**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1263

STATE OF LOUISIANA

VERSUS

MICHAEL E. FISHER

***DATE OF JUDGMENT:*** SEP 2 1 2012

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 455700, DIVISION E, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. BURRIS, JUDGE

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Walter P. Reed, District Attorney
Covington, Louisiana

Kathryn W. Landry
Attorney for the State
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Juan C. Labadie
Gretna, Louisiana

Bertha M. Hillman
Thibodaux, Louisiana

Counsel for Defendant-Appellant
Michael E. Fisher

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BEFORE: KUHN, PETTIGREW, MCDONALD, JJ.

**Disposition:** **CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED WITH INSTRUCTIONS.**

Pettigrew, J. - Concurs and assigns Reasons

McDonald, J. Concurs.

KUHN, J.,

The defendant, Michael E. Fisher, was charged by bill of information with one count of failure to register as a sex offender, a violation of La. R.S. 15:542, and pled not guilty. He moved to quash the bill of information. Following a hearing, the motion was denied. Thereafter, the State amended the charge to one count of attempted failure to register as a sex offender, a violation of La. R.S. 14:27 and La. R.S. 15:542, and the defendant pled guilty pursuant to ***State v. Crosby***, 338 So.2d 584 (La. 1976), reserving his right to seek review of the ruling denying the motion to quash. The trial court sentenced him to two years at hard labor, suspended, and two years of probation subject to general and special conditions, including a $500.00 fine. The defendant now appeals, contending that *ex post facto* application of La. R.S. 15:540 *et seq.* subjects him to double jeopardy. For the following reasons, we affirm the conviction, vacate the sentence, and remand for resentencing.

## FACTS

On August 12, 1993, the defendant was convicted, under docket number 92-21289 CFA, Eighteenth Judicial Circuit Court, Brevard County, Florida, of three counts of lewd and lascivious acts upon a child, two counts of sexual activity with a child, and one count of attempting to entice a child to commit a lewd and lascivious act. Thereafter, the defendant moved to Mississippi and was released from probation in 1998.[1] Although the defendant moved to Louisiana in 2003, he did not register as a sex offender until May 25, 2006. Thereafter, he failed to maintain his registration.[2]

[1] The defendant testified he was placed on probation for ten years, but Mississippi exercised an option to "close the case" after five years.

[2] There was no testimony concerning the date of the offense; the bill of information charged that the offense occurred on July 27, 2008.

## ***EX POST FACTO* CLAUSE**

In his sole assignment of error, the defendant concedes that the State correctly argued to the trial court that the Louisiana Supreme Court had determined that the requirements of La. R.S 15:540 *et seq.* can be applied retroactively without violating the prohibition against *ex post facto* laws. See ***State ex rel. Olivieri v. State***, 00-0172 (La. 2/21/01), 779 So.2d 735, 750, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001) & ***Hutchinson v. Louisiana***, 534 U.S. 892, 122 S.Ct. 208, 151 L.Ed.2d 148 (2001). The defendant argues, however, that the Louisiana statutes governing sex offender registration are intended as a law enforcement tool and have become so punitive in nature when viewed against the backdrop of other states' legislation as to make their retroactive application constitutionally prohibited. He further contends that forcing him to register serves as multiple punishment because he has already completed his sentence and probation.

On appeal from the denial of a motion to quash, a trial court's legal findings are subject to a *de novo* standard of review. See ***State v. Smith***, 99-0606, 99-2094, 99-2015, 99-2019 (La. 7/6/00), 766 So.2d 501, 504.

In ***State v. Mitchell***, 10-0193 (La. App. 4th Cir. 9/29/10), 49 So.3d 958, 959 n.1, the defendant also conceded that ***State ex rel. Olivieri*** was contrary to his position, but argued that La. R.S. 15:542 and its progeny had been changed and amended so many times since its initial enactment that the decision was "ripe for revisiting." We agree with the court in ***Mitchell*** that "[s]uch an argument to this court is meritless." ***Mitchell***, 49 So.3d at 959 n.1.

We also reject the defendant's claim that requiring him to register as a sex offender after completion of his sentence and probation subjects him to multiple punishment. The Louisiana Supreme Court has recently reaffirmed that the restrictions imposed by the Louisiana Sex Offender Registration Laws are civil, not

criminal. See ***State v. Trosclair***, 11-2302 (La. 5/8/12), 89 So.3d 340, 350. Thus, requiring the defendant to register does not "punish" him. Pursuant to the law in effect at the time of the commission of the sex offenses, the defendant was required to register and give notice until ten years from the date of initial registration. See La. R.S. 15:544(A) (prior to amendment by 2007 La. Acts No. 460, §2). Following amendment by 2007 La. Acts No. 460, §2, La. R.S. 15:544(B)(1) provided that a person convicted of a sexual offense against a victim who was a minor was required to register and give notice for twenty-five years after the date of initial registration in Louisiana.

The defendant did not register as a sex offender until May 25, 2006. The period of time a sex offender is obligated to register may be extended during the time of his original registration period without violating the *ex post facto* clause. See ***State v. Smith***, 10-1140 (La. 1/24/12), 84 So.3d 487, 498. Accordingly, under the current statutory law and decisions of the Louisiana Supreme Court, the trial court did not err in denying the motion to quash.

This assignment of error is without merit.

## REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.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." La. C.Cr.P. art. 920(2).

The defendant pled guilty to attempted failure to register as a sex offender, a violation of La. R.S. 14:27 and La. R.S. 15:542. A person who fails to register as a sex offender, update registration annually, or provide proof of residence address or community notification, 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. La. R.S. 15:542(F)(1) (prior to amendment by 2007 La. Acts No. 460, §2). Whoever attempts to commit any crime shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both. La. R.S. 14:27(D)(3). Thus, the sentencing range in this matter was a fine of not more than $500.00 and imprisonment at hard labor for not more than five years *without benefit of parole, probation, or suspension of sentence.* The trial court, however, improperly sentenced the defendant to two years at hard labor, suspended, and two years of probation subject to general and special conditions, including a $500.00 fine. Accordingly, we hereby vacate the sentence imposed by the trial court and remand this matter for resentencing in accordance with this decision. See La. Code Crim. P. arts 881.4(A) & 882(A).

**CONVICTION AFFIRMED; SENTENCE VACATED; AND REMANDED WITH INSTRUCTIONS.**

STATE OF LOUISIANA

VERSUS

MICHAEL E. FISHER

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

I am of the opinion the Louisiana Supreme Court should revisit the issue as to whether applying La. R.S. 15:540 et seq., retroactively violates the prohibition against *ex post facto* laws. At this time the Louisiana Supreme Court has spoken in its holdings of **State ex rel. Olivieri v. State**, 2000-0172 (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 **State v. Trosclair**, 2011-2302 (La. 5/8/12), 89 So.3d 340. Under the civilian doctrine of jurisprudence constante, I am compelled to concur. See **Hogg v. Chevron USA, Inc.**, 2009-2632, p. 14 (La. 7/6/10), 45 So.3d 991, 1014.