NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-1063

Opinion Delivered May 6, 2009

STEVEN BROWN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR 2007-2880]

HONORABLE JOHN LANGSTON, JUDGE

REVERSED AND REMANDED

M. MICHAEL KINARD, Judge

Steven Brown appeals from the judgment and commitment order sentencing him to twenty-four years' imprisonment in the Arkansas Department of Correction. A jury found him guilty of possession of a firearm by certain persons, a violation of Ark. Code Ann. § 5-73-103 (Repl. 2005).[1] On appeal, Brown argues that his sentence is illegal because it is the result of stacking a general statute providing for enhanced sentences of imprisonment for habitual offenders on top of the specific sentence enhancement for repeat firearm possessors. We reverse and remand for re-sentencing.

Arkansas Code Annotated section 5-73-103(a)(1) provides that, subject to certain exceptions not applicable in this case, it is unlawful for a convicted felon to possess or own a firearm. Appellant was charged with and convicted of being a felon in possession of a

[1] The two other charges contained in the information, aggravated assault and possession of a controlled substance (marijuana), were nolle prossed.

firearm, second offense. As proof, the State introduced a certified copy of the April 1, 1996 judgment and commitment order in which appellant pled guilty to a charge of possession of a firearm. The offense of being a felon in possession of a firearm is a Class B felony if the person has been previously convicted under this section or a similar provision from another jurisdiction. *See* Ark. Code Ann. § 5-73-103(c)(1). Appellant was charged and convicted under (c)(1)(C) because this was his second offense. Being a felon in possession of a firearm is a Class D felony if the actor has been previously convicted of a felony and his or her present conduct or the prior felony conviction does not fall within subdivision (c)(1) of this section. *See* Ark. Code Ann. § 5-73-103(c)(2). Thus, there is an enhancement for violent criminals, use of a firearm in the commission of another offense, and for repeat offenders.

In the sentencing phase of the trial, the State introduced evidence that appellant had been convicted of felony DWI, possession of a controlled substance, tampering with physical evidence, and criminal attempt to possess a controlled substance. Together with appellant's previous possession of a firearm by certain persons charge, appellant had previously been convicted of five felonies. As such, the trial court adjudged appellant to be an habitual offender with four or more prior felony offenses and instructed the jury pursuant to the habitual offender statute. Under the habitual-offender sentencing statute, Ark. Code Ann. § 5-4-501(b)(2)(C) (Supp. 2007), the trial court found that the extended term of imprisonment for appellant's Class B felony conviction was not less than five years nor more than forty years. The jury was instructed that appellant could be sentenced to

not less than five years nor more than forty years, or a fine not exceeding $15,000, or both imprisonment and a fine. Given this range, the jury fixed appellant's sentence at twenty-four years in the Arkansas Department of Correction.

Appellant's sole argument on appeal is that his sentence is illegal because it is the result of "stacking" the general sentence enhancement for an habitual offender on top of the specific sentencing enhancement provided for repeat firearm possession in the possession-of-a-firearm-by-certain-persons statute. While he did not raise the argument below, our supreme court has said that an illegal sentence is viewed as a matter of subject-matter jurisdiction; thus, it may be raised for the first time on appeal. *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002). The State contends that appellant's argument is barred because it was not raised below. Citing *Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003), the State argues that appellant cannot raise his illegal-sentence argument for the first time on appeal because he failed to make evidentiary objections to the introduction of the prior felony convictions necessary to support the habitual-offender enhancement. In *Banks*, the appellant's argument, though couched in terms of "illegal sentence," was in fact a challenge to the sufficiency of the evidence. Furthermore, the court went on to find that Banks's sentence was in fact illegal and reversed and remanded. Here, appellant is in fact making an argument that his sentence is illegal, and the law is clear that illegal sentences can be addressed for the first time on appeal. Therefore, we reach the merits of appellant's argument.

Our supreme court first directly addressed the "stacking" of enhancement statutes in *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (1988). The court wrote:

> We have long recognized the familiar principle that where a special act applies to a particular case, it excludes the operation of a general act upon the same subject. We have also always recognized the principle that penal laws should be strictly construed; that all doubts in construing a criminal statute must be resolved in favor of the defendant; and that courts are not permitted to enlarge the punishment provided by the legislature either directly or by implication.
>
> By applying these rules of construction we are satisfied the legislature did not intend this specific criminal enhancement statute should be coupled with our general criminal enhancement statute for the resulting purpose of creating a greater sentence than if either statute had been applied singly.

Id. at 41-42, 746 S.W.2d at 546 (internal citations omitted). The court held that it was error for the driving while intoxicated sentence enhancement statute to have been coupled with the general habitual criminal enhancement statute in sentencing Lawson.[2]

In *Banks v. State*, *supra*, the supreme court held that the sentence-enhancement provision of the statute setting forth the offense of domestic battering in the third degree could not be coupled with the general habitual-offender statute in sentencing the defendant. Banks was convicted of the Class D felony of domestic battering in the third degree, second offense. The court held that, under *Lawson*, it was error for the trial court to have enhanced the sentence (which would have been a maximum of six years for a Class D felony) to a maximum of twelve years for a Class D felony under the general habitual-offender statute. We believe *Banks* to be directly on point. Accordingly, we

[2] The State argues that the "crucial distinction" between *Lawson* and this case is that Lawson's DWI otherwise would have been a misdemeanor, becoming a felony only because of the existence of prior misdemeanor violations of the same statute. However, we do not interpret the misdemeanor-versus-felony issue as being critical to the holding of *Lawson*.

hold that appellant's sentence is the result of impermissible stacking of the enhancements under the general habitual-offender statute and the subsequent-offense provisions of the firearm-possession statute.

Without the habitual-offender enhancement, the sentencing range for a Class B felony is not less than five years nor more than twenty years. *See* Ark. Code Ann. § 5-4-401(a)(3) (Repl. 2006). We reverse and remand this case for re-sentencing.

Reversed and remanded.

HART and GLADWIN, JJ., agree.