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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR10-824

CHASITY ROGERS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** JANUARY 5, 2011 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. CR-2009-533T-4] HONORABLE ROBERT L. HERZFELD, JR., JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

The circuit court found appellant, Chasity Rogers, guilty of driving while intoxicated, third offense, and sentenced her to twelve months in jail and a fine of $5000. On appeal, she challenges the sufficiency of the evidence to support the conviction. Further, she argues that the circuit court's decision to impose a sentence greater than that imposed by the district court—a fine of $2500 and a one-year suspended jail sentence with ninety days of community service and fifty Alcoholics Anonymous meetings—violated her due-process rights. We conclude that these arguments were not preserved for appellate review, and accordingly, we affirm.

At the close of the State's case, appellant's counsel announced that appellant would not present any witnesses. Counsel further stated, "I'm going to rest and make a statement. That's all." Counsel asked if he went first. The court asked counsel, "Is this like a closing statement

or is it a motion or –" Counsel replied, "Well, it's a closing statement." The court noted that the State usually goes first, and counsel for the State proceeded with closing argument. Counsel for appellant then argued that the State failed to prove its case "beyond a reasonable doubt."

On appeal, appellant challenges the sufficiency of the evidence to support the conviction, and the State argues that the issue was not preserved for appellate review. In a bench trial, a challenge to the sufficiency of the evidence must be made by a motion for dismissal at the close of all the evidence. Ark. R. Crim. P. 33.1(b) (2010). Rule 33.1 is strictly construed. *Grube v. State*, 2010 Ark. 171, 368 S.W.3d 58. Failure to adhere to the requirements of Rule 33.1(b) "will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment." Ark. R. Crim. P. 33.1(c).

It is apparent from the above-described remarks by appellant's counsel that appellant did not move for dismissal at the close of the evidence. Instead, appellant, at the conclusion of all the evidence at the bench trial, presented a closing argument, asserting that the State failed to prove its case beyond a reasonable doubt. Appellant's failure to challenge the sufficiency of the evidence by moving for dismissal prior to making her closing argument precludes this court from considering the merits of her sufficiency challenge. *Grube*, *supra*.

For her second point on appeal, appellant argues that the increase of her sentence in circuit court beyond that imposed in district court deprived her of due process. This argument was not made at trial, and the State argues that this issue was thus not preserved for appellate

review. In anticipation of the State's argument, however, appellant further asserts that because the sentence was "illegal," in that the circuit court lacked authority to impose it, she was not required to raise the issue at trial in order to preserve the issue for appeal.

While an appellant may challenge an illegal sentence for the first time on appeal, a constitutional due-process argument must be raised before the circuit court to be preserved for appellate review. *Cantrell v. State*, 2009 Ark. 456, 343 S.W.3d 591. Appellant's argument is a constitutional due-process challenge. Accordingly, we cannot address the merits of appellant's argument on appeal, as it was not raised before the circuit court. *Id.*; *see Gardner v. State*, 332 Ark. 33, 963 S.W.2d 590 (1998) (holding that a due-process claim of judicial vindictiveness based on the circuit court's imposition of consecutive sentences—as opposed to the concurrent sentences originally imposed when a purported guilty plea was entered—was waived because the issue was not first raised before the circuit court when it imposed the consecutive sentences).

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.