

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 11-24

FRANK PARMLEY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 9, 2011

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CR 2003-884-1]

HONORABLE ROBIN F. GREEN,
JUDGE

AFFIRMED IN PART; REMANDED
IN PART

DOUG MARTIN, Judge

The Benton County Circuit Court revoked appellant Frank Parmley's suspended imposition of sentence (SIS) and sentenced him to serve twenty-eight years' imprisonment. As a special condition of his sentence, the trial court ordered Parmley to complete long-term drug treatment while in prison. Parmley contends that he received an illegal sentence in that (1) the maximum sentence he could have received was twelve years' imprisonment, and (2) the trial court did not have authority to order him to seek drug treatment in prison. We affirm in part, but we agree with Parmley's second point and remand with instructions for the trial court to both correct a clerical error on the judgment and commitment order and strike that portion of Parmley's sentence requiring him to complete long-term drug treatment while in prison, because this constituted an illegal sentence.

On May 20, 2004, Parmley pleaded guilty to committing possession of methamphetamine with intent to deliver on May 7, 2003. Parmley also pleaded guilty to possession of methamphetamine and possession of drug paraphernalia committed on May 18, 2003. With respect to the charge for possession of methamphetamine with intent to deliver, a Class Y felony, Parmley was sentenced to twelve years' imprisonment, with twelve years' suspended imposition of sentence. As for the crimes committed on May 18, 2003, which were Class C felonies, Parmley was sentenced to ten years' imprisonment on each. The trial court ordered that these sentences run concurrently. Parmley served only three and one-half years in prison before being released on parole.

At a revocation hearing, the trial court found "overwhelming" evidence that Parmley committed possession of methamphetamine and possession of drug paraphernalia on December 21, 2009, during the time that imposition of sentence was suspended. The court revoked Parmley's SIS and ordered him to serve twenty-eight years' imprisonment on the Class Y felony conviction for possession of methamphetamine with intent to deliver. The judgment and commitment order reflects that Parmley also received twenty-eight years' imprisonment on the 2003 convictions for possession of methamphetamine and possession of drug paraphernalia.

Parmley did not object to the sentences he received; however, it is well settled that an appellant may challenge an illegal sentence for the first time on appeal, even if he did not raise the argument below. *See Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007). Specifically, this court views 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. *Mayer v. State*, 351 Ark. 26, 89 S.W.3d 926 (2002). A sentence is void or illegal when the trial court lacks authority to impose it. *Donaldson, supra*.

Sentencing is entirely a matter of statute in Arkansas. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003). “No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter.” Ark. Code Ann. § 5-4-104(a) (Supp. 2001). A circuit court has jurisdiction to correct an illegal sentence even if it has been placed into execution. *Meadows v. State*, 324 Ark. 505, 922 S.W.2d 341 (1996).

Parmley contends that the trial court could sentence him to only twelve years’ imprisonment upon revocation of his suspended sentence. Parmley is wrong. The law at the time Parmley committed his crimes in 2003 provided that, once the defendant is found to have failed to comply with the conditions of his suspended sentence, the trial court may impose any sentence that could have originally been imposed for the offense of which he was found guilty. Ark. Code Ann. § 5-4-309(f)(1)(A) and (B) (Supp. 2001). For a Class Y felony, the sentence shall be not less than ten years and not more than forty years, or life. Ark. Code Ann. § 5-4-401(a)(1) (Repl. 1997). When the sentence given is within the maximum prescribed by law, the sentence is not illegal, because the court has the authority to impose it. *Cooley v. State*, 322 Ark. 348, 909 S.W.2d 312 (1995). The trial court had already sentenced Parmley to twelve years’ imprisonment in May 2004, so the maximum sentence Parmley could receive at the time his SIS was revoked was twenty-eight years. Thus, the

sentence of twenty-eight years' imprisonment on the Class Y felony was not an illegal sentence. Accordingly, we affirm his conviction.

The judgment and commitment order, however, contains a clerical error in that it reflects a sentence of twenty-eight years' imprisonment on the Class C felonies as well. For a Class C felony, the sentence shall not be less than three years and not more than ten years. Ark. Code Ann. § 5-4-401(a)(4) (Repl. 1997). In May 2004, Parmley was sentenced to ten years' imprisonment on the Class C felonies, the maximum Parmley could receive, and thus there was no SIS to revoke. Moreover, in rendering its ruling from the bench, the trial court stated, "I note that [Parmley] could have received the possibility of life in prison based on the 2003 charges." Clearly, the trial court referred to revocation of only the Class Y felony because a sentence of life in prison is not applicable to Class C felonies.

The purported sentence on the Class C felonies was simply a clerical error. Clerical errors in a judgment may be corrected under the common-law rule of nunc pro tunc orders. *State v. Rowe*, 374 Ark. 19, 285 S.W.3d 614 (2008). Arkansas Rule of Civil Procedure 60(b) embodies the common-law rule of nunc pro tunc orders and is applicable in both civil and criminal proceedings. Ark. R. Civ. P. 60(b). Pursuant to Rule 60(b), a trial court may at any time correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. Ark. R. Civ. P. 60(b). A true clerical error is "essentially one that arises not from an exercise of the court's judicial discretion but from a mistake on the part of its officers or perhaps someone else." *Gholson v. State*, 2009 Ark. App. 373, at 4, 308 S.W.3d 189, 191. A circuit court can enter an order nunc pro tunc at any time

to correct clerical errors for the purpose of making “the record speak the truth, but not to make it speak what it did not speak but ought to have spoken.” *Rowe*, 374 Ark. at 24–25, 285 S.W.3d at 619–20. “As clerical errors do not speak the truth, courts have the power to enter an amended judgment and commitment order nunc pro tunc to correct an erroneous judgment.” *Carter v. Norris*, 367 Ark. 360, 364, 240 S.W.3d 124, 127 (2006).

Parmley next contends that the trial court did not have authority to order him to complete drug treatment while in prison. Indeed, the State concedes error on this point. We hold that this portion of Parmley’s sentence was illegal because the trial court cannot impose special conditions in conjunction with imprisonment. A trial court may clearly place conditions on a defendant when the court suspends the imposition of sentence or places the defendant on probation; however, the same cannot be said for a sentence of imprisonment. *See, e.g., Richie v. State*, 2009 Ark. 602, ___ S.W.3d ___ (reversing because the trial court imposed an illegal sentence when it attempted to require Richie to undergo drug-and-alcohol treatment as a condition of his incarceration). Because the trial court imposed an illegal sentence when it listed the completion of drug treatment as a special condition of Parmley’s imprisonment, we remand to the trial court with directions to strike this portion of Parmley’s sentence in the judgment and commitment order.

To summarize, we direct the trial court to enter a nunc pro tunc order reflecting that Parmley, upon revocation of his SIS, is sentenced to twenty-eight years’ imprisonment with respect to the Class Y felony alone, and the trial court is ordered to strike that part of the sentence requiring Parmley to complete drug treatment while in prison.

Cite as 2011 Ark. App. 685

Affirmed in part; remanded in part.

VAUGHT, C.J., and GLADWIN, J., agree.