

SUPREME COURT OF ARKANSAS

No. CR10-923

MARVIS LASHAUN HERVEY
APPELLANT

VS.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered March 17, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
NO. CR2009-1093,
HON. MARION HUMPHREY, JUDGE

AFFIRMED.

COURTNEY HUDSON HENRY, Associate Justice

Appellant Marvis Lashaun Hervey appeals a Pulaski County Circuit Court order convicting him of first-degree murder and sentencing him to a total of thirty-eight years’ imprisonment, which included a term of ten years imposed as a firearm enhancement, pursuant to Arkansas Code Annotated section 16-90-120 (Supp. 2009). For reversal, appellant argues that his ten-year sentence was illegal because section 16-90-120 was repealed by substitution with the enactment of Arkansas Code Annotated section 5-4-505 (Repl. 1993).¹ We have jurisdiction, pursuant to Arkansas Supreme Court Rule 1-2(b)(5) (2010), as we are asked to overrule precedent. We affirm.

Because appellant does not challenge the sufficiency of the evidence, we provide only a brief recitation of the facts. On March 19, 2009, the State filed a single-count felony information against appellant, alleging that appellant committed first-degree murder by

¹ See Ark. Code Ann. § 5-4-505, *repealed by* Acts of March 16, 1993, Nos. 532 & 550, 1993 Ark. Acts 1471, 1602.

purposely causing the death of Harry Droughter. In its felony information, the State also alleged that appellant caused the victim's death by employing a firearm in the charged offense and that any sentence of imprisonment should be enhanced pursuant to section 16-90-120. On February 10, 2010, appellant proceeded to a jury trial. The following day, the jury found appellant guilty of both first-degree murder and employing a firearm to commit the offense. The jury sentenced appellant to an aggregate sentence of thirty-eight years' imprisonment with ten years as a firearm enhancement. On February 23, 2010, the circuit court entered an amended judgment reflecting appellant's conviction and sentence, and appellant timely filed a notice of appeal.

For his sole point on appeal, appellant argues that his ten-year sentence for firearm enhancement was an illegal sentence. Specifically, appellant contends that section 16-90-120, formerly codified in 1969 at Arkansas Statutes Annotated sections 43-2336 and 43-2337, was repealed by substitution with the enactment of section 5-4-505, formerly codified at Arkansas Statutes Annotated section 41-1004, when the new Arkansas Criminal Code became effective on January 1, 1976. Appellant concedes that sections 43-2336 and 43-2337 were not expressly repealed but were repealed by substitution based upon an irreconcilable conflict with section 41-1004. Appellant asserts that section 41-1004 was narrower in scope because it excluded from firearm enhancement those felonies that contained an element of employing, using, carrying, or furnishing a deadly weapon. Finally, appellant urges this court to overrule its recent decision in *Neely v. State*, 2010 Ark. 452, 370 S.W.3d 820, which was

decided by a 4–3 vote, because two new justices now sit on the court and did not decide *Neely*. In response, the State argues that appellant’s request to overrule *Neely* must be rejected based upon the doctrine of stare decisis.

Appellant recognizes our recent decision of *Neely, supra*, where we rejected the argument that section 16–90–120 was impliedly repealed with the passage of section 5–4–505. In *Neely*, we concluded that the two statutes could be read harmoniously and held that section 16–20–120 was merely a sentence enhancement, apart from the felony offense, while section 5–4–505 provided an increase in the initial, maximum sentence for the felonious offense. *Id.* Appellant now asks us to overrule *Neely*. However, we recently declined to overturn *Neely* in *Sesley v. State*, 2011 Ark. 104, 380 S.W.3d 390, where the appellant presented this precise argument and asked this court to reconsider its previous position now that two members of the *Neely* majority have been replaced. We declined to reverse our recent precedent and affirmed *Sesley’s* conviction and sentence based upon our holding in *Neely*.

In the present case, appellant’s argument fails based upon the doctrine of stare decisis. Under stare decisis principles, appellate courts are bound to follow prior case law. *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006). It is well settled that precedent governs until it gives a result that is so patently wrong or manifestly unjust that a break becomes unavoidable. *Id.* Here, appellant’s request to overrule our prior case law because two new justices now serve on this court flies in the face of that well-established principle of law. On

the subject of stare decisis, we assert the following:

Stare decisis is a maxim the application of which is necessary, not only to secure private rights, but to preserve and maintain the authority and confidence due to courts of last resort. In contemplation of law, we occupy this bench as a court, not as individual judges. It ought not to be understood that the law will or does change with the opinion of the judges who, for a time, sit here. When the law is solemnly declared by this court, there it ought to rest, and it ought not to be understood that, when new judges come upon the bench, the people may expect a change in well-established rules and principles that protect their rights. In this way only will the certain and equal administration of justice to all be secured.

Stewart v. Bd. of Supervisors of Polk Cnty., 30 Iowa 9, 18 (1870) (Beck, J., dissenting). This court strongly adheres to the doctrine of stare decisis. Therefore, for the reasons articulated in *Neely, supra*, and *Sesley, supra*, we reject appellant's argument and affirm appellant's conviction and sentence.

Affirmed.

HANNAH, C.J., and CORBIN and DANIELSON, JJ., dissent.

JIM HANNAH, Chief Justice, dissenting. I respectfully dissent for the same reasons I dissented to *Sesley v. State*, 2011 Ark. 104, 380 S.W.3d 390, *Neely v. State*, 2010 Ark. 452, 370 S.W.3d 820, and *Williams v. State*, 364 Ark. 203, 217 S.W.3d 817 (2005). Arkansas Code Annotated section 16-90-120 (Supp. 2009) was repealed. The General Assembly has not reenacted section 16-90-120. It is not possible to read a repealed statute to be harmonious with an existing statute. Again, the majority sanctions and approves of the imposition of a sentence in violation of the law.

CORBIN and DANIELSON, JJ., join.