex offenders who are indigent. After a June 23, 2015 hearing on the motion to quash, the trial court denied Mr. Jones' motion. On that same date, Mr. Jones withdrew his not guilty plea and entered a guilty plea pursuant to *State v. Crosby*, 338 So.2d 584 (La. 1976), wherein he reserved his right to appeal the trial court's ruling on his motion to quash, and the trial court sentenced Mr. Jones to two years imprisonment at hard labor, the minimum sentence allowed for a violation of La. R.S. 15:542. On June 25, 2015, Mr. Jones filed a timely motion for appeal, challenging the trial court's ruling on his motion to quash, which the trial court granted on June 29, 2015.

In my opinion, the jurisprudence cited by the majority does not control in this case. In both *State ex rel. Olivieri v. State*, 00-0172 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001), and *Smith v. State*, 10-1140 (La. 1/24/12), 84 So.3d 487, the Louisiana Supreme Court held that the registration and community notification requirements of the sex offender registration statute do not violate the *ex post facto* clause on the ground that the

statute's requirements are remedial rather than punitive in nature.

However, the questions presented in those cases are not at issue in the case at bar. Mr. Jones has not asserted any *ex post facto* violation, and the imposition of statutorily required fees is not the governmental action of which he is aggrieved in this case; rather, it is the felony accusation presented by the bill of information filed against him and the resulting conviction that implicate constitutional concerns as applied to Mr. Jones.

Moreover, the majority's reasoning, borrowed from *State v. Flores*, 14-642 (La. App. 5 Cir. 12/23/14), 167 So.3d 801, 807, that "the economically harsh results of [the] well justified system of public notification is not the result of governmental action, but as a consequence of the sex offenders' crimes," is not persuasive under the facts of this case. Though the community notification process itself is a consequence of a sex offender's crimes, Mr. Jones' new felony conviction is the result of the government's refusal to accept partial payment of the community notification fees and its refusal to grant Mr. Jones an extension of time within which to pay the remainder of the community notification fees.

Instead, I would find that Mr. Jones' conviction is unconstitutional under the Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 75 L.Ed. 2d 221 (1983), the facts of which bear a strong resemblance to Mr. Jones' case. In *Bearden*, the Supreme Court held that a trial court's imprisonment of an indigent defendant for failure to pay a fine, without determining whether the defendant made "bona fide" attempts to pay the fine or whether adequate alternative methods of punishing the defendant were available, violated the Equal Protection Clause of the Fourteenth Amendment. In *Bearden*, the defendant was convicted of felony theft and sentenced to serve probation, which was

conditioned upon his payment of a fine and restitution. *Id.* at 661.

Though the defendant in *Bearden* initially paid a portion of the fine, after he was laid off from his job and unable to find work, he notified his probation officer that he would be late with payment of the remaining balance of the fine. *Id.* The State subsequently filed a petition to revoke his probation and the trial court sentenced the defendant to serve the remainder of his sentence in prison for failure to pay the balance of the fine. *Id.* at 663. The Court reasoned that if the defendant made bona fide, reasonable efforts to pay the fine or restitution but could not do so through no fault of his own, depriving him of his conditional freedom simply because he could not pay the fine would be contrary to the fundamental fairness required by the Fourteenth Amendment. *Id.* at 672-73.

During the hearing on his motion to quash, Mr. Jones' provided uncontroverted testimony regarding the circumstances of his offense. Mr. Jones testified that his status as a sex offender, which is denoted in large, red font on his driver's license, has caused him great difficulty in obtaining employment since his release. Despite this difficulty, Mr. Jones initially demonstrated full compliance with the registration and community notification requirements of La. R.S. 15:542 in Orleans Parish. When his inadequate finances required him to move to Jefferson Parish, Mr. Jones timely notified the Jefferson Parish Sheriff's Office of his change of address, submitted the proper registration paperwork, and paid all fees attendant thereto. However, the Jefferson Parish Sheriff's Office notified Mr. Jones that the fee for making the requisite community notifications was approximately \$580.00, and Mr. Jones was unable to pay that amount. Mr. Jones testified that he attempted to make a partial payment of \$300.00 and requested an extension of time to pay the

remaining amount of \$280.00, but he was told that partial payment was not accepted and extensions were not granted.

Louisiana Revised Statutes 15:540 sets forth the legislative findings and purpose of the sex offender registration statute. It is clear from the intent enunciated in La. R.S. 15:540 that the purpose of the sex offender registration law is to protect communities, aid law enforcement in investigating sex offenders, and enable the quick apprehension of sex offenders. *See also State ex rel. Olivieri, 779 So.2d at 757.*

Mr. Jones' uncontroverted testimony at the hearing on the motion to quash reflects that his actions satisfied the legislative goals of the sex offender registration statute. Mr. Jones timely registered his new residence in Jefferson Parish with the Jefferson Parish Sheriff's Office, thereby allowing law enforcement to protect the local community by alerting them of his new residence, aiding local law enforcement in investigating him, and enabling quick apprehension of him if necessary. Moreover, Mr. Jones' attempted to fully comply with the community notification requirements of the law by requesting to make a partial payment of the community notification fees and requesting additional time to pay the remaining balance of the fees. However, he was denied the opportunity to demonstrate full compliance.

Accordingly, I would find that Mr. Jones' made sufficient bona fide efforts to comply with the sex offender registration statute, and that the State had adequate alternative methods of achieving compliance, such as accepting partial payment and granting Mr. Jones' request for an extension of time to pay the remaining balance of the community notification fees. The trial court's denial of Mr. Jones' motion to quash and the subsequent imposition of a sentence of two years imprisonment at

hard labor effectively punished Mr. Jones solely for his status as an indigent, in violation of the Fourteenth Amendment's Equal Protection Clause, under *Bearden*. Therefore, I would reverse the trial court's denial of Mr. Jones' motion to quash and declare the sex offender registration statute unconstitutional as applied to him.

Finally, the financial implications of the trial court's disposition in this case in comparison to the relatively slight burden of allowing Mr. Jones to make partial payment and granting him an extension of time to pay the remaining amount shows the absurd financial consequences of his conviction. The trial court sentenced Mr. Jones to two years imprisonment at hard labor. Under the "good time" provision of La. R.S. 15:571.3, Mr. Jones was eligible for a diminution of his sentence for good behavior, reducing the length of his imprisonment to 292 days. According to the Louisiana Department of Corrections, the average cost of incarcerating an inmate at the facility where Mr. Jones was in custody is \$24.39 per day. Therefore, the cost of incarcerating Mr. Jones for his failure to fully pay a \$580.00 community notification fee was \$7,121.88. Because this estimate is made without consideration of the State's expenses in prosecuting this case and providing Mr. Jones with an indigent defender both at trial and on appeal, this amount only considers part of the total cost to the State. Though the costs of permitting Mr. Jones to make partial payment of the community notification fee and granting him an extension to pay the remaining balance are not certain, the amount would undoubtedly be miniscule in comparison to the exorbitant costs incurred by the State in this case, and such an alternative measure would simultaneously prevent the deprivation of liberty and fundamental unfairness of imprisoning Mr. Jones solely due to his indigency.

Accordingly, for the foregoing reasons, I would reverse the trial court's judgment and grant the defendant's motion to quash the bill of information against him on the ground that application of La. R.S. 15:542 in his case violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

SUSAN M. CHEHARDY
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **DECEMBER 23, 2015** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



CHERYL Q. LANDRIEU
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15-KA-500

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