

David MARION v. STATE of Arkansas

CA CR 81-167

631 S.W. 2d 315

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

1. CRIMINAL PROCEDURE — SENTENCING — SENTENCE OF PROBATION CANNOT BE IMPOSED IN ADDITION TO SENTENCE OF IMPRISONMENT IN DEPARTMENT OF CORRECTION. — The trial court cannot impose a sentence of probation on defendant in addition to a sentence of imprisonment at the Department of Correction.
2. CRIMINAL PROCEDURE — REVOCATION OF SUSPENSION OR PROBATION — AUTHORITY OF TRIAL COURT TO IMPOSE SENTENCE THAT MIGHT HAVE BEEN IMPOSED ORIGINALLY. — If the court revokes a suspension or probation, it may enter a judgment of conviction and may impose any sentence on defendant that might have been imposed originally for the offense of which

he was found guilty, provided that the fine or imprisonment, when combined with any previous fine or imprisonment imposed for the same offense, shall not exceed the limits of Ark. Stat. Ann. §§ 41-901 or 41-1101, or, if applicable, § 41-1001. [Ark. Stat. Ann. § 41-1208 (6) (Repl. 1977).]

3. CRIMINAL PROCEDURE — NO AUTHORITY IN COURT TO SENTENCE DEFENDANT TO IMPRISONMENT AND PLACE HIM ON PROBATION — EXCEPTION. — Ark. Stat. Ann. § 41-803 (4) (Repl. 1977) provides that the court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment, but the court shall not sentence a defendant to imprisonment and place him on probation, except as authorized by § 41-1204, which is not applicable under the factual situation presented, since it provides for the placing of a defendant in a county or city jail with conditions of probation, and does not apply to a term of imprisonment at the Department of Correction.

Appeal from Clark Circuit Court, *J. Hugh Lookadoo*, Judge; reversed.

Wayne R. Williams, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. On February 8, 1980, appellant, David Marion, was placed on five years' probation following a plea of guilty to a charge of burglary. Appellant's probation was revoked at a hearing held on March 4, 1981. He was then sentenced to two years imprisonment with an additional two years of probation to follow. He was paroled by the Arkansas Department of Correction on July 23, 1981. On October 6, 1981, at a second revocation hearing, appellant's probation was revoked and he was sentenced to two years in the Department of Correction. We reverse.

We agree with appellant that the Court could not impose a two-year probation on appellant in addition to the imprisonment imposed on March 4, 1981. Ark. Stat. Ann. § 41-1208 (6) (Repl. 1977) provides as follows:

If the court revokes a suspension or probation, it

may enter a judgment of conviction and may impose any sentence on defendant that might have been imposed originally for the offense of which he was found guilty, provided that any sentence to pay a fine or to imprisonment when combined with any previous fine or imprisonment imposed for the same offense shall not exceed the limits of sections 901 [§ 41-901] or 1101 [§ 41-1101], or if applicable, section 1001 [§ 41-1001].

Ark. Stat. Ann. § 41-803 (4) (Repl. 1977) provides in part:

The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment, but the court shall not sentence a defendant to imprisonment and place him on probation, except as authorized by section 1204 [§ 41-1204].

Ark. Stat. Ann. § 41-1204 provides for the placing of a defendant in a county or city jail with conditions of probation, and does not apply to a term of imprisonment at the Department of Correction. Therefore, Ark. Stat. Ann. § 41-1204 is not applicable in the instant case.

Since the court could not impose the two-year probation in addition to the imprisonment, this case is reversed.