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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0836

Sumnar Robert Brewster

v.

State of Alabama

Appeal from Etowah Circuit Court
(CC-06-785.01 and CC-06-785.02)

MINOR, Judge.

Sumnar Robert Brewster appeals from the Etowah Circuit Court's order requiring him to pay a recoupment, under § 15-12-25, Ala. Code 1975, for the cost of his court-appointed attorneys. Most of the recoupment appears to have been for

the fees charged by attorneys who provided Brewster with constitutionally ineffective assistance of counsel. Brewster asserts that the trial court failed to consider his ability to pay and that it is unconstitutional to require him to pay for constitutionally ineffective counsel. Because the record does not show that the trial court considered Brewster's ability to pay the amount it ordered, we remand the case.¹

Facts and Procedural History

A jury convicted Brewster in 2008 of two counts of first-degree robbery, see § 13A-8-41, Ala. Code 1975. The trial court sentenced Brewster under the Habitual Felony Offender Act, see § 13A-5-9, Ala. Code 1975, to life imprisonment without the possibility of parole on each conviction. This Court affirmed Brewster's convictions and sentences.² Brewster v. State (No. CR-07-1917), 51 So. 3d 407 (Ala. Crim. App. 2009) (table). This Court later affirmed the trial court's judgment denying Brewster's petition for

¹In light of our remand, we pretermit consideration of Brewster's constitutional challenges to the recoupment, including whether those challenges are properly before us.

²Appointed counsel for Brewster filed a no-merits brief under the procedure in Anders v. California, 386 U.S. 738 (1967).

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postconviction relief under Rule 32, Ala. R. Crim. P. Brewster v. State (No. CR-11-0901), 155 So. 3d 1125 (Ala. Crim. App. 2012) (table), cert. denied, 165 So. 3d 658 (Ala. 2013) (table).

Brewster then sought relief in the United States District Court for the Northern District of Alabama under 28 U.S.C. § 2254. The district court denied him relief, but the United States Circuit Court of Appeals for the Eleventh Circuit reversed the judgment of the district court. Brewster v. Hazel, 913 F.3d 1042 (11th Cir. 2019). The Eleventh Circuit held that, given the trial court's repeated instructions to the deadlocked jury to keep deliberating until it reached a verdict, Brewster's counsel was constitutionally ineffective for not objecting to those instructions and moving for a mistrial. 913 F.3d at 1056, 1059. On remand from the Eleventh Circuit, the United States District Court gave the State 120 days to vacate Brewster's convictions and sentences. (C. 17.) The Etowah Circuit Court then vacated Brewster's convictions and sentences. (C. 23.)

Brewster pleaded guilty on April 17, 2019, to the lesser-included offenses of two counts of second-degree robbery, see

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§ 13A-8-42, Ala. Code 1975. (C. 24.) Under the plea agreement, the trial court sentenced Brewster to 156 months, the minimum sentence under the voluntary sentencing standards.³

As a part of the plea agreement, Brewster agreed to pay "appointed attorney fees in an amount to be determined." (C. 24.) The trial court assessed \$13,321.50 for attorney fees.⁴ Brewster contends that \$12,057.50 of that amount was for attorney fees from his trial. (C. 37.)

Brewster moved the trial court to vacate that portion of the fees that were assessed for the attorneys who had

³The 2016 version of the Presumptive and Voluntary Sentencing Standards Manual ("the 2016 Standards") applied to Brewster's convictions. See Morrow v. State, [Ms. CR-18-0794, March 13, 2020] ___ So. 3d ___, ___ n.8 (Ala. Crim. App. 2020) ("Although the Presumptive and Voluntary Sentencing Standards Manual was updated effective October 1, 2019, Morrow pleaded guilty in March 2019 and the circuit court sentenced him in April 2019. Thus, the 2016 version of the Presumptive and Voluntary Sentencing Standards Manual applies to Morrow's sentences."). Second-degree robbery is a "covered offense" under the 2016 Standards. See also § 12-25-34(a)(3) and (4), Ala. Code 1975.

⁴The record does not include a separate order from the trial court requiring Brewster to pay the attorney fees. But the record includes a "transcript of record conviction report" showing that Brewster was assessed \$13,321.50 for fees (C. 40) and a "fee sheet" from AlaCourt.com showing \$13,321.50 in "fees," of which \$12,057.50 was for a fee dated September 5, 2008. (C. 42).

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represented him at trial. (C. 36.) Brewster argued that he was indigent and that the trial court had to consider his ability to pay the fees. See § 15-12-25(a)(2), Ala. Code 1975; see also Rule 26.11, Ala. R. Crim. P. Brewster also argued that it was "unreasonable" to require him to pay fees for attorneys who had provided constitutionally ineffective assistance at his trial. (C. 37-38.) The trial court denied that motion. Brewster moved for reconsideration, reiterating his earlier arguments and asserting that it was unconstitutional to require him to pay fees for his constitutionally ineffective attorneys. (C. 44-47.) The trial court denied that motion, and Brewster appealed to this Court. See Hutchinson v. State, 66 So. 3d 220, 231 (Ala. 2010) ("Hutchinson I") (holding that the Court of Criminal Appeals has jurisdiction over appeals involving an award of "attorney fees 'in relation to' a criminal case"); see also Hutchinson v. State, 111 So. 3d 754, 764 (Ala. Crim. App. 2011) ("Hutchinson II") ("Justice Murdock's writing in [State v. Isbell [, 985 So. 2d 446 (Ala. 2007)]], as adopted by the Supreme Court in Hutchinson I, establishes that § 12-3-9, Ala. Code 1975, confers

jurisdiction on this Court to hear Hutchinson's appeal in the present case.").

Discussion

Brewster challenges the \$13,321.50 recoupment the circuit court assessed for the fees of his appointed attorneys. Under § 15-12-25(a)(1), Ala. Code 1975, "[a] court may require a convicted defendant to pay the fees of court appointed counsel. Fees of court appointed counsel for the purposes of this section, shall mean any attorney's fees and expenses paid an appointed counsel, contract counsel, or public defender." Brewster challenges the entire assessment because, he says, the trial court did not consider his ability to pay it. He also challenges as unconstitutional that part of the assessment for the attorneys who provided ineffective assistance at his trial.

Section 15-12-25(a)(2), Ala. Code provides:

"The court shall not order a defendant to pay the fees of court appointed counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of these fees, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of the fees will impose. A defendant who has been ordered to pay the fees of court appointed counsel and who is not in contumacious default in the payment thereof may at

any time petition the court which sentenced him or her for remission of the payment of these fees or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may remit all or part of the amount due in fees or modify the method of payment."

The State asserts, and we agree, that the record does not permit meaningful review of this issue because nothing suggests that the trial court considered § 15-12-25(a)(2) before it imposed the assessment on Brewster.

This Court has remanded cases for more proceedings where the record did not show that the trial court considered the defendant's ability to pay before imposing a statutory fine or assessment. See, e.g., D.A.H. v. State, [Ms. CR-17-1049, Jan. 11, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019) ("[W]e set aside the restitution order in this case and remand this matter to the juvenile court for that court to enter a new order. The new order should reflect that the juvenile court has considered the financial resources available to D.A.H. and his ability to reasonably meet the obligation pursuant to Rule 26.11(a), Ala. R. Crim. P."); Hurd v. State, 68 So. 3d 219, 222 (Ala. Crim. App. 2010) ("The trial court has not entered a restitution order in compliance with [the applicable laws].

... Therefore, a remand is necessary for the trial court to supplement its restitution order before we address Hurd's claims on appeal. Specifically, on remand, the trial court is directed to make specific findings regarding the following: 1) the underlying facts and circumstances that led the trial court to grant restitution; 2) the reasons supporting the ordered amount of restitution; 3) the manner and method of payment; and 4) the court's consideration of Hurd's financial ability to pay restitution."). Cf. Hutchinson II, 111 So. 3d at 761 (remanding matter for the trial court to consider specific factors before it approved only part of an attorney-fee declaration). Brewster, in his reply brief, asserts that this Court should decide the constitutional questions he poses before remanding this matter for the trial court to consider his ability to pay the recoupment. He argues: "The question of whether any recoupment assessment under these circumstances can be ordered must be answered first. If this recoupment assessment isn't legal, Mr. Brewster's ability to pay becomes moot." But the converse is also true: If the trial court sets aside the assessment because Brewster cannot pay it, the constitutional questions become moot.

A court should decide a constitutional question in a case that properly presents the issue. But this is not such a case--yet. As this Court explained in State v. Woodruff, 460 So. 2d 325, 330 (Ala. Crim. App. 1984):

"Where the question of the constitutionality of a statute is distinctly presented, and is necessary to the decision of the particular case, the courts do not hesitate to decide the question,' Bray v. State, 140 Ala. 172, 37 So. 250, 251-252 (1904), but resolution of a constitutional question should not be predicated on supposition or speculation of the facts. Whitten v. City of Atmore, 278 Ala. 70, 175 So. 2d 764, 766 (1965). We are bound by the principles espoused by the Supreme Court of Alabama in State v. Montgomery, 177 Ala. 212, 59 So. 294, 296 (1912):

"It is the established rule of this court to decline to pass upon the constitutional validity of legislative enactments, unless the determination of the questions and rights then before it requires their decision. Smith v. Speed, 50 Ala. 276 [(1874)]; Bray v. State, 140 Ala. 172, 179, 37 South. 250 [1904]; Hill v. Tarver, 130 Ala. 592, 30 South. 499 [1901] [T]his court will not decide any constitutional question respecting the validity of legislation, unless its decision thereupon is "indispensable" to the determination of that litigation. Wisdom and a just respect for the Legislature suggest and approve these rules.'"

(Emphasis added.) See also Chism v. Jefferson Cty., 954 So. 2d 1058, 1063 (Ala. 2006) ("A court has a duty to avoid

constitutional questions unless essential to the proper disposition of the case.'" Lowe v. Fulford, 442 So. 2d 29, 33 (Ala. 1983) (quoting trial court's order citing Doughty v. Tarwater, 261 Ala. 263, 73 So. 2d 540 (1954); Moses v. Tarwater, 257 Ala. 361, 58 So. 2d 757 (1952); and Lee v. Macon County Bd. of Educ., 231 F. Supp. 743 (M.D. Ala. 1964)).

"Generally courts are reluctant to reach constitutional questions, and should not do so, if the merits of the case can be settled on non-constitutional grounds.'" Lowe, 442 So. 2d at 33 (quoting trial court's order citing White v. U.S. Pipe & Foundry Co., 646 F.2d 203 (5th Cir. 1981)). "No matter how much the parties may desire adjudication of important questions of constitutional law, broad considerations of the appropriate exercise of judicial power prevent [] such determinations unless actually compelled by the litigation before the court.'" Lowe, 442 So. 2d at 33 (quoting trial court's order citing Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968)).").

The record does not show that the trial court complied with § 15-12-25(a)(2), Ala. Code 1975, before it required Brewster to repay the State the cost of his court-appointed

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attorneys. Thus, we set aside the fee-recoupment order and remand this matter to the trial court.

On remand, the trial court should allow Brewster to present evidence about his ability to pay a recoupment and any other evidence relevant to the trial court's responsibilities under § 15-12-25, Ala. Code 1975. The trial court should then enter a new order, and, if it requires Brewster to pay a new recoupment assessment, the order should show that the trial court has considered the requirements of § 15-12-25(a)(2), Ala. Code 1975. Due return must be filed within 84 days of the date of this order and must include the trial court's written order, a transcript of any hearing, and any other evidence received or relied on by the court in making its findings.⁵

REMANDED WITH INSTRUCTIONS.

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

⁵After the trial court submits its return, this Court will notify the parties of the briefing schedule for supplemental briefs. See Rule 28A, Ala. R. App. P.