

Rel: February 7, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0527

David Shaun Henderson

v.

State of Alabama

Appeal from Covington Circuit Court
(CC-16-237 and CC-19-12)

KELLUM, Judge.

David Shaun Henderson pleaded guilty to burglary in the third degree, see § 13A-7-7, Ala. Code 1975, receiving stolen property in the third degree, see § 13A-8-18.1, Ala. Code 1975, and possession of marijuana in the second degree, see §

CR-18-0527

13A-12-214, Ala. Code 1975. He was sentenced, as a habitual offender with 3 or more prior felony convictions, to 15 years' imprisonment, 10 years' imprisonment, and 1 year's imprisonment, respectively.

For a proper resolution of this appeal, an examination of the procedural history of the underlying cases is required. In February 2016, Henderson was indicted for burglary in the third degree (case no. CC-16-237). He was released on bond and subsequently committed additional crimes. On January 17, 2019, Henderson filed an application to plead guilty on information, and the State filed an information charging Henderson with receiving stolen property in the third degree, possession of marijuana in the second degree, possession of drug paraphernalia, and carrying a concealed weapon without a permit (case no. CC-19-12). On January 18, 2019, Henderson appeared in court and pleaded guilty to burglary in the third degree as charged in the indictment in case no. CC-16-237 and to receiving stolen property in the third degree and possession of marijuana in the second degree as charged in Counts I and II of the information in case no. CC-19-12. The record indicates that Henderson's pleas were part of written

CR-18-0527

plea agreements with the State. In both cases, the written plea agreements were in the form of sentencing orders and were signed by the trial judge, the prosecutor, Henderson's counsel, and Henderson. In signing each order, Henderson acknowledged that he understood the orders and that the orders "accurately set[] out the plea agreement that [he had] reached with the State." (C. 60, 135.)

In case no. CC-16-237, the written plea agreement indicates that Henderson agreed to be sentenced to 15 years' imprisonment for his burglary conviction and to pay various costs, fines, and fees, as well as restitution. Although the written agreement does not indicate that the Habitual Felony Offender Act ("HFOA"), § 13A-5-9, Ala. Code 1975, would be applied to Henderson's sentence, during the plea colloquy the prosecutor indicated that the HFOA was applicable. Henderson did not object to the application of the HFOA despite its not being specifically mentioned in the written plea agreement.

In case no. CC-19-12, the written plea agreement indicates that Henderson agreed to be sentenced to 10 years' imprisonment for the receiving-stolen-property conviction and to 1 year's imprisonment for the possession-of-marijuana

CR-18-0527

conviction and to pay various costs and fines. The agreement specifically states that the sentence for the receiving-stolen-property conviction was to be imposed under the HFOA because Henderson had at least three prior felony convictions. Although at the plea colloquy the prosecutor erroneously stated that the HFOA did not apply in case no. CC-19-12, Henderson's counsel expressly recognized that the HFOA did apply.

During the plea colloquy, the trial court was informed of additional terms of the plea agreements with respect to Henderson's sentences under the HFOA. The prosecutor stated:

"Your Honor, [the HFOA] does apply in 1[6]-237. The State is aware that Mr. Henderson has at least three prior felony convictions out of the State of Florida. We have requested certified copies of those. We have agreed with [Henderson's counsel] that we will provide those to the Court within thirty days or that Mr. Henderson may ask for his plea to be set aside at that time."

(R. 14.) Henderson's counsel acknowledged the additional terms, stating:

"Because in the CC-2019-12 case, [Henderson] is being sentenced from a D Felony to a C Felony because of the requisite prior felony convictions, we would also ask that those prior certified convictions that are to be forwarded for Case Number CC-2016-237 also be attached to CC-2019-12 within

thirty days ... [or] the guilty plea [is] to be set aside."

(R. 20-21.) The trial court acknowledged and accepted the additional terms of the agreements.

On February 17, 2019, Henderson timely filed motions to withdraw his guilty pleas in both case no. CC-16-237 and case no. CC-19-12, stating, in relevant part:

"On the day of [Henderson's] guilty plea, [Henderson] and counsel were made aware the State had not procured certified copies of [Henderson's] alleged prior felony convictions. After consultation with counsel, [Henderson] chose to postpone the entry of guilty plea until the State procured certified copies of [Henderson's] alleged prior felony convictions.

"At that time, the district attorney stated the certified copies of [Henderson's] alleged prior felony convictions could be procured within the next thirty (30) days and, if not, she would have no objection to [Henderson's] withdrawing his guilty plea and having the conviction set aside. [Henderson] agreed to move forward with the guilty plea under these conditions which were put on the record at the time of the guilty plea.

"As of today's date, and after a search of Alacourt, the record in this case has not been supplemented with certified copies of [Henderson's] alleged prior felony convictions."

(C. 65, 141.) Henderson further stated in the motions that, without application of the HFOA, his sentences of 15 years' imprisonment for the burglary conviction and 10 years'

imprisonment for the receiving-stolen-property conviction exceeded the maximum authorized by law and were illegal. Specifically, he pointed out that burglary in the third degree is a Class C felony, see § 13A-7-7(b), Ala. Code 1975, punishable by no more than 10 years' imprisonment, see § 13A-5-6(a)(3), Ala. Code 1975, and that receiving stolen property in the third degree is a Class D felony, see § 13A-8-18.1(b), Ala. Code 1975, punishable by no more than 5 years' imprisonment, see § 13A-5-6(a)(4), Ala. Code 1975. Henderson requested in each motion that "this Court to allow him to withdraw his plea of guilty and set aside the conviction dated January 18, 2019." (C. 66, 142.)

On February 28, 2019, Henderson timely filed notices of appeal in both cases. That same day, the prosecutor submitted in case no. CC-19-12, certified copies of multiple prior felony convictions Henderson had in Florida.¹ On March 1, 2019, the trial court issued an order in case no. CC-19-12 scheduling an evidentiary hearing on Henderson's motion to

¹Henderson had been previously convicted of possession of cocaine with the intent to sell, manufacture, or deliver; possession of a controlled substance; possession of cannabis weighing less than 20 grams; delivery of cocaine; two counts of possession of cocaine; and possession of a short-barreled rifle, shotgun, or machine gun.

CR-18-0527

withdraw his pleas for April 16, 2019. On March 18, 2019, the trial court issued an identical order in case no. CC-16-237.

Rule 24.4, Ala. R. Crim. P., provides:

"No motion for new trial or motion in arrest of judgment shall remain pending in the trial court for more than sixty (60) days after the pronouncement of sentence, except as provided in this section. A failure by the trial court to rule on such a motion within the sixty (60) days allowed by this section shall constitute a denial of the motion as of the sixtieth day; provided, however, that with the express consent of the prosecutor and the defendant or the defendant's attorney, which consent shall appear in the record, the motion may be carried past the sixtieth day to a date certain; if not ruled upon by the trial court as of the date to which the motion is continued, the motion is deemed denied as of that date, unless it has been continued again as provided in this section. The motion may be continued from time to time as provided in this section."

Nothing in the record, including the trial court's orders scheduling the hearing on Henderson's motions to withdraw his guilty pleas, indicates an express agreement by the parties to continue the motions past the 60th day after sentencing. Therefore, on March 19, 2019, the 60th day after sentencing, Henderson's motions to withdraw his pleas were deemed denied

by operation of law, and the trial court lost jurisdiction over the cases.²

On appeal, Henderson presents two issues for our review; we address each in turn.

I.

First, Henderson contends that his 15-year sentence for his burglary conviction and his 10-year sentence for his receiving-stolen-property conviction are illegal because, he says: (1) the State failed to provide notice of the prior convictions on which it intended to rely for application of the HFOA; (2) the State failed to prove the existence of any prior felony convictions; (3) the State failed to prove that the conduct underlying his prior convictions from Florida would have constituted a felony if committed in Alabama; and

²The record reflects that the trial court rescheduled the hearing on Henderson's motions twice, again without the express agreement by the parties, and conducted a hearing on the motions on May 29, 2019. On May 31, 2019, the trial court issued orders in both cases purporting to grant Henderson's motions to withdraw his pleas. However, because the trial court had lost jurisdiction on March 19, 2019, all proceedings conducted thereafter by the trial court are void for lack of jurisdiction and "this Court can consider neither the court's order nor anything that occurred at the hearing." Minor v. State, 914 So. 2d 372, 402 (Ala. Crim. App. 2004).

CR-18-0527

(4) the HFOA was neither invoked nor applied in case no. CC-19-12.

Both lack of notice and lack of proof of the existence of prior convictions are procedural, not substantive, aspects of sentencing. See, e.g., Nichols v. State, 629 So. 2d 51, 57-58 (Ala. Crim. App. 1993). They do not affect the jurisdiction of the trial court to impose a sentence under the HFOA, they do not render a sentence imposed under the HFOA illegal, and they are waived if not properly and timely raised in the trial court. In this case, Henderson did not raise in the trial court the State's alleged failure to provide him notice of the prior convictions on which it intended to rely for application of the HFOA. Therefore, that argument was not properly preserved for review and will not be considered. Although Henderson did raise in his motions to withdraw his guilty pleas the State's alleged failure to prove the existence of prior convictions, the State's failure of proof does not render his sentences illegal. In any event, Henderson's counsel admitted during the plea colloquy that Henderson had "the requisite prior felony convictions" for application of the HFOA when counsel requested that certified copies of those

CR-18-0527

convictions be submitted in case no. CC-19-12 as well as case no. CC-16-237. (R. 21.) In Burrell v. State, 429 So. 2d 636, 640 (Ala. Crim. App. 1982), this Court held that defense's counsel response of "'Yes, sir'" to the trial court's question, "'Now, you understand that this man had three felony convictions already?'" constituted an admission of the defendant's prior felony convictions that relieved the State of its burden to prove the prior convictions. Counsel's statement here was likewise an admission that relieved the State of its burden of proof under the law.³

We recognize, of course, that the use of an invalid prior conviction for sentence enhancement is a jurisdictional issue that may render a sentence illegal. See, e.g., Ginn v. State, 894 So. 2d 793, 796 (Ala. Crim. App. 2004). If the conduct underlying a prior conviction from another jurisdiction would not have constituted a felony if committed in Alabama on or after January 1, 1980, that conviction is not valid for sentence enhancement. See Steele v. State, 911 So. 2d 21, 31 (Ala. Crim. App. 2004). However, although "the State bears

³The admission, of course, did not relieve the State of its burden to comply with the terms of the plea agreements by presenting certified copies of Henderson's prior convictions within 30 days of sentencing.

the burden of proving the existence of prior convictions for enhancement under the HFOA, ... '[t]he burden of showing that a prior conviction is invalid for enhancement purposes is on the appellant.'" Ginn, 894 So. 2d at 798-99 (emphasis added) (quoting Thigpen v. State, 825 So. 2d 241, 245 (Ala. Crim. App. 2001) (opinion on return to remand)). Here, Henderson does not argue that his prior convictions were invalid for sentence enhancement. His sole argument is that the State failed to prove that the convictions were valid for sentence enhancement. Because the State has no burden beyond proving the existence of prior felony convictions, Henderson's argument is meritless.

Finally, we reject Henderson's argument that the HFOA was not invoked and applied in case no. CC-19-12. Although the prosecutor erroneously stated during the plea colloquy that the HFOA did not apply in case no. CC-19-12, the written plea agreement, which Henderson signed, specifically states that his sentence for receiving stolen property would be enhanced under the HFOA because Henderson had at least three prior felony convictions, and Henderson's counsel admitted during the plea colloquy that the HFOA was applicable. This is

sufficient to show that the HFOA was both invoked and applied in case no. CC-19-12.

II.

Henderson also contends that "[t]he trial court abused its discretion by denying [his] motions [to withdraw his guilty pleas] by operation of law." (Henderson's brief, p. 10; emphasis omitted.) However, his sole request for relief on appeal is that this Court remand this cause "for the trial court to resentence [him] in accordance with Alabama law and without consideration of any alleged prior felony convictions." (Henderson's brief, p. 21.) Indeed, the first two sentences of his argument as to this issue read: "To be clear, [Henderson] does not wish to withdraw his guilty pleas (R: 217-225). [Henderson] only wishes to be sentenced in accordance with Alabama law and without application of the HFOA (R: 217-225)." (Henderson's brief, p. 10.)

Henderson is not entitled to the relief he seeks. "If a breach of a plea agreement by the state is demonstrated, the trial court has the discretion to cure the breach by allowing withdrawal of the plea, or, under some circumstances, by ordering specific performance of the agreement." Alford v.

State, 651 So. 2d 1109, 1112 (Ala. Crim. App. 1994). In this case, specific performance is impossible because the only term of the plea agreements with which the State did not comply was time-sensitive and the time within which to comply has already lapsed, i.e., the State did not submit certified copies of Henderson's prior convictions to the trial court within 30 days of sentencing. The appropriate remedy, then, is to allow Henderson to withdraw his pleas, not to resentence Henderson. Indeed, to resentence Henderson to sentences not contemplated by the plea agreements would result in the trial court's rejecting the plea agreements. Although a trial court is not required to accept the terms of a plea agreement, see Ex parte Yarber, 437 So. 2d 1330, 1336 (Ala. 1983), when a trial court rejects a plea agreement and does not sentence a defendant in accordance with the terms of the agreement, the appropriate remedy is, again, to allow the defendant an opportunity to withdraw his or her guilty plea, see Ex parte Otinger, 493 So. 2d 1362, 1364 (Ala. 1983), not to resentence the defendant.

Of course, a defendant is not required to withdraw his or her guilty plea if the State breaches, or the trial court rejects, the terms of a plea agreement; a defendant must only

be afforded an opportunity to do so. In these cases, because Henderson's motions to withdraw his guilty pleas were denied by operation of law, he was not afforded the opportunity to withdraw his pleas. Although Henderson states on appeal that he does not want to withdraw his pleas, because that is the only remedy to which he is entitled, he must nonetheless be afforded the opportunity to do so.

Accordingly, we remand this cause for the trial court to conduct a hearing on Henderson's motions to withdraw his guilty pleas at which Henderson is afforded an opportunity to withdraw his pleas. If Henderson chooses to withdraw his guilty pleas, the trial court shall grant Henderson's motions to withdraw and set aside Henderson's convictions and sentences for burglary in the third degree, receiving stolen property in the third degree, and possession of marijuana in the second degree, and "the charges against [him] 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. If Henderson chooses not to withdraw his guilty pleas, the trial court shall so state in a written order. Due return shall be filed within 56 days of

CR-18-0527

the date of this opinion and shall include a transcript of the hearing conducted on remand and the trial court's written order thereon.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., concurs in the result.