Rel: February 7, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-16-1311

Devin Darnell Thompson

v.

State of Alabama

Appeal from Fayette Circuit Court
(CC-03-62.60)

On Application for Rehearing

COLE, Judge.

In 2005, Devin Darnell Thompson was convicted of six counts of capital murder for "murdering Fayette Police Officers Arnold Strickland and James Crump and police dispatcher Leslie 'Ace' Mealer during the course of a

robbery," and he was sentenced to death. This Court affirmed Thompson's convictions and death sentence on direct appeal. See Thompson v. State, 153 So. 3d 84, 101 (Ala. Crim. App. 2012) ("Thompson I"). Both the Alabama Supreme Court and the United States Supreme Court denied him certiorari review, see Thompson v. State, 153 So. 3d 191 (Ala. 2014), Thompson v. Alabama, 574 U.S. 894, 135 S. Ct. 233, 190 L. Ed. 2d 175 (2014).

In April 2015, Thompson filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief, which the circuit court summarily dismissed in July 2017. Thompson appealed, and, on November 16, 2018, this Court unanimously affirmed the circuit court's decision. Thompson v. State, [Ms. CR-16-1311, Nov. 16, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018) (Thompson II").

On December 17, 2018, Thompson filed an application for rehearing. In his application, Thompson argues that this Court should reconsider all aspects of its decision affirming the circuit court's summary dismissal of his Rule 32 petition. Thompson also claims that this Court either "overlooked" or

"misapprehended" certain facts or authorities as to every claim he raised on appeal.

> "Rule 40(b), Ala. R. App. P., ... states in relevant part: 'The application for rehearing must state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended.' The operative words are 'overlooked' and 'misapprehended.' We grant application for a rehearing in a rather narrow range of cases. A rehearing is not an opportunity to raise new issues not addressed on original application. See Town of Pike Road v. City of Montgomery, [57] So. 2d [693], [694] (Ala. 2006) (opinion on application for rehearing) ('As a general rule, the Court does not consider matters raised for the first time in an application for rehearing.' (citing Morgan Keegan & Co. v. Cunningham, 918 So. 2d 897, 908 (Ala. 2005))); Riscorp, Inc. v. Norman, 915 So. 2d 1142, 1155 (Ala. 2005) (opinion on application for rehearing) ('"The well-settled rule of this Court precludes consideration of arguments made for the first time on rehearing."' (quoting Water Works & Sewer Bd. of Selma v. Randolph, 833 So. 2d 604, 608 (Ala. 2002))); and Kirkland v. Kirkland, 281 Ala. 42, 49, 198 So. 2d 771, 777 (1967) ('We cannot sanction the practice of bringing up new questions for the first time in application for rehearing.'). Nor is an application for rehearing an invitation to reargue the issues already thoroughly considered on original application. See Willis v. Atlanta Cas. Co., 801 So. 2d 837, 838 (Ala. 2001) (overruling an application for rehearing when it was 'simply an earnest reiteration of the appellant's original brief') (Johnstone, J., concurring specially). Instead, this Court invites an application for a rehearing so that we may be informed of a fact or a point of law that we have 'overlooked' or one that we have 'misapprehended.'"

Chism v. Jefferson Cty., 954 So. 2d 1058, 1106-07 (Ala. 2006) (See, J., concurring specially) (opinion on application for rehearing).

Here, although Thompson uses the words "overlooked" and "misapprehended" throughout his application for rehearing, Thompson's application consists mostly of arguments expressing his disagreement with how this Court resolved the issues he raised on appeal. Thompson does, however, point out two arguments that he raised on appeal that were not specifically addressed by this Court on original submission.

First, Thompson correctly points out that this Court did not address his argument on appeal that his counsel was ineffective "in withdrawing the [jury] instruction on 'Failure of Defendant to Testify.'" (Thompson's brief, p. 66; Thompson's application, pp. 49-50.) Although this Court throughly examined and rejected Thompson's argument on appeal concerning his counsel's effectiveness as to certain jury instructions, this Court did not address the argument raised by Thompson as to his counsel's effectiveness for moving to withdraw a jury instruction on the failure of the defendant to testify.

The totality of Thompson's argument as to that issue on appeal was as follows:

> "Trial counsel were also ineffective in withdrawing the instruction on 'Failure of Defendant to Testify.' (R. 3705). There was no reasonable basis for withdrawing it, and the only resulting inferences left to the jury therefrom would have been negative ones, as Mr. Thompson was the only one who could have rebutted the statement that Agent Tubbs wrote, and had Mr. Thompson sign, ostensibly to clarify what happened that morning of June 7, 2003. The circuit court erred in summarily dismissing this claim."

(Thompson's brief, pp. 66-67.) Thompson's argument, as presented on appeal, fails to satisfy Rule 28(a)(10), Ala. R. App. P.; thus, he has waived it. See Morris v. State, 261 So. 3d 1181, 1198-99 (Ala. Crim. App. 2016) ("Because Morris failed to comply with the requirements of Rule 28(a)(10), he is deemed to have waived the argument for purposes of appellate review."). Although Thompson makes the conclusory assertion that his counsel was ineffective for moving to withdraw that instruction, Thompson does not explain how the circuit court erred when it summarily dismissed this claim. Moreover, even if Thompson's argument on appeal was sufficient to show how the circuit court erred as to his counsel's performance, Thompson does not explain how his counsel's

performance prejudiced him under Strickland v. Washington, 466 U.S. 668 (1984).

Second, Thompson argues that this Court did not address the claim that he raised on appeal that his counsel was ineffective for failing to object "to the admission of the Tuscaloosa jail report" and to statements "of the prosecutor during the penalty phase." (Thompson's application, pp. 56-57.) Like the issue above, however, Thompson's argument did not satisfy Rule 28(a)(10), Ala. R. App. P. Indeed, the totality of Thompson's argument in his brief on appeal was contained in the following footnote:

> "Trial counsel were also ineffective for failing to object to the admission of the incident reports at the Tuscaloosa jail from June 27, 2005 (Ex. 158) in the penalty phase. While defense mitigation expert Dr. Rosenzweig discussed this situation, it was prejudicial to admit these and trial counsel had an excellent objection as to authenticity (as the Court noted). (R. 4106-7)."

(Thompson's brief, pp. 72-73 n.26.) Thompson did not explain with any particularity how the circuit court erred when it summarily dismissed this claim. Thus, Thompson's argument, as presented on appeal, fails to satisfy Rule 28(a)(10), Ala. R. App. P., and is deemed waived.

Moreover, even if Thompson's argument was sufficient to show how the circuit court erred as to his counsel's performance, Thompson does not explain how his counsel's performance prejudiced him under Strickland.

For these reasons, Thompson's application for rehearing is overruled.

APPLICATION OVERRULED.

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