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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-16-0890

Jeffery Ray Duncan

v.

State of Alabama

Appeal from Clay Circuit Court
(CC-16-148 and CC-16-149)

KELLUM, Judge.

The appellant, Jeffery Ray Duncan, pleaded guilty on October 19, 2016, to unlawful possession of marijuana in the second degree, a violation of § 13A-12-214, Ala. Code 1975, and unlawful possession of a controlled substance, a violation

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of § 13A-12-212, Ala. Code 1975. A sentencing hearing was scheduled for January 11, 2017, but before the hearing was held Duncan made application to, and was accepted into, the Clay-Coosa Drug Court Program. The circuit court set Duncan's case on the next drug-court docket and continued the imposition of Duncan's sentence pending Duncan's successful completion of, or expulsion from, the Clay-Coosa Drug Court Program.

On February 6, 2017, the circuit court issued a writ of arrest and ordered sanctions against Duncan, finding that Duncan had violated the terms and conditions established by the Clay-Coosa Drug Court Program by failing to report. The court ordered Duncan serve 48 hours in the Clay County jail. On February 17, 2017, the circuit court ordered sanctions against Duncan because he had violated the terms and conditions established by the Clay-Coosa Drug Court Program in that he failed his drug test. The circuit court ordered Duncan to serve 48 hours in the Clay County jail. On February 23, 2017, the circuit court issued a writ of arrest and ordered sanctions against Duncan based on a violation of the terms and conditions of drug court in that Duncan failed to report for

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monitoring and failed to report to drug court on February 23, 2017. The court ordered Duncan to serve 10 days in the Clay County jail. On April 13, 2017, the circuit court found that Duncan violated the terms and conditions of the Clay-Coosa Drug Court Program in that he failed a drug test. The court ordered Duncan to surrender himself and to serve 10 days in the Clay County jail. Again, on May 2, 2017, the circuit court ordered sanctions against Duncan for violating the terms and conditions of drug court because of a positive drug test -- his fourth violation.

On May 18, 2017, the circuit court issued an order finding that Duncan was serving his fourth drug-court sanction in jail. The court found that, over the course of four months in the drug-court program, Duncan had three positive drug tests, had missed court and monitoring sessions, and had failed to complete an assessment as directed by the court. Finding Duncan unwilling and/or unable to abide by the rules of the Clay-Coosa Drug Court Program and based on the recommendation of the Drug Court Coordinator, the circuit court removed Duncan from the Clay-Coosa Drug Court Program and ordered Duncan to appear for sentencing.

At the sentencing hearing, defense counsel argued that the presumptive sentencing guidelines applied in Duncan's case. Specifically, defense counsel argued that the sentencing event in Duncan's case included both drug convictions and that "the most serious offense" in Duncan's case mandated no jail time under the presumptive sentencing standards. (R. 13.) The drug-court coordinator informed the circuit court that staff had attempted to get Duncan to go to AltaPointe Health to have a psychosocial assessment performed to determine the level of treatment Duncan needed and had made appointments at AltaPointe for Duncan; however, Duncan refused to go to the appointments. Defense counsel objected and moved to strike on the basis that the State had not provided notice of grounds to deviate from the presumptive sentencing guidelines. The circuit court overruled the objection on the basis that it did not consider Duncan's misdemeanor conviction in CC-16-148 to be a guidelines case and, therefore, there had been no deviation from the guidelines. The circuit court sentenced Duncan to 23 months' imprisonment for the unlawful-possession-of-a-controlled-substance conviction; that sentence was suspended, and Duncan was placed on 2 years' supervised

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probation. The circuit court sentenced Duncan to 12 months' in jail for his conviction for unlawful possession of marijuana in the second degree. The circuit court ordered the sentences to run concurrently. This appeal followed.

On appeal, Duncan contends that the sentence imposed by the circuit court represented an improper departure from the presumptive sentencing standards. Specifically, Duncan contends that his sentence was improper because the circuit court imposed a period of incarceration; ordered him to serve time in jail, although he had been convicted of a Class D felony and had no prior felony convictions; and did not follow the guidelines for departing from the presumptive sentencing standards. The State contends that the circuit court properly sentenced Duncan to jail time pursuant to § 13A-5-8.1, Ala. Code 1975, because Duncan was terminated from a drug-court program for noncompliance.

In 2012, the legislature enacted § 12-25-34.2, Ala. Code 1975, effective May 15, 2012, to implement presumptive sentencing standards. See Act No. 2012-473, Ala. Acts 2012. See also Hyde v. State, 185 So. 3d 501, 502-04 (Ala. Crim. App. 2015) (detailing the history of the 2012 amendment to the

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Alabama Sentencing Reform Act of 2003, codified at §§ 12-25-30 to -38, Ala. Code 1975). The presumptive sentencing standards became effective on October 1, 2013, see Clark v. State, 166 So. 3d 147 (Ala. Crim. App. 2014), and were amended on October 1, 2016, to "incorporate the new Class D felonies," to add additional nonviolent crimes to the presumptive sentencing standards, and to "provide information on the new sentencing parameters for all Class C and Class D felony offenses." See Presumptive and Voluntary Sentencing Standards Manual 15.

The Presumptive and Voluntary Sentencing Standards Manual, as amended, sets forth the offenses subject to the presumptive sentencing standards and provides circuit courts instructions and worksheets to use in imposing a sentence under the presumptive sentencing standards. When the presumptive sentencing standards apply, sentencing worksheets are presented to the prosecutor, the defendant and/or his attorney, and the sentencing judge before sentencing. Presumptive and Voluntary Sentencing Standards Manual 19. "Worksheets must be completed and considered when the 'most serious offense' at a sentencing event is a worksheet offense in the same venue." Presumptive and Voluntary Sentencing

Standards Manual 23. "A sentencing event includes all convictions sentenced at the same time, whether included as counts in one case or in multiple cases, regardless of whether offenses are worksheet offenses." Presumptive and Voluntary Sentencing Standards Manual 23 (emphasis in original). The Presumptive and Voluntary Sentencing Standards Manual sets forth five rules used to determine the "most serious offense" at a sentencing event. "Rule 5" provides that, "[w]here a sentencing event includes both a worksheet offense and a non-worksheet offense and the worksheet offense has a higher statutory maximum penalty governed by the felony offense classification, the worksheet offense is the most serious offense and the Standards are applicable to the convictions in that sentencing event." Presumptive and Voluntary Sentencing Standards Manual 24.

In this case, Duncan pleaded guilty to unlawful possession of a controlled substance, a Class D felony, see § 13A-12-212(b), Ala. Code 1975, and unlawful possession of marijuana in the second degree, a Class A misdemeanor, see § 13A-12-214(b), Ala. Code 1975. Possession of a controlled substance is a worksheet offense under the presumptive

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sentencing standards; however, possession of marijuana in the second degree is a non-worksheet offense. Presumptive and Voluntary Sentencing Standards Manual 21. Duncan was sentenced in both cases and for both convictions at the same time. Because Duncan's sentencing event included both a worksheet offense and a non-worksheet offense and his worksheet offense -- possession of a controlled substance -- carried a higher statutory maximum penalty as a Class D felony than the non-worksheet offense, the worksheet offense constituted the "most serious offense" and the presumptive sentencing standards were applicable to both convictions when the circuit court sentenced Duncan.

Furthermore, the record contains worksheets that were prepared in anticipation of the application of the presumptive sentencing standards. The worksheets recommend a sentence disposition and a range of sentence length from which a sentence is chosen. Presumptive and Voluntary Sentencing Standards Manual 16. In Duncan's case, the circuit court received a "Drug Sentence Length Worksheet" that provided for a sentencing range of 13 to 32 months for a straight sentence and 6 to 14 months for a split sentence. The circuit court

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also received a "Drug Prison In/Out Worksheet" that recommended a "non-prison" sentence based, in part, on Duncan's having no prior felony convictions. Pursuant to the presumptive sentencing standards, "[i]f the most serious offense at a sentencing event is a Class D felony and the offender's presumptive Prison In/Out worksheet recommendation is 'OUT,' a county jail sentence becomes a sentencing option only if the offender has been previously convicted of any three or more felonies, or previously convicted of any two or more felonies that are Class A or Class B felonies." Presumptive and Voluntary Sentencing Standards Manual 27. Because Duncan's Prison In/Out Worksheet recommendation was no prison time and because he had no prior felony convictions, the circuit court's imposition of a jail sentence was not allowed under the presumptive sentencing standards and, therefore, improper.

Contrary to the State's contention otherwise, § 13A-5-8.1, Ala. Code 1975, does not give the circuit court the authority in this case to disregard the presumptive sentencing standards because Duncan was terminated from a drug-court program for noncompliance.

Section 13A-5-8.1, Ala. Code 1975, states, in pertinent part:

"If a defendant is participating in a court supervised evidence-based treatment program, as that term is defined in Section 12-25-32, a court ordered faith-based program, or any other court ordered rehabilitative program and is subsequently terminated from that program, the court may then order that the defendant be confined in either a prison, jail-type institution, treatment institution, or a consenting community corrections program. The court shall impose a sentence length that complies with either Section 13A-5-6, Section 13A-5-9, or the sentencing guidelines, whichever is applicable."

Here, the circuit court sentenced Duncan to 12 months in jail on a misdemeanor charge of possession of marijuana in the second degree after Duncan was terminated from a drug-court program. Although § 13A-5-8.1 permits a circuit court to impose a sentence of confinement upon termination from a drug-court program, there are limitations on the sentence a circuit court can impose. Specifically, a circuit court can impose only a sentence that complies with sentencing ranges for felonies found in § 13A-5-6, sentencing ranges for cases involving habitual felony offenders sentenced pursuant to § 13A-5-9, and sentences imposed pursuant to sentencing guidelines. Section 13A-5-8.1 does not allow a circuit court

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to impose a sentence for a misdemeanor or other violation under § 13A-5-7, Ala. Code 1975, following a defendant's termination from a drug-court program. Therefore, § 13A-5-8.1 is inapplicable in Duncan's case. Further, as discussed above, the sentence imposed by the circuit court did not comply with the presumptive sentencing standards. Therefore, the circuit court's sentence of 12 months in jail on Duncan's misdemeanor conviction was improper.

Because the sentence imposed did not comport with the requirements of the Presumptive and Voluntary Sentencing Standards Manual as to the imposition of jail time on Duncan's misdemeanor conviction, the circuit court abused its discretion in sentencing Duncan. See Hyde, 185 So. 3d at 513. Accordingly, the judgment of the circuit court imposing a sentence including jail time is reversed, and this case is remanded to the circuit court for that court to impose a sentence that comports with the presumptive sentencing standards. Due return should be made to this Court within 56 days of the release of this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Welch, J., concur. Burke, J., dissents, with opinion. Joiner, J., dissents, with opinion, which Burke, J., joins.

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JOINER, Judge, dissenting.

I believe that § 13A-5-8.1, Ala. Code 1975, when read in conjunction with the Alabama Sentencing Commission's Presumptive and Voluntary Sentencing Standards Manual (2016), authorizes the sentences the circuit court imposed in this case. Therefore, I respectfully dissent.

As the main opinion notes, Jeffery Ray Duncan pleaded guilty to unlawful possession of a controlled substance, a Class D felony, see § 13A-12-212(b), Ala. Code 1975, and to unlawful possession of marijuana in the second degree, a Class A misdemeanor, see § 13A-12-214(b), Ala. Code 1975. Because Duncan participated in the Clay-Coosa Drug Court Program, his sentencing was postponed.

Despite having had multiple "second chances," Duncan eventually was terminated from the drug-court program. The circuit court sentenced Duncan to concurrent sentences of 23 months' imprisonment for the conviction for unlawful possession of a controlled substance and 12 months in jail for the second-degree-marijuana-possession conviction. The circuit court suspended the 23-month sentence on the Class D felony conviction but did not suspend the 12-month jail sentence on the misdemeanor conviction.

The main opinion succinctly sets forth the arguments and the controlling authorities:

"Duncan contends that the sentence imposed by the circuit court represented an improper departure from the presumptive sentencing standards. Specifically, Duncan contends that his sentence was improper because the circuit court imposed a period of incarceration; ordered him to serve time in jail, although he had been convicted of a Class D felony and had no prior felony convictions; and did not follow the guidelines for departing from the presumptive sentencing standards. The State contends that the circuit court properly sentenced Duncan to jail time pursuant to § 13A-5-8.1, Ala. Code 1975, because Duncan was terminated from a drug-court program for noncompliance.

"In 2012, the legislature enacted § 12-25-34.2, Ala. Code 1975, effective May 15, 2012, to implement presumptive sentencing standards. See Act No. 2012-473, Ala. Acts 2012. See also Hyde v. State, 185 So. 3d 501, 502-04 (Ala. Crim. App. 2015) (detailing the history of the 2012 amendment to the Alabama Sentencing Reform Act of 2003, codified at §§ 12-25-30 to -38, Ala. Code 1975). The presumptive sentencing standards became effective on October 1, 2013, see Clark v. State, 166 So. 3d 147 (Ala. Crim. App. 2014), and were amended on October 1, 2016, to 'incorporate the new Class D felonies,' to add additional nonviolent crimes to the presumptive sentencing standards, and to 'provide information on the new sentencing parameters for all Class C and Class D felony offenses.' See Presumptive and Voluntary Sentencing Standards Manual 15.

"The Presumptive and Voluntary Sentencing Standards Manual, as amended, sets forth the offenses subject to the presumptive sentencing standards and provides circuit courts instructions and worksheets to use in imposing a sentence under the presumptive sentencing standards. When the presumptive sentencing standards apply, sentencing

worksheets are presented to the prosecutor, the defendant and/or his attorney, and the sentencing judge before sentencing. Presumptive and Voluntary Sentencing Standards Manual 19. 'Worksheets must be completed and considered when the "most serious offense" at a sentencing event is a worksheet offense in the same venue.' Presumptive and Voluntary Sentencing Standards Manual 23. 'A sentencing event includes all convictions sentenced at the same time, whether included as counts in one case or in multiple cases, regardless of whether offenses are worksheet offenses.' Presumptive and Voluntary Sentencing Standards Manual 23 (emphasis in original). The Presumptive and Voluntary Sentencing Standards Manual sets forth five rules used to determine the 'most serious offense' at a sentencing event. 'Rule 5' provides that, '[w]here a sentencing event includes both a worksheet offense and a non-worksheet offense and the worksheet offense has a higher statutory maximum penalty governed by the felony offense classification, the worksheet offense is the most serious offense and the Standards are applicable to the convictions in that sentencing event.' Presumptive and Voluntary Sentencing Standards Manual 24.

"In this case, Duncan pleaded guilty to unlawful possession of a controlled substance, a Class D felony, see § 13A-12-212(b), Ala. Code 1975, and unlawful possession of marijuana in the second degree, a Class A misdemeanor, see § 13A-12-214(b), Ala. Code 1975. Possession of a controlled substance is a worksheet offense under the presumptive sentencing standards; however, possession of marijuana in the second degree is a non-worksheet offense. Presumptive and Voluntary Sentencing Standards Manual 21. Duncan was sentenced in both cases and for both convictions at the same time. Because Duncan's sentencing event included both a worksheet offense and a non-worksheet offense and his worksheet offense -- possession of a controlled substance -- carried a higher statutory maximum penalty as a Class D felony than the non-worksheet offense, the worksheet offense constituted the 'most

serious offense' and the presumptive sentencing standards were applicable to both convictions when the circuit court sentenced Duncan.

"Furthermore, the record contains worksheets that were prepared in anticipation of the application of the presumptive sentencing standards. The worksheets recommend a sentence disposition and a range of sentence length from which a sentence is chosen. Presumptive and Voluntary Sentencing Standards Manual 16. In Duncan's case, the circuit court received a 'Drug Sentence Length Worksheet' that provided for a sentencing range of 13 to 32 months for a straight sentence and 6 to 14 months for a split sentence. The circuit court also received a 'Drug Prison In/Out Worksheet' that recommended a 'non-prison' sentence based, in part, on Duncan's having no prior felony convictions. Pursuant to the presumptive sentencing standards, '[i]f the most serious offense at a sentencing event is a Class D felony and the offender's presumptive Prison In/Out worksheet recommendation is "OUT," a county jail sentence becomes a sentencing option only if the offender has been previously convicted of any three or more felonies, or previously convicted of any two or more felonies that are Class A or Class B felonies.' Presumptive and Voluntary Sentencing Standards Manual 27."

The main opinion rejects the State's argument that § 13A-5-8.1, Ala. Code 1975, authorizes the circuit court to depart from the dispositional recommendation of "non-prison" in the presumptive sentencing standards. I disagree.

Section 13A-5-8.1, Ala. Code 1975, was created by Act No. 2015-185, Ala. Acts 2015--the same legislative act that created the "Class D" felony classification and that "further required the Alabama Sentencing Commission to incorporate the

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new Class D felonies into the Sentencing Standards." Presumptive and Voluntary Sentencing Standards Manual 15 (2016). The relevant portion of § 13A-5-8.1, Ala. Code 1975, quoted by the main opinion, is as follows:

"If a defendant is participating in a court supervised evidence-based treatment program, as that term is defined in Section 12-25-32, a court ordered faith-based program, or any other court ordered rehabilitative program and is subsequently terminated from that program, the court may then order that the defendant be confined in either a prison, jail-type institution, treatment institution, or a consenting community corrections program. The court shall impose a sentence length that complies with either Section 13A-5-6, Section 13A-5-9, or the sentencing guidelines, whichever is applicable."

The first sentence quoted above addresses disposition of an offender--that is, it gives a sentencing court the option of ordering confinement for an offender like Duncan who is terminated from a drug-court program. The second sentence addresses the durational component of the sentence that may be imposed on that offender.

As the main opinion notes, the dispositional recommendation for the most serious offense in Duncan's case--the Class D felony--is "non prison." Thus, for the disposition in Duncan's case to comply with the Standards, the sentencing court would have to impose a "non-prison" sentence

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for both convictions for which Duncan was sentenced at the "sentencing event." In other words, the sentencing court would have to impose non-prison sentences on both the Class D felony conviction and the misdemeanor conviction.

The Presumptive and Voluntary Sentencing Standards Manual lists the following as examples of non-prison dispositions:

- "Non-prison
- "Probation
- "Community Corrections
- "*County Jail/Work Release
- "Reverse Split
- "Split sentence with a suspended split.

"*If the most serious offense at a sentencing event is a Class D felony, a County Jail sentence (non-prison) becomes a sentencing option only if the offender has been previously convicted of any three or more felonies or previously convicted of any two or more felonies that are Class A or Class B felonies."

Thus, if Duncan were being sentenced under the sentencing standards, "county jail" would not be a dispositional option in his case under ordinary circumstances because he has not "been previously convicted of any three or more felonies or previously convicted of any two or more felonies that are Class A or Class B felonies." Duncan's participation in and termination from a drug-court program, however, changed the circumstances to those contemplated by § 13A-5-8.1. The first sentence of § 13A-5-8.1 gave the circuit court the discretion

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to depart from the dispositional requirements of the sentencing standards. That sentence made "county jail" a sentencing option for the circuit court as to both convictions for which Duncan was sentenced, but it did not require that he be sentenced to jail on both.

The second sentence of § 13A-5-8.1, as noted above, addresses the durational component of the sentence that may be imposed on Duncan. The main opinion reads this second sentence as rendering § 13A-5-8.1 inapplicable to Duncan's case because § 13A-5-8.1 does not specifically list § 13A-5-7 as an option for imposing a sentence duration. The main opinion fails to consider, however, whether the 12-month sentence length imposed on Duncan's misdemeanor conviction "complies with ... the sentencing guidelines."

As to sentence duration in Duncan's case, the Presumptive and Voluntary Sentencing Standards Manual addresses ranges of sentence length for the Class D felony conviction only. The manual does not specifically provide sentence-length ranges for misdemeanors or other "non-worksheet" offenses. The manual presumes, however, that existing law outside the standards will provide sentence lengths for non-worksheet offenses for which an offender is sentenced at a "sentencing event" under

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the sentencing standards. (If that presumption is not the case, there could never be a sentence length imposed on a non-worksheet offense because the standards do not provide sentence lengths for non-worksheet offenses.) Thus, a sentence length imposed on a non-worksheet offense complies with the durational requirements of the sentencing standards if (1) it comports with law outside the standards and (2) it is not longer than what the sentencing standards authorize for the most serious offense. In Duncan's case, the duration of sentence imposed on the misdemeanor conviction--12 months--(1) was authorized by existing law outside the standards, see § 13A-5-7, Ala. Code 1975, and (2) did not exceed the sentence length authorized for the most serious offense. Thus, I would affirm the circuit court's imposition of sentence in this case because it complies with Alabama law.

As an appellate court judge, it is ordinarily not my role to comment on the policy underlying specific legislation--the plain language of the text of the legislation expresses that policy. During my 18 years as a circuit court judge, however, I presided over thousands of drug-court cases and witnessed hundreds of individuals turn their lives around by successfully completing drug-court programs. For drug

offenders (and first-time offenders in particular), a drug-court program offers a "carrot" and a "stick." The "carrot" is the option of avoiding a felony drug conviction by successfully completing the program. The threat of jail is the "stick" that motivates many offenders to persevere in their pursuit of the "carrot." Although longer term confinement should not frequently be used--and, in my observation and experience, the better drug-court programs do not frequently use it--the threat of longer term confinement as a result of termination from a program is an essential tool.

Many drug-court participants, as was the case with Duncan, are given several "second chances." The conduct that precedes those second chances often involves actions that would give rise to other criminal charges but for the fact that the participant is actively involved in a "court supervised evidence-based treatment program" designed to assist that individual with his or her drug addiction or dependency. Section 13A-5-8.1 appears to be the legislature's attempt to preserve for drug-court judges the option of imposing longer terms of confinement. In my opinion, many--if not most--of those individuals whom I witnessed successfully complete drug-court programs (thereby avoiding felony drug

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convictions) would not have done so if the court had not had the option of sending even first-time offenders to jail upon their termination from the program.

Burke, J., concurs.

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BURKE, Judge, dissenting.

As a trial judge, I was heavily involved in the performance of, and the needs of, drug court. I witnessed the results and how different participants were affected by the opportunity to improve the quality of his or her life. I therefore join in Judge Joiner's dissent for the reasons that he espouses. There are situations that require jail time to secure the purposes of drug court and rehabilitation. I believe that the law provides for that option and that that was the law's intention. Therefore, I respectfully dissent from the majority's opinion.