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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 11-485

STEPHANIE NICHOL SMALLEY APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 28, 2012 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. CR 2007-153] HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE APPEAL DISMISSED

DOUG MARTIN, Judge

Appellant Stephanie Smalley purports to appeal from her plea of nolo contendere to two counts of theft of property and the twenty-year sentences imposed by the circuit court. The State, in its response to Smalley's jurisdictional statement, suggests that Smalley's appeal must be dismissed. We agree and dismiss the appeal.

Smalley was charged with two counts of theft of property, both Class B felonies. *See* Ark. Code Ann. § 5-36-103(b)(1)(A) (Repl. 2006). On February 25, 2010, Smalley entered a plea of nolo contendere to both counts. At the hearing during which she entered her plea, the court advised Smalley that each theft-of-property charge carried a sentencing range of five to twenty years. The circuit court asked for a presentence report and passed the case for sentencing, scheduling a sentencing hearing for March 16, 2010. A presentence report prepared by the prosecuting attorney noted that the seriousness level of the offense was five,

but the defendant's criminal history was zero, so the Arkansas Sentencing Standards Grid offered the Community Correction Center or alternative sanctions as punishment.

Smalley failed to appear for sentencing on the appointed date, and the sentencing hearing was not held until January 6, 2011.[1] At that time, the trial court sentenced Smalley to twenty years in the Arkansas Department of Correction on each count, to run concurrently. Smalley filed a timely notice of appeal and now raises two points for reversal: 1) the trial court erred in sentencing her to the maximum sentence when the presentence report recommended probation, and 2) the trial court erred by not advising Smalley of her right to withdraw her plea in accordance with Arkansas Rule of Criminal Procedure 25.3(b).

Before reaching the merits of Smalley's arguments, however, we must address the State's contention that Smalley's appeal must be dismissed. Except as provided in Arkansas Rule of Criminal Procedure 24.3(b), one cannot take an appeal from a guilty plea or a plea of nolo contendere. *See* Ark. R. App. P.–Crim. 1(a) (2011). Under Rule 24.3(b), a defendant may enter a conditional plea of guilty premised on an appeal of the denial of a suppression motion. The supreme court has recognized a few exceptions to this general rule. The first exception is when there is a challenge to testimony or evidence presented before a jury in a sentencing hearing separate from the plea itself. *Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004); *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). The second exception is when the appeal is an appeal of a posttrial motion challenging the validity and legality of the

[1]During that interval, Smalley's federal probation was apparently revoked, and she was in federal custody for some time.

sentence itself. *Seibs*, *supra*; *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). In *Jones v. State*, 301 Ark. 510, 785 S.W.2d 217 (1990), the supreme court permitted an appeal from the trial court's failure to modify the appellant's sentence by applying jail-time credit. *See also Hampton v. State*, 48 Ark. App. 93, 890 S.W.2d 279 (1995).

None of these exceptions apply to Smalley. She did not enter a conditional plea under Rule 24.3(b); there was no evidence or testimony presented to a jury in a separate sentencing hearing; Smalley did not file a posttrial motion challenging the sentence; and there is no question about jail-time credit. Rather, Smalley challenges the trial court's upward departure from the sentencing guidelines, and she contends that the trial court should have informed her of her right to withdraw her no-contest plea. Each of these arguments is nothing more than a challenge to the validity of the sentence Smalley received as a direct result of her plea, which is not permitted. *State v. Sherman*, 303 Ark. 284, 796 S.W.2d 339 (1990).

In *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997), the supreme court refused to consider the merits of appellant Wofford's argument that the trial court erred in departing from the sentencing guidelines, holding that such an argument was not permitted in an appeal from a nolo contendere plea. *Wofford*, 330 Ark. at 14–15, 952 S.W.2d at 649. Similarly, in *Henagan v. State*, 302 Ark. 599, 791 S.W.2d 371 (1990), the supreme court dismissed an appeal from a guilty plea wherein the appellant attempted to argue that the trial court should have sentenced him to probation instead of ten years' imprisonment. There, the court noted that it was "not dealing with an appeal from the decision of a posttrial motion

but with an appeal from the sentencing procedure which was an integral part of the acceptance of Henagan's plea of guilty." *Henagan*, 302 Ark. at 601, 791 S.W.2d at 371.

In the present case, Smalley is arguing on appeal that the trial court erred in sentencing her to the maximum sentence when the presentence report recommended probation and in not advising her of her right to withdraw her plea. Smalley did not file a posttrial motion challenging the validity and legality of the sentence, however, and her appeal falls within none of the other exceptions to the rule against appeals from guilty pleas. Accordingly, we must dismiss her appeal.

Appeal dismissed.

GRUBER and ABRAMSON, JJ., agree.