

Rel: August 14, 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-19-0104

Ex parte Robert Thomas Mays

PETITION FOR A WRIT OF MANDAMUS

(In re: State of Alabama v. Robert Thomas Mays)

(Cullman Circuit Court, CC-03-619.65)

COLE, Judge.

Robert Thomas Mays appeals the circuit court's order, rejecting his attempt to file his sixth Rule 32, Ala. R. Crim. P., petition for postconviction relief. For the following reasons, we convert Mays's appeal to a petition for a writ of mandamus, grant the petition, and issue the writ.

Facts and Procedural History

On February 17, 2006, Mays was convicted of murder for shooting and killing his mother, Paula Conn, and was sentenced to 99 years' imprisonment. This Court, in an unpublished memorandum, affirmed Mays's conviction and sentence on February 23, 2007. See Mays v. State (No. CR-05-0954, Feb. 23, 2007) 4 So. 3d 584 (Ala. Crim. App. 2007) (table). Since then, Mays has filed a steady stream of Rule 32 petitions.¹

¹See Mays v. State (No. CR-07-1777) (the appeal from the summary dismissal of Mays's first Rule 32 petition, which he voluntarily dismissed); Mays v. State (No. CR-08-0995, Oct. 30, 2009), 64 So. 3d 1155 (Ala. Crim. App. 2009) (table); Mays v. State (No. CR-11-1064, Aug. 10, 2012), 152 So. 3d 462 (Ala. Crim. App. 2012) (table); Mays v. State (No. CR-14-1307, July 27, 2015) (the appeal from what appears to be the summary dismissal of Mays's fourth petition, which was dismissed because Mays failed to pay a docket fee); and Mays v. State, 233 So. 3d 1010 (Ala. Crim. App. 2016), which was docketed in this Court as CR-15-0978.

On January 21, 2020, Mays moved this Court to take judicial notice of its records in appeal no. CR-15-0978, explaining that "[f]acts and evidence relevant to this matter are contained in this Court's opinion from CR-15-0978 ... that are necessary to consider regarding the basis of the trial court's alleged claims/basis for its October 21, 2019 order outlining restrictions for future filings of post conviction relief." The State, in its brief on appeal, concedes that this Court may take judicial notice of its own records. (See State's brief, p. 1, n. 1.) Thus, we take judicial notice of the record filed with this Court in Mays's previous appeal. See Ex parte Davis, 834 So. 2d 830, 831 n.1 (Ala. Crim. App. 2002) (taking judicial notice in a mandamus petition "of our

Relevant here is the petition Mays filed in 2015, the dismissal of which was affirmed by this Court, Mays v. State, 233 So. 3d 1010 (Ala. Crim. App. 2016). In that petition, Mays alleged that "the [circuit] court was without jurisdiction to render judgment or to impose the sentence" because, he said, "he was given a mental evaluation to determine his competency but ... the trial court failed to hold a hearing or to explicitly find him either competent or incompetent." Mays, 233 So. 3d at 1011. The circuit court summarily dismissed Mays's procedural-competency claim because it was precluded under Rule 32.2(a), was successive under Rule 32.2(b), and was time-barred under Rule 32.2(c). See Mays, 233 So. 3d at 1012. In summarily dismissing Mays's petition, the circuit court also placed the following restrictions on Mays's ability to file future Rule 32 petitions:

"The Court further finds that because [Mays] has previously filed multiple post-conviction petitions in this case, which have been summarily dismissed and affirmed on appeal, it is necessary to adopt reasonable measures to prevent further frivolous litigation by [Mays] that waste limited judicial resources. It is therefore ORDERED and DECREED as follows:

previous records concerning Davis's conviction and appeal").

"'1. [Mays] is hereby expressly enjoined from filing any new petition, motion or pleading relating to any claim that he has previously raised on appeal or in a post-conviction petition for relief.

"'2. In the event [Mays] files any other post-conviction motion, petition, or pleading with this Court he shall execute a sworn affidavit expressly certifying that the claims being raised are new claims that have not [been] previously raised by him in any previous filing.

"'3. In the event [Mays] files any other post-conviction motion, petition or pleading with this Court he shall submit with his new petition or motion a summary of all previous post-conviction motions or petitions filed by him that relate to his conviction in the above case. The summary shall include the date of each filing; the claims made by him in each previous filing; the relief requested by him in each filing; a short statement as to the decision of the trial court with respect to each claim and, if the decision was appealed, the ruling of any appellate court.

"'4. Any request filed by [Mays] to proceed in forma pauperis shall include the information required in the above paragraphs.

"'5. [Mays] shall be subject to the contempt power of this Court in the event he is found in the future to have submitted a false affidavit to the Court or to have willfully violated any other provision of this order. Upon a finding of contempt, [Mays] may be punished as provided by law and this punishment may include an

additional period of incarceration for contempt after completion of his sentence in the present case.

"'6. [Mays] shall be served with a copy of this order by personal service with return made to the Cullman County Circuit Court Clerk.'"

Mays, 233 So. 3d at 1012-13. The circuit court warned that, if Mays's future filings do not conform with "'the procedures set forth [in the court's order], the court will not grant any application to proceed in forma pauperis'" and directed the circuit clerk "'to refuse to accept a filing fee for any future filings until [Mays] complies with the filing restrictions imposed [in the order].'" Mays, 233 So. 3d at 1013. Mays appealed the circuit court's summary dismissal but he did not challenge the portion of the circuit court's order placing restrictions on his ability to file future Rule 32 petitions.

On appeal from the summary dismissal of that petition, this Court affirmed the circuit court's decision to dismiss Mays's procedural-competency claim. Mays, 233 So. 3d at 1015. In so doing, this Court also noted that Mays raised a substantive-competency claim--i.e., that he was tried and convicted while incompetent--in his brief on appeal. Mays, 233

CR-19-0104

So. 3d at 1014. Because Mays did not raise that claim in his Rule 32 petition, however, this Court concluded that Mays's substantive-competency claim was not properly before this Court. Mays, 233 So. 3d at 1014 (citing Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997), and Fincher v. State, 837 So. 2d 876, 881 (Ala. Crim. App. 2002)).

Thereafter, Mays attempted to file his sixth Rule 32 petition. In that petition, Mays alleged that the circuit court was without jurisdiction to render judgment or to impose a sentence because, Mays said, he was "incompetent to stand trial, as defined by law, when tried, convicted and sentenced"--that is, a substantive-competency claim. (C. 16.) Along with his Rule 32 petition, Mays submitted a request to proceed in forma pauperis and a "Summary of Post Conviction Rule 32 Petitions," which described his five prior Rule 32 petitions as follows:

"Rule 32 Petition/03-619.60 - Filed 4-25-2008; Claims of ineffective assistance of counsel, and newly discovered evidence of [the State's] intentional destruction of known exculpatory evidence; requested any/all lawful relief due; summary dismissal via blanket preclusions; appealed, and affirmed dismissal.

"Rule 32 Petition/03-619.61 - Filed (unknown/[illegible]); claim of unauthorized

sentence, and newly discovered evidence of medicine side effects causing suicides ... (with document proof of known existence of suicide note by Inv. Tim Creel, and other exhibits); requested hearing and any/all lawful relief due; summary dismissal via blanket preclusions; appealed, and affirmed dismissal.

"Rule 32 Petitions/ -.62 and -.63 - Not filed/Failure to pay filing fee.

"Rule 32 Petition/03-619.64 - Date filed 12-30-2015; Claim of no hearing or determination of not guilty/mental disease plea and mental evaluation; requested hearing and any/all lawful relief due; summary dismissal via various preclusions and as non-jurisdictional; appealed, and affirmed dismissal."

(C. 9.) Mays also submitted along with his petition a two-page handwritten affidavit explaining that his "claim is 'jurisdictional,' new, and has not been previously raised in any filing." (C. 14.)

After Mays attempted to file his sixth petition, the circuit court issued an order, finding as follows:

"Certain filing restrictions have been placed on the above named Defendant by this court due to repeated frivolous filings by him that essentially raise the same claims previously denied by this court and affirmed on appeal. The Defendant's most recent petition does not comply with the requirements of the 2016 order entered in May[s]'s third or fourth post-conviction petition. The court will not grant any application to proceed in forma pauperis and the Clerk is directed to refuse to accept a filing fee for any future filings until the

Defendant complies with the imposed filing restrictions, especially the requirement that any new filing must raise claims not previously raised."

(C. 25.) Mays then filed a notice of appeal. (C. 26.)

Discussion

On appeal, Mays argues that the circuit court erred when it did not accept his sixth Rule 32 petition and did not grant him in forma pauperis status because, he says, his sixth petition raised a jurisdictional claim and complied with "[e]ach and every restriction imposed" on him by the circuit court's order summarily dismissing his fifth Rule 32 petition.

Before we address Mays's argument, however, we note that the proper way to challenge a circuit court's decision to reject the filing of a Rule 32 petition because it does not comply with a previous order imposing restrictions on a petitioner's future filings is by a petition for a writ of mandamus, not by way of appeal. See, e.g., Ex parte Thompson, 38 So. 3d 119 (Ala. Crim. App. 2009). This is because circuit courts do not obtain subject-matter jurisdiction over a Rule 32 petition "without first collecting a docket fee or granting a proper request to be allowed to proceed in forma pauperis." Ex parte McWilliams, 812 So. 2d 318, 321-22 (Ala. 2001).

Furthermore, this Court's appellate jurisdiction in a Rule 32 proceeding hinges on the circuit court first obtaining subject-matter jurisdiction over the petition. See Hyde v. State, 894 So. 2d 808, 809 (Ala. Crim. App. 2004) (holding that, because the circuit court did not obtain subject-matter jurisdiction over the Rule 32 petition, the court's attempt to dismiss the petition was void and a void judgment will not support an appeal). Because circuit courts--in certain limited circumstances discussed below--have the power to decide not to accept a Rule 32 filing before it obtains subject-matter jurisdiction over the petition, this Court, in turn, must also have the power to review that decision. When faced with this "jurisdictional paradox" this Court may treat a notice of appeal as a petition for a writ of mandamus. Ex parte Butler, [Ms. CR-18-0066, October 25, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019). Thus, we are treating Mays's notice of appeal as a petition for a writ of mandamus.² See Ex parte

²Similarly, this Court reviews a circuit court's denial of a request to proceed in forma pauperis in a Rule 32 proceeding by way of petition for a writ of mandamus. See Goldsmith v. State, 709 So. 2d 1352, 1353 (Ala. Crim. App. 1997) (holding that "mandamus, and not appeal, is the proper method by which to compel the circuit court to proceed on an in forma pauperis petition" because, until such a request is approved or a filing fee is paid, the circuit court does not

CR-19-0104

Nice, 407 So. 2d 874, 876 (Ala. 1981) ("The Court of Criminal Appeals has authority to issue such remedial and original writs as are necessary to give it a general superintendence and control of the circuit courts in criminal matters, over which it has exclusive appellate jurisdiction."). In so doing, we are mindful of the following standard of review:

"The writ of mandamus is a drastic and extraordinary writ, to be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.' Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993); see also Ex parte Ziglar, 669 So. 2d 133, 134 (Ala. 1995)."

Ex parte Butler, ___ So. 3d at ___. (quoting Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001), quoting in turn, Ex parte Carter, 807 So. 2d 534, 536 (Ala. 2001)). We now turn to Mays's argument on appeal.

"This Court has long held that circuit courts possess the inherent power to limit the ability of abusive litigants to file a stream of frivolous petitions." Dennis v. State, [Ms. CR-17-0246, Feb. 7, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020) (opinion on return to remand and on application for _____ acquire subject-matter jurisdiction).

rehearing) (citing McConico v. State, 84 So. 3d 159, 162-63 (Ala. Crim. App. 2011); Thompson, 38 So. 3d at 124-25; and Peoples v. State, 531 So. 2d 323, 326-27 (Ala. Crim. App. 1988)). And this Court has provided a nonexhaustive list of hurdles that courts may require abusive litigants to clear before accepting future Rule 32 petitions, including the ones the circuit court imposed on Mays's ability to file future Rule 32 petitions in this case.³ This Court has also held that, when a petitioner fails to clear these hurdles, circuit courts may either refuse to accept the Rule 32 petition, see Thompson, 38 So. 3d at 126, or (if it has already accepted the petition and then learns that the petition violates the restrictions the court placed on future filings) it may summarily dismiss the petition under Rule 32.7(d), Ala. R. Crim. P., see Dennis, ___ So. 3d at ___. When a petitioner clears these hurdles, on the other hand, the circuit court must accept the newly filed Rule 32 petition if the petitioner pays the filing fee or qualifies for indigent status.

³Mays does not argue that the circuit court's sanctions are improper or overly burdensome. Rather, Mays argues that he complied with the sanctions the circuit court imposed and, thus, that the court should have accepted his filing.

As set out above, in summarily dismissing Mays's fifth Rule 32 petition, the circuit court ordered that Mays could not file any future Rule 32 petitions unless he complied with the following requirements:

1. The petition must include an affidavit "expressly certifying that the claims being raised are new claims that have not [been] previously raised by him in any previous filing."

2. The petition must include "a summary of all previous post-conviction motions or petitions filed by him that relate to his conviction" and that summary must set out "the date of each filing; the claims made by him in each previous filing; the relief requested by him in each filing; a short statement as to the decision of the trial court with respect to each claim and, if the decision was appealed, the ruling of any appellate court."

3. If the petition includes a request to proceed in forma pauperis, that request must "include the information required in the above paragraphs."

Here, Mays attached to his petition a request to proceed in forma pauperis, which showed that, at the time he signed the request, he had \$4.21 in his inmate account and he had deposited a total of \$8.79 into his inmate account in the 12 months preceding the filing of his petition. (C. 6.) Mays also included a summary of his previous Rule 32 petitions, which detailed the date each petition was filed, the nature of the claims raised in those petitions, the result in the circuit

CR-19-0104

court, and the result on appeal. (C. 9.) Mays also included an affidavit, in which he swore that he had never previously raised the claim that he was incompetent at the time of his trial. (C. 14.)

On appeal, the State argues that Mays's sixth petition does not comply with the circuit court's requirements for Mays to file future Rule 32 petitions because, the State says, Mays's substantive-competency claim is "essentially the same claim that he previously raised." (State's brief, p. 4.) This conclusion by the State is incorrect and conflicts with this Court's decision affirming the circuit court's dismissal of Mays's fifth Rule 32 petition. To be sure, Mays previously raised a procedural-competency claim in his fifth Rule 32 petition, but a procedural-competency claim and a substantive-competency claim are not, as the State puts it, "essentially the same." Indeed, the former is a nonjurisdictional claim that is subject to the grounds of preclusion in Rule 32.2. The latter is a jurisdictional claim that is not subject to the grounds of preclusion set out in Rule 32.2. Moreover, this Court recognized that these two claims are not "essentially the same" when it addressed Mays's procedural-competency claim

but refused to address Mays's substantive-competency claim in the appeal from the summary dismissal of his fifth Rule 32 petition because he did not raise his substantive-competency claim in his fifth Rule 32 petition.

In short, Mays's sixth Rule 32 petition complies with the requirements the circuit court imposed on Mays's filing of future Rule 32 petitions. Accordingly, we must grant Mays's petition and issue the writ, ordering the circuit court to set aside its order rejecting Mays's sixth Rule 32 petition, to accept Mays's sixth petition, and to proceed with his case under the procedures set out in Rule 32, Ala. R. Crim. P.

To be clear, we do not hold that Mays's substantive-competency claim has merit. Nor do we hold that his claim is sufficiently pleaded. Rather, we hold only that, although circuit courts are permitted to impose requirements on frequent frivolous filers to make it more difficult for them to file additional Rule 32 petitions, when a petitioner complies with these requirements, the court must accept that filing and proceed with the case under the rules set out in Rule 32, Ala. R. Crim. P.

After Mays pays the required filing fee or his request to proceed in forma pauperis is granted, if the circuit court determines that Mays has "submitted a false affidavit to the Court or [has] willfully violated any other provision" of the circuit court's 2016 order, then the circuit court may enforce the contempt provision of its 2016 order and it may use the violation of that order as a basis for summary dismissal of Mays's petition. See Dennis, supra.

Accordingly, we grant Mays's petition for a writ of mandamus.

PETITION GRANTED; WRIT ISSUED.

Kellum, McCool, and Minor, JJ., concur. Windom, P.J., dissents, with opinion.

CR-19-0104

WINDOM, Presiding Judge, dissenting.

I agree with the majority that Robert Thomas Mays's substantive-competency claim raised in the instant postconviction petition is distinct from the claims raised in his prior postconviction petitions. Nonetheless, I would not treat his notice of appeal as a petition for writ of mandamus and, even if I were to do so, I would not ignore the fact that Mays's filing in this Court fails to comply with the requirements of Rule 21(a), Ala. R. App. P. I see no reason to aid Mays in his abuse of our legal system, especially in light of the fact that the issue of Mays's competence to stand trial was raised and assessed before his trial.

I believe Mays's appeal should be dismissed. Therefore, I respectfully dissent.