REL: January 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0837

Catrina Renee Faircloth

v.

State of Alabama

Appeal from Escambia Circuit Court
(CC-17-458.72)

MINOR, Judge.

Catrina Renee Faircloth appeals from the circuit court's revocation of her sentence to community corrections. We consider whether there was sufficient evidence for the circuit court to revoke Faircloth's sentence to community corrections,

and, if so, whether the circuit court's imposition of a three-year split sentence and a five-year probationary period exceeded the restrictions of § 15-18-8(b), Ala. Code 1975, the Split-Sentence Act.[1] For the reasons discussed below, we conclude that there was sufficient evidence to revoke Faircloth's sentence to community corrections but that the split sentence and probationary term imposed by the circuit court following that revocation exceeded that allowed by § 15-18-8(b).

Faircloth pleaded guilty to obstruction of justice, a Class C felony, and, on July 2, 2018, she was sentenced as a habitual felony offender to 15 years in the custody of the State Department of Corrections ("DOC"), split to serve 2 years in community corrections followed by 5 years of probation. On February 1, 2019, Faircloth's probation officer filed a petition to revoke Faircloth's community-corrections sentence, alleging that Faircloth had violated the conditions of community corrections by committing the new offenses of unlawful possession of drug paraphernalia and having an

[1]Section 15-18-8, Ala. Code 1975, was amended effective May 31, 2019, but that amendment does not apply in this case. See Act No. 2019-344, Ala. Acts 2019.

automobile tag on her vehicle that belonged to another vehicle.[2] A revocation hearing was held on April 24, 2019. The State presented the testimony of two witnesses.

Officer Derrick Hodges testified that on January 27, 2019, he was employed as a police officer with the East Brewton Police Department when he saw Faircloth driving a vehicle. Officer Hodges "made eye contact" with Faircloth because, he said, "she has been warned several times to quit driving without a license." (R. 7.) Officer Hodges "ran the tag" on the vehicle Faircloth was driving and when it came back as a tag belonging to a vehicle other than the one she was driving, Officer Hodges initiated a traffic stop.

Officer Hodges testified that when he stopped Faircloth's vehicle, Faircloth was alone. Officer Hodges testified that he asked Faircloth why she was driving, and she told him that she did not have a driver's license but that the vehicle belonged to her father. Officer Hodges testified that he

[2]Faircloth was previously given a sanction in October 2018 for violating the terms of her community-corrections sentence by not being at her approved residence and for testing positive for methamphetamine. In November 2018, Faircloth received a 45-day sanction for testing positive for methamphetamine and cocaine. She was reinstated to community corrections following the 45-day sanction.

asked Faircloth if there was anything illegal in the vehicle, and Faircloth told him that she was on community corrections and that she "can't mess up." Officer Hodges asked Faircloth if he could search the vehicle, and Faircloth agreed. Officer Hodges searched the vehicle and found "a digital scale used to weigh drugs" in the center console of the vehicle. (R. 9, 11.) Officer Hodges testified that there was a "white residue" on top of the scales. (R. 11.) Officer Hodges did not field-test the scales or the white residue, but he testified that he is familiar with digital scales and that they are commonly used to weigh drugs. Faircloth told Officer Hodges that the scales belonged to her boyfriend, who had been in possession of the vehicle before her, and that her boyfriend would admit that the scales belonged to him. Officer Hodges arrested Faircloth for possession of drug paraphernalia and gave her a citation for having a switched tag. Officer Hodges testified that Faircloth's boyfriend tried to come forward and take the blame for the scales but that "he was incarcerated in the jail and I don't talk to inmates." (R. 10.)

Matthew Rabren, the director of the Escambia County community corrections program, testified that one of the conditions of Faircloth's sentence to community corrections was that she not be the subject of any new charges. He testified that the new charges that had been brought against Faircloth represented Faircloth's third community-corrections violation.

Faircloth testified in her own defense at the revocation hearing. She testified that she was driving her father's vehicle and that her father had not yet switched the tag. Faircloth testified that the digital scales found in the vehicle belonged to her boyfriend, Michael Lawrence, who was, she admitted, selling drugs, and that she did not know that the scales were in the vehicle. Faircloth testified that, when she went to court regarding the drug-paraphernalia charge, that charge was dismissed. Faircloth admitted that she had previously been convicted of possession of a controlled substance.

Following the hearing the circuit court, having heard the evidence, stated: "I hereby adjudge, adjudicate and find that Ms. Faircloth did violate community corrections by unlawfully

possessing drug paraphernalia and driving a vehicle with a switched tag." (R. 23.) The circuit court then entered a written revocation order summarizing each witness's testimony and detailing the evidence supporting a finding that Faircloth had violated her community-corrections sentence. The circuit court revoked Faircloth's sentence to community corrections and ordered as follows:

> "After hearing all of the testimony and evidence, and the court being reasonably satisfied that defendant has violated community corrections in this case, it is, therefore, ordered and adjudged that the defendant has violated community corrections in this case. It is therefore ordered and adjudged that the defendant is hereby resentenced to one-hundred eighty (180) months in the custody of the Department of Corrections. The 180 month sentence is suspended, and, under the Split Sentence Act to serve thirty-six (36) months in the Department of Corrections and the balance of sixty (60) months on state probation. The defendant shall be given credit for time served as allowed by Alabama law."

(C. 19.) This appeal followed.

Faircloth raises two issues on appeal: Whether the State presented sufficient evidence regarding the allegation of unlawful possession of drug paraphernalia and whether the three-year split sentence and the five-year probationary period imposed upon her at the time of the revocation were

allowable under § 15-18-8(b), Ala. Code 1975. We address each of those issues below.

I.

Faircloth argues that there was insufficient evidence presented at the hearing upon which to revoke her sentence to community corrections. She argues that the State failed to show that the digital scales that were found in the vehicle that Faircloth was driving were drug paraphernalia because, she says, the State failed to properly identify the white residue on the scales as a controlled substance.

We do not need to decide, however, whether the State produced sufficient evidence showing that the scales found in the vehicle were drug paraphernalia because the circuit court also found that Faircloth had violated her community-corrections sentence by driving a vehicle with a switched tag --a finding that Faircloth did not challenge below or on appeal. It is well settled that this Court "will not review issues not listed and argued in brief." Wilkerson v. State, 70 So. 3d 442, 466 (Ala. Crim. App. 2011) (quoting Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995)). Because Faircloth does not challenge the circuit court's finding that

she violated her community-corrections sentence by driving a vehicle with a switched tag, Faircloth has waived any argument that the State failed to produce sufficient evidence to revoke her sentence to community-corrections. Thus, we need not consider whether the State produced sufficient evidence showing a second violation of Faircloth's community-corrections sentence.

II.

Faircloth also contends that the circuit court abused its discretion when it "resentenced" her to serve a split sentence of more than two years and when it imposed a probationary period of more than three years. Faircloth argues that the "new sentence"[3] imposed upon her at the time of her community-corrections revocation "violates the restrictions set out in § 15-18-8(b)[, Ala. Code 1975], which states that a split sentence must be no longer than two (2) years for any Class C felony offense where the imposed sentence is not more than fifteen (15) years." (Faircloth's brief, pp. 10, 18.)

[3]Although Faircloth refers to the circuit court's revocation order as imposing a "new sentence," the Alabama Supreme Court has held that the revocation of probation is not a new sentencing event. Wray v. State, 472 So. 2d 1119, 1121 (Ala. 1985).

Because upon revocation of Faircloth's sentence to community corrections the circuit court increased the split portion of Faircloth's sentence to three years and ordered her to serve "the balance of sixty (60) months on State probation," Faircloth argues that that sentence runs afoul of § 15-18-8(b), and is an illegal sentence.

Although Faircloth did not object on this basis in the circuit court, a claim alleging that a sentence is illegal may be raised for the first time on appeal. Pettibone v. State, 91 So. 3d 94, 120 (Ala. Crim. App. 2011).

In arguing that it was illegal for the circuit court to sentence her upon revocation of her sentence to community corrections to a split sentence of more than two years, Faircloth relies upon § 15-18-8(b), which states:

> "Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C or D felony offense and receives a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense or in a consenting community corrections program for a Class D felony offense, except as provided in subsection (e), for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the

> execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for a period not exceeding three years and upon such terms as the court deems best ...."

(Emphasis added.) Faircloth argues, based upon the above-quoted language, that, when the circuit court revoked her community corrections and ordered her in April 2019 to serve a split sentence of three years in the DOC, the circuit court imposed an illegal sentence not authorized by § 15-18-8(b). We agree.

In Dixon v. State, 912 So. 2d 292 (Ala. Crim. App. 2005), we held that, although a circuit court has the authority to split a defendant's sentence after it revokes the defendant's probation, the split portion of a sentence imposed at the time of revocation cannot exceed the maximum amount of confinement allowed by § 15-18-8, Ala. Code 1975.

In Dixon, supra, the defendant was sentenced to concurrent terms of 10 years in prison, but the circuit court split his sentences and ordered him to serve 15 months' imprisonment followed by 5 years of probation. After revocation proceedings were initiated, the circuit court revoked the defendant's probation and reinstated his original

sentences. But the circuit court then split those sentences and ordered the defendant to serve an additional 24 months, followed by 3 years of probation. This Court held that, by ordering the defendant to serve a total confinement period of 39 months (that is, the original split sentence of 15 months plus the additional split sentence of 24 months), the circuit court had imposed a period of confinement not allowed by § 15-18-8, which, at that time, limited the confinement period of a split sentence to 3 years. This Court stated:

> "[Dixon] also argues that the circuit court erroneously imposed a twenty-four month period of confinement on his ten-year sentence. Specifically, he contends that, because he had previously served fifteen months, the imposition of an additional twenty-four months of confinement caused the total period of confinement in his case to exceed the maximum set forth in § 15-18-8(a)(1), Ala. Code 1975. As we previously noted, the appellant had already served fifteen months. Therefore, when the circuit court ordered him to serve an additional twenty-four months, that increased the total period of confinement to thirty-nine months. However, § 15-18-8(a), Ala. Code 1975, provides, in pertinent part:
>
> > "'When a defendant is convicted of an offense and receives a sentence of 20 years or less in any court having jurisdiction to try offenses against the State of Alabama and the judge presiding over the case is satisfied that the ends of justice and the best interests of the public as well as the

> defendant will be served thereby, he or she may order:
>
> > "'(1) That the convicted defendant may be confined in a prison, jail-type institution, or treatment institution for a period not exceeding three years in cases where the imposed sentence is not more than 15 years ....'
>
> "(Emphasis added.) In this case, the trial court sentenced the appellant to serve concurrent terms of ten years in prison. Therefore, the total period of confinement the circuit court could impose on his split sentences was three years, and the circuit court was not authorized to impose an additional period of confinement that would cause his total period of confinement to exceed three years. See Phillips, supra; Havis v. State, 710 So. 2d 527 (Ala. Crim. App. 1998). Because the additional twenty-four month period of confinement caused the appellant's total period of confinement to exceed the maximum set forth in § 15-18-8(a)(1), Ala. Code 1975, we remand this case to the circuit court with instructions that that court set aside the additional twenty-four month period of confinement in each case."

Dixon, 912 So. 2d at 298–99. See also Phillips v. State, 755 So. 2d 63, 65 n.3 (Ala. Crim. App. 1999) ("Upon revocation of the probation of a defendant sentenced under the Split Sentence Act, if the circuit court does not order execution of the full sentence originally imposed at sentencing, but instead continues the split sentence and increases the

confinement portion of the split sentence, the total length of the confinement portion of the split sentence may not exceed three years."); Havis v. State, 710 So. 2d 527, 528 (Ala. Crim. App. 1997) ("It is clear to this Court that the legislature, in enacting § 15-18-8, intended to provide that a defendant whose sentence was being 'split' pursuant to that section could be sentenced to mandatory confinement for a period not exceeding three years .... [T]he manner in which the trial court 'split' the appellant's 15-year sentence--3 years' imprisonment and 5 years on probation--was proper. However, the trial court's order issued after the hearing on the State's motion to revoke probation, which increased the period of the appellant's confinement from three years' to five years' imprisonment was not authorized by the Split Sentence Act and was, therefore, improper."). Thus, although a circuit court may, at the time of revocation, increase the split portion of a sentence, it cannot increase the split portion of the sentence beyond the maximum provided in § 15-18-8--which, in Faircloth's case, was two years.[4]

[4]The State does not argue that § 15-18-8(b), would permit a split of three years on a Class C felony. Rather, the State contends that, under § 15-18-8(a)(1), Ala. Code 1975, a split of three years with a probationary term of five years is

Faircloth also argues that, under § 15-18-8(b), the maximum length of probation the circuit court could impose upon her was three years. We agree.

Section 15-18-8(b), Ala. Code 1975, provides that a defendant who is convicted of a Class C or D felony and receives a sentence of not more than 15 years shall be placed on probation "for a period not exceeding three years." § 15-18-8(b), Ala. Code 1975. So, then, at the time that Faircloth was sentenced for obstruction of justice in July 2018--and at the time the circuit court revoked her probation in April 2019 and again ordered her to serve a split sentence followed by five years of probation--the maximum period of probation the circuit court could impose was three years. Thus, the five-year probationary term imposed upon Faircloth exceeded the maximum probationary period allowable under § 15-18-8(b). Cf. Brand v. State, 93 So. 3d 985, 991-92 (Ala. Crim. App. 2011) (holding that every split sentence "must be evaluated individually to determine whether it exceeds the limitations on confinement and probation stated or implied in § 15-18-8").

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appropriate. But § 15-18-8(a)(1) applies only to Class A and Class B felonies, and the record reflects that Faircloth was convicted of a Class C felony. (Record on return to remand, C. 6-11.)

Because the increased split sentence imposed by the circuit court upon revocation of Faircloth's community-corrections sentence exceeded that allowed by § 15-18-8(b), and because the probationary period of five years imposed upon Faircloth exceeds the maximum probationary period applicable to Faircloth under § 15-18-8(b), Ala. Code 1975, we remand this case with instructions that the circuit court set aside that portion of its April 24, 2019, order imposing a split sentence of more than two years and imposing a probationary period of more than five years. On remand, if the circuit court imposes a split sentence, it shall impose a split sentence that does not exceed the two-year maximum set forth in § 15-18-8(b), and it shall impose a probationary period that does not exceed the three-year maximum set forth in § 15-18-8(b). The circuit court shall take all necessary action to see that the circuit clerk makes due return to this court within 42 days after the release of this opinion. The return to remand shall include a transcript of the remand proceedings, if any, conducted by the circuit court.

REMANDED WITH INSTRUCTIONS.

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