DIVISION II

CACR06-666

DAVID LEE WASHINGTON — FEBRUARY 21, 2007

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [CR-1989-205A, CR-1989-601A, CR-1989-602A]

HONORABLE RALPH EDWIN WILSON, JR., JUDGE

AFFIRMED

Appellant David Lee Washington alleges that the trial court committed reversible error in failing to set aside his sentence on aggravated robbery. He asserts that he was illegally convicted and sentenced on the underlying felonies of robbery and battery in addition to his conviction for the first-degree-murder charge that was necessarily predicated upon the underlying felonies. We find no error and affirm.

An information filed in Crittenden County Circuit Court charged appellant with the capital-felony murder of Melvin D. Rogers in furtherance of the felonies of robbery and battery. A second information charged appellant with the offense of first-degree battery against Diane McCommon by shooting her with a firearm. A third information charged appellant with committing a third crime, aggravated robbery with a firearm of Judy Lynne McCool, doing business as Fina Truck Stop. All of the offenses occurred on February 1, 1988. On November 13, 1989, appellant pleaded guilty to first-degree murder, first-degree battery,and aggravated

robbery as charged in each of the three separate informations for which he was sentenced to 40, 10, and 40 years' imprisonment, respectively, to be served consecutively. An amended judgment-and-commitment order reflecting appellant's convictions and sentences as a result of his pleas was entered on January 30, 1990.

On November 7, 2005, appellant filed a pro se petition requesting correction of an illegal sentence citing Arkansas Code Annotated section 16-90-111(1987) (superseded).[1] His petition alleged that his 90-year sentence was illegal because both the battery and the aggravated robbery were underlying felonies for the first-degree murder to which he had pleaded guilty. Appellant alleged that the imposition of cumulative sentences for these offenses ran afoul of Ark. Code Ann. § 5-1-110(1987) (superseded), which, at the time he committed the offense, did not authorize cumulative punishments and convictions for felony murder and its underlying felonies. After appellant filed his petition, the circuit court appointed him counsel and directed the parties to file briefs on the matter.

In briefing the matter, appellant's counsel reiterated appellant's claim and added that, if the court concluded that only one of the allegedly underlying felonies should be vacated, it should be the aggravated-robbery conviction, not the first-degree-battery conviction. The prosecution conceded that appellant was entitled to some relief but maintained, however, that first-degree battery should be counted as the offense underlying the murder conviction. The circuit court adopted the prosecution's position, merging appellant's first-degree-battery

[1]This section, concerning correction or reduction of sentences was declared superseded by Ark. R. CR. P. 37.2(c) in *Harris v. State*, 318 Ark. 599, 887 S.W. 2d 514 (1994).

conviction into his first-degree-murder conviction, leaving intact his convictions for aggravated robbery and first-degree murder, with their 40-year sentences to be served consecutively. On February 1, 2006, an amended judgment-and-commitment order was entered in accordance with the circuit court's ruling.

Appellant now appeals that order, asserting that the trial court should have vacated the aggravated-robbery conviction or, if only one conviction was vacated, the court should have vacated the aggravated-robbery conviction, not the first-degree-battery conviction.

Although appellant does not cite *Flowers v. Norris*, 347 Ark. 760, 68 S.W.3d 289, (2002), his argument closely follows the analysis our supreme court applied in that case for habeas relief:

> In *Bangs v. State,* 310 Ark. 235, 835 S.W.2d 294 (1992), this court stated that it treats allegations of void or illegal sentences as it does issues of subject-matter jurisdiction, in that it reviews such allegations whether or not an objection was made in the trial court. Thus, the issue on appeal is whether Appellant has demonstrated that the trial court lacked jurisdiction or that his commitment order was invalid on its face.
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> Appellant contends that it was improper for the trial court to sentence him for attempted capital murder, as well as both of the underlying felonies used to support that conviction. According to Appellant, his sentence violates the prohibition against double convictions set forth in Ark. Code Ann. § 5-1-110 (Repl.1997). The State counters that Appellant has failed to sufficiently demonstrate that he is entitled to habeas relief.
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> A sentence is void when the trial court lacks authority to impose it. *Bangs,* 310 Ark. 235, 835 S.W.2d 294. This court has held that when a criminal offense, by definition, includes a lesser offense, a conviction cannot be had for both offenses. *See McClendon v. State,* 295 Ark. 303, 748 S.W.2d 641 (1988); *Rowe v. State,* 275 Ark. 37, 627 S.W.2d 16 (1982) (*per curiam*); *Barnum v. State,* 276 Ark. 477, 637 S.W.2d 534 (1982) (*per curiam*). Recently, in *Meny,* 340 Ark. 418, 13 S.W.3d 143, this court held that where the appellant was convicted of three counts of rape, one count of kidnapping, and one count of attempted capital murder, one conviction for an underlying felony had to merge with the conviction for attempted capital murder. This court then modified the

> appellant's convictions and sentences by setting aside one of the convictions and sentences for rape, and leaving the remaining convictions and sentences in effect.
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> Here, in order to convict appellant of attempted capital murder, it was necessary for the State to prove either the elements of aggravated robbery or kidnapping. *See e.g., Richie v. State,* 298 Ark. 358, 767 S.W.2d 522 (1989). The State set forth its case on the attempted murder charge by specifying both aggravated robbery and kidnapping as the underlying felonies for the charge of attempted capital murder. The trial court then convicted and sentenced Appellant on all three charges. Because the State was required to establish the elements of one underlying felony in order to convict Appellant of attempted capital murder, it was error for the trial court to convict and sentence Appellant for attempted capital murder and both of the underlying felonies.

Flowers v. Norris, 347 Ark. at 764-65, 68 S.W.3d at 291-92.

While the premise appellant asserts is valid, appellant has failed to show that it applies to the facts of his case. Appellant's aggravated robbery of Ms. McCool is not necessarily the underlying offense for his murder of Melvin Rogers. Appellant does not present the underlying facts resulting in the conviction to show that the murder of Rogers was committed in furtherance of the aggravated robbery of McCool. While the crimes against Rogers and McCool apparently occurred during the same criminal episode at the Fina Truck Stop in West Memphis, that fact alone does not establish that the aggravated robbery of McCool was the underlying felony for the murder of Rogers.

Appellant might well have entered the Fina Truck Stop, robbed Rogers, and, during the course of that robbery, shot and killed Rogers, and then separately robbed McCool during the same criminal episode. In those circumstances, the entry of separate convictions for the first-degree murder of Rogers and for the aggravated robbery of McCool do not run afoul of section 5-1-110(a)(1). *See Kinsey v. State*, 290 Ark. 4, 6-7, 716 S.W.2d 188, 189-90 (1986) (holding

both aggravated-robbery and attempted first-degree-murder convictions permissible under prior version of section 5-1-110(a)(1) because when "crimes are committed in the same escapade, they are not part of the same conduct when committed against different persons"). Appellant has failed to provide a record supporting his argument that the robbery of McCool was the underlying felony for his first-degree murder conviction. In the absence of a record sufficient to demonstrate error, we must affirm.

Affirmed.

GLADWIN and BIRD, JJ., agree.