REL: September 11, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-19-0621

Bryan Donald Smith

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-2019-0014.60 and CC-2019-0015.60)

MINOR, Judge.

Bryan Donald Smith appeals the Mobile Circuit Court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. For the reasons below, we hold that the circuit court properly dismissed all of Smith's claims

except his claim that the split portions of his sentences do not comply with the requirement in § 15-18-8(a)(2), Ala. Code 1975, that, when imposing a split sentence on a 20-year sentence for a Class C felony conviction, the sentencing court must impose a 3-year split.

Facts and Procedural History

Smith pleaded guilty in January 2019 to two counts of third-degree burglary, see § 13A-7-7(b), Ala. Code 1975. Smith stipulated that he had nine prior felony convictions and that he committed the offenses while he was on probation for another offense. (C. 35.) The circuit court sentenced Smith in February 2019 to 20 years' imprisonment on each count and ordered that the sentences be served concurrently. (C. 33, 79.) The circuit court split those sentences, ordering Smith to serve five years' imprisonment followed by five years of probation supervised by Community Corrections. (Id.) Smith did not appeal his convictions or his sentences.

Smith filed the instant Rule 32 petition on November 29, 2019. (C. 22,78.) Smith alleged (1) that the State had never shown him a search warrant; (2) that his counsel had been ineffective; (3) that he should have been sentenced under the

presumptive sentencing standards; (4) that the prosecutor had a conflict of interest; and (5) that the split portions of his sentences exceed the maximum allowed by law.[1] (C. 24-32.)

The State responded and moved to dismiss the petition on February 10, 2020. (C. 37.) That same day, the circuit court summarily dismissed the petition. (C. 79.) Smith timely appealed. (C. 71.)

Rule 32.7(d), Ala. R. Crim. P., permits a circuit court to summarily dismiss a Rule 32 petition if the claims in the petition are insufficiently pleaded, precluded, or without merit. This Court reviews a circuit court's summary dismissal of a Rule 32 petition for an abuse of discretion. Lee v. State, 44 So. 3d 1145, 1149 (Ala. Crim. App. 2009). Under most circumstances, "we may affirm a ruling if it is correct for any reason." Bush v. State, 92 So. 3d 121, 134 (Ala. Crim. App. 2009).

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[1]Smith also alleged in his petition that the circuit court should not have ordered that Community Corrections supervise his probation. Smith has abandoned this claim on appeal. See Jones v. State, 104 So. 3d 296, 297 (Ala. Crim. App. 2012) ("Other claims raised in [the] petition were not pursued on appeal and, therefore, those claims are deemed abandoned. See, e.g., Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ('We will not review issues not listed and argued in brief.').").

On appeal, Smith generally reiterates the claims he raised in his petition.

I.

Smith challenges the "unconstitutional search and seizure" in his case, arguing that the State has never showed him a warrant and that he thus cannot know if the search was valid. (Smith's brief, p. 8.) The circuit court dismissed this claim as insufficiently pleaded.

> "A Rule 32 petitioner has the burden of pleading 'the facts necessary to entitle the petitioner to relief.' Rule 32.3, Ala. R. Crim. P. See also Rule 32.6, Ala. R. Crim. P. To avoid summary dismissal, the petitioner must provide 'the full factual basis for the claim in the petition itself.' Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). And those facts, if assumed true, must show that the petitioner is entitled to relief. Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). If the factual allegations when assumed true do not show that the petitioner is entitled to relief, the circuit court may summarily dismiss the petition. See Rule 32.7(d), Ala. R. Crim. P.; Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011)."

Walker v. State, [Ms. CR-18-0098, March 13, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020).

Smith offered no allegations in support of his claim other than that the State never showed him a warrant. Smith did not plead any facts, for example, about the circumstances

of his arrest or his offenses. This does not meet the pleading requirements of Rule 32.3 and Rule 32.6, Ala. R. Crim. P., and the circuit court's summary dismissal of the claim was proper.[2] See Rule 32.7(d), Ala. R. Crim. P.

II.

Smith alleged in his petition that his trial counsel was ineffective in several ways: for not adequately investigating his case, for waiving a preliminary hearing, and for objecting to Smith's being sentenced by one judge (Judge Wood) but not objecting to his being sentenced by another judge (Judge Lockett). (C. 24-26.) The circuit court dismissed this claim as insufficiently pleaded.

The standard for evaluating an ineffective-assistance-of-counsel claim--and what a petitioner must plead and prove to

[2]The State argues on appeal that the claim is precluded under Rule 32.2(a)(3) and (5), Ala. R. Crim. P., because Smith could have raised it in the trial court or on appeal but did not. Because the State did not raise these grounds in its response to Smith's petition, it may not raise them on appeal. See, e.g., McLeod v. State, 121 So. 3d 1020, 1022 (Ala. Crim. App. 2012) ("The Alabama Supreme Court has held that the procedural bars contained in Rules 32.2(a) and 32.2(c), Ala. R.Crim. P., do not implicate the circuit court's jurisdiction to reach the merits of a petitioner's claim; instead, they are affirmative defenses that will be waived if not raised in the circuit court.").

have a right to relief--is well established. See, e.g., Marshall v. State, 182 So. 3d 573, 582-83 (Ala. Crim. App. 2014). Stated briefly, a petitioner must plead facts showing that counsel performed deficiently and that counsel's deficient performance prejudiced the petitioner. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). Smith did not do that.

Smith did not allege facts showing that his counsel's actions or inactions were deficient in any way, nor did Smith allege facts showing that his counsel's alleged deficient performance prejudiced him. For example, he did not allege what other investigation counsel should have done or what evidence that investigation would have led to. See, e.g., Yeomans v. State, 195 So. 3d 1018, 1035 (Ala. Crim. App. 2013). Summary dismissal of this claim was proper. Rule 32.7(d), Ala. R. Crim. P.

III.

Although his brief is not a model of clarity, Smith alleges that the circuit court should have sentenced him under the presumptive sentencing standards. (C. 31.) The limited record before us does not show under which subsection of §

13A-7-7, Ala. Code 1975, Smith was convicted. The presumptive sentencing standards in effect when the circuit court sentenced Smith applied to a third-degree-burglary conviction under § 13A-7-7(a)(1) and (a)(3), but the voluntary standards applied to a third-degree-burglary conviction under § 13A-7-7(a)(2).[3] See Presumptive and Voluntary Sentencing Standards Manual (2016) 22. Even if the presumptive standards applied, however, Smith has no right to relief.

The record shows that when he pleaded guilty, Smith admitted that, when he committed the offense, he was on probation. (C. 35, 84.) Thus, even if the presumptive sentence standards applied to Smith's convictions, the existence of an admitted aggravating factor authorized the circuit court to depart from the presumptive guidelines and to impose a sentence outside the standards. Presumptive and Voluntary Sentencing Standards Manual 29-30. The circuit court properly

[3]The law in effect when an offense is committed usually determines the applicable sentencing requirements. See, e.g., Hardy v. State, 570 So. 2d 871, 872 (Ala. Crim. App. 1990). The presumptive and voluntary sentencing standards are a notable exception to this general rule. For offenses that the sentencing standards cover, the standards apply to any sentencing event after the effective date of the standards. See Clark v. State, 166 So. 3d 147, 151 (Ala. Crim. App. 2014).

dismissed this claim as having no merit. Rule 32.7(d), Ala. R. Crim. P.

IV.

Smith alleges that the prosecutor had a conflict of interest because, Smith says, the prosecutor represented Smith about 28 years before Smith pleaded guilty to the underlying offenses. The circuit court dismissed this claim as insufficiently pleaded.

As the circuit court held, Smith pleaded no details about the alleged prior representation or how it had any relation to or effect on Smith's prosecution for the underlying offenses. Smith thus did not plead facts showing that he had a right to relief. See, e.g., Acklin v. State, 266 So. 3d 89, 106-07 (Ala. Crim. App. 2017). The circuit court properly dismissed this claim.

V.

Smith alleges that the split portions of his sentences exceed the maximum allowed under § 15-18-8, Ala. Code 1975. This claim has merit.

As noted, Smith pleaded guilty in January 2019 to two Class C felony offenses. The circuit court sentenced Smith as

a habitual felony offender with 9 prior felony convictions to concurrent sentences of 20 years' imprisonment. See § 13A-5-6 and § 13A-5-9, Ala. Code 1975. The circuit court then split those sentences under § 15-18-8, Ala. Code 1975, ordering Smith to serve 5 years' imprisonment followed by 5 years' probation to be supervised by Community Corrections.

Smith contends that the five-year split portions of his sentences do not comply with § 15-18-8(a)(2), Ala. Code 1975. That subsection provides, in relevant 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:
>
> "....
>
> "(2) That a defendant convicted of a Class A, Class B, or Class C felony with an imposed sentence of greater than 15 years but not more than 20 years be confined in a prison, jail-type institution, or treatment institution for a period of three to five years for Class A or Class B felony convictions and for a period of three years for Class C felony convictions ... and that 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 the period upon the terms as the court deems best."

(Emphasis added.)

In the circuit court, the State argued incorrectly, and the circuit court erroneously held, that an earlier version of § 15-18-8, Ala. Code 1975, applied to Smith's convictions for offenses he committed in November 2018. (C. 44.) See, e.g., Hardy v. State, 570 So. 2d 871, 872 (Ala. Crim. App. 1990) ("Unless the statute contains a clear expression to the contrary, the law in effect at the time of the commission of the offense 'govern[s] the offense, the offender, and all proceedings incident thereto.' Bracewell v. State, 401 So. 2d 123, 124 (Ala. 1979), cert. denied, 469 U.S. 980, 105 S. Ct. 382, 83 L. Ed. 2d 318 (1984)."). Before its amendment in 2015, § 15-18-8(a) provided:

> "When a defendant is convicted of an offense, other than a criminal sex offense involving a child as defined in Section 15-20-21(5), which constitutes a Class A or B felony and receives a sentence of 20 years or less in any court having jurisdiction to try offenses against the State of Alabama ... the judge presiding over the case ... may order:
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> "(1) That the convicted defendant 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 .... In cases involving an imposed sentence of greater than 15 years, but not more than 20 years, the sentencing judge may order that the convicted defendant be confined in a prison,

> jail-type institution, or treatment institution for a period not exceeding five years, but not less than three years ...."

Under that version, the length of the imposed sentence (or "base sentence")--either "not more than 15 years" or "greater than 15 years, but not more than 20 years"--determined the maximum length of the split portion of the sentence, regardless of the felony classification of the defendant's conviction.[4]

On appeal, the State acknowledges that the current version of § 15-18-8(a) applies to Smith. The State argues, however, that current subsection (a)(2) authorizes Smith's split sentence because, the State says, the circuit court sentenced Smith as a habitual felony offender to a base sentence appropriate for a Class A felony conviction under § 13A-5-6. The State argues:

> "[T]hough Smith was convicted of Class C felonies, for sentencing purposes, he was treated as a Class A offender based on the habitual felony offender

[4]One exception was the sentence imposed on "a defendant ... convicted of ... a criminal sex offense involving a child as defined in Section 15-20-21(5), which constitutes a Class A or B felony" (emphasis added). A defendant with such a conviction was not eligible for a split sentence under § 15-18-8. That prohibition remains in the current version of § 15-18-8.

> law. According to [§ 13A-5-9(c)(1), Ala. Code 1975], when a defendant has three or more prior felony convictions (Smith admitted to nine prior felony convictions), and is convicted of a Class C felony offense, he must be punished by 'imprisonment for life or for any term of not more than 99 years, but not less than 15 years.' That sentence range is commensurate with the range of a Class A felony which is for 'life or not more than 99 years' as set forth in [§ 13A-5-6(a)(1), Ala. Code 1975]. In other words, because of Smith's numerous prior felony convictions, he was properly treated as a Class A felon, which, under the Split Sentence Act in effect in March 2019, his sentence was properly split to serve up to five years' incarceration."

(State's brief, pp. 12-13.)

In addressing this issue, we keep these principles in mind:

> "'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says.' IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992), quoted in Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001). Our primary obligation is to 'ascertain and give effect to the intent of the Legislature as that intent is expressed through the language of the statute.' Ex parte Krothapalli, 762 So. 2d 836, 838 (Ala. 2000). Moreover, we must presume '"that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used."' Ex parte Children's Hosp. of Alabama, 721 So. 2d 184 (Ala. 1998), quoting Sheffield v. State, 708 So. 2d 899, 909 (Ala. Crim. App. 1997). See also Elder v. State, 162 Ala. 41, 45, 50 So. 370, 371 (Ala. 1909)

> (stating that it is unreasonable to presume that the Legislature intended the words it used to be meaningless)."

Simcala, Inc. v. American Coal Trade, Inc., 821 So. 2d 197, 200-01 (Ala. 2001).

The State's position conflicts with the plain meaning of § 15-18-8(a)(2). The application of § 15-18-8(a)(2) turns on both the classification of a defendant's felony conviction and the length of the defendant's base sentence. The first part of the first sentence of subsection (a)(2) recognizes the classification of the conviction: "a defendant convicted of a Class A, Class B, or Class C felony" (emphasis added). The second part of that sentence recognizes the length of the base sentence: "with an imposed sentence of greater than 15 years but not more than 20 years" (emphasis added). Smith's conviction and base sentence meet both conditions.

The rest of § 15-18-8(a)(2) limits the length of the split term the court may impose on a base sentence of more than 15 years but not more than 20 years. The court may order a split "for a period of three to five years for Class A or Class B felony convictions and for a period of three years for Class C felony convictions" (emphasis added). Those limits

turn on the classification of the felony conviction, not, as the State argues, the length of the imposed base sentence. Indeed, the State's position would render unnecessary the language in subsection (a)(2) about the classification of felonies. See, e.g., Simcala, supra. See also Harrison v. State, 203 So. 3d 126, 130 (Ala. Crim. App. 2015) ("We must presume that the legislature did not ... create a meaningless provision. See Ex parte Wilson, 854 So. 2d 1106, 1110 (Ala. 2002), quoting Ex parte Welch, 519 So. 2d 517, 519 (Ala. 1987) ('"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."').").

Based on the plain meaning of subsection 15-18-8(a)(2), Smith has a right to relief. When it decided to split Smith's 20-year sentences for his class C felony convictions, the circuit court had to impose 3-year split terms on those sentences.

We affirm the circuit court's judgment denying relief except insofar as it denies Smith's claim that the split

portions of his sentences do not comply with § 15-18-8(a)(2), Ala. Code 1975. As to that claim, we reverse the judgment. The circuit court is instructed to grant Smith Rule 32 relief as to that claim and to impose 3-year split terms on Smith's 20-year sentences. Due return shall be made to this Court within 28 days of this decision.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

McCool and Cole, JJ., concur. Kellum, J., concurs in the result. Windom, P.J., recuses herself.