

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION I

CACR07-857

May 7, 2008

RICHARD WARREN HAMILTON
APPELLANT

AN APPEAL FROM BENTON
COUNTY CIRCUIT COURT
[CR1998-337-2]

V.

HON. DAVID CLINGER, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

The main issue in this case is whether a person who enters a guilty plea but whose judgment of guilt is deferred under the First Offender Act, as codified at Ark. Code Ann. § 16-16-903(a)(1)(Repl. 1997), is required to register as a sex offender because he is a person who has been “adjudicated guilty” of a sex offense under the Sex Offender Registration Act (Registration Act). *See* Ark. Code Ann. §§ 12-12-903(a)(1997) and 12-12-905(a)(1)(1997).

Richard Hamilton was placed on probation as a first offender in 1999 after being charged with having sexual contact with a thirteen-year-old child. One of the special conditions of his probation required him to “register as a sex offender as required by statute.” Thus, he was ordered to register pursuant to the Registration Act. After completing his probation, appellant filed a petition to have the circuit court terminate his registration obligation.

He now appeals from the order denying his request to terminate his registration obligation. He asserts that because he was not required to register as a sex offender under the statutes that were in effect when he was placed on probation, the circuit court lacked

authority to require him to register, erred in denying the petition to terminate his registration requirement, and also imposed an *ex post facto* punishment. We are unable to reach the merits of any of appellant's arguments because he failed to preserve them for appellate review. Accordingly, we affirm the circuit court's order denying appellant's request to terminate his registration obligation.

Procedural History

Appellant was charged with having sexual contact with a thirteen-year-old child from March 1, 1998, through March 27, 1998, in violation of Ark. Code Ann. § 5-14-108 (Repl. 2006). On November 16, 1998, pursuant to the First Offender Act, appellant entered a plea agreement by which he pleaded guilty to Class C felony first-degree sexual abuse in exchange for a six-year probationary sentence. The circuit court entered an order of probation on January 27, 1999, but refused to accept appellant's guilty plea. It deferred further proceedings under the First Offender Act and ordered appellant to register as a sex offender.

Appellant did not challenge the propriety of the court's order until 2005, after he successfully completed his probation and the circuit court entered an order to dismiss his case and seal the record. He subsequently filed a petition to terminate his registration obligation because his probationary case had been dismissed. He asserted that the First Offender Act did not require him to register where he pleaded guilty pursuant to that Act. Nonetheless, he asserted that Act 1353 of 1999, an amendment to the Registration Act, codified at § 12-12-905(b)(1999), provided that a person's obligation to register as a sex offender was terminated upon an expungement of the record by the court. The latter provision, however, was repealed before appellant's probationary sentence expired by Act 1754 of 2001. Finally, appellant observed that, pursuant to Act 1264 of 2003, as codified at § 12-12-905(c)(1)(Repl. 2003), a registrant is relieved of his duty to register if the underlying conviction of the registrant is reversed, vacated, or set aside, or if the registrant is pardoned. Pursuant to these

provisions, appellant asserted that he had satisfied all requirements to cease registration.

The State opposed the petition, arguing that pursuant to the current version of the Registration Act, codified at Ark. Code Ann. § 12-12-905(b) (Supp. 2007), a defendant whose record is expunged under the First Offender Act is not relieved of the obligation to register; that none of the conditions in § 12-12-905(c)(1) applied to appellant, and that no other language in § 12-12-905 relieved him of his registration obligation. No hearing was held; the matter was decided on the parties' filings. The circuit court essentially adopted the State's response and denied appellant's petition.

I. Applicability of the Registration Act

Appellant was placed on probation as a first offender pursuant to Ark. Code Ann. § 16-93-303, which provided:

(a)(1) Whenever an accused enters a *plea of guilty* or *nolo contendere prior to an adjudication of guilt*, the judge of the circuit or municipal court..., in the case of a defendant who has not been previously convicted of a felony, *without entering a judgment of guilt* and with the consent of the defendant, may defer further proceedings and place the defendant on probation for a period of not less than one (1) year, under such terms and conditions as may be set by the court.

....
(b) Upon fulfillment of the terms and conditions of probation or upon release by the court prior to the termination period thereof, *the defendant shall be discharged without court adjudication of guilt*, whereupon the court shall enter an appropriate order which shall effectively dismiss the case, discharge the defendant, and expunge the record, if consistent with the procedures established in § 16-90-901 et seq.

(Emphasis added.)

Additionally, Ark. Code Ann. § 12-12-905(a)(1) required registration by a person who, on or after August 1, 1997, was “adjudicated guilty” of a qualifying sex offense.¹ The term “‘adjudication of guilt’ or other words of similar import,” was defined under the Registration Act to mean “a plea of guilty, a plea of *nolo contendere*, a negotiated plea, a finding of guilty by a judge, or a finding of guilt by a jury.” See Ark. Code Ann. § 12-12-903(1)(1997).

¹Appellant does not dispute that he pled guilty to a qualifying “sex offense” under the Registration Act, which includes first-degree sexual abuse. See Ark. Code Ann. § 12-12-903(12)(F) (1997).

Appellant first argues that the circuit court lacked authority in 1998 to order him to register because he had not received an “adjudication of guilt” as required by the Registration Act. *See* Ark. Code Ann. § 12-12-905(a)(1). However, because appellant failed to appeal from the probation order requiring him to register as a sex offender within thirty days after the order was written, he is precluded from now challenging the applicability of the Registration Act to his probationary sentence. *See, e.g., J.C.S. v. State*, 336 Ark. 364, 985 S.W.2d 312 (1999) (holding the defendant failed to preserve for appellate review a challenge to the applicability of the Registration Act where he failed to timely file a post-trial motion or an appeal to the probationary sentence imposed under First Offender Act). Accordingly, we affirm the circuit court’s order denying appellant’s request to terminate his registration obligation without reaching the merits of his argument.²

II. *Ex Post Facto* Violation

Appellant’s *ex post facto* argument is premised, first, on the assertion that the Registration Act did not require a person to register as a sex offender. His argument is premised, second, on his assertion that the circuit court improperly retroactively applied § 12-12-905(c)(1), which relieves a registrant from the registration obligation only when the underlying conviction is reversed, vacated, or set aside, or the registrant is pardoned. More specifically, appellant argues that because he was not required to register when he was placed on probation, and because § 12-12-905(c)(1) was adopted *after* he was placed on probation, the circuit court erred in denying his petition because he did not fall within any category of registrants under § 12-12-905(c)(1).

²Although not discussed by the parties, we recognize that, before an offender’s registration obligation may be terminated, the Registration Act requires the offender to prove by a preponderance of the evidence that he has not committed an offense within *fifteen years* after being placed on probation and that he is not likely to pose a threat to the safety of others. *See* Ark. Code Ann. § 12-12-919(a)(1)-(2) (1997)(emphasis added). We take judicial notice that fifteen years have not yet passed since appellant was placed on probation.

Nonetheless, because appellant did not raise the *ex post facto* argument below, we do not reach the merits of his argument. See, e.g., *Ussery v. State*, 308 Ark. 67, 822 S.W.2d 848 (1992) (refusing to address the defendant’s *ex post facto* argument because he failed to present the argument to the trial court).³

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.

³ To any extent that the circuit court appeared to rely on the current versions of the applicable statutes, we note that current versions of the relevant statutes impose the same requirements as the statutes in effect when appellant was ordered to register. See Ark. Code Ann. §§ 12-12-905(a)(1)(1997) and 12-12-905(a)(1)(Supp. 2007) (requiring registration of persons adjudicated of a sex offense on or after August 1, 1997); Ark. Code Ann. §§ 12-12-905(b)(1997) and 12-12-905(b)(Supp. 2007) (stating that the offender’s duty to register is not relieved if his record of conviction will be expunged under §§ 16-93-301-16-93-303); and Ark. Code Ann. §§ 12-12-919(a)(1)-(2)(1997) and 12-12-919(b)(2) (Supp. 2007)(specifying the conditions under which an offender may request termination of his registration obligation).