

Samuel ROBINSON *v.* STATE of Arkansas

CR 82-138

648 S.W.2d 446

Supreme Court of Arkansas  
Opinion delivered April 4, 1983

APPEAL & ERROR — APPELLANT IMPROPERLY CONVICTED OF BATTERY AND AGGRAVATED ROBBERY. — Where appellant was charged with first degree battery in violation of Ark. Stat. Ann. § 41-1601 (d) in that he committed the battery during the course of a felony, that felony being aggravated robbery, the conviction and sentence for first degree battery are set aside, but the conviction and sentence for aggravated robbery are not disturbed.

Petition for Relief Pursuant to Rule 37.2, A.R.Cr.P. (Repl. 1977); petition granted.

*Lessenberry & Carpenter*, by: *Thomas M. Carpenter*, for appellant.

*Steve Clark*, Atty. Gen., by: *Victoria L. Fewell*, Asst. Atty. Gen., for appellee.

PER CURIAM. Samuel Robinson filed a petition for A.R.Cr.P., Rule 37, relief because he was convicted of aggravated robbery and first degree battery and sentenced in violation of Ark. Stat. Ann. § 41-105 (2) (a) (lesser included offense). We affirmed Robinson's conviction and his sentence of twenty-five years imprisonment for aggravated robbery and twelve years for first degree battery, finding that the issue argued to us was not properly raised.

Robinson was charged with first degree battery in violation of Ark. Stat. Ann. § 41-1601 (d) in that he committed the battery during the course of a felony, that felony being aggravated robbery. The jury was instructed accordingly, AMCI 1601(A). In accordance with our decisions in *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981), *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982), and *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983), the conviction

and sentence for first degree battery are set aside as being imposed in violation of Ark. Stat. Ann. § 41-105 (Repl. 1977). The conviction and sentence for aggravated robbery are not disturbed. See *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982).

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