Rel: 08/12/2016

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-15-0295

Thomas McMeans

v.

State of Alabama

Appeal from Butler Circuit Court
(CC-12-47.61 and CC-13-14.61)

WELCH, Judge.

Thomas McMeans appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. The petition challenged his July 11,

2013, convictions for first-degree rape, a violation of § 13A-6-61(a)(1), Ala. Code 1975, and second-degree rape, a violation of § 13A-6-62(a)(1), Ala. Code 1975, and his resulting concurrent sentences of 30 years in prison and ten years in prison, respectively.

This Court affirmed McMeans's convictions and sentences on appeal in an unpublished memorandum issued on April 25, 2014. See McMeans v. State (No. CR-12-1825), 184 So. 3d 466 (Ala. Crim. App. 2014) (table).

After his application for in forma pauperis status was denied, McMeans paid a filing fee on February 17, 2015 (C. 33), and filed the instant petition. The petition, McMeans's first[1] was timely.

McMeans filed the standard Rule 32 form found in the appendix to Rule 32, Ala. R. Crim. P. As grounds for his claims, McMeans selected the constitutional ground 12(A)(9) on the form, (denial of effective assistance of counsel), as well as grounds 12(B) (the court was without jurisdiction to render

[1]McMeans filed the same petition twice. After his application for in forma pauperis status was denied, McMeans apparently sent a copy of his petition to the clerk when he paid the filing fee. The clerk assigned the .61 case extensions to the second filing. (C. 36-37.)

judgment or to impose the sentence) and 12(C) (the sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law).

Petitioner's Claims

McMeans raised a number of claims in a supplement to the petition; however, claim III(C) is the only claim pleaded with sufficient specificity to require the trial court to receive evidence pursuant to Rule 32.9. In claim III(C) McMeans alleged that the trial court erred when "[t]he trial judge entered a judgment of conviction and sentenced the defendant on both the greater and lesser included offenses." (C. 14.) Because the resolution of that claim will be the dispositive issue on appeal, we pretermit discussion of McMeans's other claims.

McMeans's claim III(C), though inartfully pleaded, alleged that he was indicted twice[2] for the same act of sexual intercourse with the same victim, in violation of the right to be free from double jeopardy. He asserted that following a single act, he was convicted both of first-degree rape based

[2]McMeans was indicted for first-degree rape in case no. CC-12-0061 and later for second-degree rape in case no. CC-13-0014. The trial court granted the State's motion to consolidate the two cases before trial.

on forcible compulsion and of second-degree rape because the victim was less than 16 years old and more than 12 years old.

State's Response

The State filed a response alleging that McMeans's claim III(C) was based on an incorrect statement of the law. The State cited Allen v. State, 472 So. 2d 1122 (Ala. Crim. App. 1985), for the proposition that second-degree rape was not a lesser-included offense of the offense of first-degree rape.

Circuit Court's Order

The circuit court issued the following order dismissing McMeans's petition:

"ORDER

> "This matter comes before the Court on [McMeans's] Petition for Relief from Conviction or Sentence, along with a response from the State of Alabama, and a response in opposition and a motion for summary judgment filed thereto by the Defendant. [McMeans] was tried and convicted on the charge of Forcible Rape (Rape in the 1st Degree) and Statutory Rape (Rape in the 2nd Degree) and was sentenced on July 11, 2013, to 30 years for the Forcible Rape and 10 years for the Statutory Rape, with the sentences to run concurrent with each other. The Alabama Court of Criminal Appeals affirmed the conviction on April 25, 2014.
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> "[McMeans] has alleged four grounds for relief:

> "1. That the Constitution of the United States or of the State of Alabama requires a new trial, a new sentencing proceeding, or other relief.
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> "2. That trial and appellate counsel was ineffective.
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> "3. That the court was without jurisdiction to render judgment or impose the sentence.
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> "4. That the sentence imposed exceeds the maximum authorized by law, or is otherwise not authorized.
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> "The Claims raised by [McMeans] are precluded by Rule 32.2(a)(3) and 32.2(a)(5), and 32.6(b).
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> "The claims raised by [McMeans] in his petition fail to meet the requirement of Rule 32.6(b), due to bare allegations without specific factual support, and are further precluded by Rule 32.2(a)(3) and 32.2(a)(5), and the claim that trial counsel was ineffective further fails to meet the requirements of Strickland v. Washington [,466 U.S. 668 (1984)]. It is therefore
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> "ORDERED ADJUDGED and DECREED that [McMeans's] Petition for Relief from Conviction or Sentence and [McMeans's] request for an evidentiary hearing be and the same are hereby denied."

(C. 51-52.)

Standard of Review

When reviewing a circuit court's summary dismissal of a postconviction petition "'[t]he standard of review this Court uses ... is whether the [circuit] court abused its discretion.'" Lee v. State, 44 So. 3d 1145, 1149 (Ala. Crim.

App. 2009) (quoting Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005)). If, however, the circuit court bases its determination on undisputed facts, "and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo. State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996)." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001).

Discussion

On appeal, McMeans reasserts the claims raised in his petition. He has, somewhat inexpertly, pleaded facts sufficient to allege that he was subjected to double jeopardy and that the trial court did not have jurisdiction to adjudge and sentence him for both first-degree rape and second-degree rape under the facts proven at trial.[3]

[3]The Court of Criminal Appeals may take judicial notice of its own records. See Hull v. State, 607 So. 2d 369, 371 (Ala. Crim. App. 1992); Ex parte Salter, 520 So. 2d 213, 216 (Ala. Crim. App. 1987). We have examined the record of the trial in McMeans's direct appeal, McMeans v. State (No. CR-12-1825), 184 So. 3d 466 (Ala. Crim. App. 2014) (table), and note that the victim testified to only one act of rape and specifically disavowed any other acts of rape perpetrated against her by McMeans.

The Alabama Supreme Court has specifically recognized only two double-jeopardy claims that implicate the jurisdiction of the trial court: (1) multiple convictions in a single proceeding for the same offense under the same statute, see Ex parte Robey, 920 So. 2d 1069 (Ala. 2004); and (2) multiple convictions in a single proceeding for both a greater and a lesser-included offense, see Ex parte Benefield, 932 So. 2d 92 (Ala. 2005).

In Ex parte Washington, 571 So. 2d 1062 (Ala. 1990), the Alabama Supreme Court held that, under the facts of that case, which are identical in all relevant circumstances to the facts in this case, the offense of second-degree rape, a violation of § 13A-6-62(a)(1) was a lesser-included offense of first-degree rape, a violation of § 13A-6-61(a)(1), when both offenses related to the same single act. In that case the Alabama Supreme Court held:

"The indictment in this case read as follows:

> "'The Grand Jury of said County charge that, before the finding of this indictment,
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> "'CLARENCE KEY WASHINGTON, alias CLARENCE K. WASHINGTON, alias KEITH WASHINGTON,
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> "'whose name is otherwise unknown to the Grand Jury, a male, did engage in sexual

> intercourse with [W.M.], a female, by forcible compulsion, in violation of Section 13A-6-61 of the Code of Alabama.'
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> "The petitioner cites in support of his argument that rape in the second degree is not a lesser included offense of rape in the first degree the case of Allen v. State, 472 So. 2d 1122 (Ala. Cr. App. 1985). In that case the Court of Criminal Appeals did hold that rape in the second degree was not a lesser included offense of rape in the first degree when the victim is over 12 and the indictment charges rape in the first degree under § 13A-6-61(a)(3). We find that case to be distinguishable from this case. In Allen, the indictment alleged that the defendant was 16 years old or older and that the victim was less than 12 years old, but the proof at trial showed that the victim was 12 years old at the time of the offense. Therefore, the trial court dismissed the indictment for rape in the first degree, and the State was allowed to reindict the defendant for rape in the second degree, because, under those facts, rape in the second degree was not a lesser included offense of rape in the first degree. In that case, Allen was indicted under § 13A-6-61(a)(3), which makes the ages of the defendant and the victim necessary elements of the crime, and the ages specified in § 13A-6-61(a)(3) (defendant 16 years old or older and victim less than 12) necessarily exclude the ages needed to prove rape in the second degree under § 13A-6-62(a)(1) (defendant 16 years or older and victim less than 16 and more than 12 years old -- the facts of this case). Thus, Allen stands for the proposition that rape in the second degree under § 13A-6-62(a)(1) is not a lesser included offense of rape in the first degree under § 13A-6-61(a)(3), because of the different proof of ages required.
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> "In the present case, however, Washington was not indicted under § 13A-6-61(a)(3); he was indicted under § 13A-6-61(a)(1), engaging in sexual

intercourse with a female by forcible compulsion. The ages of the defendant and the victim are not necessary elements under § 13A-6-61(a)(1). The facts that the State would have brought forth in this case to prove forcible compulsion would have included the ages of Washington and the victim. If this case had gone to a jury, Washington would have been entitled to a jury instruction on second degree rape, as defined in § 13A-6-62(a)(1), the section of the Code Washington was charged with violating, and the charge to which he entered a plea of guilty.

"The Court of Criminal Appeals has held that, under the proper facts, a jury in a case involving a defendant indicted for rape in the first degree can be instructed on rape in the second degree as a lesser included offense. In Beavers v. State, 511 So. 2d 951, 954-55 (Ala. Cr. App. 1987), the court stated:

> "'The appellant contends that the trial court erred in instructing the jury on rape in the second degree. He cites Allen v. State, 472 So. 2d 1122 (Ala. Crim. App. 1985) in support of his contention that rape in the second degree is not a lesser included offense of rape in the first degree, therefore, the judge's jury charge, under this indictment, which charged rape in the first degree, constituted reversible error. We disagree.
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> "'This appellant was charged with "forcible compulsion" rape under § 13A-6-61(a)(1), Code of Alabama 1975. The court charged on second degree rape under § 13A-6-62(a)(1). The evidence supported this charge since the appellant was clearly over 16 years old and the victim was 14 years old at the time. Had the jury concluded that no forcible compulsion existed then, under the evidence, it would

> have been authorized to convict the appellant of second degree rape under the evidence presented. See Sharpe v. State, 340 So. 2d 885 (Ala. Crim. App.), cert. denied, 340 So. 2d 889 (Ala. 1976).
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> "'In Allen, supra, the appellant was charged in the indictment with a violation of § 13A-6-61(a)(3), and not forcible compulsion rape under § 13A-6-61(a)(1), as was the case here. Based on the differing age factors under the two statutes, and in light of the specific offense charged in that particular indictment, we held that second degree rape was not a lesser included offense of first degree rape....
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> "'Where, as here, the indictment charges forcible compulsion rape in the first degree, and the evidence supports a charge on rape in the second degree, a jury charge on rape in the second degree is not erroneous since the proof necessary here to establish rape in the first degree of necessity established every element of rape in the second degree.'
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> "(Emphasis original.)
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> "All or fewer than all the facts of this case that would establish commission of first degree rape would also establish every element of second degree rape. Therefore, under these facts, rape in the second degree is a lesser included offense of rape in the first degree, and the State could amend the indictment."

571 So. 2d 1062, 1063-65.

A trial court does not have jurisdiction to adjudicate and sentence a defendant in a single proceeding for both a

greater and a lesser-included offense. In Ex parte Benefield, 932 So. 2d 92 (Ala. 2005), the Alabama Supreme Court held:

> "In 2000, Benefield pleaded guilty to first-degree sexual abuse, first-degree rape, and first-degree sodomy. He was sentenced for each offense, and he did not appeal. In January 2005, Benefield filed a Rule 32 petition challenging his guilty-plea convictions.
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> "In his Rule 32 petition, Benefield claimed, in pertinent part, that his convictions for first-degree rape and first-degree sexual abuse arose 'from a single transaction involving the same victim,' and that, therefore, the convictions violated his double-jeopardy rights. Thus, he argued, 'the [trial] court lacked jurisdiction to adjudicate and sentence [him] as guilty of both charges.' (Emphasis added.) Finally, Benefield alleged that his claim raised 'a true jurisdictional issue, [which] is not subject to the preclusions [of Rule 32.2(a)] or the limitations period [of Rule 32.2(c)].' (Emphasis added.)
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> "....
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> "We granted certiorari review to consider Benefield's claim that the Court of Criminal Appeals' holding that his double-jeopardy claim is nonjurisdictional conflicts with its decision in Rolling v. State, 673 So. 2d 812 (Ala. Crim. App. 1995), and with this Court's decision in Ex parte Robey, 920 So. 2d 1069 (Ala. 2004). In Rolling, the defendant appealed 'from the circuit court's denial of his Rule 32, Ala. R. Crim. P., petition in which he contest[ed] his ... convictions for felony murder and reckless manslaughter.' 673 So. 2d at 813. In his petition, Rolling asserted, in pertinent part, 'that because his two convictions [were] based on

> the same act -- the killing of Jim Godfrey -- they violate his right against double jeopardy.' 673 So. 2d at 813. The Court of Criminal Appeals held that 'this double jeopardy claim goes to the jurisdiction of the trial court to render judgment,' and that, therefore, 'Rolling's double jeopardy/jurisdictional issue [was] not precluded by operation of the limitations period.' 673 So. 2d at 816.
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> "....
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> "In Robey, the defendant was convicted of two counts of assault in the first degree based on injuries suffered by Jessie McNabb as the result of a motor-vehicle accident involving Robey's vehicle. This Court held that 'punishing Robey twice for the same offense -- first-degree assault -- violated his double-jeopardy rights.' 920 So. 2d at 1073. Further, this Court stated:
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> > "'The violation of Robey's double-jeopardy rights raises questions of the trial court's jurisdiction to enter a judgment on both assault counts. See Ex parte McKelvey, 630 So. 2d 56, 57 (Ala. 1992)("If the trial court imposed the sentence on [the defendant] without jurisdiction to impose the consecutive sentences for burglary and theft, then [the defendant"s] ground for appeal was not procedurally barred by his failure to object at his sentencing hearing."). Therefore, Robey is not barred from asserting in this successive Rule 32 petition the violation of his double-jeopardy rights.'"

932 So. 2d 92, 92-94 (Ala. 2005).

Therefore, McMeans has pleaded facts sufficient, if proven to be true, to establish that he was subjected to

double jeopardy by being convicted of both the greater offense of first-degree rape and the lesser-included offense of second-degree rape. As a result, McMeans is entitled to an evidentiary hearing to prove that the trial court did not have jurisdiction to adjudge and to sentence him for both offenses.

Conclusion

Based on the foregoing, this Court must remand this cause to the circuit court for that court to enter a new order addressing the merits of McMeans's double-jeopardy claim. In making factual determinations, the circuit court may take judicial notice of the record in McMeans's 2013 rape trial, and, should the circuit court deem it necessary, it may take evidence by any means set forth in Rule 32.9, Ala. R. Crim. P. If the court finds that McMeans was subjected to double jeopardy, the trial court may vacate one of the convictions or grant whatever other relief it deems necessary. In any event, the circuit court shall issue specific written findings of fact regarding claim III(C). Due return shall be filed within 60 days of the date of this opinion, and shall include the circuit court's written findings of fact, a transcript of the evidentiary hearing, if one is conducted, and any other

evidence received and/or relied on by the court in making its findings, except that a transcript of McMeans's 2013 trial, which this court already possesses as a result of McMeans's direct appeal, need not be included if the court states that it has reviewed the transcript.

REMANDED WITH DIRECTIONS.

Windom, P.J., and Kellum and Joiner, JJ., concur. Burke, J., concurs in the result.