Cite as 2011 Ark. App. 656

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 11-227

	Opinion Delivered NOVEMBER 2, 2011
LEON JACKSON RICE, JR. APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION [NO. CR-10-1733]
V.	HONORABLE HERBERT WRIGHT, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Leon Jackson Rice, Jr., was convicted by a jury of possession of cocaine, a Class C felony, and resisting arrest, a Class A misdemeanor. During the sentencing phase of the trial the State presented evidence that Mr. Rice had previously been convicted of four or more felonies, which enhanced the sentencing range for the Class C felony to a term of imprisonment of not less than three years nor more than thirty years. *See* Ark. Code Ann. § 5-4-501(b) (Supp. 2011). Mr. Rice was sentenced to thirty years' imprisonment for possession of cocaine and one year in the county jail for resisting arrest. Pursuant to Ark. Code Ann. § 5-4-403(c)(1) (Repl. 2006), Mr. Rice's one-year incarceration in the county jail was run concurrently with his thirty-year prison sentence.

Mr. Rice now appeals, arguing that his thirty-year prison sentence as a habitual offender for possession of cocaine was improper. Mr. Rice specifically complains that he had

only eight prior felony convictions, but that during the sentencing phase the State read to the jury a list of nine felony convictions. For that reason, Mr. Rice asks that we remand this case to the trial court for resentencing on the cocaine conviction.

During the guilt phase of the trial, the State elicited testimony from North Little Rock Police Officers Daniel Haley and Greg Blankenship. These officers testified that they were patrolling on the night of April 9, 2010, when they conducted a traffic stop of Mr. Rice's car for driving without headlights. As Officer Haley approached appellant's car he observed an open beer in the console and saw Mr. Rice stuffing a baggie containing a rock-like substance into his pants. The officers removed Mr. Rice from the vehicle and handcuffed him. According to Officer Haley, he repeatedly tried to remove the baggie from Mr. Rice's pants, but Mr. Rice violently resisted by spinning his body around and kicking. As a result of Mr. Rice's resistance, the officers shackled his feet and used a taser to subdue him. Eventually Officer Haley was able to remove the baggie from Mr. Rice, and it was sent to the crime lab. The chemist at the crime lab determined that the substance in the baggie was cocaine-based and weighed 3.2 grams.

After the jury found Mr. Rice guilty of cocaine possession, the trial proceeded to the sentencing phase. During the sentencing phase the State was permitted, without objection, to introduce copies of Mr. Rice's prior convictions. In addition, the State read to the jury the felony convictions as reflected by the exhibit, which consisted of residential burglary, first-degree terroristic threatening, residential burglary and theft of property, second-degree battery, theft by receiving, possession of cocaine with intent to deliver, second-offense

possession of marijuana, and possession of cocaine. The trial court instructed the jury that Mr. Rice had previously been convicted of eight felonies and was classified as a habitual offender. In the State's closing argument during sentencing it advised that Mr. Rice had eight felony convictions and asked for the maximum sentence.

In this appeal, Mr. Rice argues that error occurred during the sentencing phase when the State read a list of his felony convictions that comprised nine felony convictions. Mr. Rice contends that for purposes of his habitual-offender status he had only eight prior felonies. In making his argument, Mr. Rice relies on Ark. Code Ann. § 5-4-501(e)(1) (Supp. 2001), which provides:

> For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary, § 5-39-201, and of the felony that was the object of the burglary are considered a single felony conviction or finding of guilt.

Mr. Rice asserts that the State's list of prior felonies that it read to the jury included residential burglary and theft of property committed in the same case on December 3, 1991. Pursuant to the above statute, Mr. Rice maintains that these offenses are considered a single felony conviction. Because the State indicated that these were separate offenses bringing his total felony count to nine, Mr. Rice argues that reversible error occurred. He further submits that he suffered prejudice as reflected by the jury's imposition of the maximum penalty of thirty years.

We hold that the argument being raised in this appeal is not preserved for review. Except in very limited circumstances not applicable here, a contemporaneous objection is a prerequisite to appellate review. *See Withers v. State*, 308 Ark. 507, 825 S.W.2d 819 (1992)

(failing to object to criminal record and habitual-offender status at trial barred Withers from raising the issue on appeal). In the present case, Mr. Rice did not raise any objection at trial to the State's recital of his prior convictions, nor did he object to the introduction of the judgment and commitment order reflecting convictions for residential burglary and theft of property committed on December 3, 1991. Because there was no contemporaneous objection made below, the merits of appellant's argument need not be reached.

Moreover, as the State asserts in its brief, Mr. Rice has failed to demonstrate that any error in this regard resulted in prejudice. Prejudice is not presumed when error is alleged; rather, it is the appellant's burden to produce a record that demonstrates prejudice has occurred because harmless error does not warrant reversal. *See Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995). During the sentencing phase, both the trial court and the State accurately informed the jury that Mr. Rice had eight prior felony convictions in addition to his fifteen prior misdemeanor convictions. And the State's recitation of nine prior felonies did not deny Mr. Rice a fair sentencing proceeding. In *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985), the appellant was sentenced as a habitual offender with eleven prior felonies, and it appeared from the record that his burglary and theft-of-property convictions were counted as separate felonies in contravention of the applicable statute. Nonetheless, the supreme court declared that any error was not prejudicial because the maximum enhancement of sentence applies to defendants convicted of at least four or more felonies and does not increase regardless of the number of felonies above four. Similarly, no prejudice resulted in the instant case because the issue of whether Mr. Rice had been convicted of

eight or nine prior felonies did not change his status as a habitual offender or the sentencing range.

Affirmed.

WYNNE and GLOVER, JJ., agree.

William R. Simpson, Jr., Public Defender, and *Natalie Dickson*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., and *Sydney Butler*, Law Student No. 1595 Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Supreme Court under the supervision of *Darnisa Evans Johnson*, for appellee.