

ARKANSAS SUPREME COURT

No. CR 07-905

WILLIE J. CARTWRIGHT
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered December 11, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF GRANT COUNTY, CR
2004-119, HON. PHILLIP H. SHIRRON,
JUDGE

REMANDED.

PER CURIAM

In 2005, a jury found appellant Willie J. Cartwright guilty of theft of property and sentenced him to 360 months' imprisonment in the Arkansas Department of Correction, a fine of \$15,000 and court costs of \$150. The Arkansas Court of Appeals affirmed the judgment. *Cartwright v. State*, CACR 05-1382 (Ark. App. Sept. 13, 2006). Appellant timely filed in the trial court a pro se petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, which was denied without a hearing. Appellant appeals the denial of postconviction relief.

Appellant sets out three points of error on appeal, each of which concerns the issue of whether his sentence was illegal because he was convicted of a Class B felony, while the only informations filed prior to his trial listed the theft charge as a Class C felony. In his first point, appellant contends that trial counsel was ineffective for failing to object to the jury instruction as to the Class B charge. In his second point, appellant asserts counsel was ineffective for failing to move for a new trial when an information was filed after trial indicating that the charge was a Class B felony. In his third point, appellant asserts simply that the sentence was illegal and the judgment

invalid on its face.

All three of appellant's points on appeal turn upon the issue of whether the failure to amend the information prior to trial was fatal error that would invalidate the judgment.¹ The trial court considered the first two points and found that there was no prejudice shown, that the outcome of the trial would not have been different. The third point was not included in the petition as a separate ground for relief. Whether or not it was raised below, the question may be raised on appeal because a question as to an illegal sentence is treated as a jurisdictional question. *See Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992).

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Small v. State*, 371 Ark. 244, ___ S.W.3d ___ (2007) (per curiam).

The trial court appears to have concluded that an amendment to the information filed after petitioner's trial only corrected a scrivener's error. A defect that merely presents a challenge to the sufficiency of the information is not sufficient to divest the trial court of jurisdiction. *See Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001). The defect alleged in this case, however, concerns the degree of the charge.

The affidavit filed with the original information that was filed before trial, as well as the one

¹ The State contends that the record is not sufficient to support appellant's arguments on appeal because the record of the Rule 37.1 proceeding does not include the informations filed. As a part of the public record already filed with the appellate court in the earlier appeal, the trial record is included as a part of the record before us. *See Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997). That record does contain each of the informations filed.

filed after trial, alleged facts to support a B level of the charge. Under Arkansas Code Annotated § 16-89-126(e)(1) (Repl. 2005), however, a jury may not find a defendant guilty of a higher degree of an offense than that charged in the indictment, even though the proof may support the higher charge. *Robbins v. State*, 219 Ark. 376, 242 S.W.2d 640 (1951).

The State may, before the case is submitted to the jury, amend an information under Arkansas Code Annotated § 16-85-407 (Repl. 2005), provided that the amendment does not change the nature or degree of the crime charged or create unfair surprise. *Hill v. State*, 370 Ark. 102, 257 S.W.3d 534 (2007). This court has even allowed an amendment that authorizes a more severe penalty where the defendant was sufficiently apprised of the specific crime charged to the extent necessary to prepare a defense. *Id.* Even when the degree of the offense is changed, the error is not reversible unless there is a showing of prejudice. *Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993). Here, it is clear that there would have been no prejudice because the facts alleged in the affidavits would have supported the level of the charge, but it is not clear from the record whether or not the State did amend the information at trial as to the degree of the charge.

The State moved to amend the information on the day of the trial to include enhancement under the habitual offender statute, although that amendment was not filed until after trial. When it was filed, the amendment listed the charge as a Class B felony. It is not clear whether the document filed posttrial had been shown to defense counsel and the court when the enhancement amendment was discussed before trial, and there is no other indication in the record that the State moved to make that change in the charge. When announcing the charges to the jury, however, the court indicated that the theft charge was a Class B felony.

Because we cannot determine if the State did in fact move to amend the information as to the

degree of the charge, we cannot determine whether appellant's sentence was, in fact, in violation of section 16-89-126(e)(1). If the information was not amended before submission to the jury, the maximum sentence for a Class C offense as charged, subject to enhancement in accord with Arkansas Code Annotated § 5-4-501(a) (Supp. 2003), would have been twenty years. Without a timely amendment, a sentence in excess of that range would require resentencing. *See Ward v. State*, 97 Ark. App. 294, 248 S.W.3d 489 (2007); *see also State v. Kinard*, 319 Ark. 360, 891 S.W.2d 378 (1995).

Accordingly, we remand to the trial court to conduct a hearing to determine whether the State did amend the information as to the degree of the charge and to provide findings of fact as to that issue. We order that the hearing be conducted and the trial court return those findings of fact, along with a transcript of the hearing, within ninety days of the date of this opinion.

Remanded.