REL: December 16, 2020

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0999

Porter Allen Batts

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-93-1192.63 and CC-94-28.63)

PER CURIAM.

Porter Allen Batts appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

In January 1994, pursuant to a plea agreement with the State, Batts pleaded guilty to two counts of trafficking in cocaine. In accordance with the plea agreement, the trial court sentenced Batts, as a habitual offender with two prior felony convictions, to life imprisonment for each conviction. Batts did not appeal his convictions and sentences.

On April 14, 2020, over 26 years after his convictions and sentences became final, Batts filed the Rule 32 petition that is the subject of this appeal, raising two claims relating to his sentences. First, Batts alleged that his life sentences were illegal because, he said, he was improperly sentenced as a habitual offender with two prior felony convictions when, in fact, he had four prior felony convictions.[1] He maintained that the

[1]Trafficking in cocaine is a Class A felony. See § 13A-12-231, Ala. Code 1975. At the time of the crime, see Davis v. State, 571 So. 2d 1287, 1289 (Ala. Crim. App. 1990) (holding that, generally "[a] defendant's sentence is determined by the law in effect at the time of the commission of the offense"), § 13A-5-9(b)(3), Ala. Code 1975, provided that a defendant convicted of a Class A felony who has 2 prior felony convictions must be punished by life imprisonment or any term not less than 99 years' imprisonment, while § 13A-5-9(c)(3), Ala. Code 1975, provided that a defendant convicted of a Class A felony who has 3 or more prior felony convictions must be punished by a sentence of life imprisonment without the possibility of parole.

prosecutor knew at the time he entered his guilty pleas that he had four prior convictions and that, by negotiating an agreement allowing him to be sentenced using only two of those convictions, the prosecutor perpetrated a fraud on the court that resulted in an illegal sentence. Second, he alleged that his sentences were illegal because, he said, the trial court did not impose the fine required by § 13A-12-281, Ala. Code 1975, for either of his convictions. Without receiving a response from the State, the circuit court summarily dismissed Batts's petition on July 1, 2020, without stating grounds. Batts filed a postjudgment motion to alter, amend, or vacate the circuit court's judgment, which was denied by operation of law on July 31, 2020. See, e.g., Loggins v. State, 910 So. 2d 146, 148-49 (Ala. Crim. App. 2005). Batts filed a timely notice of appeal.

I.

Batts first contends on appeal, as he did in his postjudgment motion, that the circuit court erred in summarily dismissing his petition without explaining the basis for its decision. However, "Rule 32.7 does not require the trial court to make specific findings of fact upon a summary dismissal." Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998).

II.

Second, Batts reasserts on appeal the claim from his petition that his life sentences were illegal because, he said, he was improperly sentenced as a habitual offender with two prior felony convictions when, in fact, he had four prior felony convictions.[2]

In Scott v. State, 742 So. 2d 799 (Ala. Crim. App. 1998), relying on Ex parte Johnson, 669 So. 2d 205 (Ala. 1995), this Court recognized that the State may waive application of the Habitual Felony Offender Act, § 13A-5-9, Ala. Code 1975 ("the HFOA"), as part of a plea agreement. If the State may waive all of a defendant's prior convictions when negotiating a plea agreement, it logically follows that the State may also waive some of a defendant's prior convictions when negotiating a plea agreement. In this case, the written plea agreement, which Batts attached to his petition, indicates that the State agreed that Batts would be sentenced to life imprisonment for his convictions. Although the written plea

[2]We note that the State concedes on appeal that Batts, in fact, had four prior felony convictions but was sentenced using only two of those convictions.

agreement does not specifically mention the HFOA, the Ireland[3] form, also attached to Batts's petition, sets out the sentencing range for a Class A felony offender with two prior convictions. Thus, it is apparent that the State waived two of Batts's prior convictions as part of the plea agreement. Therefore, Batts's life sentences -- which were within the range of punishment for a Class A felony offender with two prior convictions -- were not illegal.

III.

Batts also reasserts on appeal the claim from his petition that his sentences were illegal because, he said, the trial court did not impose the fine required by § 13A-12-281, Ala. Code 1975, for either of his convictions. However, in Hall v. State, 223 So. 3d 977 (Ala. Crim. App. 2016), this Court held that the fine in § 13A-12-281 is not a jurisdictional aspect of sentencing. Because this claim is not jurisdictional, it is subject to preclusion. Specifically, this claim is time-barred by Rule 32.2(c), Ala. R.

[3]Ireland v. State, 47 Ala. App. 65, 250 So. 2d 602 (1971).

Crim. P., because Batts's petition was filed long after the limitations period had expired.

In this respect, we point out that, although no preclusions were asserted by the State below or applied by the circuit court, we may nonetheless apply Rule 32.2(c) for the first time on appeal in this case for the same reasons we were permitted to apply preclusions for the first time on appeal in McAnally v. State, 295 So. 3d 149 (Ala. Crim. App. 2019), where we explained:

> "Initially, we recognize that in Ex parte Clemons, 55 So. 3d 348 (Ala. 2007), the Alabama Supreme Court held that the preclusions in Rule 32.2 are waivable affirmative defenses and that an appellate court may not sua sponte apply the preclusions on appeal except in extraordinary circumstances. We likewise recognize that the State did not file a response to McAnally's petition raising any of the preclusions in Rule 32.2, even though it had the opportunity to do so, and the circuit court stated no grounds for its summary dismissal of McAnally's petition. However, under the circumstances in this case, we may apply the preclusions in Rule 32.2(a)(4), Rule 32.2(b), and Rule 32.2(d) to McAnally's claims.
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> "First, this Court has recognized that Ex parte Clemons was 'grounded in due-process principles' of 'be[ing] given notice of [any] preclusion ground.' A.G. v. State, 989 So. 2d 1167, 1179 (Ala. Crim. App. 2007). However, because

> " 'the Supreme Court expressly recognized in Ex parte Clemons, [55] So. 3d at [353], that Rule 32.7(d) specifically "authorizes sua sponte action by" the circuit court in applying a preclusion ground and ... subsequently, in Ex parte Ward, 46 So. 3d 888, 897 (Ala. 2007), the Court reaffirmed the long-standing rule that a circuit court "may properly summarily dismiss such a petition without waiting for a response to the petition from the State," ... this notice requirement is triggered only when the State files a response to the petition.'

"989 So. 2d at 1179 n.6 (emphasis added). See also Davenport v. State, 987 So. 2d 652, 655 n.4 (Ala. Crim. App. 2007) (noting that where the circuit court does not require a response from the State, the prohibition in Ex parte Clemons against sua sponte application of preclusions on appeal is inapplicable). Because the State did not file a response to McAnally's petition, this Court may apply preclusions on appeal even if they were not raised by the State below or applied by the circuit court.

"Second, this case presents the type of extraordinary circumstances that permit this Court to apply the preclusions on appeal. The Alabama Supreme Court specifically recognized in Ex parte Clemons that permitting an appellate court to sua sponte apply a procedural default on appeal ' "is necessary to protect the finality of ... criminal judgments." ' 55 So. 3d at 355 (quoting Rosario v. United States, 164 F.3d 729, 732 (2d Cir. 1998)). In this case, McAnally's petition was filed almost 12 years after his conviction and sentence became final. '[A]s time passes, justice becomes more elusive and the necessity for preserving finality and certainty of judgments increases.' State v. Afanador, 151 N.J. 41, 52, 697 A.2d 529, 534 (1997). In addition, an appellate court ' "[r]aising the issue

> of defendants' procedural default [for the first time on appeal] is particularly appropriate where, as here, the movants pled guilty." ' Ex parte Clemons, 55 So. 3d at 355 (quoting Rosario, 164 F.3d at 732). Finally, where ' "the procedural default is manifest from the record and, hence, resolution of this defense does not require further fact-finding," ' an appellate court sua sponte applying a preclusion is appropriate. Ex parte Clemons, 55 So. 3d at 355 (quoting Rosario, 164 F.3d at 733). This Court's records clearly show the applicability of the preclusions in Rule 32.2(a)(4), Rule 32.2(b), and Rule 32.2(d), and no further fact-finding is necessary. We also point out that this is not a case, like Ex parte Clemons, in which the State expressly waived the preclusions in Rule 32.2; rather, as noted above, the State here simply did not file a response to the petition. Because extraordinary circumstances exist, this Court may apply preclusions on appeal even if they were not raised by the State below or applied by the circuit court."

295 So. 3d at 152-53.

IV.

Rule 32.7(d), Ala. R. Crim. P., authorizes the circuit court to summarily dismiss a petitioner's Rule 32 petition,

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ...."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v.

State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). "Summary disposition is also appropriate when the petition is obviously without merit or where the record directly refutes a Rule 32 petitioner's claim." Lanier v. State, 296 So. 3d 341, 343 (Ala. Crim. App. 2019). Because Batts's claims were either meritless or precluded, summary disposition of Batts's Rule 32 petition was appropriate.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and McCool, J., concur. Minor, J., concurs specially, with opinion, which Cole, J., joins. Kellum, J., concurs in part and dissents in part, with opinion.

MINOR, Judge, concurring specially.

I concur in the Court's decision affirming the Madison Circuit Court's judgment denying Porter Allen Batts's Rule 32, Ala. R. Crim. P., petition. I write specially to state an additional reason for affirming the circuit court's judgment.

In his petition, Batts sought the "relief" of having the circuit court impose a longer sentence and an additional fine on him.[4] For the reasons stated in my special writing in Washington v. State, [Ms. CR-17-1201, Aug. 16, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019), " 'it simply is not "relief" to obtain the "remedy" of' a harsher sentence or additional punishment." ___ So. 3d at ___ (Minor, J., concurring specially) (quoting Hall v. State, 223 So. 3d 977, 983 (Ala. Crim. App. 2016) (Joiner, J., concurring specially)).

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[4]Batts has pending before this Court two other appeals involving Rule 32 petitions in which Batts alleges he should received as "relief" a more severe punishment. See Batts v. State, No. CR-19-0870 (alleging that his prison sentence should not be suspended); Batts v. State, No. CR-19-0968 (alleging that he should receive a longer sentence as a habitual felon). See also Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998) ("[T]his Court may take judicial notice of its own records." (citing Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992)).

Cole, J., concurs.

KELLUM, Judge, concurring in part and dissenting in part.

I concur with Parts I and II of the main opinion. However, for the reasons stated in my dissent in Hall v. State, 223 So. 3d 977 (Ala. Crim. App. 2016) (Kellum, J., dissenting), I respectfully dissent as to Part III of the main opinion.