Cite as 2024 Ark. App. 293

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-23-285

TODD MENARD APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered May 1, 2024 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. 26CR-22-549] HONORABLE RALPH C. OHM, JUDGE AFFIRMED

MIKE MURPHY, Judge

A Garland County jury convicted appellant Todd Menard of robbery, theft of a firearm, and being a felon in possession of a firearm. As a habitual offender with four prior felonies, Menard received an aggregate sentence of forty years in prison. On appeal, he argues the circuit court lacked subject-matter jurisdiction to enter sentences on both the robbery and the theft convictions because theft is a lesser-included offense of robbery. We affirm.

A review of the record reveals that on the evening of June 19, 2022, an officer was dispatched to a church where he made contact with the pastor, Michael Gentry. The officer stated that Gentry was "in complete shock" as Gentry told him about the robbery. Gentry identified the assailant as Menard.

Gentry testified he had become acquainted with Menard through his ministry at the church and had known him for a few months. Gentry said that, during that time, his family

had fed Menard, provided him with clothes, and let him use the church facilities to shower and take care of himself. Gentry also testified that, because the church is located in a neighborhood that has a reputation for criminal activity, he regularly carries a firearm in a holster tucked into his front pants pocket.

Gentry said that Menard came to the church's front door, and he appeared "very sweaty" and "disheveled." Gentry invited him inside the sanctuary where they talked. Gentry gave Menard several glasses of water, and Menard told him that he was "in some trouble" but did not tell Gentry what kind of trouble. Gentry said that the two of them continued talking when Menard pushed him in the chest, knocked him off balance, grabbed his .380 pistol and its holster, and then ran out the door. Gentry said that he had fallen back from being pushed, but he quickly ran to the door and called after Menard, to no avail. Gentry then shut the door and called the police.

After the State's case, the defense moved for a directed verdict, arguing that the State had failed to establish that Menard used physical force against Gentry when he took Gentry's pistol. Menard also argued that there was no substantial evidence to support the theft-of-a-firearm charge because the State had failed to adduce proof that the firearm was functional. The circuit court denied both of Menard's directed-verdict motions. The defense then rested without putting on any evidence and renewed its directed-verdict motions, which the circuit court again denied. Following closing arguments, the jury deliberated and returned a guilty verdict on the charges of robbery and theft of a firearm. A sentencing hearing followed, whereupon the jury recommended consecutive sentences of five years on the theft

conviction, twenty-five years on the robbery conviction, and ten years on the felon-in-possession-of-a-firearm. The court imposed the recommended sentences. Menard now appeals.

On appeal, Menard argues that he was illegally sentenced to terms of imprisonment for both robbery and theft of a firearm because the theft component was necessary to prove the robbery. To support his argument, he relies on Arkansas Code Annotated section 5-1-110 (Repl. 2013), which states that a defendant cannot be convicted of both a criminal offense and a lesser-included offense of that crime. He additionally seeks to overturn our precedent in *Cartwright v. State*, 2016 Ark. App. 425, 501 S.W.3d 849, where we held theft is not a lesser-included offense of robbery.

As a preliminary matter, the State argues that because Menard did not object to the entry of his convictions and sentences, his argument is waived. Menard argues that an illegal-sentence issue may be raised for the first time on appeal.

This court views an issue of a void or an illegal sentence as one of subject-matter jurisdiction in that it cannot be waived by the parties and may be addressed for the first time on appeal. *Anderson v. State*, 2017 Ark. App. 300, at 2. A sentence is illegal when the circuit court lacks the authority to impose it. *Taylor v. State*, 2018 Ark. App. 30, at 3–4, 540 S.W.3d 295, 297. An illegal sentence is one that is illegal on its face, which requires that the sentence exceed the statutory maximum for the offense for which the defendant was convicted; if a sentence is within the statutory limits, it is legal. *Id.*

In *Anderson*, 2017 Ark. App. 300, the appellants were convicted of six felony offenses and six counts under the firearm-enhancement statute. On appeal, they argued that the firearm-enhancement statute is a lesser-included offense of any crime for which use of a firearm is an element, thereby making their sentences for both the underlying felonies and the firearm enhancements illegal. We held "their sole point on appeal is more accurately understood as a double-jeopardy challenge than as a challenge to an illegal sentence." *Anderson*, 2017 Ark. App. 300, at 1. However, because the appellants in *Anderson* had failed to raise this argument below, we held it was not preserved for our review.

Here, the substance of Menard's argument is that theft is a lesser-included offense of robbery, which is not an issue that is apparent on the face of the sentencing order and does not relate to whether the sentence exceeded the statutory maximum. As in *Anderson*, Menard's challenge is not to an illegal sentence; rather, it is a double-jeopardy challenge. Because Menard failed to raise his argument after the jury convicted him of both charges, he waived his argument for purposes of appeal. *See Brown v. State*, 347 Ark. 308, 317, 65 S.W.3d 394, 400 (2001) (discussing how objections in double-jeopardy situations do not arise until after the jury renders its verdict because a defendant can be *prosecuted* for multiple offenses, whereas certain multiple *convictions* are barred by the Double Jeopardy Clause). Accordingly, we affirm.

Affirmed.

ABRAMSON and THYER, JJ., agree.

Matt Kezhaya and *Sonia Kezhaya*, for appellant.

Tim Griffin, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.