

Cite as 2010 Ark. 63

SUPREME COURT OF ARKANSAS

No. CR09-175

MITCHELL SCOTT JOHNSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered February 12, 2010

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CR-08-274-1]

HON. TOMMY J. KEITH, JUDGE,

CERTIFIED QUESTION ANSWERED;
REMANDED TO COURT OF
APPEALS.

PAUL E. DANIELSON, Associate Justice

The court of appeals certified the question in this criminal case to us pursuant to Arkansas Supreme Court Rule 1-2(b)(5) (2009) as one involving a significant issue needing clarification of the law. The question certified to us is whether an appeal regarding a circuit court’s admission of evidence or testimony during the sentencing phase of a trial may be entertained, despite the fact that the sentencing phase followed a guilty plea and sentencing was performed by the court, sitting without a jury. We hold that such an appeal is proper, and we remand the case to the court of appeals for a determination on the merits.

On February 20, 2008, appellant Mitchell Scott Johnson was charged with theft by receiving—credit or debit card or account number, a Class C felony, in violation of Ark.



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Code Ann. § 5-36-106, and financial-identity fraud, a Class B felony, in violation of Ark. Code Ann. § 5-37-227. On May 2, 2008, the charging information was amended to add the offense of possession of a controlled substance, a Class A misdemeanor, in violation of Ark. Code Ann. § 5-64-401(c). Johnson appeared before the Benton County Circuit Court on October 7, 2008, and requested that he be allowed to plead guilty to the three offenses in the form of an “open plea” to the court, rather than making a plea agreement with the State. The circuit court accepted his plea and filed the order on October 9, 2008.

The court then held a sentencing hearing on November 14, 2008, and sentenced Johnson to twelve years in the Arkansas Department of Correction, with an additional eight-year suspended sentence for the offense of financial-identity fraud; a ten-year suspended sentence for the offense of theft by receiving; and, twelve months for the offense of possession of a controlled substance. Johnson filed a timely notice of appeal to his sentence.

Johnson’s counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Rule 4-3(k)(1) of the Arkansas Supreme Court Rules and requests that his motion to withdraw as counsel be granted. Johnson, acting pro se, then filed his argument supporting the reversal of his sentence. Johnson argues that the court erred by (1) admitting and relying on evidence regarding Johnson’s juvenile record, (2) demonstrating bias, and (3) imposing a sentence that was disproportionate in view of the crimes to which he pled guilty. The State does not argue that his appeal following the guilty plea is impermissible. The State argues only that Johnson’s arguments were waived because he failed to raise the issues below and



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failed to demonstrate prejudice. Johnson’s counsel argues that none of the exceptions to the general rule that an appeal may not be taken from a plea of guilty apply in the instant case because the sentencing hearing was before the court and not a jury. As noted, the court of appeals certified that issue to this court.

Rule 1(a) of the Arkansas Rules of Appellate Procedure—Criminal instructs that there shall be no appeal from a plea of guilty, except as provided by Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. However, this court has established additional exceptions. *See, e.g., Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41 (1999); *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). In *Hill*, we accepted an appeal after a plea of guilty because the appeal involved the admission of evidence or testimony, a nonjurisdictional issue, which arose in the sentencing phase of trial. In a line of cases following *Hill*, the exception was explained to be an exception that existed when there was a challenge to testimony or evidence presented *before a jury* in a sentencing hearing separate from the plea itself. *See Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004); *Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005); *Wickham v. State*, 2009 Ark. 357, 324 S.W.3d 344. The “before a jury” language in those cases caused concern for the court of appeals as the sentencing phase in the instant case was not before a jury.

While the allegations presented in *Hill* stemmed from a sentencing phase that was before a jury, the presence of the jury was irrelevant to the creation of this exception. This court explained that “[t]he introduction of evidence during [the penalty/sentencing phase]



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must be governed by our rules of admissibility and exclusion; otherwise, these proceedings would not pass constitutional muster, which is all the more reason to permit appeal.” *Hill*, 318 Ark. at 413, 887 S.W.2d at 278.

Furthermore, this court has previously permitted an appeal challenging a sentence following a guilty plea where the sentencing was performed by the court and not a jury. See *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). Although there were three dissenting justices, the dissent opined only that it was not an appropriate appeal because it involved a sentencing procedure that was an integral part of the acceptance of the defendant’s plea of guilty. The fact that the sentencing phase had not been before a jury was of no moment.

Therefore, we conclude that an appeal may be taken after a guilty plea when it alleges evidentiary errors that arose after the plea and during the sentencing phase, regardless of whether a jury was impaneled for that phase of trial. We now remand this case to the court of appeals for a determination on the merits.

Certified question answered; remanded to court of appeals.

Paul M. Gehring, for appellant.

Dustin McDaniel, Att’y Gen., by: *Eileen W. Harrison*, Ass’t Att’y Gen., for appellee.