

Cite as 2009 Ark. 432

SUPREME COURT OF ARKANSAS
No. CR08-1455

ROBERT MALDONADO
 APPELLANT
 VS.
 STATE OF ARKANSAS
 APPELLEE

**Opinion Delivered September 24,
 2009**

APPEAL FROM PULASKI COUNTY
 CIRCUIT COURT,
 NO. CR 2007-603,
 HON. BARRY SIMS, JUDGE,

AFFIRMED

JIM GUNTER, Associate Justice

Appellant Robert Maldonado appeals from the judgment and commitment order sentencing him to a total of eighty years in prison for violating Ark. Code Ann. § 5-37-301, the Arkansas Hot Check Law, after his probation was revoked by the Pulaski County Circuit Court. We accepted this case on certification from the court of appeals pursuant to Arkansas Supreme Court Rule 1-2(d)(2009). At issue is whether the circuit court had authority to sentence appellant to consecutive terms of imprisonment after revocation. We affirm.

On February 1, 2008, appellant pled guilty to eight violations of the Arkansas Hot Check Law. Five counts were class B felonies, two counts were class C felonies, and one count was a class A misdemeanor. Appellant was placed on probation for ninety-six months for each felony count. He was also ordered to complete 100 hours of community service within one year and pay \$127,103.58 in restitution and a \$100 fine. A special condition of his probation was that he could not write or pass checks.

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On June 19, 2008, the State filed a petition to revoke appellant's probation, alleging that he had violated the imposed terms and conditions by committing new criminal offenses, failing to report to his probation officer, and failing to pay his monthly supervision fee. The State amended its petition on September 2, 2008, adding that appellant had written personal checks in violation of the special condition of his probation and that he had failed to report an arrest to his probation officer.

Following a revocation hearing on September 9, 2008, the circuit court sentenced appellant to twenty years' imprisonment each on four hot-check counts to run consecutively and ten years' imprisonment each on the other felony hot-check counts to run concurrently. Appellant filed a timely pro se notice of appeal. On October 1, 2008, he filed a Motion for New Trial or for Correction of Illegal Sentence asserting that the circuit court lacked authority to order consecutive sentences upon revocation because his probationary sentence ran concurrently. Following a hearing, the circuit court denied the motion. Appellant filed a timely amended notice of appeal from the original judgment and the denial of his motion.¹

Appellant's sole point on appeal is that the circuit court erred in giving him consecutive sentences upon revocation after having made his probation sentences concurrent at the original sentencing. Sentencing is entirely a matter of statute in Arkansas, and no

¹Although Arkansas Rule of Criminal Procedure 37 provides a procedure for post-conviction relief on the basis of illegal sentence, an allegation of illegal sentence may be brought on direct appeal. *See* Ark. R. Crim. P. 33.3 (2009); *see also* *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007) (stating that an appellant may challenge an illegal sentence for the first time on appeal, even if he did not raise the argument below).

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defendant convicted of an offense may be sentenced other than as provided by statute. *Harness v. State*, 352 Ark. 335, 339, 101 S.W.3d 235, 238 (2003). Our law provides that

[w]hen multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless the court orders the sentences to run consecutively.

Ark. Code Ann. § 5-4-403(a) (Repl. 2006). The decision to impose consecutive or concurrent sentences lies solely within the province of the trial judge, and the appellant assumes a heavy burden of showing that the trial judge failed to give due consideration in the exercise of that discretion. *Smith v. State*, 354 Ark. 226, 248, 118 S.W.3d 542, 555 (2003). Probation, however, always runs concurrently. “Whether imposed at the same time or a different time, multiple periods of suspension or probation run concurrently.” Ark. Code Ann. § 5-4-307 (Repl. 2006). Upon revocation, Ark. Code Ann. § 5-4-309(f)(1)(A) provides that

the court 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.

Appellant contends that because § 5-4-309(f)(1)(A) uses the singular “offense” instead of the plural “offenses,” it does not explicitly authorize making sentences consecutive upon revocation. He claims that § 5-4-309(f)(1)(A) is ambiguous and that the ambiguity should be interpreted in his favor. As support for his proposition, appellant cites *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995); *Nelson v. State*, 284 Ark. 156, 680 S.W.2d 91 (1984); and *Cashion v. State*, 265 Ark. 677, 580 S.W.2d 470 (1979). These cases all stand for the

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proposition that once a sentence has been placed into execution, the trial court is without jurisdiction to modify it. *Hadley*, 322 Ark. at 476–77, 910 S.W.2d at 678; *Nelson*, 284 Ark. at 157, 680 S.W.2d at 92; *Cashion*, 265 Ark. at 677–78, 580 S.W.2d at 471.

The cases cited by appellant predate the passage of Act 1569 of 1999, the enactment of which now allows for modification of an original sentence upon revocation of suspended sentence or probation. Codified at Ark. Code Ann. § 5-4-301(d)(2)(A) (Supp. 2009), the statute now provides that

(2) The entry of a judgment of conviction does not preclude:

(A) The modification of the original order suspending the imposition of sentence on a defendant or placing a defendant on probation following a revocation hearing held pursuant to § 5-4-310[.]

Pursuant to the plain language of Ark. Code Ann. § 5-4-301(d)(2) and Ark. Code Ann. § 5-4-309(f)(1)(A), the trial court was authorized following revocation to modify the original order and impose any sentence that appellant originally could have been given. Appellant was originally sentenced to probation on multiple counts, served concurrently by statute. The trial court revoked appellant’s probation on all counts. The sentences that the trial court ordered on each count after revocation were within the parameters authorized by statute for appellant’s multiple felony convictions. *See* Ark. Code Ann. § 5-4-401 (Repl. 2006). Furthermore, the trial court was permitted, based on Ark. Code Ann. § 5-4-403(a), to run multiple sentences of imprisonment for multiple offenses consecutively, including those where probation had been revoked. Because the trial court properly applied the law, we affirm.

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Affirmed.

IMBER, J., not participating.