NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0012

STATE OF LOUISIANA

VERSUS

RODNEY R. SCOTT

Judgment rendered June 10, 2011.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 434441
Honorable Allison H. Penzato, Judge

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HON. WALTER P. REED
DISTRICT ATTORNEY
CONVINGTON, LA
AND
KATHRYN W. LANDRY
SPECIAL APPEALS COUNSEL
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

HECTOR R. LOPEZ
COVINGTON, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
RODNEY R. SCOTT

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

PETTIGREW, J.

The defendant, Rodney R. Scott, was charged by bill of information with possession of 400 grams or more of cocaine, a violation of La. R.S. 40:967(A)(1). The defendant filed a motion to suppress the evidence and, following a hearing on the matter, the motion was denied. Thereafter, the defendant withdrew his prior plea of not guilty and, at a **Boykin** hearing, entered a **Crosby** plea of guilty to the charge, reserving his right to challenge the trial court's ruling on the motion to suppress. The State filed a multiple offender bill of information. The defendant was adjudicated a second-felony habitual offender and sentenced to thirty-five years at hard labor. See **State v. Crosby**, 338 So.2d 584 (La. 1976). The defendant now appeals, designating the following four assignments of error:

> 1. The warrantless stop of [the defendant's] vehicle violated his Fourth Amendment [r]ights.
>
> 2. The State failed to prove a basis for an exception to [the defendant's] Fourth Amendment protections against warrantless intrusion.
>
> 3. The civil administrative stop of [the defendant's] bobtail tractor did not properly limit the discretion of Trooper Pierce and therefore infringed upon [the defendant's] Fourth Amendment right against warrantless intrusion.
>
> 4. Evidence seized in connection with a violation of [the defendant's] Fourth Amendment Right is subject to exclusion.[1]

For the reasons that follow, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

At the motion to suppress hearing, Sergeant Donald Pierce, with the Louisiana State Police, testified that on July 16, 2007, he was on patrol on I-12 in St. Tammany Parish. At about 11:40 p.m., Sergeant Pierce[2] stopped the defendant, who was driving a bobtail tractor (a tractor with no trailer). Certified in motor carrier safety inspections, Sergeant Pierce randomly picked the defendant's vehicle for a safety inspection, which

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[1] We assume the defendant meant the evidence seized is subject to suppression.

[2] At the time of the stop, Sergeant Pierce was a road trooper with the Louisiana State Police.

allows an officer to review the truck driver's paperwork and logbook and to check the vehicle to verify the driver is not violating any safety regulations. Sergeant Pierce did not observe the defendant violate any traffic law prior to stopping him.

Upon the stop, Sergeant Pierce asked the defendant for his driver's license. He then asked the defendant a couple of questions to determine if the defendant was driving a commercial motor vehicle. The defendant informed him he was using the truck as a commercial motor vehicle. Once outside of his truck, Sergeant Pierce then asked the defendant for his registration, medical card, and logbook. The defendant said he had to go back to the truck to get these documents. Sergeant Pierce asked the defendant if there was a co-driver or anyone else in the vehicle. The defendant responded there was not. Shortly thereafter, Sergeant Pierce saw someone named Mr. Reese sitting in the passenger seat of the truck. Mr. Reese could not speak because he had throat cancer. Sergeant Pierce discovered the defendant's logbook was about 23 hours behind. When he questioned the defendant about this and the purpose of his trip, the defendant told him that he went to Texas to pick up a tractor at a Peterbilt dealership, but did not know the name of the dealership. The defendant said he waited over 24 hours in a truck stop in Texas for his boss to call him and tell him what dealership to go to. Not believing the defendant's story, Sergeant Pierce ran a criminal records check on the defendant and Mr. Reese. He discovered that each had a criminal history for narcotics. Sergeant Pierce asked the defendant if he had anything illegal in his truck, and the defendant advised him that he did not. Sergeant Pierce asked the defendant if he could search his truck, and the defendant said that he could. Sergeant Pierce filled out a Louisiana State Police consent form and read it to the defendant. The defendant signed the consent form. Sergeant Pierce searched the inside of the truck. In the sleeper portion, the top bed was folded up. When he pulled the bed down, he found a black leather bag containing three kilograms of cocaine and a paper bag containing two kilograms of cocaine.

ASSIGNMENTS OF ERROR NOS. 1 - 4

In these four related assignments of error, the defendant argues the warrantless stop of his vehicle violated his Fourth Amendment rights. Specifically, the defendant

contends Sergeant Pierce did not have reasonable suspicion or probable cause to stop his truck. He further maintains that the stop and search of his truck was not justified under the regulatory exception to the Fourth Amendment's warrant requirement.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

As noted by the trial court in its reasons for denying the motion to suppress, the statutory authority for the stop of the defendant's vehicle was La. R.S. 32:1505, which provides in pertinent part:

> A. The secretary may authorize any officer, employee, or agent of the department[3] to:
>
> (1) Enter, inspect, and examine at reasonable times and in a reasonable manner the property or records of any person or carrier, to the extent those records or properties relate to this Chapter and the transportation of hazardous materials, freight, or passengers; and
>
> (2) Stop and inspect any transport vehicle or part thereof for any violation of this Chapter or any regulation issued pursuant thereto.

The defendant argues in his brief that his Fourth Amendment rights were violated because Sergeant Pierce stopped him without reasonable suspicion or probable cause that he was engaged in criminal activity. The defendant further asserts that Sergeant Pierce did not observe any traffic violations before stopping him. Sergeant Pierce testified at the motion to suppress hearing that he did not observe the defendant violate a traffic law and that his stop of the defendant was a random stop to conduct a federally regulated safety inspection of a commercial motor vehicle. Sergeant Pierce testified he had gone to MCSAP (Motor Carrier Safety Assistance Program) school where he received his certification to randomly stop commercial vehicles for safety inspections. Louisiana State

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[3] Department of Public Safety and Corrections. See La. R.S. 32:1502(4).

Trooper Steven Paulus, who arrived later on the scene as backup, testified at the motion to suppress hearing about the purpose of conducting a MCSAP stop:

> It's the Motor Carrier Safety Assistance Program where we adopt the federal guidelines, and it's to ensure that the drivers are following the rules for logbook, maintaining their hours, and to ensure that the vehicles comply with the federal standards for safety and have all their lights, fire extinguishers, et cetera.

Lieutenant Mark Mix, with the Louisiana State Police, testified at the motion to suppress hearing that he was with the State Police motor carrier unit and that his job entailed inspecting commercial motor vehicles to ensure compliance with the Federal Motor Carrier Regulations through enforcement. Lieutenant Mix explained that Louisiana law has enacted the Federal Motor Carrier Safety Regulations. Lieutenant Mix further testified that MCSAP-qualified inspectors could stop any commercial vehicle in interstate commerce and that they did not need probable cause to stop a vehicle. When asked on cross-examination if he could stop a vehicle even though he did not see anything wrong with it, Lieutenant Mix replied that Federal Motor Carrier Regulations state that vehicles in commerce are subject to inspection at any time.

Based on the foregoing, we find Sergeant Pierce's random MCSAP stop of the defendant pursuant to La. R.S. 32:1505 was valid. Sergeant Pierce needed neither probable cause nor reasonable suspicion of a traffic violation to randomly stop the defendant's vehicle; nor was Sergeant Pierce required to observe some defect on the defendant's vehicle before stopping him. Louisiana Revised Statutes 32:1505 specifically allows for the random inspections of commercial vehicles without first requiring the officer to have reasonable suspicion or probable cause to stop the vehicle.

The defendant in his brief devotes a good amount of his argument to the notion that Lieutenant Mix relied on a different statute - La. R.S. 32:1302 - as the authority to randomly stop commercial vehicles. Under Section 1302, a police officer needs "reasonable cause" to believe a vehicle is unsafe or not equipped as required by law to

stop it.[4] As we noted, the proper authority to make random stops for inspection is La. R.S. 32:1505. That Lieutenant Mix may have not stated the correct law in his testimony is of no moment. Moreover, Lieutenant Mix specifically stated in his testimony that he could not remember the law, and only agreed that the applicable law was La. R.S. 32:1302 when the prosecutor suggested that that was the law. The following testimony bears this out. On cross-examination, Lieutenant Mix testified as follows:

> Q. The law, you just mentioned the Louisiana law. Do you know the specific statute?
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> A. I think it's Statute -- if I'm not correct, I think it's Statute -- I'm not 100 percent sure. I think it's 49:1303, 1303, 1305.
>
> Q. 49?
>
> A. I'm thinking, I'm not quite sure. That gives the Louisiana State Police the authority to perform motor vehicle inspections.
>
> I'm not a lawyer. I'll have to apologize, Your Honor. I don't like to quote law and stuff like that. I'm not that type of person.

On redirect examination, the prosecutor asked, "Lieutenant, if I gave you the statute Title 32, Section 1301, 1302, does that sound like -- ?" Lieutenant Mix responded, "That is correct. I'm sorry about that. Yeah."

Finally, we note that La. R.S. 32:1301 et seq., falls under the "Motor Vehicle Inspection" chapter. These sections apply to "any motor vehicle." See La. R.S. 32:1301. Section 1302 allows a police officer to stop any vehicle when he notices a defect that could be unsafe on that vehicle. While inevitably there is overlap between Sections 1302 and 1505, Section 1302 is not the authority for officers to make random stops of commercial vehicles. That specific authority is squarely contained within Section 1505, which falls under the chapter heading of "Hazardous Materials Transportation and Motor Carrier Safety." As can be seen in Section 1501 (entitled "Declaration of policy"), La. R.S.

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[4] Louisiana Revised Statutes 32:1302(A) provides:

> The Director of Public Safety, members of the State Police and such other officers and employees of the department as the director may designate, may at any time upon reasonable cause to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of such vehicle to stop and submit such vehicle to an inspection and such test with reference thereto as may be appropriate.

32:1501 et seq., apply not to *any* vehicle, but to "all carrier transportation." See La. R.S. 32:1501(3).[5]

Accordingly, we find the trial court was correct in its determination that the Louisiana statutes provided the authority to stop the defendant's truck. We find, as well, that Sergeant Pierce's warrantless stop of the defendant's truck was justified at its inception pursuant to the regulatory exception to the Fourth Amendment's warrant requirement announced in **New York v. Burger**, 482 U.S. 691, 702-703, 107 S.Ct. 2636, 2643-2644, 96 L.Ed.2d 601 (1987). See **U.S. v. Fort**, 248 F.3d 475, 478-479 (5th Cir.), cert. denied, 534 U.S. 977, 122 S.Ct. 405, 151 L.Ed.2d 307 (2001). In **City of Indianapolis v. Edmond**, 531 U.S. 32, 37, 121 S.Ct. 447, 452, 148 L.Ed.2d 333 (2000), the Supreme Court again recognized the regulatory exception of **Burger** as permitting searches for administrative purposes without particularized suspicion of misconduct. See **Fort**, 248 F.3d at 480 n.4.

A warrantless inspection of a pervasively regulated business is valid under **Burger** if: 1) there is a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; 2) the inspection is necessary to further the regulatory scheme; and 3) the statutory or regulatory scheme provides a constitutionally adequate substitute for a warrant. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See **Burger**, 482 U.S. at 702-703, 107 S.Ct. at 2643-2644.

We note initially that the courts have consistently found that trucking is a pervasively regulated industry. See **U.S. v. Burch**, 153 F.3d 1140, 1141-1142 (10th Cir. 1998); **V-1 Oil Co. v. Means**, 94 F.3d 1420, 1426-1428 (10th Cir. 1996); **U.S. v. Dominguez-Prieto**, 923 F.2d 464, 468 (6th Cir.), cert. denied, 500 U.S. 936, 111 S.Ct.

[5] "Carrier" means any person who transports in a transport vehicle hazardous materials, freight or passengers subject to this Chapter and includes a common, contract, or private carrier. La. R.S. 32:1502(1).

2063, 114 L.Ed.2d 468 (1991). **Fort**, 248 F.3d at 480. Accordingly, since commercial trucking is governed by extensive federal and state regulations, **Burger** applies to the commercial trucking industry.

Upon review of the applicable law, we find that the three prongs of **Burger** are easily met in this case. Clearly the State of Louisiana has a substantial interest in closely regulating the trucking industry, particularly in traveler safety and economic costs. See **Fort**, 248 F.3d at 480. Given the pervasiveness of the trucking industry in this State, La. R.S. 32:1501(1) declares that it is the policy of this State that hazardous materials are essential for various industrial and commercial purposes and that the transportation of such material is required for economic prosperity. Section 1501(2) declares that the transportation and loading and unloading of hazardous materials pose a substantial danger to the health and safety of the citizens unless such materials are loaded and transported in a safe and prudent manner. Section 1501(3) further declares that all carrier transportation, or transportation of hazardous materials, freight, or passengers,

> [S]hould comply with minimum state standards of safe operation, manufacture, and maintenance due to the size and momentum of the transport vehicles involved, the adverse impact on economic welfare posed to the citizens of this state when these transport vehicles are involved in accidents, the threat to public safety caused by these accidents, and the huge volume of shipments in which carriers are involved.

The inspection, effectuated through a warrantless stop, is also clearly necessary to further the State's regulatory scheme. Louisiana has a strong interest in promoting safety and compliance with federal and state regulations and statutes governing commercial vehicles in this State. See La. R.S. 32:1501 et seq.; **Fort**, 248 F.3d at 481. Because of the transitory nature of commercial trucks, there is a compelling need for the warrantless stops and inspections of such vehicles. See **Fort**, 248 F.3d at 481. We note as well that the federal statutes do not specifically prohibit random inspections of commercial motor vehicles. See 49 U.S.C. § 31142(d); **Fort**, 248 F.3d at 482 n.6.

Finally, we find that Louisiana's statutory scheme provides a constitutionally adequate substitute for a warrant. Louisiana law clearly provides property owners with adequate notice that their vehicles may be stopped and searched on the highways under

Section 1505. Further, Section 1505 limits the discretion of the inspecting officers by requiring the stop and inspection to be "at reasonable times" and "in a reasonable manner." In addition, inspection of the driver's records or properties is allowed only to the extent that they relate to "this Chapter." Our statutory scheme adequately permits any owner of a commercial vehicle to be aware that he would be subject to warrantless and suspicionless stops while driving. See **Fort**, 248 F.3d at 482. See also **Burger**, 482 U.S. at 703, 107 S.Ct. at 2644.

Accordingly, the warrantless stop and inspection of the defendant's commercial vehicle were valid under **Burger**'s regulatory exception to the warrant requirement.

Citing three out-of-state cases to support his position, the defendant argues "no law can supply a government actor with unbridled discretion to engage in random stops merely to determine whether it belongs to a regulated class." In fact, this is the argument that runs, in one form or another, throughout the defendant's twenty-four-page brief. According to the defendant, an officer making an MCSAP stop must know with certainty that the vehicle he is stopping is a commercial vehicle operating in commerce. Since Sergeant Pierce stopped the defendant *to determine* if he was driving a commercial vehicle, and was not aware of this fact prior to the stop, the defendant claims his Fourth Amendments rights were violated. We do not agree. The defendant's bobtail tractor clearly appeared to be a commercial vehicle travelling on a major interstate. In his first moments of contact with the defendant, Sergeant Pierce determined that the defendant's truck was, in fact, a commercial vehicle. Therefore, any subsequent inspection pursuant to La. R.S. 32:1505 was valid. To require a police officer, randomly picking a vehicle for MCSAP inspection, to know with 100 percent certitude that the vehicle he is stopping is, in fact, a commercial vehicle before stopping it is an untenable regulatory scheme not found in the Fourth Amendment jurisprudence dealing with the regulatory search and seizure exception. See **Edmond**, 531 U.S. at 37-40, 121 S.Ct. at 451-453; **Fort**, 248 F.3d at 478-482.

While the out-of-state jurisprudence cited by the defendant is by no means controlling, we nevertheless address and distinguish it from the instant matter. **U.S. v.**

Herrera, 444 F.3d 1238 (10th Cir. 2006) dealt with the stop of a Ford F-350 pickup truck by a Kansas state trooper. The trooper testified that he had made these stops of commercial vehicles in the past that were the same make and model of Herrera's truck. When the trooper made such stops of these types of trucks, he would check the VIN number on the VIN plate inside the driver's door to determine if the truck qualified as a commercial vehicle. Herrera's truck, in fact, weighed 10,000 pounds, one pound short of the definition of a commercial vehicle under Kansas law. However, the state trooper continued to question Herrera, who was arrested for being unable to produce proof of insurance. The trooper then conducted an inventory search and found twenty-three kilograms of cocaine in the truck's bed. **Herrera**, 444 F.3d at 1241. The Tenth Circuit concluded that since the truck was not a commercial vehicle, Herrera was not engaging in a closely-regulated industry. Thus, the Kansas law that allowed the warrantless stop and administrative inspection of commercial vehicles did not apply. The stop was therefore illegal and the drugs were suppressed. **Herrera**, 444 F.3d at 1255.

In the case at hand, the bobtail or semi-tractor clearly appeared to be a commercial vehicle. As we discussed, the first thing Sergeant Pierce did when he stopped the defendant was to determine if his truck was a commercial vehicle, which it was. In **Herrera**, the Kansas state trooper continued to question Herrera without confirming that his truck was not a commercial vehicle and subsequently arrested **Herrera**.[6] If Sergeant Pierce had determined during the initial part of the stop that the defendant's truck was not a commercial vehicle (and therefore not engaging in a closely-regulated industry), but continued with his inspection, then Sergeant Pierce, like the state trooper in **Herrera**, may well have gone beyond what is allowed under the regulatory exception to the warrant requirement.

[6] The facts are not clear here. We assume the Kansas state trooper continued to question the defendant without confirming the status of his vehicle. The other possibility, no less troublesome, is that the trooper confirmed that Herrera's pickup truck was not a commercial vehicle, but nevertheless continued with his inspection.

Similarly, in **U.S. v. Seslar**, 996 F.2d 1058 (10th Cir. 1993), cited by the defendant, a Kansas state trooper stopped a Ryder rental truck driven by Seslar. The trooper examined the truck's rental papers, which showed the truck had been rented in California for commercial purposes. However, after speaking with Seslar and the passenger and learning the truck contained personal goods, including furniture, the trooper indicated on his inspection form that the load was noncommercial. Because of the discrepancy with the rental papers and what he was told, the trooper directed the cargo door to be opened. The trooper observed several items of furniture and some sealed boxes and determined the load was noncommercial. Despite this determination, the trooper continued with his inspection. He took the passenger to his patrol car and performed a driver's license and criminal history check. The trooper eventually obtained consent to search the truck and found about 248 pounds of marijuana in the boxes. **Seslar**, 996 F.2d at 1059-1060. The Tenth Circuit found that the spot-check provisions of Kansas law relied on by the government did not authorize the trooper to stop the defendant because the defendant was not, in fact, engaged in a regulated industry. The Tenth Circuit noted that the closely-regulated industry line of cases did not justify the warrantless search of unregulated persons. **Seslar**, 996 F.2d at 1062-1063.

As in **Herrera**, which based its analysis on **Seslar**, Seslar was not driving a commercial vehicle. Despite this knowledge, the trooper continued his investigatory stop and kept the defendant at the scene. In the case at hand, the defendant was driving a commercial vehicle and was, therefore, subject to random inspections.

Finally, the defendant cites **Dominguez v. State**, 720 S.W.2d 703 (Ark. 1986). Two Arkansas Transportation Commission agents stopped a U-Haul truck to see what the driver was hauling. After searching the truck, the agents found marijuana. The agents claimed their authority to stop the truck was pursuant to a section of the Arkansas Motor Carrier Act, which provided in pertinent part that enforcement officers "upon reasonable belief" that a motor vehicle was being operated in violation of any provisions of the Act were authorized to stop the driver. **Dominguez**, 720 S.W.2d at 705. The state also argued the authority of the agents to stop the U-Haul was a provision that allowed for

administrative inspections. In suppressing the drugs, the court found the agents had no idea whether the defendant was regularly engaged in transportation for compensation. Even by the time of trial, the agents did not know if the defendant had been driving a regulated motor carrier. **Dominguez,** 720 S.W.2d at 706-709.

In the case at hand, as mentioned, Sergeant Pierce determined in the first moments of contact with the defendant that he was driving a commercial vehicle. Moreover, the statute relied upon by the agents in **Dominguez** required reasonable belief that the motor vehicle being stopped was in violation of the Act. Under Louisiana's statutory scheme, an officer is not required to have probable cause or reasonable suspicion before stopping a commercial vehicle for random inspection. See La. R.S. 32:1501 et seq.

We find, thus, that pursuant to La. R.S. 32:1505, which provides a regulatory exception to the warrant requirement, Sergeant Pierce was authorized to stop the defendant's bobtail tractor and inspect it. After some initial discussion with the defendant, and given the defendant's unbelievable story about going to Texas and waiting for over a day to pick up a truck at a place he could not identify; the defendant's lying about having someone else in his truck; and the defendant's criminal history for narcotics, Sergeant Pierce became suspicious. Sergeant Pierce then diligently pursued a means of investigation that was likely to confirm or dispel his suspicions quickly. See **State v. Miller**, 2000-1657, p. 4 (La. 10/26/01), 798 So.2d 947, 950 (per curiam). He asked the defendant if he could search his truck, and the defendant consented to the search in writing. A search conducted with the consent of a defendant is an exception to both the warrant and the probable cause requirements of the law. See **State v. Tennant**, 352 So.2d 629, 633 (La. 1977), cert. denied, 435 U.S. 945, 98 S.Ct. 1529, 55 L.Ed.2d 543 (1978). Thus, given the defendant's written consent to search, Sergeant Pierce did not need probable cause to search the truck. Thus, Sergeant Pierce's seizure of the cocaine was proper. Accordingly, the trial court did not err in denying the defendant's motion to suppress. These assignments of error are without merit.

SENTENCING ERROR

Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error.

For his adjudication as a second-felony habitual offender, based on the underlying conviction of possession of four hundred grams or more of cocaine, the defendant was sentenced to thirty-five years imprisonment at hard labor. Pursuant to La. R.S. 40:967(F)(1)(c), any person who knowingly or intentionally possesses four hundred grams or more of cocaine shall be sentenced at hard labor to not less than fifteen years nor more than thirty years and to pay a fine of not less than two hundred fifty thousand dollars nor more than six hundred thousand dollars. The trial court failed to impose the mandatory fine.[7] Accordingly, the defendant's sentence, which did not include the mandatory fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-125 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

[7] The minutes also reflect that no fine was imposed.