

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CACR12-705

EDWARD VINCENT SMITH  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered October 31, 2012

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT, FIFTH  
DIVISION  
[NO. CR-10-536]

HONORABLE WENDELL GRIFFEN,  
JUDGE

AFFIRMED

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**WAYMOND M. BROWN, Judge**

The Pulaski County Circuit Court convicted appellant Edward Smith of criminal attempt to commit capital murder, aggravated robbery, aggravated residential burglary, two counts of battery in the first degree, and theft of property. Smith was sentenced to an aggregate of 298 months' imprisonment. This sentence was to run concurrently with the sentence Smith received in an unrelated case. Smith argues on appeal that the evidence does not support his theft-of-property conviction, for which he was sentenced to ten years' imprisonment. We affirm.<sup>1</sup>

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<sup>1</sup>This is the second time the case is before us. We initially dismissed Smith's appeal with instructions because he attempted to appeal two unrelated cases in a single appeal. See *Smith v. State*, 2012 Ark. App. 223.

A person commits theft of property if he takes or exercises unauthorized control over the property of another person with the purpose of depriving the owner of the property.<sup>2</sup> It is a Class C felony if the property's value is more than \$500 but less than \$2,500.<sup>3</sup> Smith contends that the State failed to introduce any evidence that the stolen property had any value at all. He acknowledges that he did not raise this issue to the trial court, but argues that we should address the merits of his argument for the first time on appeal because it deals with the issue of an illegal or otherwise void sentence.

Rule 33.1(b) of the Arkansas Rules of Criminal Procedure provides that, in a bench trial, "if a motion for dismissal is to be made, it shall be made at the close of all of the evidence." Such motion must state the specific grounds for dismissal. Subsection (c) of Rule 33.1 states that failure to challenge the sufficiency of the evidence "at the times and in the manner required in subsection ... (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support ... the judgment."

Here, Smith made no such motion, but contends that since the State failed to provide any evidence "whatsoever" of the value of the property, he is allowed to collaterally attack it on direct appeal. It is well settled that an appellant may challenge an illegal sentence for the first time on appeal.<sup>4</sup> We view an issue of a void or illegal sentence as being an issue of

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<sup>2</sup>Ark. Code Ann. § 5-36-103 (Repl. 2006).

<sup>3</sup>*Id.* Under the new statute, it would have been a Class A misdemeanor. See Ark. Code Ann. § 5-36-103 (Supp. 2011).

<sup>4</sup>*Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909 (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)).

subject-matter jurisdiction, which we may review whether or not an objection was made in the trial court.<sup>5</sup> A sentence is void or illegal when the trial court lacks authority to impose it.<sup>6</sup>

Smith's contention that this court may address his argument on appeal because it involves a void or illegal sentence, rather than the sufficiency of the evidence supporting his theft-of-property conviction, is without merit. We hold that Smith's argument is not preserved for appellate review because he failed to make a motion for dismissal of his theft-of-property charge on the ground that the State did not prove the value element of the offense. Therefore, we affirm.

Affirmed.

VAUGHT, C.J., and WYNNE, J., agree.

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<sup>5</sup>*Richie, supra.*

<sup>6</sup>*Id.*