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ARKANSAS COURT OF APPEALS

DIVISION I

No. CR-18-652

JOHN MARK WILSON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: February 20, 2019

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT,
WESTERN DISTRICT
[NO. 16]CR-15-577]

HONORABLE TONYA M.
ALEXANDER, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

John Mark Wilson appeals from the June 6, 2018 amended order that sentenced him to thirty-six months' probation and ordered him to register as a sex offender. He raises two points on appeal: (1) the trial court erred in resentencing him because Arkansas Code Annotated section 16-93-303 (Supp. 2013) prohibits the sealing of his offense but does not prohibit deferred adjudication, and (2) he should not be required to register as a sex offender. We affirm.

On June 11, 2015, Wilson was charged with one count of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child under Arkansas Code Annotated section 5-27-602 (Repl. 2013). He pleaded guilty to the charge on August 30, 2016. Pursuant to Arkansas Code Annotated section 16-93-303, the guilty plea was accepted; he was sentenced to thirty-six months' suspended probation, deferred conditioned

upon his continuing counseling and complying with all terms of probation. He was not ordered to register as a sex offender.

On March 7, 2017, the State filed a motion to amend the judgment to conform with the law, explaining that Wilson pleaded guilty to an offense described in Arkansas Code Annotated section 5-27-602, which made him ineligible for any sentence under the First Offender Act. In addition, the State contended that by pleading guilty to an offense under section 5-27-602, Wilson was required by law to comply with the sex-offender-registration requirements pursuant to section 12-12-905 (a)(1) (Supp. 2007). Wilson responded, disputing the State's interpretation of the cited statutes.

On April 18, 2018, the State filed a motion to correct Wilson's illegal sentence. The State contended the sentence was illegal because Wilson could not plead guilty to the offense under section 5-27-602 and be sentenced under section 16-93-303(a) of the first-offender statutes. The State further contended that because Wilson pleaded guilty to a section 5-27-602 offense, he was required by law to comply with the sex-offender-registration requirements.

The trial court entered an amended sentencing order nunc pro tunc. The amended sentencing order also required Wilson to register as a sex offender.

Wilson moved to vacate the amended sentencing order, arguing (1) he was eligible to plead guilty and be sentenced pursuant to section 16-93-303; (2) he should not be required to register as a sex offender because his original sentence was entered prior to a finding of guilt or the entry of a judgment of guilt under section 16-93-303(a)(1)(A)(i), and section 12-12-905 requires registration as a sex offender only after an adjudication of guilt;

and (3) the trial court violated his due-process rights by not allowing him to be heard before amending the sentencing order.

On May 7, 2018, the trial court entered an order finding Wilson's original sentence was illegal because he was not eligible to avail himself of the first-offender deferred adjudication under sections 16-93-301 et seq.; however, the court set aside the amended sentencing order and scheduled a hearing for June 1, 2018.

At the June 1 hearing, the trial court heard arguments from both sides but ultimately agreed with the State. An amended sentencing order was entered on June 6, 2018, reflecting Wilson was convicted under section 5-27-602, sentencing him to thirty-six months' probation, and ordering him to register as a sex offender. This appeal followed.

Wilson's two points of appeal are so interrelated they can best be discussed together. At the core of his two arguments, he contends that, for someone who commits a sex offense, section 16-93-303 prohibits only the sealing of the record. He takes the position that the trial court is permitted to employ the deferred-adjudication portion of the "first-offender" statute for persons who commit a sex offense. He then argues that, with the deferred-adjudication portion of the statute available to him, the trial court erred in requiring him to register as a sex offender. He contends Arkansas Code Annotated section 12-12-905(b) (Repl. 2016) provides that "a person *who has been adjudicated guilty of a sex offense* and whose record of conviction will be expunged under the provisions of §§ 16-93-301 to -303 is not relieved of the duty to register or verify registration," and because he was "not *adjudicated guilty of a sex offense*" under his interpretation of the deferred-adjudication portion of the

statute, he should not be required to register as a sex offender under section 12-12-905(b). (Emphasis added.) We disagree.

Our research convinces us the issues Wilson raises have already been settled. In *Thomas v. State*, 349 Ark. 447, 458–59, 79 S.W.3d 347, 353 (2002), our supreme court explained:

Notwithstanding this conclusion, we modify that part of the judgment that reflects that Thomas was sentenced pursuant to Act 346 of 1975, better known as the Arkansas First Offender Act. *See Lewis v. State*, 336 Ark. 469, 986 S.W.2d 95 (1999). Under Act 346, an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, and the circuit court, without entering a judgment of guilt and with the consent of the defendant, may defer further proceedings and place the defendant on probation for a period of not less than one year. *See Ark. Code Ann. § 16-93-303(a)(1)(A)* (Supp. 2001); *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996). Thereafter, upon fulfillment of the terms and conditions of probation, the defendant shall be discharged without court adjudication of guilt, and the court shall enter an order discharging the defendant and expunging the record. *See Ark. Code Ann. § 16-93-303(b)* (Supp. 2001).

Section 16-93-303(a) was amended by Act 1407 of 1999 to provide that “*no person who pleads guilty, nolo contendere, or is found guilty of a sexual offense as defined by Chapter 5, Title 14, Arkansas Code of 1987 Annotated where the victim was under the age of eighteen (18) years shall be eligible for expungement of the record under this subchapter[.]*” Thomas was convicted of the crime of sexual solicitation of a child, in violation of Ark. Code Ann. § 5-14-110 (Repl. 1997). He is therefore not eligible to have his record expunged under Act 346.

....

A sentence is void or illegal when the trial court lacks authority to impose it. *Id.* Under the circumstances of this case, the trial court lacked the authority to sentence Thomas under Act 346. That portion of the sentence is therefore illegal. This court may correct this error without reversing and remanding for resentencing. *See Renshaw v. Norris*, 337 Ark. 494, 989 S.W.2d 515 (1999); *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996). *Accordingly, we modify Thomas’s sentence to reflect that his probation is not pursuant to Act 346 and that he is not entitled to the expungement provisions therein.* [Emphasis added.]

Several years later, our court characterized the holding in *Thomas*, *supra*, as follows:

In [*Thomas*], the Arkansas Supreme Court held that a defendant's sentence was illegal because, even though Act 1407 of 1999 made the defendant ineligible for expungement, the circuit court nevertheless placed the defendant on probation under Ark. Code Ann. § 16-93-303 for a sexual offense where the victim was under eighteen. The Arkansas Supreme Court concluded that the sentence was illegal, as the circuit court lacked authority to apply Ark. Code Ann. § 16-93-303, and that the issue could be addressed for the first time on appeal. Similarly to *Thomas*, the question [in *McBride*] is whether the circuit court lacked authority to impose a sentence in contravention of Ark. Code Ann. § 16-93-303.

McBride v. State, 99 Ark. App. 201, 203, 258 S.W.3d 782, 784 (2007).

Accordingly, our two state appellate courts have interpreted the ineligibility provisions of section 16-93-303(a)(B)¹ more expansively than *Wilson*, concluding that first-time offenders to whom section 16-93-303(a)(B) applies lose more than just the possibility of having their records sealed. Rather, our appellate courts have more broadly held that if section 16-93-303(a)(B) applies, then the trial court lacks authority to impose any sentence pursuant to section 16-93-303(a)(1)(A). We therefore affirm the amended sentencing order in accordance with the *Thomas* and *McBride* holdings and have no need to conduct our own statutory interpretation.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.

Jeff Rosenzweig, for appellant.

Leslie Rutledge, Att'y Gen., by: *Brooke Jackson Gasaway*, Ass't Att'y Gen., for appellee.

¹“(B) However, a person who is found guilty of or pleads guilty or nolo contendere to one (1) or more of the following offenses is not eligible for sealing of the record under this subchapter: (i) An offense that requires the person to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq.”