

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR11-235

DEWANA DIONE RUNION
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 30, 2012

APPEAL FROM THE DREW
COUNTY CIRCUIT COURT
[No. CR 2009-005-3]

HONORABLE ROBERT BYNUM
GIBSON, JR., JUDGE

REMANDED WITH
INSTRUCTIONS

LARRY D. VAUGHT, Chief Judge

Dewana Runion appeals the judgment and disposition order entered by the Circuit Court of Drew County revoking her probation and sentencing her to 365 days in the Arkansas Department of Community Correction (DCC) where she was directed by the trial court to successfully complete a drug program. She argues on appeal that the sentence was illegal because it placed a condition on her incarceration that is not authorized under Arkansas Code Annotated section 5-4-104(d).¹ We agree and remand.

¹Section 5-4-104(d) sets out authorized sentences and provides as follows:

(d) A defendant convicted of an offense other than a Class Y felony, capital murder, § 5-10-101, treason, § 5-51-201, or murder in the second degree, § 5-10-103, may be sentenced to any one (1) or more of the following, except as precluded by subsection (e) of this section:

- (1) Imprisonment as authorized by §§ 5-4-401-5-4-404;
- (2) Probation as authorized by §§ 5-4-301-5-4-311;
- (3) Payment of a fine as authorized by §§ 5-4-201-5-4-203;
- (4) Restitution as authorized by a provision of § 5-4-205; or

On June 18, 2009, Runion pled guilty to fraudulent use of a credit or debit card and was sentenced to thirty-six months' probation under the Community Punishment Act. Runion's conditions of probation prohibited her from consuming controlled substances and required that she submit to random drug testing, report to her probation officer, and pay probation-supervision fees. On October 25, 2010, the State filed a petition for revocation of probation alleging that Runion violated these terms and conditions of her probation.

At the revocation hearing on January 24, 2011, David Crutchfield, a probation/parole officer with the DCC, testified that Runion violated the terms and conditions of her probation by testing positive for heroin/opiates on August 14, 2009; testing positive for heroin/opiates and benzodiazepines on January 29, 2010; failing to report for random drug testing in April, May, June, August, September, and October 2010; failing to report to her probation officer in April, May, June, August, September, and October 2010; and failing to pay her probation-supervision fees.

Runion testified at the hearing. She admitted that she tested positive for controlled substances but stated that she was under a doctor's care and had prescriptions for the controlled substances. She also admitted that she failed to report as ordered because she did not have a driver's license. She added that sometimes she did report, but her probation officer was not there. Finally, Runion admitted that she was behind on paying her fees because she did not have a job.

(5) Imprisonment and payment of a fine.

Ark. Code Ann. § 5-4-104(d) (Repl. 2006).

At the conclusion of the hearing, the trial court revoked Runion's probation, finding that by her own admissions, she had violated the terms and conditions of her probation. The trial court entered a judgment and disposition order on January 24, 2011, that sentenced Runion to 365 days' confinement in the DCC and stated that Runion was to complete a nine-month drug program provided by the DCC. It is this order from which Runion appeals.² The sole issue is whether the trial court imposed an illegal sentence when it ordered Runion to complete a drug program during her DCC confinement.

While the argument raised by Runion was not raised below, it is well settled that an appellant may challenge an illegal sentence for the first time on appeal. *Richie v. State*, 2009 Ark. 602, at 4, 357 S.W.3d 909, 912 (citing *Cantrell v. State*, 2009 Ark. 456, 343 S.W.3d 591; *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007); *Sullivan v. State*, 366 Ark. 183, 234 S.W.3d 285 (2006)). We view an issue of a void or illegal sentence as being an issue of subject-matter jurisdiction, which we may review whether or not an objection was made in the trial court. *Richie*, 2009 Ark. 602, at 4, 357 S.W.3d at 912. A sentence is void or illegal when the trial court lacks authority to impose it. *Id.* at 4, 357 S.W.3d at 912.

In *Richie*, our supreme court held that a sentence of incarceration with the special condition that the defendant complete drug and alcohol treatment was an illegal sentence. *Richie*, 2009 Ark. 602, at 11–12, 357 S.W.3d at 915 (citing Ark. Code Ann. § 5-4-104(d) (Repl. 2006)). Relying on *Richie*, Runion argues that the trial court entered an illegal sentence

²This is actually the second time Runion's case has been appealed. The first appeal was a no-merit appeal filed by Runion's counsel. Due to the issue regarding the legality of the trial court's sentence, we ordered rebriefing and denied Runion's counsel's motion to withdraw. *Runion v. State*, 2012 Ark. App. 30.

when it required her to complete a drug program during her 365-day sentence. In response, the State argues³ the sentence was lawful because Runion was not sentenced to incarceration; rather, she was sentenced to probation with the added condition of confinement, which is permitted pursuant to Arkansas Code Annotated sections 5-4-303(d)(4) (Repl. 2006)⁴ and 5-4-304(c) (Repl. 2006).⁵ Therefore, we must determine whether the trial court, upon revoking Runion's probation, sentenced Runion to incarceration or probation. Based on the record in this case, we hold that the trial court sentenced Runion to incarceration.

The order entered from which Runion appeals does not state that Runion was sentenced to probation upon her revocation. The relevant section of the order provides:

Period of Confinement: 0 months 365 days.
 Suspended Imposition of Sentence: ____ months.
 Period of Probation: ____ months.
 Defendant is assigned to ____ county jail ____ [DCC] and/or probation ____
 confinement under special conditions

The only portion of this section of the order that the trial court made an entry on is the "Period of Confinement." The probation sections were not marked.

³The State also argues that Runion's point on appeal is moot because she has already served her sentence. However, the record does not establish this. Because we are unable to consider matters outside the record, *Dodge v. Lee*, 352 Ark. 235, 237, 100 S.W.3d 707, 709 (2003), we cannot conclude that Runion has served her sentence and that her illegal-sentence issue is moot.

⁴Arkansas Code Annotated section 5-4-303(d)(4) provides that, following a revocation hearing in which a defendant has been found guilty, the court may impose a period of confinement within the limits set by § 5-4-304.

⁵Arkansas Code Annotated section 5-4-304(c) provides that, following a revocation hearing in which a finding of guilt has been made, a court may add a period of confinement to be served during the period of probation. Where confinement to a facility in the DCC has been imposed, the period actually spent in confinement under this section shall not exceed 365 days. Ark. Code Ann. § 5-4-304(d)(1)(B) (Repl. 2006).

Moreover, the trial court's statements at the conclusion of the revocation hearing reflect its intent to incarcerate Runion. While the trial court stated that it was interested in having Runion receive drug treatment, it also made it clear that it wanted Runion to serve time for her probation violations, stating, "I'm going to lock you up," and "it's the sentence and judgment of this Court that [Runion] serve one year, 365 days, at the — It's community corrections . . . [.]” At no time did the trial court state that it was sentencing Runion to probation.

Our supreme court has stated that “judgments are generally construed like other instruments and the determinative factor is the intention of the court, gathered from the judgment itself and the record, including the pleadings and the evidence.” *Seamster v. State*, 2009 Ark. 258, at 5–6, 308 S.W.3d 567, 570 (citing *Lewis v. State*, 336 Ark. 469, 475, 986 S.W.2d 95, 98 (1999); *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993)). When considering both the order and the trial court's statements at the revocation hearing, we hold that the intention of the trial court was to incarcerate Runion for 365 days. As part of her incarceration, the trial court also required her to attend a drug program. Because such a condition to incarceration is not authorized by Arkansas Code Annotated section 5-4-104(d), the sentence was illegal. Accordingly, we remand to the trial court with directions to strike the unlawful condition and for the entry of a new judgment and disposition order consistent with this opinion.

Remanded with instructions.

MARTIN and BROWN, JJ., agree.