Rel: February 7, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-17-1149

Tyrone Harris

v.

State of Alabama

Appeal from Morgan Circuit Court
(CC-93-150; CC-150.63)

PER CURIAM.

Tyrone Harris appeals the circuit court's decision resentencing him to life in prison without the possibility of parole on his convictions for one count of capital murder committed by shooting into an occupied dwelling and one count

of capital murder committed by shooting from inside a vehicle in violation of § § 13A-5-40(a)(16) and (18), Ala. Code 1975. Harris raises six issues on appeal, but because the disposition of this appeal is dictated by the first issue raised by Harris, this Court will address only that issue.

On January 15, 1993, Harris was indicted in connection with the drive-by shooting death of Terry Sharpley. Harris was 15 years old at the time of the offense. On February 15, 1994, a jury found Harris guilty of one count of capital murder committed by shooting into an occupied dwelling and one count of capital murder committed by shooting from inside a vehicle in violation of Sections 13A-5-40(a)(16) and (18), Ala. Code 1975. Because of his youth, Harris was not subject to the death penalty. The circuit court imposed two consecutive mandatory sentences of life in prison without the possibility of parole. After filing three previous petitions for postconviction relief pursuant to Rule 32, Ala. R. Crim. P., Harris filed his fourth Rule 32 petition and asserted that his sentences are unconstitutional in light of the United States Supreme Court's ruling in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The State

initially opposed Harris's petition but subsequently agreed that Harris was "entitled to postconviction relief from his unconstitutional mandatory life without parole sentence" pursuant to the decisions in Miller and Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). (C. 94.) The circuit court then granted Harris's Rule 32 petition and set the case for a new sentencing hearing. The resentencing hearing was held on July 23, 2018, but the circuit court took the matter under advisement and did not impose a sentence at that time. Three days later, on July 26, 2018, the circuit court entered a detailed written order again imposing sentences of life in prison without the possibility of parole and explaining the reasons for its decision. This appeal followed.

On appeal, Harris correctly argues that this Court obtains jurisdiction to hear an appeal only after a "judgment of conviction" has been entered by the lower court. Harris asserts that the circuit court's failure to pronounce his sentence in open court makes the "judgment of conviction" incomplete and deprives this Court of jurisdiction to hear his

appeal. For the reasons outlined below, Harris is correct and he is entitled, in part, to the relief requested.

The request for relief in Harris's "Amended Petition for Relief from Judgment Pursuant to Rule 32" asked the circuit court to "vacate his unconstitutional sentence and order a resentencing hearing." (C. 27.) Without expressly stating that Harris's previous sentence of life in prison without the possibility of parole was "vacated," the circuit court granted the Rule 32 Petition and set the case for a new sentencing hearing. At the resentencing hearing, the attorneys were allowed to make opening remarks, both sides were given an opportunity to present evidence, and the attorneys were given an opportunity to make closing remarks. Harris also was allowed to speak to the circuit court, and he asked for forgiveness.

The issue to be addressed is whether the circuit court's written order sentencing Harris to life in prison without the possibility of parole, without imposing the sentence in open court with Harris being present, is a final and appealable judgment. In Ex parte Kelley, 246 So. 3d 1068 (Ala. 2015), the Alabama Supreme Court addressed an appeal in which the

defendant had been convicted of two counts of capital murder and one count of sexual torture. Although the jury found Kelley guilty of all three counts, the circuit court did not expressly adjudge Kelley guilty of sexual torture. At Kelley's sentencing hearing, the trial court imposed a sentence of death in open court on both capital-murder convictions, but failed to mention a sentence in the sexual-torture case. Following the sentencing hearing, the trial court entered a written order sentencing Kelley to death on both capital-murder convictions and sentencing him to life imprisonment on his sexual-torture conviction. The Alabama Supreme Court held that a "judgment of conviction consists of the pronouncement of both a determination of a defendant's guilt and a sentence" and that "the trial court did not pronounce a determination of guilt as the [sexual-torture] conviction or sentence. Thus, a judgment of conviction was not entered as to that offense." 246 So. 3d at 1071 (citing Ex parte Walker, 152 So. 2d 1247, 1252 (Ala. 2014)). Because there was no final judgment as to the sexual-torture conviction, our Supreme Court held that the appellate courts

did not have jurisdiction to hear the appeal of that conviction.

A similar situation arose in Benn v. State, 211 So. 3d 857 (2016). In Benn, the defendant was convicted of seven counts of capital murder, and the jury recommended a sentence of death. A judicial-sentencing hearing was held, but at the conclusion of the hearing the circuit court did not pronounce Benn's sentence. Rather, the circuit court announced that the matter would be taken under advisement, that a written sentencing order would be entered, and that the attorneys would be served with a copy of the circuit court's order. Over a month later, the circuit court issued a written order imposing a sentence of death. Relying largely upon the Alabama Supreme Court's decision in Ex parte Kelley, this Court held as follows:

> "In Ex parte Kelley, 246 So. 3d 1068 (Ala. 2015), the Alabama Supreme Court reviewed a materially indistinguishable case and held that the circuit court's failure to pronounce the defendant's sentence in open court deprived this Court of jurisdiction to review that conviction. Our Supreme Court explained that, under § 12-22-130, Ala. Code 1975:
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> > "'"A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the

> Supreme Court or Court of Criminal Appeals may appeal from the judgment of conviction to the appropriate appellate court."'

"Ex parte Kelley, 246 So. 3d at 1071 (quoting § 12-22-130, Ala. Code 1975). Thus, '[u]nder § 12-22-130, appeals lie only from a "judgment of conviction."' Ex parte Kelley, 246 So. 3d at 1071 (quoting Ex parte Eason, 929 So. 2d 992, 993 (Ala. 2005), and citing Thornton v. State, 390 So. 2d 1093, 1096 (Ala. Crim. App. 1980)). The Alabama Supreme Court explained that, '[a] judgment of conviction consists of the pronouncement of both a determination of a defendant's guilt and a sentence.' Ex parte Kelley, 246 So. 3d at 1071 (citing Ex parte Walker, 152 So. 3d at 1252). The Alabama Supreme Court then determined that,

> "'"'[to]"[p]ronounce" is "to utter officially or ceremoniously." Webster's Third New International Dictionary, G. & C. Merriam Co. 1971. "Utter" is defined as "to send forth as a sound: give out in an audible voice." Id.'" King v. State 862 So. 2d 677, 678 (Ala. Crim. App. 2003)(quoting Hill v. State, 733 So. 2d 937, 939 (Ala. Crim. App. 1998)).'

"Ex parte Kelley, 246 So. 3d at 1071. Accordingly, the Supreme Court held that, to enter a judgment of conviction, the trial court must pronounce in open court both an adjudication of guilt and a sentence. Id. at 1071. 'Absent a judgment of conviction, a conviction is not ripe for appeal,' and this Court lacks jurisdiction to review the cause. Ex parte Kelley, 246 So. 3d at 1071 (citing Ex parte Walker, 152 So. 3d at 1252).

" ....

"Under Ex parte Kelley, because the circuit court did not pronounce sentences for Benn's

> convictions, there is no 'judgment of conviction, [and Benn's] conviction[s] [are] not ripe for appeal.' Ex parte Kelley, 246 So. 3d at 1071. Consequently, this Court lacks jurisdiction to review Benn's appeal.
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> "The State appears to concede that the Alabama Supreme Court's opinion in Kelley supports the position that no judgments of conviction have been entered in these cases but argues that this Court should nonetheless hold that issuance of a sentencing order without pronouncement in open court of a sentence is sufficient to enter Benn's judgments of conviction. In Ex parte Kelley, the Alabama Supreme Court considered the State's argument and rejected it, holding that nothing less than pronouncement in open court of the defendant's sentence will satisfy the sentencing element of a judgment of conviction. 246 So. 3d at 1073 (holding that the 'trial court's written order was not the entry of a "sentence" sufficient to support a [determination] that a judgment of conviction was entered'). '[T]his Court is bound by the decisions of the Alabama Supreme Court and has no authority to modify those decisions.' Vanpelt v. State, 74 So. 3d 32, 86 (Ala. Crim. App. 2009) (citing § 12-3-16, Ala. Code 1975)."

Benn v. State, 211 So. 3d 857, 858-59 (Ala. Crim. App. 2016) (emphasis added).

Because the circuit court granted Harris's Rule 32 petition, which expressly requested that his original sentence be vacated, the sentence was vacated and the circuit court held a new sentencing hearing and imposed a new sentence. Although the circuit court resentenced Harris to the same

sentences that were originally imposed, under the express language of Ex parte Kelley, and this Court's interpretation of the Kelley decision in Benn, an appealable final judgment has not been entered in this matter.

The State makes several arguments as to why this Court should hold that the written order entered by the circuit court is sufficient to support this appeal. First, we note that all of the State's arguments are premised on the conclusion that Harris is raising a denial of his right-to-allocution claim rather that Harris's actual claim that his sentence was not pronounced in open court in violation of Ex parte Kelley. In Banks v. State, 510 So. 3d 386, 393 (Ala. Crim. App. 2010), this Court held that a "lack of allocution claim is a nonjurisdictional defect," albeit exempt from general preservation requirements, but our Supreme Court in Ex parte Kelley made it clear that the failure to impose a sentence in open court is a jurisdictional defect. Therefore, contrary to the State's argument that this issue should not be considered because it was not raised in the circuit court, Harris is correct that he was not required to raise this jurisdictional issue in the motion for new trial he filed in

the circuit court. See Hall v. State, 676 So. 2d 954, 955 (Ala. Crim. App. 1995) ("'Matters concerning unauthorized sentences are jurisdictional and, therefore, can be reviewed even if they have not been preserved.'") (quoting Hunt v. State, 659 So. 2d 998 (Ala. Cr. App. 1994)). The State also argues that Harris's "allocution" claim is subject to harmless error analysis. In essence, the State asserts that any error in failing to impose Harris's sentence in open court was harmless because, it says, all safeguards afforded to defendants pursuant to their right to a formal allocution as outlined in Rule 26.9, Ala. R. Crim. P., including the right to make a statement, the right to know the sentence imposed, the right to appeal, and the right to counsel, were sufficiently provided to Harris as evidenced by his current appeal with able counsel. Yet, as previously explained, Harris's claim is incorrectly classified as an "allocution" claim by the State, and binding precedent holds that Harris's claim is a jurisdictional claim. This Court has consistently held that "[j]urisdictional defects are not subject to a harmless-error analysis." Robey v. State, 950 So. 2d 1235, 1236 (Ala. Crim. App. 2006) (citing Tucker v. State, 833 So.

2d 668, 669 (Ala. Crim. App. 2001)). Therefore, any argument that Harris's claim is precluded or is subject to harmless-error analysis is without merit.

Because a "judgment of conviction" is required to support an appeal, and because the Alabama Supreme Court has held that a "judgment of conviction" requires the pronouncement of sentence in open court, rather than imposition of a sentence in a written order, this Court does not have jurisdiction to hear this appeal. Although the record reflects that Harris consented to imposition of the sentence through a written order, rather than in open court, "a defendant cannot consent to waive a jurisdictional defect." Moore v. City of Leeds, 1 So. 3d 145, 152 (Ala. Crim. App. 2008) (citing Bradley v. State, 925 So. 2d 232, 241 (Ala. 2005)). Therefore, this appeal is due to be dismissed.

APPEAL DISMISSED.

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

COLE, Judge, concurring specially.

Although I agree with this Court's per curiam decision holding that Ex parte Kelley, 246 So. 3d 1068 (2015), requires the dismissal of Tyrone Harris's appeal, I believe our Supreme Court should consider whether an exception should be made in a case such as this one. As outlined in the opinion, Harris filed a petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P. The petition correctly asserted that Harris's mandatory sentence of life in prison without parole was unconstitutional pursuant to the United States Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012), which held that juveniles cannot receive mandatory sentences of life in prison without the possibility of parole. Harris's request to vacate his sentence was granted, and he was given a new sentencing hearing. Like Harris, once the decision in Miller was held to apply retroactively in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), numerous other defendants have been allowed to petition the trial courts for reconsideration of their sentences. In all of those cases, the trial courts can consider only two possible sentences: life in prison without the possibility of parole and life in

prison with the possibility of parole. In essence, the trial courts are considering whether the defendant's sentence should be reduced to life in prison with the possibility of parole or remain the same. The issue raised in this appeal was clearly foreseen by the trial court, which was acutely aware of this Court's caselaw regarding orders that are required when a defendant is "resentenced" pursuant to Miller and Montgomery. After the parties were heard in Harris's resentencing hearing, the following occurred:

> "The Court: ... There has been--so far, insofar as I can determine, there has only been one reported case that has made it into the appellate courts since [Ex parte] Henderson[, 144 So. 3d 1262 (Ala. 2013)]. And that's the case of Betton v. State [Ms. CR-15-1501]. That opinion was released. It's still not for publication yet, but it was released on April the 27th, 2018, by the Court of Criminal Appeals.
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> "In that case the judge--it was in DeKalb County. The judge, as best I can determine, immediately after the resentencing hearing, went ahead and ruled and pronounced sentence. Well, it got reversed because they said we need a written order that addresses those Henderson factors, those 14 Henderson factors.
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> "So I guess if there's anything to be learned from that at this point or where we're going with these type hearings, is that I'm going to have to prepare a written order, and that will include whatever sentence that I find to be appropriate under the circumstances.

> "Now, I don't want to get into the situation where somebody says--for example, if y'all were to take the position after I rule that Mr. Harris is not here, present in front of me for the pronouncement of sentence, I don't intend to go through that, and I don't know that y'all are asking for that.
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> "[Defense counsel]: No, Your Honor, we're not. I think you're correct in your evaluation of Henderson. It does require a separate order covering each of those factors as you explained.
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> "The Court: Right.
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> "[Defense counsel]: And we're happy for you to just enter a written order and not do it in open court. That's fine. That's what I expect you to do.
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> "The Court: Well, I'm glad that I heard from Mr. Harris because I think he does have, you know, the right to an allocution, and I'm going to treat that as being--coming from the statement that he made here just a few minutes ago.
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> "But otherwise, I will take under advisement the evidence that has been submitted, and I will get a written order issued. It will be filed with the clerk, it will go to the attorneys, and it will address the factors that I'm required by law to consider, and it will impose whatever sentence I find to be appropriate."

(R. 26-28.)

Although the State addresses this on appeal as an issue involving allocution, Harris frames his argument as a violation of Harris's right to be present at a critical stage

of the proceedings pursuant to Rule 9.1, Ala. R. Crim. P., and as contrary to the holding in Ex parte Kelley--that the appellate jurisdiction of this Court hinges on there having been an audible pronouncement of the sentence in open court.

Rule 9.1, Ala. R. Crim. P., states that a

> "defendant has the right to be present at the arraignment, and at every stage of the trial, including the selection of the jury, the giving of additional instructions pursuant to Rule 21, the return of the verdict, and sentencing.
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> "(b) Waiver of the Right to Be Present.
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> > "(1) Except as provided in subsection (2), a defendant may waive the right to be present at any proceeding in the following manner:
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> > > "(I) With the consent of the court, by an understanding and voluntary waiver in open court or by a written consent executed by the defendant and by the defendant's attorney of record, filed in the case.
> > >
> > > "(ii) By the defendant's absence from any proceeding, upon the court's finding that such absence was voluntary and constitutes an understanding and voluntary waiver of the right to be present, and that the defendant had notice of the time and place of the proceeding and was informed of the right to be present.

> "(2) A defendant may not waive the right to be present if:
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> > "(I) The defendant is not represented by counsel at the proceeding at which the defendant is not present, except in minor misdemeanor cases or proceedings conducted after the defendant has been adjudicated guilty; or
> >
> > "(ii) The defendant has been convicted of an offense that may be punishable by death and sentence is being imposed."

As outlined above, although there are some exceptions that do not apply in this case, "a defendant may waive the right to be present at any proceeding ... [w]ith the consent of the court, by an understanding voluntary waiver in open court." Rule 9.1(b), Ala. R. Crim. P. The holding in Kelley appears to abrogate this rule by making an audible pronouncement of sentence in open court a jurisdictional prerequisite to seeking an appeal. Indeed, a defendant cannot both waive his or her presence at a sentencing hearing and hear the trial court announce his or her sentence in open court.

In this case, the circuit court fully explained the procedure it intended to follow so that the sentencing order

could include an analysis of all 14 factors outlined in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013). Harris voluntarily waived his right to be present at the pronouncement of his sentence and agreed that pronouncement of sentence in a written order was what he "expect[ed]." He expressly stated that not imposing the sentence in open court was "fine." Unlike the defendant in Kelley, who had neither been adjudged guilty nor been sentenced in open court, Harris had been adjudged guilty and sentenced years before his resentencing hearing. Although this case did involve a new sentencing hearing, the circuit court was in essence deciding whether Harris was eligible for a lesser sentence or if the original sentence of life in prison without the possibility of parole would remain.

This Court's decision in Betton v. State, [Ms. CR-15-1501, Apr. 27, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018), which correctly held that the resentencing orders of trial court's must include written findings regarding the 14 factors outlined in Henderson, coupled with Harris's agreement that it would be appropriate for the trial court to fully weigh the factors and impose the sentence in a written order rather than

in open court, placed the circuit court in this case in a difficult position. Although I understand and appreciate the importance of requiring that a defendant be present in open court when his or her sentence is imposed, I am of the opinion that an exception to the rule outlined in Kelley would be appropriate when a defendant voluntarily waives his right to be present when the sentence is imposed under Rule 9.1(b)(1), Ala. R. Crim. P. At the least, an exception to Kelley should be considered in a case such as this when a judgment has been entered and the sentence has been previously imposed in open court, the defendant waives his presence at resentencing, and the circuit court is merely determining whether the original sentence should remain or if an alternative lower sentence will be imposed.

Minor, J., concurs.