Cite as 2010 Ark. App. 280

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 09-1046

BERNARD JONES APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 31, 2010 APPEAL FROM THE HEMPSTEAD COUNTY CIRCUIT COURT [NO. CR-06-302-2] HONORABLE WILLIAM RANDAL WRIGHT, JUDGE AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Bernard Jones appeals the decision of the Hempstead County Circuit Court revoking his probation and sentencing him to a term of six years in prison. For reversal, he alleges that the trial court erred by ordering him to attend drug counseling as a condition of his incarceration. We affirm.

In an amended felony information, the prosecuting attorney charged appellant as an habitual offender with the offense of possession of a controlled substance (crack cocaine) with intent to deliver. In April 2007, appellant pled guilty to this offense, and the trial court placed appellant on probation for three years. The trial court also granted appellant's request to participate in the drug-court program. In June 2007, the assigned judge recused, and the

supreme court appointed another judge to preside over appellant's case.[1] In March 2009, the court ousted appellant from drug court for testing positive for cocaine and for not complying with the sanctions imposed as a result of the failed drug tests.

On April 17, 2009, the State filed a petition to revoke appellant's probation. In the petition, the State alleged that appellant violated the conditions of his probation by testing positive for cocaine on five occasions and by committing the offenses of possession of a controlled substance with intent to deliver near certain facilities, resisting arrest, careless and prohibited driving, and first-degree forgery. In his testimony at the hearing, appellant conceded that he violated the terms of his probation by continuing to use cocaine. Appellant advised the court that he remained addicted to cocaine despite his participation in the drug-court program, which included a stay in residential treatment. He requested leniency and asked the trial court not to impose a prison sentence but rather to allow him to seek additional treatment for his addiction. At the conclusion of the hearing, the trial court revoked appellant's probation and orally pronounced a six-year term of imprisonment "with therapeutic community recommended." In its comments from the bench, the trial court remarked, "If you truly want to help yourself, you'll have the opportunity, Mr. Jones. The penitentiary has therapeutic community that they will allow you, with the recommendation I've made, for you to get the drug help that you want."

[1] Appellant filed suit against the trial judge and others.

The trial court entered its judgment and commitment order on June 12, 2009, sentencing appellant to six years in prison. In addition, the trial court signed a separate, file-marked document styled "Special Conditions of Confinement," which stated, "The Court recommends that this defendant complete the therapeutic communities program while at the Arkansas Department of Correction." Appellant filed a timely notice of appeal from the judgment and commitment order.

On appeal, appellant asks us to consider the court's recommendation that he complete the therapeutic community program as an order of the court. Based on his construction of the document, he argues that the trial court exceeded its authority by requiring him to complete the program as a special condition during the period of confinement. In essence, appellant argues that the condition imposed by the trial court resulted in an illegal sentence. Although appellant did not raise this argument in the trial court, it is well settled that an appellant may challenge an alleged void or illegal sentence for the first time on appeal, even if he did not raise the argument below. *See Ward v. State*, 2010 Ark. App. 79, 374 S.W.3d 62. This is so because the question of a void or illegal sentence is viewed as an issue of subject-matter jurisdiction, which we may review whether or not an objection was made in the trial court. *See Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007). The term "illegal sentence" refers to any sentence that the trial court lacks the authority to impose. *Bell v. State*, 101 Ark. App. 144, 272 S.W.3d 110 (2008).

In Arkansas, sentencing is entirely a matter of statute, and a trial court may only impose a sentence that is authorized by statute. *Cross v. State*, 2009 Ark. 597, 357 S.W.3d 895. Specifically, Arkansas Code Annotated section 5-4-104(a) (Supp. 2009) directs that "[n]o defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter." Where the law does not authorize the particular sentence pronounced by the trial court, the sentence is unauthorized and illegal. *Donaldson*, *supra*.

Section 5-4-104(d) sets out the authorized sentences and provides as follows:

> (d) A defendant convicted of an offense other than a Class Y felony, capital murder, § 5-10-101, treason, § 5-51-201, or murder in the second degree, § 5-10-103, may be sentenced to any one (1) or more of the following, except as precluded by subsection (e) of this section:
>
> (1) Imprisonment as authorized by §§ 5-4-401–5-4-404;
>
> (2) Probation as authorized by §§ 5-4-301–5-4-311;
>
> (3) Payment of a fine as authorized by §§ 5-4-201–5-4-203;
>
> (4) Restitution as authorized by a provision of § 5-4-205; or
>
> (5) Imprisonment and payment of a fine.

In *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909, the supreme court addressed a similar, but not identical, issue to the one before us. There, Richie challenged the trial court's authority to include in the judgment and commitment order the requirement that he "submit to ... drug [and] alcohol treatment and counseling along with any other counseling deemed appropriate." On appeal, the supreme court recognized that a trial court is authorized to impose conditions on a defendant when the court suspends the imposition of

sentence or places the defendant on probation under the authority of Arkansas Code Annotated section 5-4-303 (Supp. 2009). The court determined, however, that section 5-4-104(d) contained no provision that would allow a court to place specific conditions on a sentence of incarceration. Consequently, the supreme court agreed with Richie that his sentence was illegal, and the court reversed and remanded for the entry of a new judgment and commitment order omitting the unlawful provision.

In this case, appellant specifically asked the court for rehabilitative treatment to combat his drug problem, and the court granted that request by recommending a treatment program for drug addiction that is available to inmates incarcerated in the department of correction. Under the doctrine of invited error, one who is responsible for error cannot be heard to complain. *Hayes v. State*, 2009 Ark. App. 663. Moreover, we do not construe the "Special Conditions of Confinement" as a directive for appellant to complete the program during his incarceration. Unlike *Richie*, *supra*, the document in question is not a part of the judgment and commitment order, and the "condition" is stated in the form of a "recommendation," not a mandate. It contains no language indicating that appellant's attendance is compulsory or that appellant would be subject to sanctions for not completing the program. In sum, the "condition" is only what it purports to be, and that is a recommendation for appellant to participate in the program.

Affirmed.

HART and ROBBINS, JJ., agree.