Ricky JONES *v.* STATE of Arkansas

CR 80-86

605 S.W. 2d 7

Supreme Court of Arkansas
Opinion delivered September 22, 1980

1. CRIMINAL LAW – SENTENCE TO DEPARTMENT OF CORRECTION – JUDICIAL NOTICE. – The Supreme Court will take judicial notice of the fact that a sentence to the Department of Correction is only ordered in felony cases.
2. APPEAL & ERROR – QUESTION RAISED FIRST TIME ON APPEAL. – Where counsel had represented defendant when he received three prior convictions and made no objection to their introduction, nor challenged nor attempted to rebut the state's contention that all three were felony convictions, it is too late to raise the question on appeal.
3. CRIMINAL LAW – EVIDENCE OF PRIOR CONVICTIONS – NO PREJUDICE SHOWN. – Where the jury found that defendant had been convicted of only two or more prior felonies, no prejudice resulted from the state's contention that he had been convicted of three prior felonies, even if one of the convictions had been a misdemeanor.
4. CRIMINAL LAW – PAROLE ELIGIBILITY – NO AUTHORITY IN COURT TO DETERMINE HOW PAROLE BOARD EXERCISES ITS AUTHORITY. – The provisions of Ark. Stat. Ann. §§ 43-2801 – 43-2834 (Repl. 1977) are for the use of the Department of Correction in determining parole eligibility; and the court has no authority to determine the manner in which the Board of Pardons and Parole exercises its prerogative under Act 50, Ark. Acts of 1968 (1st Ex. Sess.) [Ark. Stat. Ann. §§ 43-2801 – 43-2815 (Repl. 1977)].

Appeal from Cleburne Circuit Court, *Leroy Blankenship*, Judge; affirmed as modified.

E. Alvin Schay, State Appellate Defender, by: *Ray Hartenstein*, Chief Deputy Defender, Little Rock, for appellant.

Steve Clark, Atty. Gen., by: *Jack W. Dickerson*, Asst. Atty. Gen., Little Rock, for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of Breaking or Entering in violation of Ark. Stat. Ann. § 41-2003 (Repl. 1977) and Theft of Property with a value less than

$100, a violation of Ark. Stat. Ann. § 41-2203 (2) (c) (Repl. 1977). The jury also found he had been convicted of two or more prior felonies. He was sentenced to 30 days on the misdemeanor of Theft of Property and five years for Breaking or Entering. The court further entered a notation on the judgment that he was not to be considered for parole.

The only point argued on appeal is that appellant was improperly sentenced as an habitual offender and was denied eligibility for parole.

Only the pleadings, instructions, verdict, sentencing and proceedings by the court are questioned; therefore, the facts of the case wil not otherwise be included in this opinion.

On August 21, 1979, an information was filed charging appellant with Breaking or Entering and misdemeanor Theft of Property. An amended information was filed on September 7, 1979, in which appellant was charged as an habitual offender pursuant to Ark. Stat. Ann. § 41-1001 (Repl. 1977). The amended information listed three prior alleged felony convictions.

At the bifurcated trial appellant was found guilty of Theft of Property and Breaking or Entering. The jury also found he had been convicted of two or more prior felonies. His punishment was assessed at 30 days on the misdemeanor theft and five years on breaking or entering.

During the sentencing phase of the trial, the state entered the three prior convictions without objection. Two of the convictions were obviously felony convictions, and the third was a judgment in the circuit court on a guilty plea for which he was sentenced to one year in the Department of Correction for the crime of theft. The judgment failed to state that the conviction was a felony. However, the judgment did show on its face the appellant was represented by counsel and was sentenced to the Department of Correction for the period of one year.

Appellant argues there is no proof that the disputed judgment was a felony. As previously stated, it was a circuit

court judgment and the sentence was one year in the Department of Correction. We take judicial notice of the fact that a sentence to the Department of Correction is only ordered in felony cases. The defense attorney in the trial of the present case was the attorney on all three of the prior convictions. He had knowledge of the three alleged felonies that the state intended to prove from the date of the amended information. He made no objection to their introduction, and he did not take advantage of the opportunity to challenge or rebut the state's contention that all three were felony convictions. It is too late to raise the question on appeal. *Garner* v. *Holland*, 264 Ark. 536, 572 S.W. 2d 589 (1978). Regardless, he was only found to have been convicted of two or more prior felonies; thus, no prejudice resulted to appellant even if the disputed judgment had been a misdemeanor.

The maximum sentence for Breaking or Entering is five years because it is a class D felony. Had he been sentenced as an habitual offender, pursuant to Ark. Stat. Ann. § 41-1001, he could have received up to seven years, considering the fact that the jury found he had been convicted of two prior felonies. We cannot say from the sentence he received that he was even convicted as an habitual offender.

The court gave credit for jail time and allowed the sentences to run concurrently; however, a provision was added to the judgment that appellant would not be eligible for parole.

Ark. Stat. Ann. §§ 43-2801 thru 2834 (Repl. 1977) are for the use of the Department of Correction in determining parole eligibility. The court has no authority to determine the manner in which the Board of Pardons and Paroles exercises their prerogative under Acts 1968 (1st Ex. Sess.), No. 50. See *Stevens* v. *State*, 262 Ark. 216, 555 S.W. 2d 229 (1977); and *Elliott* v. *State*, 268 Ark. 454, 597 S.W. 2d 76 (1980).

Therefore, the case is remanded for the purpose of correcting the sentence by deleting the reference to appellant's eligibility for parole. Otherwise, the case is affirmed.

Affirmed as modified.