

ARKANSAS COURT OF APPEALSDIVISION II
No. CACR11-935JOHN WILLIAM WAKELEY
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** April 10, 2013APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[No. CR-02-185-1]HONORABLE ROBIN F. GREEN,
JUDGEAFFIRMED; REMANDED FOR
RESENTENCING**LARRY D. VAUGHT, Judge**

On October 18, 2004, the Benton County Circuit Court entered a judgment and disposition and order of probation (order of probation), reflecting that appellant John William Wakeley pled guilty to arson, residential burglary, and theft of property. The order of probation sentenced Wakeley to fifteen years' supervised probation.¹ On December 17, 2010, the State petitioned to revoke Wakeley's probation, alleging that he violated the terms and conditions of his probation when, in September 2010, he pled guilty in Missouri to felony theft. A revocation hearing was held on June 16, 2011, after which the Benton County Circuit Court entered a judgment and commitment order (revocation order) finding Wakeley guilty of violating the terms and conditions of his probation and revoking his probation. The revocation order also sentenced him to twenty years' imprisonment in the Arkansas

¹The order of probation further provided that the Interstate Compact with the State of Missouri applied to Wakeley's probation, and his probation was supervised there.

Department of Correction, with an additional ten years' suspended sentence, for each of the three convictions, to run concurrently. On appeal, Wakeley challenges the sufficiency of the evidence supporting the revocation and argues that his sentence is illegal. Because Wakeley's sufficiency-of-the-evidence argument is not preserved, we affirm his convictions. We remand for resentencing, however, because his sentence is illegal.

The State's petition for revocation alleged that on September 17, 2010, Wakeley pled guilty to Class C felony theft/stealing in Newton County, Missouri. At the revocation hearing, the trial court initiated the questioning with Wakeley by asking if he pled guilty to the Missouri theft charges. Wakeley answered, "I admit it," adding that he transferred money from one bank to another without sufficient funds. Wakeley also told the trial court that as a result of his Missouri guilty plea he was given a five-year deferred sentence and ordered to pay restitution.

Arkansas probation officer Emily McCandless attended the hearing and told the trial court that Wakeley stole \$11,921.24 in the Missouri theft. She added that Wakeley had been regularly reporting in Missouri, stating "reporting [there] has never been a problem."

Based on Wakeley's admission, the trial court revoked his probation and sentenced him to serve three terms of twenty years' imprisonment with an additional ten-year suspended sentence for each of the offenses—arson, residential burglary, and theft of property—to be

served concurrently. The trial court's order of revocation was entered June 16, 2011, and this appeal followed.²

Wakeley raises two points on appeal. First, he challenges the sufficiency of the evidence supporting the revocation. Under this heading, he argues that “the trial court’s ruling in this matter should be reversed because the judicial process was fundamentally defective” because no witness testified under oath; the trial court relied on Wakeley’s self-incriminating admission to committing the theft in Missouri; and no Missouri judgment or guilty plea was entered or testimony from a Missouri official was introduced into evidence. However, none of these arguments were made below; thus, they are not preserved for appeal. In Arkansas, issues raised for the first time on appeal, even constitutional ones, will not be considered because the trial court never had the opportunity to rule on them. *Jones v. State*, 2011 Ark. App. 324, at 10, 384 S.W.3d 22, 27; *Ingram v. State*, 2009 Ark. App. 729, at 6, 363 S.W.3d 6, 9 (holding that appellant’s arguments—that the trial court failed to require the State to present testimony or evidence, failed to hold the State to its burden of proof, and found her guilty in the absence of any evidence advanced by the State—were not preserved for appeal where she failed to raise them in the trial court). Because Wakeley’s sufficiency arguments are not preserved for appeal, we affirm the trial court’s order revoking his probation.

²This is the second time Wakeley’s case has been on appeal. In the first, Wakeley’s counsel filed a no-merit appeal, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(k) (2012), along with a motion to withdraw as counsel. In an opinion handed down August 29, 2012, we questioned the legality of Wakeley’s sentence and noted the absence of Wakeley’s probation terms and conditions in the record. *Wakeley v. State*, 2012 Ark. App. 448, at 3. Thus, we remanded for supplementation of the record, ordered rebriefing, and denied counsel’s motion to withdraw. *Id.* at 4.

Wakeley's second point on appeal is that his sentence is illegal. On review of the legality of a sentence, we must determine whether the trial court had the authority to impose a particular sentence and not whether the sentence is illegal on its face or within the prescribed statutory range. *Glaze v. State*, 2011 Ark. 464, at 7, 385 S.W.3d 203, 209. The touchstone for determining whether a sentence is illegal or void is the trial court's "authority to act." *Id.*, 385 S.W.3d at 209. A sentence is illegal if the trial court is without the authority to impose it, even if on its face it is within the statutory range. *Id.*, 385 S.W.3d at 209. Because sentencing is entirely a matter of statute, the trial court only has the authority to impose a particular sentence when it complies with the applicable statute. *Id.*, 385 S.W.3d at 209.

In the instant case, we hold that there are two illegal sentences contained in the June 2011 revocation order. This order sentenced Wakeley on three offenses—arson, residential burglary, and theft of property. At all relevant times, arson was a Class A felony, punishable by a term of imprisonment of not less than six years and not more than thirty years. Ark. Code Ann. §§ 5-38-301(b)(5) (Repl. 1997); 5-4-401(a)(2) (Repl. 1997). Residential burglary was a Class B felony, punishable by a term of imprisonment of not less than five years and not more than twenty years. Ark. Code Ann. §§ 5-39-201(a)(2) (Repl. 1997); 5-4-401(a)(3) (Repl. 1997). Theft of property was a Class C felony, punishable by a term of imprisonment of not less than three years and not more than ten years. Ark. Code Ann. §§ 5-36-103(b)(2) (Repl. 1997); 5-4-401(a)(4) (Repl. 1997). However, the trial court's revocation order sentenced Wakeley to a term of twenty years' imprisonment with a ten-year suspended

imposition of sentence (SIS) for each of the three offenses. Arkansas Code Annotated section 5-4-309(g)(1)(A) (Repl. 1997)³ provided that if a court revokes probation, it may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he or she was found guilty. While a thirty-year sentence falls within the statutory-sentencing range for Class A arson, it exceeds the range for Class B residential burglary and Class C theft of property. Therefore, the residential-burglary and theft-of-property sentences are illegal.

The remedy for an illegal sentence is not dismissal of all related proceedings in the trial court and release from imprisonment. *Bangs v. State*, 310 Ark. 235, 241, 835 S.W.2d 294, 297 (1992). The remedy is not dismissal of the State's petition to revoke. *Id.*, 835 S.W.2d at 297. The general rule is that if the original sentence is illegal, even though partially executed, the sentencing court may correct it. *Id.*, 835 S.W.2d at 297. Where an error has nothing to do with the issue of guilt or innocence and relates only to punishment, it may be corrected in lieu of reversing and dismissing. *Id.*, 835 S.W.2d at 297. Therefore, we remand for resentencing in the 2011 revocation order consistent with the governing statutes.⁴

³This statute was repealed by Acts of 2011, Act 570, §§ 10 to 13, effective July 27, 2011.

⁴We also note that in the October 2004 order of probation, the trial court sentenced Wakeley to serve three concurrent fifteen-year probation terms for pleading guilty to arson, residential burglary, and theft of property. The fifteen-year probation term fell within the statutory-sentencing range for Class A arson and Class B residential burglary. However, it exceeded the range for Class C theft of property. If a trial court places a defendant on probation, the period of probation shall be for a definite period of time not to exceed the maximum jail or prison sentence allowable for the offense charged. Ark. Code Ann. § 5-4-306 (Repl. 1997). On remand, we direct the trial court to correct the 2004 theft-of-property

Affirmed; remanded for resentencing.

GRUBER and HIXSON, JJ., agree.

Law Office of Farris Merritt, by: *Farris E. Merritt*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Jake H. Jones*, Ass't Att'y Gen., for appellee.

probation sentence consistent with governing statutes.