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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0969

Lugine Capri Caver

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-18-6664)

KELLUM, Judge.

The appellant, Lugine Capri Caver, was convicted of robbery in the first degree, a violation of § 13A-8-41, Ala. Code 1975. The circuit court sentenced Caver as a habitual

felony offender to life in prison without the possibility of parole.

On appeal, Caver raises two issues challenging his sentence. Specifically, Caver contends that he did not receive notice of the State's intent to proceed under the Habitual Felony Offender Act, § 13A-5-9, Ala. Code 1975 ("the HFOA"), and that he was sentenced in violation of Rule 26.9(b)(1), Ala. R. Crim. P., because he was not given an opportunity to allocute before his sentence was imposed. The State rejects Caver's first contention with regard to notice under the HFOA but concedes that Caver was not afforded an opportunity to allocute before the circuit court imposed the sentence.

"This Court has previously held ... that "the requirement that the defendant be afforded the opportunity to speak on his or her behalf at the sentencing hearing [is an] exception[] to the general preservation rule and [is] required to afford a defendant the minimal due process." Banks v. State, 51 So. 3d 386, 392 (Ala. Crim. App. 2010). Accordingly, this issue is properly before this Court for review.

"Rule 26.9(b)(1), Ala. R. Crim. P., provides that, in pronouncing the sentence, the circuit court must '[a]fford the defendant an opportunity to make a statement in his or her own behalf before imposing sentence.' In Banks, 51 So. 3d at 393, this Court noted:

""[R]egarding the requirement of an allocution, Ex parte Anderson, 434 So. 2d 737 (Ala. 1983), and the cases following it hold that when the lack of an allocution or the waiver of allocution is raised on direct appeal remand is required because a sentence without an allocution is erroneous. See Davis v. State, 747 So.2d 921, 925 (Ala. Crim. App. 1999); Newton v. State, 673 So. 2d 799, 800-01 (Ala. Crim. App. 1995); Burks v. State, 600 So. 2d 374, 382-83 (Ala. Crim. App. 1991); Duncan v. State, 587 So. 2d 1260, 1264 (Ala. Crim. App. 1991); Cline v. State, 571 So. 2d 368, 372 (Ala. Crim. App. 1990); Maul v. State, 531 So. 2d 35, 36 (Ala. Crim. App. 1988). See also Ebens v. State, 518 So. 2d 1264, 1269 (Ala. Crim. App. 1986); Oliver v. State, 25 Ala. App. 34, 34, 140 So. 180, 181 (1932) (wherein the court noted that "to constitute a valid judgement[, the fact that the defendant was asked if he had anything to say why the sentence of law should not be pronounced upon him] must appear in the minute entry of the judgment"). We note that in Shaw v. State, [949 So. 2d 184 (Ala. Crim. App. 2006)], this Court recognized and reiterated that on direct appeal, when the issue of the lack of an allocution or a waiver of an allocution is raised, the case is to be remanded. 949 So. 2d at 187. Rule 26.9(b)(1)[, Ala. R.

Crim. P.,] also provides that in pronouncing the sentence, the trial judge must "[a]fford the defendant an opportunity to make a statement in his or her own behalf before imposing sentence." The Committee Comments following Rule 26 state that a defendant is entitled to allocution, regardless of the gravity of the sentence imposed. See Rule 26.9, Ala. R. Crim. P., Committee Comments.'"

"'Thompson v. State, 92 So. 3d 801, 805 (Ala. Crim. App. 2011).'"

R.V.D. v. State, 268 So. 3d 96, 101-02 (Ala. Crim. App. 2018) (quoting Green v. State, 200 So. 3d 677, 678-79 (Ala. Crim. App. 2015)).

Because Caver was not afforded the opportunity to make a statement on his own behalf before the circuit court sentenced him, this Court is compelled to reverse the sentencing order and to remand this case to the circuit court for that court to resentence Caver.¹ On remand the circuit court shall conduct a sentencing hearing in which a proper allocution is provided pursuant to Rule 26.9(b)(1), Ala. R. Crim. P. The circuit

¹Because we are remanding this case for a new sentencing hearing, the remaining issue on appeal regarding whether the State provided proper notice of its intent to proceed under the HFOA before Caver was sentenced is rendered moot.

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court is directed to make a return to this Court showing compliance with these instructions within 42 days from the date of this opinion. The return to remand shall include a transcript of the sentencing hearing and copies of documents, if any, relied upon by the circuit court in imposing Caver's sentence.

REVERSED AS TO SENTENCE AND REMANDED WITH DIRECTIONS.

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