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Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-1118

Kyle Horvat

v.

State of Alabama

**Appeal from Jefferson Circuit Court
(CC-17-3081; CC-17-3082; CC-17-3083; CC-17-3084)**

On Return to Second Remand

MINOR, Judge.

Kyle Horvat appealed his convictions for one count of first-degree sexual abuse of a child under 12, see § 13A-6-69.1, Ala. Code 1975, and for

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one count of attempted first-degree sexual abuse of a child under 12, see §§ 13A-4-2 and 13A-6-69.1, Ala. Code 1975, and his sentences of 15 years' imprisonment and 10 years' imprisonment, respectively.¹

On original submission, we affirmed Horvat's convictions. We remanded the cause, however, because, as Horvat argued, the circuit court erroneously used the enhancement under § 13A-5-6(a)(6), Ala. Code 1975, when it sentenced him for attempted first-degree sexual abuse of a child under 12. Horvat v. State, [Ms. CR-18-1118, Sept. 11, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020). On remand, the circuit court, without using the enhancement under § 13A-5-6(a)(6) resentenced Horvat to 10

¹This Court's opinion on original submission, Horvat v. State, [Ms. CR-18-1118, Sept. 11, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020), incorrectly stated the Code sections governing Horvat's convictions. In both cases, because the victim was under the age of 12, § 13A-6-69.1, Ala. Code 1975, applies—rather than § 13A-6-66, Ala. Code 1975. The jury convicted Horvat of first-degree sexual abuse in CC-17-3083 under § 13A-6-69.1. (C. 467-68; R. 1186-87, 1190-91, 1359-60.). And the jury convicted him in CC-17-3084 of attempted first-degree sexual abuse of a child under 12. See §§ 13A-6-69.1 and 13A-4-2, Ala. Code 1975. This Court's opinion also incorrectly stated Horvat's sentence as 20 years' imprisonment for his conviction for first-degree sexual abuse of a child under 12; the circuit court sentenced Horvat to 15 years' imprisonment for that conviction. (C. 192, 195; R. 1421.)

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years' imprisonment on his conviction for attempted first-degree sexual abuse of a child under 12.

We remanded this cause again, by order, for the circuit court to split Horvat's 10-year sentence under the law in effect in November 2016, when Horvat committed the offenses. In Jackson v. State, [Ms. CR-18-0454, Feb. 7, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020), this Court stated:

"The punishment for committing a Class C felony is a sentence of not 'more than 10 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8[, Ala. Code 1975,] unless sentencing is pursuant to Section 13A-5-9[, Ala. Code 1975].' § 13A-5-6(a)(3), Ala. Code 1975.^[2]

"To put it differently, unless a defendant is sentenced as a habitual felony offender, a sentence for a Class C felony must fall within the range set out in § 13A-5-6(a)(3), Ala. Code 1975, and must comply with subsection (b) of the Split Sentence Act. That subsection provides, in relevant part, as follows:

"Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C ... felony offense and receives

²Act No. 2019-465, Ala. Acts 2019, amended § 13A-5-6(a)(3), Ala. Code 1975, to no longer require compliance with § 15-18-8(b) if the Class C felony is for "a sex offense pursuant to Section 15-20A-5." That amendment does not apply to Horvat because he committed his offense before the effective date of that act.

a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense ... for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for a period not exceeding three years and upon such terms as the court deems best....”

"§ 15-18-8(b), Ala. Code 1975.

"In short, §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, do not allow a trial court to impose a 'straight' sentence for a Class C felony when the Habitual Felony Offender Act does not apply. Instead, under § 13A-5-6(a)(3), once the trial court imposes on a defendant a sentence length between 1 year and 1 day and 10 years, the trial court must either:

"(1) Sentence the defendant to probation, drug court, or a pretrial diversion program; or

"(2) 'Split' the confinement portion of the defendant's sentence to a period not exceeding two years, suspend the remainder of the defendant's sentence, and impose a term of probation on the defendant that does not exceed three years.

"Here, Jackson is not a habitual felony offender, and thus could not be sentenced under § 13A-5-9, Ala. Code 1975. ... Yet the trial court sentenced Jackson to a 'straight' 10-year

sentence in the custody of the Alabama Department of Corrections, which, as explained above, is impermissible under § 13A-5-6(a)(3), Ala. Code 1975. Thus, we must remand this case to the trial court to impose a sentence on Jackson that complies with §§ 13A-5-6(a)(3) and 15-18-8(b).

"In so doing, however, we note that Jackson's 10-year sentence is valid; thus, the trial court cannot change the underlying sentence. See generally Moore v. State, 871 So. 2d 106, 110 (Ala. Crim. App. 2003) (recognizing that, when the base sentence imposed by the trial court is valid, the trial court cannot alter it on remand)."

___ So. 3d at ___ (footnotes omitted).

Because Horvat was convicted of attempted first-degree sexual abuse of a child under 12—a Class C felony—the circuit court must

"(1) Sentence the defendant to probation, drug court, or a pretrial diversion program; or

"(2) 'Split' the confinement portion of the defendant's sentence to a period not exceeding two years, suspend the remainder of the defendant's sentence, and impose a term of probation on the defendant that does not exceed three years."

Jackson, ___ So. 3d at ___.

On March 29, 2021, on second remand, the circuit court ordered: "[Horvat] is hereby resentenced in CC-2017-3084 to a ten (10) year sentence with a split of two (2) years to serve in the Department of

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Corrections. The remainder of the sentence is probated for three (3) years." (Record on Return to Second Remand, p. 54.)

The record on return to second remand shows that the circuit court complied with our instructions, and the judgment of the circuit court is due to be affirmed.

AFFIRMED.

Windom, P.J., and Kellum, McCool, and Cole, JJ., concur.