

Cite as 2010 Ark. 307

SUPREME COURT OF ARKANSAS

No. CR 10-121

STATE OF ARKANSAS,

APPELLANT,

VS.

RICARDO TYLER,

APPELLEE,

Opinion Delivered June 24, 2010APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
NO. CR-89-988,
HON. WILLARD PROCTOR, JR.,
JUDGE,REVERSED AND REMANDED.**PAUL E. DANIELSON, Associate Justice**

Appellant the State of Arkansas appeals from the circuit court's order sealing appellee Ricardo Tyler's convictions pursuant to Act 531 of 1993. Its sole point on appeal is that the circuit court erred in doing so. We reverse the circuit court's order and remand to set aside the order to seal.

A review of the record reveals that in 1989, a felony information was filed charging that Tyler, on or about April 21, 1989, committed breaking or entering and criminal attempt to commit theft of property. He pled guilty to both counts. Accordingly, he was sentenced to probation for three years, along with certain conditions. Included in the order of probation was a circled notation regarding expungement under Act 346 of 1975.

On January 23, 1992, the State filed a petition to revoke Tyler's probation, and Tyler was ultimately sentenced to four years' imprisonment in the Arkansas Department of

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Correction (ADC) with two years suspended. In addition, Tyler was sentenced to two years' probation and ordered to report immediately upon release from ADC. Neither Tyler's judgment and commitment order following revocation nor the order of probation following revocation had any notation reflecting the applicability of any expungement provision or other parole-eligibility provision.

On July 2, 2003, Tyler filed a petition to seal his convictions, and the State filed a response; however, the record reflects no action on that petition. Then, on October 1, 2009, Tyler filed yet another petition to seal. On November 18, 2009, the circuit court held a hearing on Tyler's petition.¹

There, the State argued that while Tyler was originally sentenced in 1989 under Act 346, his probation was later revoked and he was sentenced to the ADC. Specifically, the State argued that

because he had to be revoked and was subsequently sentenced to the ADC, it would be the State's opinion that he did not fulfill his conditions of probation and as such, an adjudication of guilt was essentially entered, which violates the provisions of Act 346.

The circuit court disagreed, however, and ruled that it was going to grant Tyler's petition to seal his 1989 convictions under Act 531. Consequently, on November 23, 2009, the circuit court filed its order sealing Tyler's 1989 convictions and stated, in pertinent part:

¹While the State's prosecutor asserted to the circuit court her belief that a response to Tyler's petition had been filed on November 12, 2009, the record reflects no response filed by the State. In addition, during the hearing, the circuit court denied Tyler's motion to seal his 1991 convictions that prompted the revocation of his 1989 probation. That denial is not part of the instant appeal.

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Defendant was sentenced to 3 years probation and ordered to pay fines, court costs and restitution. The Court further finds that the defendant was originally sentenced under the provisions of A.C.A. § 16-93-301, Act 346 which provides for the sealing of a defendant's record. However, the Defendant's probation was revoked and a suspended sentence was imposed. Defendant is eligible for expungement pursuant to Act 531.

This Court now finds that the petition to seal the record of these offenses pursuant to A.C.A. § 16-90-901, Act 531 should be granted.

The State now appeals.

The State argues, for its sole point on appeal, that the circuit court erred in finding that Tyler's 1989 convictions were eligible for sealing pursuant to Act 531. It contends that because Act 531 did not become effective until after Tyler committed his crimes and was sentenced, the circuit court was precluded from considering expungement under the Act. Accordingly, the State urges, the circuit court erred in sealing the convictions and this court should reverse. Tyler, responding pro se, asserts that the circuit court did not err in sealing his convictions because they were eligible for expungement under Act 378 of 1975. The State replies that Tyler was not sentenced in 1989 under Act 378, and, therefore, his convictions were not eligible for expungement under that act either.

While this court would typically consider whether the State's appeal is proper under Arkansas Rule of Appellate Procedure—Criminal 3, we need not do so in the instant case. This court has previously held that the State's appeal from an order to seal criminal convictions, despite its criminal designation, is civil in nature and does not require satisfaction of or compliance with Rule 3. See *State v. Webb*, 373 Ark. 65, 281 S.W.3d 273 (2008); *State v. Burnett*, 368 Ark. 625, 249 S.W.3d 141 (2007).

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Turning then to the merits, this court has held that a sentence must be in accordance with the statutes in effect on the date of the crime. *See State v. Burnett*, 368 Ark. 625, 249 S.W.3d 141 (2007). It has further held that a circuit court does not have the power to expunge a defendant's record when the defendant was not sentenced under one of the statutes that specifically provides for expunging the record. *See id.* A sentence is void or illegal when the court lacks authority to impose it. *See id.*

Act 531, or the "The Community Punishment Act," was enacted in 1993. Accordingly, it was not in effect on the date of Tyler's crimes, which were charged as occurring on April 21, 1989, as already set forth. Tyler's convictions, then, were ineligible for expungement under Act 531.

While Tyler urges that the order to seal was proper based upon Act 378, he is mistaken. First, a review of the order of probation entered by the circuit court in 1989 and signed by Tyler makes no indication that he was sentenced under Act 378, then codified at §§ 16-93-501 to 16-93-510 (1987 & Supp. 1987). To the contrary, the order lists under the term "expungement" two acts, Act 378 and Act 346, and only Act 346 is circled. Moreover, Ark. Code Ann. § 16-93-508(a)(1) (1987) specifically required that:

(a) Upon the sentencing or placing on probation of any person under the provisions of this subchapter, the sentencing court shall issue an order or commitment, whichever is appropriate, in writing, setting forth the following:

(1) That the offender is being sentenced or placed on probation under the provisions of this subchapter[.]

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As the order in Tyler's case reveals no such indication, Tyler could not avail himself of the provisions of Act 378 either.²

Because Tyler's convictions from 1989 were ineligible for expungement under Act 531, the circuit court erred in entering an order to seal them. For this reason, we reverse and remand to set aside the order to seal.

Reversed and remanded.

CORBIN, J., not participating.

²We are cognizant of the fact that in *Fulmer v. State*, 337 Ark. 177, 987 S.W.2d 700 (1999), we held that it was irrelevant for expungement purposes that Fulmer's judgment and commitment order did not specifically recite that he was sentenced under Ark. Code Ann. § 16-93-1207, as such a recitation was not required. However, the language of section 16-93-1207, which was at issue in *Fulmer*, differs from the language of section 16-93-508, part of Act 378, relied upon by Tyler; section 16-93-1207(a) provides:

(a) Upon the sentencing or placing on probation of any person under the provisions of this subchapter, the sentencing court shall issue an order or commitment, whichever is appropriate, in writing, setting forth the following:

(1) That the offender is being:

(A) Committed to the Department of Correction;

(B) Committed to the Department of Correction with judicial transfer to the Department of Community Punishment;

(C) Placed on suspended imposition of sentence; *or*

(D) Placed on probation under the provisions of this subchapter.

(2) That the offender has knowledge and understanding of the consequences of the sentence or placement on probation and violations thereof;

(3) A designation of sentence or supervision length along with community punishment program distinctions of that sentence or supervision length;

(4) Any applicable terms and conditions of the sentence or probation term; and

(5) Presentence investigation or sentencing information, including, but not limited to, criminal history elements and other appropriate or necessary information for correctional use.

Ark. Code Ann. § 16-93-1207(a) (Supp. 1997) (emphasis added).