REL: August 14, 2019

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-1120

J.F.C.

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-15-405.60)

On Application for Rehearing

PER CURIAM.

The unpublished memorandum issued on January 4, 2019, is withdrawn, and the following opinion is substituted therefor.

J.F.C. appeals the circuit court's denial of his Rule 32, Ala. R. Crim. P., petition for postconviction relief, challenging his 2015 guilty-plea convictions for three counts of first-degree rape (counts 4, 8, and 56), three counts of incest (counts 1, 3, and 6), three counts of first-degree sodomy (counts 5, 9, and, 11), two counts of the production of child pornography (counts 13 and 14), and one count of aggravated child abuse (count 62).[1] In counts 4 and 5, the victim was less than 12 years old.[2] J.F.C. was sentenced to concurrent sentences of 10 years' imprisonment on counts 1, 3,

[1]The record indicates that J.F.C. was indicted on 64 counts relating to a variety of sex offenses involving his three daughters. He pleaded guilty to 12 counts; the remaining counts were nol-prossed in accordance with the plea agreement.

[2]Although the indictment is not contained in the record, a transcript of the guilty-plea colloquy is included in the record. During the colloquy, the prosecutor specifically stated that Counts 4 and 5 were "based upon age." (C. 50.) More specifically, the prosecutor stated: "Count IV and count V, because it's based upon the victim being less than 12, with enhancement, that would be 20 years to life on both of those counts." (C. 51.) Further, when the prosecutor stated the factual basis for the plea, he stated that J.F.C. "had sexual intercourse with one of [his] daughters who was, at the time, under the age of 12" and that "[h]e, also, engaged in deviant sexual intercourse with his daughter who was under the age of 12 at that time." (C. 54.)

and 6, 20 years' imprisonment on counts 4, 5, 13, 14, and 62, and life imprisonment on counts 8, 9, 11, and 56.

J.F.C. filed his Rule 32 petition in May 2018. He asserted three arguments: (1) that the trial court failed to inform him of the minimum and maximum sentences that could be imposed, including enhancements; (2) that the State likewise failed to inform him of the minimum and maximum sentences and of its intent to invoke enhancements; and (3) that his counsel was ineffective for failing to ensure that the trial court properly informed J.F.C. of the sentencing range. Specifically, J.F.C. argued that he was not properly informed of the minimum and/or maximum possible sentences on counts 4, 5, 13, and 14. According to J.F.C., under § 13A-5-6(a)(4), Ala. Code 1975, as it read at the time of the offenses, the minimum sentence he could receive for counts 13 and 14 was 20 years' imprisonment, but he was incorrectly informed during the plea colloquy that the minimum sentence that he could receive on those counts was 10 years' imprisonment. J.F.C. further alleged that he was never informed that he would be ineligible for parole on counts 4, 5, 13, and 14 under § 15-22-27.3, Ala. Code 1975, which bars parole for defendants

convicted of Class A or Class B felony sex offenses involving a child. J.F.C. argued that he was informed during the plea colloquy that the maximum sentence he could receive on Counts 4, 5, 13, and 14 was life imprisonment; however, under § 15-22-27.3 the maximum sentence he could receive was life imprisonment without the possibility of parole.

The State filed an answer, arguing that J.F.C. had been sentenced to life imprisonment rather than life imprisonment without parole and was eligible for parole. Therefore, according to the State, the court and the State did not improperly inform him otherwise. Moreover, the State contended that it "did not fail to inform him on the mandatory minimum or parole ineligibility because the petitioner is eligible for parole and there is not a mandatory minimum for Rape 1 by forcible compulsion -- unless the child is under 12 years of age." (C. 81-82.) Finally, the State noted that J.F.C. was correct in his argument that the Ireland[3] form he signed did not indicate a sentencing enhancement or parole ineligibility, because, according to the State, neither was

[3]Ireland v. State, 47 Ala. App. 65, 250 So. 2d 602 (1971).

applicable. Therefore, the State argued, his counsel was not ineffective for failing to so inform him.

The circuit court held an evidentiary hearing at which J.F.C. was represented by counsel. Following the hearing, the circuit court issued the following order:

> "[J.F.C.] filed this, his first Rule 32 petition, the State responded, an attorney was appointed, and a hearing was convened. [J.F.C.] was indicted on over 60 counts related to his rape of his three daughters and pleaded guilty to twelve counts. By agreement, he received concurrent sentences ranging from ten years to life imprisonment. After incarceration, he received a letter from the Board of Pardons and Parole informing him that he was ineligible for parole because his victims were under twelve years of age. Thus he had, in effect, received a sentence of life without parole, which did not comport with his plea agreement and/or he was not properly advised of the possible range of sentence. See McCarv v State, 93 So. 3d 1002 (Ala. Crim. App. 2011). He seeks to withdraw his plea.
>
> "Initially, the only counts impacted are those on which he received a life sentence: Counts 8, 9, 11, and 56. On the record at the hearing he disclaimed any challenge to the other counts concerning a sentence range argument and the Court does not believe that any such error exists. Thus, [J.F.C.] is not entitled to withdraw his guilty plea on those counts not challenged.
>
> "The flaw in [J.F.C.]'s argument is that the Board of Pardons and Parole's letter is erroneous. He would only be ineligible for parole if counts 8, 9, 11,and 56 charged him with rape of someone under age twelve. They do not; they are not age specific.

> The victims could have been over the age of twelve at the time the offenses alleged in the counts occurred. It was the motivating factor behind the plea agreement that [J.F.C.] would be eligible for parole at some point.
>
> "The District Attorney's office is ordered to provide a copy of this order to Pardons and Parole. Pardons and Parole will correct its records to reflect that [J.F.C.] is parole eligible and provide confirmation of such to [J.F.C.]. If this directive is not followed within 30 days, [J.F.C.], the District Attorney, or Pardons and Parole may petition the Court to reopen this matter.
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> "Petition denied."

(C. 93.)

On appeal, as he did in his Rule 32 petition, J.F.C. argues that his guilty plea was involuntary and that he should be allowed to withdraw the plea because, he says, he was not properly informed of the minimum and/or maximum possible sentences he faced on counts 4, 5, 13, and 14.

"The standard of review on appeal in a post conviction proceeding is whether the trial judge abused his discretion when he denied the petition." Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). "'"'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.'"'" Hodges

v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005)(quoting State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996), quoting in turn Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979), quoting in turn Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225 (9th Cir. 1975)). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001).

In Heard v. State, 687 So. 2d 212 (Ala. Crim. App. 1996), the trial court mistakenly informed the defendant during the plea colloquy that the minimum sentence he could receive was 10 years in prison. On appeal, the defendant argued that, because the trial court had incorrectly advised him as to the minimum sentence he could receive for this crime, he should have been allowed to withdraw his guilty plea. This Court agreed and stated:

> "We believe that the erroneous information given to the appellant by the trial judge concerning the minimum sentence that could be imposed for a conviction of first degree robbery requires reversal. In Carter v. State, 291 Ala. 83, 277 So. 2d 896 (1973), the Alabama Supreme Court held that 'a defendant, prior to pleading guilty, must be advised of the maximum and minimum potential

> punishment for his crime' by the trial court in order to sustain a ruling that the defendant voluntarily entered a guilty plea. See, Gordon v. State, 692 So. 2d 871 (Ala. Cr. App.); Pritchett v. State, 686 So. 2d 1300 (Ala. Cr. App. 1996); Knight v. State, 55 Ala. pp. 565, 317 So. 2d 532 (1975); Moore v. State, 54 Ala. App. 463, 309 So. 2d 500 (1975). This holding is supported by Boykin [v. Alabama, 395 U.S. 238 (1969),] and Rule 14.4, Ala. R. Crim. P. The rule that the trial judge conduct a colloquy with the defendant before accepting a guilty plea ensures that a criminal defendant is adequately advised of his rights so that he may make a voluntary and intelligent decision to enter such a plea."

Heard, 687 So. 2d at 213.

In McCary v. State, 93 So. 3d 1002 (Ala. Crim. App. 2011), the defendant filed a Rule 32 petition challenging his guilty plea as involuntary because he was not informed that he would be ineligible for parole. The circuit court summarily dismissed the petition. On appeal, this Court remanded the case for the circuit court to allow the defendant an opportunity to present evidence establishing that the trial court did not inform him, at the time he entered his plea, that he was ineligible for parole and that, therefore, his guilty plea was involuntary. In doing so, this Court stated:

> "'"The accused's right to know the possible sentence he faces is absolute,"' Bozeman v. State, 686 So. 2d 556, 559 (Ala. Crim. App. 1996) (quoting Henry v. State, 639 So. 2d 583, 584 (Ala. Crim. App. 1994)),

and 'the trial court's failure to correctly advise a defendant of the minimum and maximum sentences before accepting his guilty plea renders that guilty plea involuntary.' White v. State, 888 So. 2d 1288, 1290 (Ala. Crim. App. 2004).

> "'The Alabama Supreme Court and this Court "have consistently held that a defendant must be informed of the maximum and minimum possible sentences as an absolute constitutional prerequisite to the acceptance of a guilty plea." Ex parte Rivers, 597 So. 2d 1308, 1309 (Ala. 1991). It is well settled, moreover, that "if the appellant's sentence could be enhanced under any of the enhancement statutes, the appellant should be informed of the additional sentence he could receive under the applicable enhancement statute." Elrod v. State, 629 So. 2d 58, 59 (Ala. Cr. App. 1993), citing Rivers. Accord, White v. State, 616 So. 2d 399 (Ala. Cr. App. 1993); Looney v. State, 563 So. 2d 3, 4 (Ala. Cr. App. 1989); Smith v. State, 494 So. 2d 182 (Ala. Cr. App. 1986).'

"Aaron v. State, 673 So. 2d 849, 849–50 (Ala. Crim. App. 1995). See also Durr v. State, 29 So. 3d 922 (Ala. Crim. App. 2009); and Riley v. State, 892 So. 2d 471 (Ala. Crim. App. 2004).

"Although § 15-22-27.3 is not a sentence-enhancement statute but is a parole statute, its effect, in circumstances such as those in Frost [v. State, 76 So. 3d 862 (Ala. Crim. App. 2011),] and in this case, is to increase the maximum possible sentence from life imprisonment to life imprisonment without the possibility of parole; thus, parole ineligibility under § 15-22-27.3 must be considered a direct consequence of a guilty plea, of which a defendant is entitled to be informed. Therefore, we hold that when the effect of parole ineligibility

> under § 15-22-27.3 is to increase the maximum sentence a defendant faces upon pleading guilty, a trial court must inform a defendant of his or her parole ineligibility under § 15-22-27.3 and the effect of that ineligibility on the maximum sentence, and the failure to do so will render the plea involuntary."

McCary, 93 So. 3d at 1006-07.

In the present case, the circuit court did not address J.F.C.'s claim that he was not properly informed of the minimum sentences he could receive on counts 13 and 14. J.F.C. testified at the hearing, and the transcript of the plea colloquy reflects, that J.F.C. was informed that the minimum sentence he could receive on counts 13 and 14 was 10 years' imprisonment. However, J.F.C. is correct that § 13A-5-6(a)(4), as it read at the time of the offenses, mandated a minimum sentence of 20 years' imprisonment for "a Class A felony sex offense involving a child as defined in Section 15-20A-4(2[5])." At the time of the offenses, § 15-20A-4(25) defined a "sex offense involving a child" as "[a] conviction for any sex offense in which the victim was a child or any offense involving child pornography." (Emphasis added.) Production of child pornography is a Class A felony, see § 13A-12-197, Ala. Code 1975, and is, by definition, a "sex

offense involving a child" as that term was defined in § 15-20A-4(25). Therefore, J.F.C. was improperly informed of the minimum sentence he could receive on counts 13 and 14, and, thus, his guilty plea was involuntary. Accordingly, J.F.C. should have been allowed to withdraw his plea.

Furthermore, the circuit court misconstrued J.F.C.'s claim that he was not properly advised of the maximum sentences he could receive for counts 4, 5, 13, and 14. The court construed the claim as a challenge to the life sentences J.F.C. had received on counts 8, 9, 11, and 56 on the ground that those sentences were effectively sentences of life imprisonment without the possibility of parole and, thus, not in compliance with his plea agreement. The court also stated that "[o]n the record at the hearing [J.F.C.] disclaimed any challenge to [any count other than counts 8, 9, 11, and 56] concerning a sentence range argument." However, both in his petition and throughout the hearing, J.F.C. made clear that he was challenging the voluntariness of his pleas on the ground that he was not properly advised of the minimum and/or maximum sentences he could receive on counts 4, 5, 13, and 14, not on the ground that his sentences on counts 8, 9, 11, and 56 did

not comport with the plea agreement. In addition, at no time during the hearing did J.F.C. ever abandon the claims he had raised in his petition. Rather, J.F.C. stated that he was properly advised of the minimum and maximum sentences he could receive on all counts except counts 4, 5, 13, and 14.[4]

J.F.C. testified at the hearing, and the guilty-plea colloquy reflects, that J.F.C. was informed that the maximum sentence he could receive on counts 4, 5, 13, and 14 was life imprisonment. However, he was never informed that he would be ineligible for parole on those counts by virtue of § 15-22-27.3. As already noted, production of child pornography is a Class A felony "sex offense involving a child" as that term

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[4]At the hearing, J.F.C. testified that he had been sentenced in accordance with the plea agreement and when asked by the trial court if the basis of his claim was that "because of the age of the children, you were, in effect, given a life without parole sentence," J.F.C. stated:

> "No. The basis of my Rule 32 is -- I was not properly informed -- correctly informed of the minimum or maximum possible sentence provided by law."

(R. Supp. 13.) Later, the court asked: "Which ones were you told the incorrect range of sentence" and J.F.C. stated "4, 5, 13, and 14." (R. Supp. 14.) On cross-examination by the prosecutor, J.F.C. again reiterated that he was not properly informed of the sentencing range for Counts 4, 5, 13, and 14. (R. Supp. 16.)

was defined in § 15-20A-4(25), as it read at the time of the offenses. In addition, first-degree rape of a victim less than 12 (count 4) and first-degree sodomy of a victim less than 12 (count 5) are also both Class A felony "sex offenses involving a child" as that term was defined in § 15-20A-4(25), as it read at the time of the offenses. Thus, there is no question that J.F.C. is, in fact, ineligible for parole on counts 4, 5, 13, and 14 pursuant to § 15-22-27.3.

The trial court was required to inform J.F.C. of his parole ineligibility under § 15-22-27.3 and the effect of that ineligibility on the maximum sentence in counts 4, 5, 13, and 14; and the court's failure to do so rendered the plea involuntary. See McCary, supra. Contrary to the circuit court's apparent belief, the fact that J.F.C. did not receive life sentences on counts 4, 5, 13, and 14 is irrelevant to whether J.F.C. was properly informed of the maximum sentences he could receive on those counts.

Based on the foregoing, we grant J.F.C.'s application for a rehearing, and we reverse the circuit court's judgment and remand the case with instructions for the circuit court to grant J.F.C.'s Rule 32 petition and allow him to withdraw his

guilty plea. "Upon withdrawal of a guilty plea, the charges against the defendant as they existed before any amendment, reduction, or dismissal made as part of a plea agreement shall be reinstated automatically." Rule 14.4(e), Ala. R. Crim. P.

APPLICATION FOR REHEARING GRANTED; UNPUBLISHED MEMORANDUM OF JANUARY 4, 2019, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur; Kellum, J., concurs specially, with opinion.

KELLUM, Judge, concurring specially.

"The law in Alabama is clear that the trial court's failure to correctly advise a defendant of the minimum and maximum sentences before accepting his guilty plea renders that guilty plea involuntary." White v. State, 888 So. 3d 1288, 1290 (Ala. Crim. App. 2004). As repugnant as these crimes are, based on the record before this Court, I have no choice but to agree that J.F.C. was not properly informed of the minimum and/or maximum sentences he could receive for counts 4, 5, 13, and 14 and that, therefore, his pleas to those counts were involuntary. Moreover, because his pleas to counts 4, 5, 13, and 14 were part of a single plea agreement with the State, the involuntariness of his pleas to counts 4, 5, 13, and 14 renders involuntary all of his pleas entered pursuant to the same agreement. Therefore, I concur to grant J.F.C.'s application for rehearing, reverse the circuit court's judgment denying J.F.C.'s Rule 32, Ala. R. Crim. P., petition for postconviction relief, and remand the case for the circuit court to grant J.F.C.'s Rule 32 petition, set aside all of J.F.C.'s guilty pleas, and reinstate the 64-count indictment against him.

I write specially only to note that J.F.C.'s petition is, on its face, time-barred by Rule 32.2(c), Ala. R. Crim. P. J.F.C. pleaded guilty on September 21, 2015, and was sentenced on November 19, 2015; he did not appeal his convictions and sentences. J.F.C. filed his Rule 32 petition on May 10, 2018, over two years after his convictions and sentences became final, and he did not assert equitable tolling in his petition. However, the State did not assert in its response to the petition that J.F.C.'s petition was precluded by Rule 32.2(c), and the circuit court did not apply that preclusion. In Ex parte Clemons, 55 So. 3d 348, 355-56 (Ala. 2007), the Alabama Supreme Court held that the preclusions in Rule 32.2 are waivable affirmative defenses and that an appellate court may not sua sponte apply the preclusions on appeal except in extraordinary circumstances. I do not believe there are extraordinary circumstances present in this case that would permit this Court sua sponte to apply Rule 32.2(c) on appeal. Therefore, although J.F.C.'s petition is clearly precluded by Rule 32.2(c), because the State did not raise this preclusion and the circuit court did not apply it, this Court has no choice but to grant J.F.C. the relief he requests.