**REL:02/01/2008 Clemons**



# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2007-2008**

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**CR-05-1950**

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**State of Alabama**

**v.**

**Cleo Charles Clemons**

**Appeal from Mobile Circuit Court**
**(CC-06-28)**

On Application for Rehearing

SHAW, Judge.

APPLICATION FOR REHEARING OVERRULED.

McMillan and Welch, JJ., concur. Baschab, P.J., dissents, adheres to original writing. Wise, J., dissents, with opinion.

WISE, Judge, dissenting.

Although I concurred in this Court's original opinion in this case, issued on November 2, 2007, I was deeply troubled by our holding. Upon careful consideration of the State's application for rehearing and the accompanying brief, together with Judge Baschab's dissent to the original opinion, I am persuaded that this Court's original decision was incorrect. Therefore, I must respectfully dissent from the denial of rehearing.

In its November 2, 2007, opinion, this Court held:

> "[T]he record indicates that the prosecutor made no specific arguments on the record in opposition to Clemons's motions, and she made no objection when the trial court indicated that it was going to apply the law as it understood it to be at the time of sentencing, instead of the law in effect at the time of the commission of the offense. See, e.g., Minnifield v. State, 941 So. 2d 1000 (Ala.Crim.App. 2005) (noting that generally the law in effect at the time of the commission of the offense controls the prosecution, including the sentence). The State conceded as much during the oral argument of this case, and its argument in its reply brief that Rule 15.7, Ala.R.Crim.P., does not require the State to preserve its arguments at the trial court level is unpersuasive. It is well-settled that '[r]eview on appeal is limited to review of questions properly and timely raised at trial.' Newsome v. State, 570 So. 2d 703, 716 (Ala.Crim.App. 1989). '[A]s a general proposition of law, the failure of a party to object to a matter at trial precludes the party from raising that matter on appeal as error.' Ex

> parte Williams, 571 So. 2d 987, 989 (Ala. 1990). See also Washington v. State, 922 So. 2d 145, 162 (Ala.Crim.App. 2005), and State v. Cortner, 893 So. 2d 1264 (Ala.Crim.App. 2004). Therefore, even assuming, as the State suggests, that the trial court based its ruling on the common-law doctrine of amelioration, without an objection on a stated ground and an adverse ruling the specific argument that the State now makes on appeal is not properly before this Court. This Court will not reverse a trial court's judgment based on a nonjurisdictional argument that that court was not given an opportunity to consider. See, e.g., Rogers Found. Repair, Inc. v. Powell, 748 So. 2d 869, 872 (Ala. 1999) ('[T]he appellate courts will not reverse a trial court on any ground not presented to the trial court .')."

___ So. 2d at ___ (footnotes omitted).

Judge Baschab, in her dissent, asserted that the majority's conclusion that the State's argument was not properly before this Court to be incorrect, noting that

> "the appellee specifically sought to exclude the prior convictions and dismiss the indictment based on § 32-5A-191(o), Ala. Code 1975. Therefore, the question of whether this particular subsection applied in this case was clearly before the trial court, and the State expressed its opposition to the dismissal of the indictment. I recongnize that the trial court did not actually impose an illegal sentence in this case. However, the ruling could result in an unauthorized sentence, assuming the State could properly prove the prior DUI convictions. Under these circumstances, this issue is properly before this court, and the majority's holding to the contrary is erroneous."

___ So. 2d at ___ (Baschab, J., dissenting).

Alternatively, the State argues that this Court should choose to treat the limited circumstances involving a State's pretrial appeal under Rule 15.7, Ala.R.Crim.P., the same way it treats a trial error by the defense so clear and blatant that it is beyond contrary interpretation. Appellate courts have held that where an error of defense counsel is so "blatant and clear on the face of the record that there is no room for interpretation" constitutes an exception to the contemporaneous preservation of error rule. See, e.g., Ex parte Jefferson, 749 So. 2d 406, 408 (Ala. 1999); Finney v. State, 860 So. 2d 367, 386 (Ala.Crim.App. 2002). Such a clear and blatant error as the one presented here -- namely, that §§ 1-1-9 and 1-1-15(b), Ala. Code 1975, require that the law in effect at the time of an offense apply to a defendant's sentencing -- is beyond contrary interpretation and deserves correction in the first instance, just as the errors found to warrant correction on appeal in Ex parte Jefferson, supra, and Finney v. State, supra.

As the State further points out, the specific-objection rules of Rule 103(a), Ala.R.Evid., and Rule 45, Ala.R.App.P., should be considered superseded by Rule 15.7, Ala.R.Crim.P.,

with respect to the designation and formulation of appellate grounds in a State's pretrial appeal. Unlike ordinary grounds for objection, Rule 15.7, Ala.R.Crim.P., allows the State to file a pretrial appeal in three limited situations: (1) a suppression relative to a confession or to the admission of evidence; (2) the dismissal of an indictment; and (3) the quashing of an arrest or search warrant. See State v. Sullivan, 741 So. 2d 1125, 1126 (Ala.Crim.App. 1999). "Rules and statutes relating to the same subject matter must be read in pari materia, thus allowing for legal harmony where possible." State ex rel. Daw, 786 So. 2d 1124, 1136 (Ala. 2000) (citing Burlington Northern R.R. v. Whitt, 611 So. 2d 219, 222 (Ala. 1992)). Similarly, when two or more rules concern the same subject, the more specific provision controls the more general provision. See Hatcher v. State, 547 So. 2d 905, 906 (Ala.Crim.App. 1989). Under Rule 15.7 -- the more specific rule relating to the State's right of appeal -- the only requirements for appeal are that the district attorney certify "that the appeal is not brought for the purpose of delay and that the order, if not reversed on appeal, will be fatal to the prosecution of the charge." Beyond this, Rule

15.7 does not call for the State to further specify the grounds for its appeal.

The purpose of this State's "specific objection" rule, i.e., the preservation of error for appellate review, is to give the trial court an opportunity to correct the alleged error or defect called to its attention before being found in error by an appellate court. See Jennings v. State, 588 So. 2d 540, 541 (Ala.Crim.App. 1991). Here, it is clear that the trial court knew what the issue before it was when making its ruling; namely, whether the felony DUI law applicable to Clemons was the one in effect at the time of his arrest or at the time of his conviction. Therefore, the policy considerations underlying the specific-objection rule were satisfied. Thus, this Court should have reached the merits of the State's claim, rather than concluding that the claim had not been preserved for appellate review.

I would grant the State's application for rehearing, reverse the trial court's dismissal of the indictment against Clemons, and remand this case for the Mobile Circuit Court to reinstate the indictment charging Clemons with felony DUI and to proceed accordingly.