REL: September 20, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-18-0656

Jerry Brad McAnally

v.

State of Alabama

Appeal from Shelby Circuit Court
(CC-04-1257.61)

KELLUM, Judge.

Jerry Brad McAnally appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his January 2006 guilty-plea conviction for criminal

solicitation to commit murder and his resulting May 2006 sentence of life imprisonment. McAnally did not appeal his conviction and sentence. However, in 2007, McAnally filed a Rule 32 petition challenging his conviction and sentence. The circuit court summarily dismissed that petition, and this Court affirmed the dismissal on appeal in an unpublished memorandum issued on August 10, 2012. McAnally v. State (No. CR-10-1314), 152 So. 3d 455 (Ala. Crim. App. 2012) (table).[1]

On March 12, 2018, McAnally filed this, his second, Rule 32 petition. He filed the petition pro se and argued that the trial court lacked jurisdiction to accept his guilty plea or to sentence him. McAnally subsequently retained counsel to represent him, and the circuit court granted counsel leave to file an amended petition. McAnally, through counsel, filed an amended petition on December 28, 2018,[2] in which he alleged: (1) that his guilty plea was involuntary because, he said, he

[1]This Court may take judicial notice of its own records. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

[2]The amended petition superseded the original petition. See, e.g., Woodward v. State, [Ms. CR-15-0748, April 27, 2018] ___ So. 3d ___, ___ n.4 (Ala. Crim. App. 2018); Reeves v. State, 226 So. 3d 711, 722 (Ala. Crim. App. 2016); and Smith v. State, 160 So. 3d 40, 47-49 (Ala. Crim. App. 2010).

had "the distinct impression" that he would receive a lesser sentence than life imprisonment (C. 89); and (2) that his trial counsel was ineffective for not moving to withdraw his guilty plea when he was sentenced to life imprisonment. McAnally also argued in the amended petition that he was entitled to equitable tolling because, he said, he had retained counsel to file his first Rule 32 petition, but counsel had failed to properly file that petition within the limitations period in Rule 32.2(c), Ala. R. Crim. P. Therefore, McAnally concluded, he should be permitted to pursue the claims in the instant petition. Without receiving a response from the State, the circuit court summarily dismissed McAnally's amended petition on February 25, 2019, without stating grounds. McAnally did not file a postjudgment motion.

I.

McAnally first contends that the circuit court erred in summarily dismissing his petition without stating its reasons for doing so. However, "[t]he general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). McAnally did not raise

this issue in the circuit court; therefore, it was not properly preserved for review. See, e.g., Robinson v. State, 869 So. 2d 1191, 1193 (Ala. Crim. App. 2003), and Whitehead v. State, 593 So. 2d 126, 130 (Ala. Crim. App. 1991). Moreover, even if this issue had been properly preserved, it is meritless because "Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal." Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998).

II.

McAnally also reasserts on appeal the two claims from his amended petition and contends that the circuit court erred in summarily dismissing those claims. Specifically, McAnally argues that he pleaded both claims with sufficient specificity to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P., and that, for the same reasons asserted in his amended petition, he is entitled to the benefit of equitable tolling.

> "A Rule 32 petitioner is entitled to an evidentiary hearing on a claim in a postconviction petition only if the claim is 'meritorious on its face.' Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985). A postconviction claim is 'meritorious on its face' only if the claim (1) is sufficiently pleaded in accordance with Rule 32.3 and Rule 32.6(b); (2) is not precluded by one of the

> provisions in Rule 32.2; and (3) contains factual allegations that, if true, would entitle the petitioner to relief. A Rule 32 petitioner is not entitled to an evidentiary hearing on claims that are precluded by one or more of the provisions in Rule 32.2. See Sumlin v. State, 710 So. 2d 941, 943 (Ala. Crim. App. 1998) ('[B]ecause the issues he raised were procedurally barred, the appellant was not entitled to an evidentiary hearing on his petition.')."

Kuenzel v. State, 204 So. 3d 910, 914 (Ala. Crim. App. 2015). Moreover, although the doctrine of equitable tolling, if applicable, operates to toll the limitations period in Rule 32.2(c), Ala. R. Crim. P., it is not applicable to any of the other preclusions in Rule 32.2, Ala. R. Crim. P. See State v. Baker, 172 So. 3d 860, 866 (Ala. Crim. App. 2015).

Assuming, without deciding, that McAnally's claims were sufficiently pleaded and that he is entitled to the benefit of equitable tolling,[3] we nonetheless conclude that he is entitled to no relief because this is McAnally's second petition and it is, by definition, a successive petition, see Rule 32.2(b), Ala. R. Crim. P.; therefore, his claims are subject to the preclusions in Rule 32.2(a)(4), Rule 32.2(b), and Rule 32.2(d), Ala. R. Crim. P.

[3]We express no opinion on these issues.

A.

Initially, we recognize that in Ex parte Clemons, 55 So. 3d 348 (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. We likewise recognize that the State did not file a response to McAnally's petition raising any of the preclusions in Rule 32.2, even though it had the opportunity to do so, and the circuit court stated no grounds for its summary dismissal of McAnally's petition. However, under the circumstances in this case, we may apply the preclusions in Rule 32.2(a)(4), Rule 32.2(b), and Rule 32.2(d) to McAnally's claims.

First, this Court has recognized that Ex parte Clemons was "grounded in due-process principles" of "be[ing] given notice of [any] preclusion ground." A.G. v. State, 989 So. 2d 1167, 1179 (Ala. Crim. App. 2007). However, because

> "the Supreme Court expressly recognized in Ex parte Clemons, [55] So. 3d at [353], that Rule 32.7(d) specifically 'authorizes sua sponte action by' the circuit court in applying a preclusion ground and ... subsequently, in Ex parte Ward, 46 So. 3d 888, 897 (Ala. 2007), the Court reaffirmed the long-standing rule that a circuit court 'may properly summarily dismiss such a petition without

> waiting for a response to the petition from the State,' ... this notice requirement is triggered only when the State files a response to the petition."

989 So. 2d at 1179 n.6 (emphasis added). See also Davenport v. State, 987 So. 2d 652, 655 n.4 (Ala. Crim. App. 2007) (noting that where the circuit court does not require a response from the State, the prohibition in Ex parte Clemons against sua sponte application of preclusions on appeal is inapplicable). Because the State did not file a response to McAnally's petition, this Court may apply preclusions on appeal even if they were not raised by the State below or applied by the circuit court.

Second, this case presents the type of extraordinary circumstances that permit this Court to apply the preclusions on appeal. The Alabama Supreme Court specifically recognized in Ex parte Clemons that permitting an appellate court to sua sponte apply a procedural default on appeal "'is necessary to protect the finality of ... criminal judgments.'" 55 So. 3d at 355 (quoting Rosario v. United States, 164 F.3d 729, 732 (2d Cir. 1998)). In this case, McAnally's petition was filed almost 12 years after his conviction and sentence became final. "[A]s time passes, justice becomes more elusive and

the necessity for preserving finality and certainty of judgments increases." State v. Afanador, 151 N.J. 41, 52, 697 A.2d 529, 534 (1997). In addition, an appellate court "'[r]aising the issue of defendants' procedural default [for the first time on appeal] is particularly appropriate where, as here, the movants pled guilty.'" Ex parte Clemons, 55 So. 3d at 355 (quoting Rosario, 164 F.3d at 732). Finally, where "'the procedural default is manifest from the record and, hence, resolution of this defense does not require further fact-finding,'" an appellate court sua sponte applying a preclusion is appropriate. Ex parte Clemons, 55 So. 3d at 355 (quoting Rosario, 164 F.3d at 733). This Court's records clearly show the applicability of the preclusions in Rule 32.2(a)(4), Rule 32.2(b), and Rule 32.2(d), and no further fact-finding is necessary. We also point out that this is not a case, like Ex parte Clemons, in which the State expressly waived the preclusions in Rule 32.2; rather, as noted above, the State here simply did not file a response to the petition. Because extraordinary circumstances exist, this Court may apply preclusions on appeal even if they were not raised by the State below or applied by the circuit court.

B.

McAnally's first claim -- that his guilty plea was involuntary -- is not a jurisdictional claim. See Fincher v. State, 837 So. 2d 876, 878 (Ala. Crim. App. 2002) ("Claims relating to the voluntariness of guilty pleas are not jurisdictional."). This same claim was raised in McAnally's first Rule 32 petition. This Court's records indicate that the circuit court summarily dismissed McAnally's first petition on the ground that it was time-barred by Rule 32.2(c), Ala. R. Crim. P., and the court did not reach the merits of McAnally's claim.

Rule 32.2(a), Ala. R. Crim. P., provides, in relevant part:

> "(a) Preclusion of Grounds. A petitioner will not be given relief under this rule based upon any ground:
>
> "....
>
> "(4) Which was raised or addressed on appeal or in any previous collateral proceeding not dismissed pursuant to the last sentence of Rule 32.1 as a petition that challenges multiple judgments, whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised."

Rule 32.2(b), Ala. R. Crim. P., provides:

> "If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

To the extent that Rule 32.2(a)(4) and Rule 32.2(b) both contain provisions precluding the same or similar claim from being raised in a second or subsequent Rule 32 petition, those provisions operate in conjunction with each other and must be read in pari materia. See, e.g., Ex parte Jett, 5 So. 3d 640, 643 (Ala. 2007) ("'[R]ules and statutes relating to the same subject matter must be read in pari materia, thus allowing for legal harmony where possible.' Ex parte State ex rel. Daw, 786 So. 2d 1134, 1136 (Ala. 2000).").

In construing Rule 20.2(a)(4) and Rule 20.2(b), Ala. R. Crim. P. Temp., the predecessors to Rule 32.2(a)(4) and Rule 32.2(b), this Court held in Blount v. State, 572 So. 2d 498,

500 (Ala. Crim. App. 1990), that "before a subsequent petition can be deemed successive, a previous petition must have been considered on its merits." Subsequently, in Whitt v. State, 827 So. 2d 869 (Ala. Crim. App. 2001), this Court overruled Blount to the extent it required a previous petition to have been decided on its merits before a new or different ground raised in a successive petition could be precluded by Rule 32.2(b). We held that "where a particular claim in a petition is new and was not raised in a previous petition ..., the 'decided-on-the-merits' requirement is obviously inapplicable, because the claim is being raised for the first time." Whitt, 827 So. 2d at 875. However, this Court in Whitt reiterated "that where a particular claim in a Rule 32 petition has been raised in a previous petition ..., for that claim to be precluded as successive under Rule 32.2(b), the claim must have been decided on the merits in a previous petition." Id. We also note that, in Ex parte Walker, 800 So. 2d 135 (Ala. 2000), the Alabama Supreme Court cited Blount with approval when addressing the applicability of Rule 32.2(a)(4) and Rule 32.2(b) to claims of ineffective assistance of counsel that

had been raised by the petitioner in a previous Rule 32 petition.

However, Blount, Whitt, and Ex parte Walker, were all decided before the Alabama Supreme Court amended Rule 32.2(a)(4) effective August 1, 2002. Before August 1, 2002, Rule 32.2(a)(4) simply precluded any claim that "was raised or addressed on appeal or in any previous collateral proceeding." The August 1, 2002, amendment to Rule 32.2(a)(4) added, among other things, the phrase "whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised." By amending Rule 32.2(a)(4) to preclude a claim that had been raised in a previous petition "whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised," the Alabama Supreme Court abrogated the requirement that a claim raised in a previous petition must have been decided on its merits before it is subject to preclusion under Rule 32.2(a)(4) or Rule 32.2(b) and, thus, effectively abrogated Blount and Whitt, at least with respect to nonjurisdictional claims.[4] Therefore, to the

[4]Subsequent to the amendment to Rule 32.2(a)(4), the Alabama Supreme Court held in Ex parte Trawick, 972 So. 2d 782, 784 (Ala. 2007), that a jurisdictional claim that was

extent that Blount and Whitt held that a claim raised in a previous petition must have been decided on its merits before it is subject to preclusion under Rule 32.2(a)(4) or Rule 32.2(b), they are expressly overruled.

Because McAnally's challenge to the voluntariness of his guilty plea was raised in his first Rule 32 petition, even though the claim was not decided on its merits, it is precluded by Rule 32.2(a)(4) and Rule 32.2(b).

C.

McAnally's second claim -- that his trial counsel was ineffective for not filing a motion to withdraw his guilty plea -- is precluded by Rule 32.2(d), Ala. R. Crim. P., which provides:

> "Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable. In no event can relief be granted on a claim of ineffective assistance of trial or appellate counsel raised in a successive petition."

---

raised in a previous petition must have been decided on its merits in the previous petition before it is subject to the preclusion in Rule 32.2(b).

(Emphasis added.) Because this is McAnally's second Rule 32 petition, he is entitled to no relief on any claim of ineffective assistance of counsel.

III.

Rule 32.7(d), Ala. R. Crim. P., authorizes the circuit court to summarily dismiss a petitioner's Rule 32 petition

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ...."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Because McAnally's claims were precluded by Rule 32.2(a)(4), Rule 32.2(b), or Rule 32.2(d), summary disposition of McAnally's Rule 32 petition was appropriate.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

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