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SUPREME COURT OF ARKANSAS

No. CR-18-40

JUSTIN JAMAILLE THORNTON APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered: April 25, 2019 APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT [NO. 40CR-11-47] HONORABLE ALEX GUYNN, JUDGE AFFIRMED.

JOHN DAN KEMP, Chief Justice

Appellant Justin Thornton appeals an order dismissing his petition to correct an illegal sentence. For reversal, he contends that the circuit court erred in dismissing his petition because this court reversed and dismissed all of his convictions in *Thornton v. State*, 2014 Ark. 157, 433 S.W.3d 216 (*Thornton I*). We affirm.

I. *Facts and Procedural History*

A. *Thornton I*

Following a bench trial held in February 2013, the Lincoln County Circuit Court found Thornton guilty of capital murder, felon in possession of a firearm, unauthorized use of a vehicle, and abuse of a corpse for which he was sentenced to life without parole plus ten years for his commission of the murder with a firearm. Thornton appealed to this court. His sole claim for reversal was that the circuit court erred in denying his motion for directed verdict on the capital-murder charge because the proof failed to establish that he acted with the requisite premeditation and deliberation. *Thornton I*, 2014 Ark. 157, at 1, 433 S.W.3d at 217.

We held that the evidence was insufficient to support a conclusion that Thornton killed the victim with a premeditated and deliberate intent; therefore, we reversed and dismissed. Further, we stated, "While the evidence cannot sustain the charge of capital murder, we offer no opinion about whether it would sustain a lesser offense." *Id.* at 15, 433 S.W.3d at 224. The State filed a petition for rehearing contending that this court committed errors of law in its analysis of the sufficiency of the evidence for the capital-murder conviction. In addition, the State contended that because "only the sufficiency of the element of premeditation and deliberation of the capital murder conviction was raised on appeal, the Court should clarify that the convictions of felony theft of property,[1] possession of a firearm, and abuse of a corpse still stand." We denied the State's petition for rehearing. Thereafter, we issued our mandate, which stated, in pertinent part, "After due consideration, it is the decision of the court that the conviction is reversed and dismissed for the reasons set out in the attached opinion."

B. *Thornton II*

After this court's mandate issued in *Thornton I*, the State filed in the circuit court a "Motion for Court to Consider Lesser-Included Offenses." The circuit court granted the State's motion and set a hearing for December 1, 2014. At the hearing, Thornton argued that the circuit court lacked jurisdiction to consider the lesser-included offenses, that the conviction of a lesser-included offense following the reversal and dismissal of a greater offense violates double-jeopardy principles, that his right to a speedy trial was violated, and that the circuit court denied him due process at the hearing when it did not allow him to argue that there was

[1]Thornton was not convicted of felony theft of property. The circuit court reduced the felony-theft charge to a misdemeanor count of unauthorized use of a vehicle. *Thornton I*, 2014 Ark. 157, at 3, 433 S.W.3d at 218.

insufficient evidence to sustain convictions of the lesser-included offenses. The circuit court rejected Thornton's arguments, ruled that the evidence from the February 2013 bench trial was sufficient to prove that Thornton acted with purpose in causing the death of the victim, and found Thornton guilty of first-degree murder. The circuit court sentenced Thornton, as a habitual offender, to forty years' imprisonment for first-degree murder, enhanced by ten years for its commission with a firearm. After noting that Thornton's other convictions and sentences had not been affected by this court's reversal and dismissal in *Thornton I*, the circuit court entered an amended sentencing order on December 16, 2014. The amended sentencing order reflected that Thornton was sentenced to an aggregate term of seventy years' imprisonment for his four convictions.

Thornton appealed and challenged only his conviction and sentence for first-degree murder. *See Thornton v. State*, 2015 Ark. 438, at 4, n.3, 475 S.W.3d 544, 546 n.3 (*Thornton II*). We reversed and dismissed, holding that the circuit court did not have jurisdiction to hear the State's "Motion for Court to Consider Lesser-Included Offenses." *Id.* at 5, 475 S.W.3d at 547. Our mandate issued on January 14, 2016, and stated, in pertinent part, "After due consideration, it is the decision of the court that the conviction is reversed and dismissed for the reasons set out in the attached opinion."

II. *Present Appeal*

On July 1, 2016, Thornton filed in the circuit court a petition to correct an illegal sentence pursuant to Arkansas Code Annotated section 16-90-111(a) (Repl. 2016).[2] He claimed that, by reversing and dismissing his *conviction* in *Thornton I*, this court reversed and dismissed *all* of his *convictions*. In his petition, Thornton stated,

> The Lincoln County Circuit Court has refused to obey the Supreme Court's mandate entirely reversing and dismissing my entire conviction and has instead entered a sentencing order contrary to the Arkansas Supreme Court mandate. I am currently doing a sentence of 240 months for possession of firearm by certain person and 240 months for abuse of corpse. Charges I am no longer convicted of due to the [supreme court's] May 15, 2014 mandate . . . reversing and dismissing my entire conviction.

Thornton requested that the circuit court declare his sentence illegal, correct his sentence, and order his release. The State responded that the only issue raised and considered on appeal in *Thornton I* was the sufficiency of the evidence to support a conviction for capital murder. The State asserted that the convictions for the firearm charge and abuse of a corpse were never appealed, never considered, and therefore stood intact. After reviewing this court's mandate and opinion in *Thornton I*, the circuit court ruled that Thornton was not entitled to relief because only the conviction for capital murder had been reversed and dismissed and not the convictions for felon in possession of a firearm by certain persons and abuse of a corpse. Accordingly, the circuit court dismissed the petition. We review the circuit court's dismissal of

[2]"Any circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time."

Thornton's petition for clear error. *E.g.*, *Williams v. State*, 2016 Ark. 16, 479 S.W.3d 544 (per curiam).

III. *Arguments and Analysis*

On appeal, Thornton maintains that his convictions and sentences are illegal because this court reversed and dismissed all his convictions and sentences in *Thornton I*. The State contends that this court's mandate in *Thornton I* reversing and dismissing "the conviction . . . for the reasons set out in the attached opinion" reversed only his capital-murder conviction and not his other convictions.

An appellate-court mandate[3] should be construed in accordance with both its "letter and spirit . . . taking into account the appellate court's opinion and the circumstances it embraces." *Dolphin v. Wilson*, 335 Ark. 113, 118, 983 S.W.2d 113, 115 (1998). In construing our mandate, we must identify the issue raised and decided in *Thornton I*. In his brief for that case, Thornton's sole point on appeal was that the circuit court erred in denying his motions for directed verdict "due to insufficiency of the evidence as to the offense of capital murder."

[3]The function of an appellate-court mandate is threefold: to establish the finality of the appellate court's decision, to restore jurisdiction in the circuit court from which the appeal is taken, and to communicate the appellate court's decision to the circuit court. *See* Ark. Sup. Ct. R. 5-3 (2018) (stating that in all cases, the clerk of this court will issue a mandate when the decision becomes final and will mail it to the clerk of the circuit court from which the appeal was taken for filing and recording); *Barclay v. Farm Credit Servs.*, 340 Ark. 65, 69, 8 S.W.3d 517, 519 (2000) (stating that this court loses jurisdiction to the circuit court once the mandate is issued from this court to the circuit court); *Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't*, 356 Ark. 494, 498, 156 S.W.3d 249, 253 (2004) (explaining that the mandate is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to recognize, obey, and execute the appellate court's decision).

See Abstract, Addendum, and Brief for Appellant, at Arg. 1, *Thornton I* (No. CR-13-807). He asserted that there was "insufficient evidence as to whether [he] acted with premeditation and deliberation," that the circuit court should have granted his motion for directed verdict on the capital-murder charge, and that his conviction for capital murder should be reversed and dismissed. *Id.* at Arg. 5, 16. Moreover, Thornton expressly conceded in his brief that there was sufficient evidence to support his remaining convictions. *Id.* at Arg. 5–6. Thus, the only issue presented for our consideration was whether there was sufficient evidence to support a conviction for capital murder.[4] We concluded that the evidence was insufficient, and we reversed and dismissed. *Thornton I*, 2014 Ark. 157, at 1, 15, 433 S.W.3d at 217, 224.

Our mandate in *Thornton I* specifically stated that Thornton's "conviction" was "reversed and dismissed for the reasons set out in the attached opinion." The opinion and the mandate did not state that Thornton's "convictions"––plural––were set aside or that the "judgment" was reversed and dismissed. In *Thornton I*, we did not reverse and dismiss Thornton's convictions for felon in possession of a firearm and abuse of a corpse. As such, we will not read our mandate as having done so.

Finally, we are not persuaded by Thornton's contention that, because we did not "sever the convictions," his "entire conviction" was reversed and dismissed, including his convictions

[4]*See Thornton I*, 2014 Ark. 157, at 1, 433 S.W.3d at 217 ("Thornton's sole argument on appeal is that the circuit court erred in denying his motions for a directed verdict because there was insufficient evidence to establish that he acted with the requisite intent of premeditation and deliberation."); *id.* at 4, 433 S.W.3d at 219 (stating that the sole point on appeal was whether there was sufficient evidence to prove the charge of capital murder and more specifically whether the State established that he acted with premeditation and deliberation); *id.* at 3, n.1, 433 S.W.3d at 218, n.1 (noting that Thornton did not challenge the sufficiency of the evidence to support remaining convictions).

for felon in possession of a firearm and abuse of a corpse. In making this argument, Thornton relies on this court's decision in *Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986). In that case, we recognized that "[w]hen a judgment in a criminal case is correct as to one count, but erroneous as to another, . . . we have the power to sever the judgment, affirm the count on which the appellant was properly convicted, and reverse and grant a new trial as to the other." *Id.* at 297, 718 S.W.2d at 940. But *Martin* does not purport to hold that there is only one way to sever a judgment, nor does it contain the actual language from a mandate or explain how to construe a mandate that the court has already issued.

Furthermore, *Martin* is factually inapposite to the case at bar. In *Martin*, the appellant was convicted of first-degree murder and first-degree battery. He challenged both convictions on appeal, contending that the trial court erred in refusing to give self-defense instructions on both charges. We held that the appellant was not entitled to the instruction for the murder charge but that he was entitled to the instruction on the battery charge. *Id.* at 296–97, 718 S.W.2d at 939. Therefore, we severed the judgment, affirmed the murder conviction, and reversed and remanded the battery conviction. *Id.* at 297, 718 S.W.2d at 940. In the present case, however, only one conviction was challenged. In *Thornton I*, we did not reverse and dismiss—or even address—Thornton's convictions for felon in possession of a firearm and abuse of a corpse; rather, we left intact Thornton's remaining convictions. Consequently, the circuit court did not clearly err in dismissing Thornton's petition to correct an illegal sentence.

Affirmed.

BAKER, J., dissents.

KAREN R. BAKER, Justice, dissenting. Because the majority continues to fail to correct the errors from Thornton's previous appeals, I dissent from the majority opinion.

This is Thornton's fourth time before the court regarding this appeal. In three of those cases, Thornton has contended that this court's mandate from *Thornton I* reversed and dismissed all his convictions. *Thornton v. State*, 2014 Ark. 157, 433 S.W.3d 433 S.W.3d 216. I agree and would reverse the circuit court's denial of Thornton's petition to correct his illegal sentence pursuant to Ark. Code Ann. § 16-90-111.

The majority states:

> Our mandate in *Thornton I* specifically stated that Thornton's "conviction" was "reversed and dismissed for the reasons set out in the attached opinion." The opinion and the mandate did not state that Thornton's "convictions"––plural––were set aside or that the "judgment" was reversed and dismissed. In *Thornton I*, we did not reverse and dismiss Thornton's convictions for felon in possession of a firearm and abuse of a corpse. As such, we will not read our mandate as having done so.

Although the majority attempts to again clarify *Thornton I*, as I explained in my dissent in *Thornton II*, "the majority's mandate unambiguously reversed and dismissed Thornton's conviction. Stated differently, the majority reversed and dismissed Thornton's entire judgment and conviction, cannot modify that mandate, and Thornton no longer has a conviction against him. *See Milsap v. Holland*, 186 Ark. 895, 56 S.W.2d 578 (1933); *Stroud v. Crow*, 209 Ark. 820, 823, 192 S.W.2d 548, 549 (1946) (the supreme court cannot amend its opinion after lapse of the term in which it was handed down.)[5]" *Thornton II*, 2015 Ark.

[5]*See also Ginn v. Penobscot Co.*, 342 A.2d 270, 274 (Me. 1975) ("Absent a statutory or rule provision to the contrary, the general rule is that, after an appellate court has determined the issues involved in the case submitted to it and caused its judgment in

438, at 12, 475 S.W.3d 544, 550 (Baker, J., dissenting.). Therefore, as in *Thornton II* and *Thornton v. Jones*, 2015 Ark. 109 (per curiam) (*Thornton III*), Thornton's return to this court today and the majority affirming the circuit court's denial of Thornton's petition to correct an illegal sentence is nonsensical because his entire case was dismissed by the mandate issued in *Thornton I* and the petition should be granted.

Based on my discussion above, I dissent.

Justin Thornton, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

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conformity with such determination to be entered and the case, together with the rescript of decision, to be remanded to the lower court, the appellate court thereafter has no power to reconsider, alter, or modify its decision. An appellate court, generally speaking, is without power to recall a mandate regularly issued for the purpose of correcting judicial error. *See*, 5 C.J.S. *Appeal and Error* [§ 1195 (Westlaw Mar. 2019); 5 Am. Jur. 2d [*Appellate Review* § 696 (Westlaw Feb. 2019)]; 5 C.J.S. *Appeal and Error* § [1195] ("The rule most generally adhered to is that an appellate court is without power to recall a mandate regularly issued without mistake, inadvertence, fraud, prematurity, or misapprehension, and that it will not recall the mandate for the purpose of re-examining the cause on the merits, or to correct judicial error. Likewise, a mandate may not be recalled for the purpose of granting supplemental relief.").