

SUPREME COURT OF ARKANSAS

No. CR 11-161

SARAH MARIE LYNN

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 12, 2012APPEAL FROM THE MADISON
COUNTY CIRCUIT COURT

[NO. CR-10-16]

HON. WILLIAM A. STOREY, JUDGE

APPEAL DISMISSED.**JIM GUNTER, Associate Justice**

This case involves a judgment and disposition order entered in Madison County Circuit Court reflecting that Appellant Sarah Marie Lynn entered a negotiated guilty plea to possession of marijuana and possession of drug paraphernalia and was sentenced pursuant to the First Offender Act, §§ 16-93-301 to -305 (Supp. 2011). The question presented to this court is whether that judgment and disposition order constituted a “finding of guilt” or “judgment of guilt,” which is expressly prohibited by Ark. Code Ann. § 16-93-303(a)(1)(A)(i) (Supp. 2011). Because we are convinced that Lynn did not have a right to appeal her Act 346 disposition, we dismiss the appeal.

At a hearing held on July 13, 2010, Lynn entered a negotiated plea of guilty to possession of marijuana in violation of Ark. Code Ann. § 5-64-401 (Repl. 2005), *repealed by* Public Safety Improvement Act, No. 570, § 33, 2011 Ark. Acts 1851, 1889, and possession of drug paraphernalia in violation of Ark. Code Ann. § 5-64-403 (Supp. 2009), *amended by*

Public Safety Improvement Act, No. 570, § 35, 2011 Ark. Acts 1851, 1898. A judgment and disposition order was filed on October 27, 2010, showing that Lynn had entered a negotiated plea of guilty or nolo contendere on both charges and that she was sentenced pursuant to the First Offender Act. The order includes a handwritten notation that the case involves Act 346. Lynn was placed on probation for thirty-six months and ordered to pay a \$1000 fine as well as court costs and fees. On November 17, 2010, she filed a notice of appeal from the judgment and disposition order.¹

Rule 1(a) of the Arkansas Rules of Appellate Procedure—Criminal provides:

Right of Appeal. Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas. An appeal may be taken jointly by codefendants or by any defendant jointly charged and convicted with another defendant, and only one (1) appeal need be taken where a defendant has been found guilty of one (1) or more charges at a single trial. Except as provided by A.R.Cr.P. 24.3(b) there shall be no appeal from a plea of guilty or nolo contendere.

Moreover, Ark. Code Ann. § 16-91-101(a) (Repl. 2006), provides that any person convicted of a misdemeanor or a felony by virtue of a trial in any circuit court of this state has the right of appeal to the Supreme Court. We have held that where there is no conviction, there is no right to appeal. See *Hughes v. State*, 2011 Ark. 147; *Cook v. City of Pine Bluff*, 318 Ark. 190,

¹Also in the record is a letter written by Lynn’s counsel to Circuit Judge Storey and copied to the prosecuting attorney. In the letter, defense counsel refers to concern he expressed during plea negotiations that the judgment and disposition order used by the circuit court for disposition of Act 346 cases conflicted with Ark. Code Ann. § 16-93-303(a)(1)(A)(i). Defense counsel asks the circuit court to strike through the words “Judgment and” at the top of the document to make “clear that judgment is not being entered in this particular case, consistent with the provisions of Act 346.”

885 S.W.2d 7 (1994).

Under Act 346 of 1975, better known as the Arkansas First Offender Act, an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, and the circuit court, without entering a judgment of guilt and with the defendant's consent, may defer further proceedings and place the defendant on probation for a period of not less than one year. Ark. Code Ann. § 16-93-303(a)(1)(A)(i); see also *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002). Thereafter, upon fulfillment of the terms and conditions of probation, the defendant shall be discharged without court adjudication of guilt, and the court shall enter an appropriate order dismissing the case, discharging the defendant, and expunging the record. Ark. Code Ann. § 16-93-303(b). We have repeatedly recognized that a plea of guilty or nolo contendere tendered pursuant to Act 346 is not a conviction.² *Montoya v. State*, 2010 Ark.

²There are exceptions to this rule as provided by the statute:

- (c) During the period of probation described in subdivision (a)(1)(A)(i) of this section, a defendant is considered as not having a felony conviction except for:
- (1) Application of any law prohibiting possession of a firearm by certain persons;
 - (2) A determination of habitual offender status;
 - (3) A determination of criminal history;
 - (4) A determination of criminal history scores;
 - (5) Sentencing; and
 - (6) A purpose of impeachment as a witness under Rule 609 of the Arkansas Rules of Evidence.
- (d) After successful completion of probation placed on the defendant under this section, a defendant is considered as not having a felony conviction except for:
- (1) A determination of habitual offender status;
 - (2) A determination of criminal history;
 - (3) A determination of criminal history scores;
 - (4) Sentencing; and
 - (5) A purpose of impeachment as a witness under Rule 609 of the Arkansas Rules of

419; *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998); *Duncan v. State*, 308 Ark. 205, 823 S.W.2d 886 (1992); *cf. Gage v. State*, 307 Ark. 285, 819 S.W.2d 279 (1991) (reversing the defendant’s conviction where it was clear the circuit court had adjudicated the defendant guilty and sentenced him although the plea was entered pursuant to Act 346).

Here, although Lynn filed a notice of appeal from the judgment and disposition order, she has no appeal of right from an Act 346 disposition where she has not met the threshold requirement of being “convicted of a misdemeanor or a felony.” The plain language of the rule requires that a defendant must be *convicted* before a right of appeal lies. Although Lynn entered a plea of guilty to the charges, in accordance with Act 346, further proceedings were deferred during her three-year probationary period. The circuit court’s order reflects that she entered a negotiated plea of guilty or *nolo contendere* and that she was sentenced pursuant to Act 346. There is no indication that she was adjudicated guilty by the court, and a disposition pursuant to Act 346 is not a conviction. Therefore, because appellant has not been convicted of a misdemeanor or felony, she has no right to appeal.

Appeal dismissed.

BROWN, J., concurs.

Evidence.

Ark. Code Ann. § 16-93-303(c)–(d) (Supp. 2009).