

THE SUPREME COURT OF ARKANSAS HOLDS THAT THE SENTENCING ENHANCEMENTS IN SECTION 16-90-120 OF THE ARKANSAS CODE WERE NOT REPEALED BY THE ADOPTION OF THE ARKANSAS CRIMINAL CODE.

In *Sesley v. State*,<sup>1</sup> the Arkansas Supreme Court affirmed the trial court's five-year sentence enhancement pursuant to section 16-90-120 of the Arkansas Code<sup>2</sup> for using a firearm during the commission of a felony.<sup>3</sup> In doing so, the court reaffirmed its prior decision in *Neely v. State*,<sup>4</sup> in which the court held that section 16-90-120 was not repealed by implication with the adoption of Arkansas Criminal Code on January 1, 1976.<sup>5</sup>

On December 22, 2009, the State charged Appellant Zvontric Lamar Sesley with seven felony counts and alleged that, under section 16-90-120 of the Arkansas Code, appellant's sentence should be enhanced because he committed the felonies while employing a firearm.<sup>6</sup> After a jury convicted him of all seven counts and found that he had employed a firearm during the commission of each count, appellant filed a Motion to Dismiss the Ark. Code Ann. § 16-90-120 Sentencing Enhancements, arguing that the statute in question had been repealed.<sup>7</sup> The trial court rejected appellant's argument and sentenced Sesley to twenty-two years' imprisonment, five of which were the result of the firearm enhancement in section 16-90-120 of the Arkansas Code.<sup>8</sup> On appeal, the Arkansas Supreme Court considered whether the five-year enhancement applied to appellant's sentence was an illegal sentence because the statute had been repealed by implication.<sup>9</sup>

The following portions of section 16-90-120 were at issue in this case:

- (a) Any person convicted of any offense that is classified by the laws of this state as a felony who employed any firearm of any character as a means of committing or escaping from the felony, in the discretion of the sentencing court, may be subjected to an additional period of confinement in the state penitentiary for a period not to exceed fifteen (15) years.

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1. 2011 Ark. 104, \_\_\_ S.W.3d \_\_\_.
2. ARK. CODE ANN. § 16-90-120 (LEXIS Supp. 2009).
3. *Sesley*, 2011 Ark. 104, at 1, \_\_\_ S.W.3d at \_\_\_.
4. 2010 Ark. 452, \_\_\_ S.W.3d \_\_\_.
5. *Sesley*, 2011 Ark. 104, at 1, \_\_\_ S.W.3d at \_\_\_.
6. *Id.* at 2, \_\_\_ S.W.3d at \_\_\_.
7. *Id.*, \_\_\_ S.W.3d at \_\_\_.
8. *Id.* at 2-3, \_\_\_ S.W.3d at \_\_\_.
9. *Id.*, \_\_\_ S.W.3d at \_\_\_.

(b) The period of confinement, if any, imposed under this section shall be in addition to any fine or penalty provided by law as punishment for the felony itself. Any additional prison sentence imposed under the provisions of this section, if any, shall run consecutively and not concurrently with any period of confinement imposed for conviction of the felony itself.<sup>10</sup>

Section (a) was originally codified at Ark. Stat. Ann. § 43-2336, and section (b) was originally codified at Ark. Stat. Ann. § 43-2337.<sup>11</sup> Both of these statutes were in force on January 1, 1976, the date upon which the Arkansas Criminal Code was adopted.<sup>12</sup> Among the provisions of the new criminal code was Ark. Stat. Ann. § 41-1004,<sup>13</sup> which mandated that a defendant who employed a firearm in the course or furtherance of a felony would have his sentence extended by fifteen years.<sup>14</sup>

According to appellant, sections 43-2336 and 43-2337 were in irreconcilable conflict with section 41-1004 when the latter was adopted on January 1, 1976.<sup>15</sup> Consequently, the General Assembly did not intend for sections 43-2336 and 43-2337—later codified at Ark. Code Ann. 16-90-120, the statute at issue in this case—to remain in effect after the Arkansas Criminal Code was enacted.<sup>16</sup>

Appellant argues that the court's decision in *Neely* failed to adequately consider whether the legislature intended sections 43-2336 and 43-2337 to be repealed and replaced by section 41-1004.<sup>17</sup> For support, he points to section 41-1004(1), an exception to the mandatory firearm enhancement, as evincing the General Assembly's intent to eliminate overlapping criminal statutes by promulgating the criminal code.<sup>18</sup> The original comment to the statute states that “[i]t is obviously unfair to convict a person of a more serious felony because he used a deadly weapon and then further increase the penalty for the felony because the deadly weapon was a firearm.”<sup>19</sup>

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10. ARK. CODE ANN. § 16-90-120 (LEXIS Supp. 2009).

11. ARK. STAT. ANN. § 43-2336, § 43-2337 (Bobbs-Merrill Repl. 1977) (later codified at ARK. CODE ANN. § 16-90-120).

12. *Sesley*, 2011 Ark. 104, at 4, \_\_\_ S.W.3d at \_\_\_.

13. ARK. STAT. ANN. § 41-1004 (Bobbs-Merrill Repl. 1977) (later codified at ARK. CODE ANN. § 5-4-505), *repealed by* Acts of March 16, 1993, Nos. 533 & 550, 1993 Ark. Acts 1471, 1603.

14. *Sesley*, 2011 Ark. 104, at 4, \_\_\_ S.W.3d at \_\_\_.

15. *Id.* at 4, \_\_\_ S.W.3d at \_\_\_.

16. *Id.*, \_\_\_ S.W.3d at \_\_\_.

17. *Id.* at 4–5, \_\_\_ S.W.3d at \_\_\_.

18. *Id.*, \_\_\_ S.W.3d at \_\_\_.

19. ARK. STAT. ANN. § 41-1004 cmt. (Bobbs-Merrill Repl. 1977) (later codified at ARK. CODE ANN. § 5-4-505), *repealed by* Acts of March 16, 1993, Nos. 533 & 550, 1993 Ark. Acts 1471, 1603.

However, the court rejected appellant's argument and reaffirmed its recent decision in *Neely*.<sup>20</sup> In fact, a substantial portion of the opinion is simply a direct quotation of *Neely*, which, in turn, quotes a substantial portion of the court's reasoning in *Williams v. State*.<sup>21</sup> Both of these cases address whether section 16-90-120 of the Arkansas Code was repealed by the adoption of the Arkansas Criminal Code.<sup>22</sup>

In *Williams*, the court held that it is possible for section 5-4-104(a) of the Arkansas Code, which says “[n]o defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter,” to be read in harmony with section 16-90-120, the mandatory firearm enhancement.<sup>23</sup> The court reconciled these two statutes by finding that section 5-4-104(a) referred “only to the initial sentence imposed based on the crime for which the defendant was convicted, and § 16-90-120(a–b) can be read as referring only to a sentence enhancement that may be added to the initial sentence.”<sup>24</sup> Additionally, it identified the language in section 16-90-120(a) as classifying the sentence enhancement as an “*additional* period of confinement,” further distinguishing one statute from the other.<sup>25</sup>

The court in *Neely* drew heavily from *Williams* in declaring that section 5-4-505,<sup>26</sup> a later codification of Ark. Stat. Ann. section 41-1004,<sup>27</sup> can also be read harmoniously with section 16-90-120<sup>28</sup> of the Arkansas Code.<sup>29</sup> According to the court, section 16-90-120 is “only a sentence enhancement, apart from the punishment for the felony itself, while § 5-4-505 provides an increase in the maximum sentence to be imposed for a felonious offense.”<sup>30</sup>

Beneath this seemingly dubious distinction is the court's deference to the legislature and aversion to finding statutes repealed by implication. The court cites *Thomas v. State*<sup>31</sup> for the “well-settled” proposition that statutes

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20. *Sesley*, 2011 Ark. 104, at 6–8, \_\_\_ S.W.3d at \_\_\_. (quoting *Neely v. State*, 2010 Ark. 452, at 4–6, \_\_\_ S.W.3d at \_\_\_).

21. 364 Ark. 203, 217 S.W.3d 817 (2005).

22. *Sesley*, 2011 Ark. 104, at 6, \_\_\_ S.W.3d at \_\_\_.

23. *Williams*, 364 Ark. . at 207–09, 217 S.W.3d at 820.

24. *Id.* at 208, 217 S.W.3d at 820.

25. *Id.* at 208, 217 S.W.3d at 820 (quoting ARK. CODE ANN. § 16-90-120(a) (Michie 1987) (emphasis added in original quotation)).

26. ARK. CODE ANN. § 5-4-505, repealed by Acts of March 16, 1993, Nos. 533 & 550, 1993 Ark. Acts 1471, 1603.

27. ARK. STAT. ANN. § 41-1004 (Bobbs-Merrill Repl. 1977) (later codified at ARK. CODE ANN. § 5-4-505), repealed by Acts of March 16, 1993, Nos. 533 & 550, 1993 Ark. Acts 1471, 1603.

28. ARK. CODE ANN. § 16-90-120 (LEXIS Supp. 2009).

29. *Neely v. State*, 2010 Ark. 452, at 4–6, \_\_\_ S.W.3d at \_\_\_. (quoting *Williams v. State*, 364 Ark. 208–09, 217 S.W.3d 817, 820 (2005)).

30. *Neely*, 2010 Ark. 452, at 5, \_\_\_ S.W.3d at \_\_\_.

31. 349 Ark. 447, 79 S.W.3d 347 (2002).

dealing with the same subject should be harmonized if at all possible.<sup>32</sup> More pointedly, the court also clarifies that repeal by implication is rare.<sup>33</sup> Repeal by implication can occur only if the statutes are in irreconcilable conflict or the legislature clearly shows its intent to substitute one statute for another.<sup>34</sup> The court found that the legislature showed no intent to substitute;<sup>35</sup> instead, the court pointed to the amendment of section 16-90-120 in 2007 as evidence that the legislature does not consider the statute repealed.<sup>36</sup>

The court in *Neely* elaborated on this strict standard for finding a statute repealed by implication. It is not enough that the two statutes merely may have been redundant, and it also does not matter if applying both statutes would have resulted in error.<sup>37</sup> Neither of those issues were before the court in *Sesley*, and it did not factor them into its decision.<sup>38</sup>

Neither the *Neely* decision nor the *Sesley* decision were unanimous. Chief Justice Jim Hannah, joined by Justices Danielson and Corbin, authored a lengthy dissent in *Neely* and reaffirmed their disagreement with the majority again in *Sesley*.<sup>39</sup> According to the dissent, section 16-90-120, in its former codification as sections 43-2336 and 43-2337, was repealed with the adoption of the Arkansas Criminal Code.<sup>40</sup> For support, the dissent points to section 3201 of Act 280,<sup>41</sup> explaining the nature of the criminal code, where it provided that “[a]ll laws and parts of laws in conflict with this Code are hereby repealed.”<sup>42</sup> Furthermore, section 1004 of Act 280<sup>43</sup> provided a sentence enhancement for use of a firearm in a felony, which the dissent argues “fully occupied the area of law previously occupied by sections 43-2336 and 43-2337.”<sup>44</sup> Additionally, according to Justice Hannah, the majority’s distinction between a sentence enhancement and the punishment itself is misguided.<sup>45</sup>

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32. *Sesley*, 2011 Ark. 104, at 3, \_\_\_ S.W.3d at \_\_\_.

33. *Id.*, \_\_\_ S.W.3d at \_\_\_.

34. *Id.*, \_\_\_ S.W.3d at \_\_\_ (citing *Cox v. State*, 365 Ark. 358, 229 S.W.3d 883 (2006)).

35. *Sesley*, 2011 Ark. 104, at 8, \_\_\_ S.W.3d at \_\_\_.

36. *Id.* at 8–9, \_\_\_ S.W.3d at \_\_\_.

37. *Neely*, 2010 Ark. 452, at 5–6, \_\_\_ S.W.3d at \_\_\_. (quoted by *Sesley*, 2011 Ark. 104, at 8, \_\_\_ S.W.3d at \_\_\_).

38. *Sesley*, 2011 Ark. 104, at 8–9, \_\_\_ S.W.3d at \_\_\_.

39. *Id.* at 9, \_\_\_ S.W.3d \_\_\_. (Hannah, C.J., dissenting) (citing *Neely*, 2010 Ark. 452, at 6–11, \_\_\_ S.W.3d at \_\_\_ (Hannah, C.J., dissenting)).

40. *Neely*, 2010 Ark. 452, at 7–8, \_\_\_ S.W.3d at \_\_\_. (Hannah, C.J., dissenting).

41. Act of Mar. 3, 1975, § 3201, 1975 Ark. Acts 560, 698.

42. *Neely*, 2010 Ark. 452, at 7, \_\_\_ S.W.3d at \_\_\_. (Hannah, C.J., dissenting) (quoting Act of Mar. 3, 1975, § 3201, 1975 Ark. Acts 560, 698).

43. Act of Mar. 3, 1975, § 1004, 1975 Ark. Acts 571–72 (later codified at ARK. STAT. ANN. 41-1004).

44. *Neely*, 2010 Ark. 452, at 7, \_\_\_ S.W.3d at \_\_\_. (Hannah, C.J., dissenting).

45. *Id.* at 10, \_\_\_ S.W.3d at \_\_\_. (Hannah, C.J., dissenting) (“The majority opinion is based on a distinction that does not exist. A sentence is a sentence.”).

The Arkansas Supreme Court's recent decision in *Sesley v. State*<sup>46</sup> makes clear that legislative acts are not easily repealed by implication. A party arguing repeal by implication must prove that either the two statutes are in irreconcilable conflict or show a clear intent by the legislature to repeal the latter act. This burden is not easily met. Chief Justice Hannah's robust dissents, however, reveal that this issue is hardly clear-cut. With the support of two other influential members of the court, Justice Hannah's objections to the majority decision are significant. The petitioner in *Sesley* challenged the issue again last year in hopes that the addition of two new justices would yield a different result than *Neely*. As two more justices in the majority will leave the court later this year, another optimistic party may soon challenge the issue yet again.

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46. 2011 Ark. 104, \_\_\_ S.W.3d \_\_\_.