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SUPREME COURT OF ARKANSAS

No. CR11-736

NAPOLEAN JOHNSON, JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** May 17, 2012 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT, [NOS. CR-2007-1015-5 AND CR-2010-194-5] HONORABLE JODI RAINES DENNIS, JUDGE APPEAL DISMISSED.

ROBERT L. BROWN, Associate Justice

Johnson appeals to this court to enforce the terms of his plea agreement and to prevent the Arkansas Department of Correction (ADC) from ignoring the judgment and commitment order. The State has moved to dismiss Johnson's appeal on the basis that the circuit court lacked jurisdiction to modify his sentence and, in turn, this court lacks jurisdiction to consider his appeal. We agree that the circuit court correctly ruled that it lacked jurisdiction. Accordingly, we grant the State's motion to dismiss Johnson's appeal.

On October 24, 2007, in case number CR-2007-1015-5, appellant, Napolean Johnson, Jr., was charged with (1) possession of a controlled substance with intent to deliver, crack cocaine, a class Y felony; (2) possession of a controlled substance with intent to deliver, marijuana, a class C felony; (3) possession of drug paraphernalia, a class C felony; (4) unauthorized use of property to facilitate a crime, a class B felony; and (5) possession of drug

paraphernalia with intent to manufacture a controlled substance, crack cocaine, a class C felony. On March 23, 2010, Johnson was charged in case number CR-2010-194-5 with (1) terroristic threatening in the second degree, a class A misdemeanor; (2) kidnapping, a class Y felony; and (3) battery in the third degree, a class A misdemeanor.

On November 17, 2010, Johnson entered a negotiated plea of guilty, in case number CR-2007-1015-5, to (1) possession of cocaine, a class C felony; (2) possession of marijuana with intent to deliver, a class C felony; and (3) possession of drug paraphernalia, a class C felony. As part of the plea agreement, the State agreed to reduce the charge of possession of cocaine with intent to deliver, which was a class Y felony, to simple possession. The State also nolle-prossed the charges of unauthorized use of property to facilitate a crime and possession of drug paraphernalia with intent to manufacture a controlled substance. Johnson then pled guilty, in case number CR-2010-194-5, to (1) second-degree terroristic threatening, a class A misdemeanor; (2) kidnapping, a class B felony; and (3) third-degree battery, a class A misdemeanor. In exchange for Johnson's plea, the State agreed to reduce the class Y kidnapping charge to class B kidnapping.

Johnson was sentenced as a habitual offender pursuant to Arkansas Code Annotated § 5-4-501(b) to one year on each misdemeanor conviction and to ten years on each felony conviction. The sentences were to run concurrently for a total term of ten years. The judgment and commitment order reflecting his plea and sentence was entered on December 1, 2010.

On January 7, 2011, the ADC issued a time-computation card, which showed that Johnson would be required to serve the entirety of his ten-year sentence for kidnapping because he was ineligible for parole pursuant to Act 1805 of 2001, codified at Arkansas Code Annotated section 16-93-609. That statute excludes from parole eligibility a person who commits a violent felony offense after having previously been convicted of a violent felony offense. Ark. Code Ann. § 16-93-609(b) (Repl. 2006). Because of this, Johnson filed a "Motion to Modify Sentence to Conform with the Intent of the Parties" on February 3, 2011. In his motion, Johnson alleged that he was sentenced under Arkansas Code Annotated section 5-4-501(b), and not section 16-93-609, and that no agency, like the ADC, should have the authority to change the terms of a plea bargain. He moved that the court "modify his sentence and amend the judgment to show that he was not sentenced under the provisions of Act 1805 A.C.A. 16-93-609." The State responded that amending the judgment as requested would amount to a modification of Johnson's sentence, which the circuit court had no jurisdiction to do. This lack of jurisdiction was due to the fact that his sentence, which Johnson did not contest as illegal or illegally imposed, had already been put into execution.

On April 29, 2011, the circuit court denied Johnson's motion and explained in its order:

> The defendant seeks modification of his sentence as a result of the effect of A.C.A. § 16-93-609 on his parole eligibility. He asked the court to order that the Arkansas Department of Correction not apply A.C.A. § 16-93-609 to his sentence. Unless a sentence is illegal or illegally imposed, this court does not have jurisdiction to modify a sentence once the sentence is executed. The defendant does not argue that his sentence is illegal or illegally imposed. Parole eligibility is within the prerogative of the Arkansas Department of Correction. The motion is denied.

Johnson moved for reconsideration on May 4, 2011, and requested that the court reconsider its decision and give him the benefit of his plea bargain, which would include directing the ADC not to apply section 16-93-609 to his sentence. His motion for reconsideration was not ruled on by the circuit court, and he filed a notice of appeal.

We first note that Johnson does not contend that his sentence is illegal or illegally imposed by the circuit court. Instead, his disagreement is with the ADC and its decision to apply section 16-93-609, a parole-eligibility statute, to his sentence. Accordingly, we question whether he has chosen the right vehicle to raise this issue because he is not really seeking a modification of sentence. Rather, he is asking that this court direct the ADC to make him eligible for parole. This is not a recognized exception for an appeal following a guilty plea. *See Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41 (1999) (noting the following exceptions to the general rule that there is no appeal from a plea of guilty: (1) appeals following a conditional guilty plea; (2) appeals relating to issues involving testimony and evidence which occurred after the guilty plea but before statutorily authorized sentencing hearings; and (3) appeals from postjudgment motions to amend incorrect or illegal sentences, which follow a guilty plea).

Moreover, there is no question that Johnson's sentence has been placed into execution because he is presently incarcerated in the ADC. The record reflects that the judgment and commitment order was entered on December 1, 2010, which means it was put into execution on that date. *See Gates v. State*, 353 Ark. 333, 107 S.W.3d 868 (2003). This court has long held that the circuit court lacks jurisdiction to modify, amend, or revise a valid sentence once

it is placed into execution. *See Green v. State*, 2009 Ark. 113, 313 S.W.3d 521 (citing *Gavin v. State*, 354 Ark. 425, 125 S.W.3d 189 (2003)). Generally speaking, absent a statute, rule, or available writ, once the circuit court enters a judgment and commitment order, jurisdiction is transferred to the executive branch of our government for implementation. *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909. And the circuit court does not have the authority to place conditions as to parole eligibility on the sentence announced. *Morris v. State*, 333 Ark. 466, 970 S.W.2d 210 (1998). Again, Johnson makes no argument that the sentence itself is invalid. His allegation, in reality, is a challenge to the calculation of his parole eligibility and the ADC's application of a parole-eligibility statute to his sentence.

Parole eligibility falls clearly within the domain of the executive branch and specifically the ADC, as fixed by statute. *See* Ark. Code Ann. § 5-4-402(a) (Repl. 2006) ("[A] defendant convicted of a felony and sentenced to imprisonment shall be committed to the custody of the Department of Correction for the term of his or her sentence or until released in accordance with law."). Accordingly, the judiciary has no jurisdiction over how parole eligibility is determined or the conditions to be placed on it once the sentence is placed into execution. *See Richie*, 2009 Ark. 602, at 11, 357 S.W.3d at 915 (Circuit court lacked the authority to require defendant to undergo drug and alcohol treatment as a condition of his incarceration.); *see also Ark. Dep't of Corr. v. Stapleton*, 345 Ark. 500, 51 S.W.3d 862 (2001) (Once a valid judgment and commitment order is entered, a circuit court has no authority to order where the sentence will be served.). The circuit court had no jurisdiction to grant

Johnson the relief requested; nor does this court. We grant the State's motion to dismiss the appeal.

Appeal dismissed.