**Rel: November 22, 2019**



# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2019-2020**

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**CR-18-1058**

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**Charles Justo, Jr.**

**v.**

**State of Alabama**

**Appeal from Etowah Circuit Court**
**(CC-88-495.60)**

COLE, Judge.

Charles Justo, Jr., appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief, in which Justo challenged his 1989 convictions for first-degree rape, a violation of § 13A-6-61,

Ala. Code 1975, and first-degree burglary, a violation of § 13A-7-5, Ala. Code 1975, and his resulting sentences, as a habitual felony offender, of life imprisonment without the possibility of parole.

On September 27, 2018, Justo filed the instant petition, which appears to be his first, alleging that his sentences exceed the maximum authorized by law. (C. 10.) According to Justo, although he was sentenced as a habitual felony offender with three prior felony convictions, "only two of those prior convictions are legally allowed for enhancement of sentence." (C. 13.) Specifically, Justo contends that his prior conviction for second-degree theft of property for stealing property valued at $530, is now classified as a Class D felony offense,[1] which cannot be used to enhance a sentence under the Habitual Felony Offender Act ("the HFOA"), see § 13A-5-9, Ala. Code 1975. In short, Justo claims that, because his prior theft offense is now a Class D felony, and because a conviction for a Class D felony cannot be used to enhance a

[1]In Act No. 2015-185, the Alabama Legislature made changes to several substantive criminal offenses, including making theft of property that exceeds $500 in value but does not exceed $1,499 in value a third-degree-theft offense that is punished as a Class D felony. See § 13A-8-4.1, Ala. Code 1975.

sentence under the HFOA, he has only "two prior convictions for enhancement of sentence." (C. 13.)

On June 10, 2019, the State filed a motion to dismiss, alleging, among other things, that Justo's claim is meritless because "the law requires looking at the statute made the underlying charge at the time the subsequent offense occurred and not what it may be at some future date." (C. 24.)

On June 17, 2019, Justo filed a response to the State's motion, arguing that his claim "rests upon the recent amendment to the Alabama Criminal Code, that his prior Class 'C' felony would under the current Alabama Criminal Code be a Class 'D' felony, being applied retroactively to the 1988 Theft 2nd Degree case." (C. 27.)

On June 24, 2019, the circuit court issued an order summarily dismissing Justo's petition, finding that, "although such statute was reclassified by the State Legislature subsequent to the time of such offense being used to enhance [Justo's] sentence under the provisions of the Alabama Habitual Felony Offender Act, such Act of the Legislature fails to provide that the same shall be applied retroactively, nor is such unmistakably implied." (C. 31-32.) Justo then

filed a motion to alter, amend, or vacate the circuit court's judgment, which the circuit court did not rule on, and Justo filed a timely notice of appeal.

On appeal, Justo contends that the circuit court erred in summarily dismissing his petition because, he says, the circuit court "ignor[ed] the most recent case law available on the subject of retroactivity, which defines the applicability of new rules to convictions that have already become final." (Justo's brief, p. 4.) Justo also argues that the circuit court "erred when it charged [him] $246 for court fees in violation of Rule 32.7(e), assessment of filing fee."[2] (Justo's brief, p. 4.) We address each issue in turn.

As set out above, in his petition, Justo alleged that his sentences exceed the maximum authorized by law because, he argues, his prior conviction for second-degree theft of property (which was one of the offenses used to enhance his sentences) for stealing property valued at $530, is now classified as a Class D felony offense, see § 13A-8-4.1, Ala. Code 1975, and cannot be used to enhance a sentence under the HFOA, see § 13A-5-9, Ala. Code 1975. In other words, Justo

[2]The State does not address this argument in its brief on appeal.

claims that the legislature's decision in Act No. 2015-185 to change the classification of the substantive criminal offense of theft of property applies retroactively to the theft conviction that was used to enhance his first-degree-rape and first-degree-burglary sentences. We disagree.

Although Justo correctly points out that Act No. 2015-185, in part, altered the definitions of the theft offenses to make the theft of property that exceeds $500 in value but does not exceed $1,499 in value a Class D felony offense, see § 13A-8-4.1, Ala. Code 1975, Justo incorrectly argues that the amended theft statute applies retroactively to him. In fact, the express language of Act No. 2015-185 shows that the change made to the theft statute does not apply retroactively.

Section 19 of Act No. 2015-185 provides that "[t]he portions of this act relating to the substantive provisions of criminal offenses shall apply to offenses committed after the effective date of this act." (Emphasis added). In other words, criminal offenses that were committed before the effective date of the act, like Justo's theft offense, are subject to the statutes in effect at the time those offenses were committed.

Because Justo's theft offense was committed well before the legislature amended the theft statutes, his theft offense is still treated as a Class C felony and, thus, can be used to enhance a sentence under the HFOA. Accordingly, the circuit court did not err when it summarily dismissed this claim, finding that, "although such statute was reclassified by the State Legislature subsequent to the time of such offense being used to enhance [Justo's] sentence under the provisions of the Alabama Habitual Felony Offender Act, such Act of the Legislature fails to provide that the same shall be applied retroactively, nor is such unmistakably implied." (C. 31-32.)

Justo also argues that the circuit court erred when it ordered him to pay "$246 in court fees" because, he says, that order is "in violation of Rule 32.7(e), assessment of filing fee." (Justo's brief, p. 4.) We disagree.

Rule 32.7(e), Ala. R. Crim. P., provides that, "[i]f, upon final disposition of the petition, the court finds that all the claims for relief ... fail to state a claim of law or fact that is meritorious, it may assess the filing fee, or any portion thereof, and order the correctional institution having custody of the petitioner to withhold 50% of all moneys the

institution then has on deposit for the petitioner, or receives in the future for the petitioner, until the filing fee that has been assessed by the court has been collected and paid in full."

As explained above, Justo's claim that his sentences of life in prison without the possibility of parole exceed the maximum authorized by law is meritless. Thus, the circuit court was well within its discretion to order Justo to pay the $246 filing fee under Rule 32.7(e), Ala. R. Crim. P.

Moreover, we note that, although the circuit court granted Justo's request to proceed in forma pauperis (C. 23), the record on appeal shows that Justo had deposited into his inmate account $2,311 in the 12 months preceding the filing of his request to proceed in forma pauperis. (C. 22.) The amount of money deposited into Justo's inmate account was "appreciably more than the amount necessary to pay [the] filing fee"; thus, the circuit court would not have abused its discretion if it had denied Justo's request to proceed in forma pauperis and had required him to pay a filing fee before accepting his petition. See Ex parte Wyre, 74 So. 3d 479, 483 (Ala. Crim. App. 2011) ("[A]n inmate who has appreciably more

than the amount necessary to pay a filing fee deposited in his inmate account in the 12 months preceding the filing of an [in forma pauperis] request is not indigent as that term is defined in Rule 6.3(a), Ala. R. Crim. P.").

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

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