REL: March 12, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-1086

K.D.D., Jr.

v.

State of Alabama

Appeal from Pickens Juvenile Court
(JU-15-86.11; JU-15-86.12; JU-15-86.13; and JU-15-86.14)

KELLUM, Judge.

K.D.D., Jr., ("K.D.D.") appeals the juvenile court's summary dismissal of his petition for a writ of error coram nobis.

On November 14, 2019, the Pickens Juvenile Court adjudicated K.D.D. delinquent on underlying charges of attempting to elude a law-enforcement officer, first-degree receiving stolen property, and two counts of reckless endangerment. The court placed K.D.D. on probation for 18 months and committed K.D.D. to the custody of the Department of Youth Services ("DYS"), with "a recommendation for a placement under the continuing supervision of this Court. Placement shall be 18 months Mt. Meigs -- 6 months CTS [credit for time served] time in Detention." (C. 51.) As a condition of probation, the court ordered that K.D.D. was "[n]ot to return to Pickens County." (C. 54.) K.D.D. did not appeal his adjudication.

On or about May 26, 2020, K.D.D., through retained counsel, filed in the Pickens Juvenile Court a petition for a writ of error coram nobis challenging his adjudication and resulting sentence. See W.B.S. v. State, 244 So. 3d 133 (Ala. Crim. App. 2017) (holding that a petition for a writ of error coram nobis is the proper means by which to challenge a delinquency adjudication). As best we can discern, K.D.D. alleged in his petition:

> (1) That his trial counsel was ineffective for not moving to transfer the delinquency proceedings to Tuscaloosa County, his county of residence, pursuant to § 12-15-260, Ala. Code 1975;
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> (2) That the juvenile court erred in imposing a determinate commitment without adjudicating him a serious juvenile offender and without complying with the requirements in Ex parte R.E.C., 678 So. 2d 1041 (Ala. 1995), and that his trial counsel was ineffective for not objecting to the alleged error;
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> (3) That the juvenile court erred in banishing him from Pickens County as a condition of his probation, and that his trial counsel was ineffective for not objecting to the banishment; and
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> (4) That his trial counsel was ineffective for not appealing the adjudication despite K.D.D.'s request that he do so and that, therefore, he was entitled to an out-of-time appeal.

The State did not file a response to K.D.D.'s petition. On September 9, 2020, the juvenile court summarily dismissed K.D.D.'s petition without an evidentiary hearing and without stating grounds.

On appeal, K.D.D. reasserts all four claims he raised in his petition, and he contends that the juvenile court erred in summarily dismissing his claims. He argues that he was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel and that he was entitled to relief

on his substantive challenges to his sentence found in claims (2) and (3), as set out above.

I.

Before addressing K.D.D.'s claims, we address two arguments made by the State.

First, the State argues that K.D.D. did not properly preserve for appellate review the issue whether he was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel because, it says, K.D.D. did not file a postjudgment motion objecting to the juvenile court's summary dismissal of those claims without a hearing. It relies on Whitehead v. State, 593 So. 2d 126, 130 (Ala. Crim. App. 1991), in support of its argument. In Whitehead, this Court held that a postconviction petitioner's argument on appeal that the circuit court had failed to make specific findings of fact in its order denying the petition was not properly preserved for review because it was not raised in the circuit court.[1]

[1]Whitehead involved a postconviction petition under Rule 32, Ala. R. Crim. P. However, in W.B.S., 244 So. 3d 133, 144 (Ala. Crim. App. 2017), this Court recognized that "[t]he standards governing a postconviction petition under Rule 32, Ala. R. Crim. P., and a petition for the writ of

However, Whitehead did not speak to the issue whether a petitioner must object in the circuit court to the lack of an evidentiary hearing; therefore, it is inapposite.

There is no question that "[t]he general rules of preservation apply to [postconviction] proceedings," Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003), and that "[a]n adverse ruling is a prerequisite for preserving alleged error for appellate review." Rice v. State, 611 So. 2d 1161, 1163 (Ala. Crim. App. 1992). However, in Ex parte McCall, 30 So. 3d 400, 403-404 (Ala. 2008), the Alabama Supreme Court recognized that, because a hearing on a postconviction petition is not required unless the petitioner adequately presents a material issue of fact or law that, if true, would entitle the petitioner to relief, when a court conducts an evidentiary hearing on a postconviction petition, the court has made an implicit finding that the petitioner has adequately raised such a material issue. The converse is likewise true. When a court summarily dismisses a

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error coram nobis are closely related." Therefore, this Court may look to Rule 32 caselaw if necessary when reviewing the dismissal or denial of a coram nobis petition.

postconviction petition without an evidentiary hearing, it has made an implicit finding that the petitioner has failed to adequately present a material issue of fact or law that, if true, would entitle the petitioner to relief, and that, therefore, an evidentiary hearing is not warranted. Thus, the summary dismissal of a postconviction petition is itself an adverse ruling on the issue whether a petitioner is entitled to an evidentiary hearing, and a petitioner is not required to file a postjudgment motion raising that issue again to properly preserve it for appellate review. Therefore, K.D.D.'s argument that he was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel is properly before this Court for review.

Second, the State argues that any error in the juvenile court's not conducting an evidentiary hearing on K.D.D.'s claims of ineffective assistance of counsel was "arguably" invited by K.D.D. because K.D.D. objected to the court conducting a "virtual" hearing which, the State says, "was perhaps a signal to the court that he did not want a hearing." (State's brief, p. 9.) We disagree. The record reflects that the juvenile court initially scheduled an evidentiary hearing on K.D.D.'s petition and

that K.D.D. filed a motion to be transported to the hearing from the juvenile facility where he was confined. The State objected to K.D.D.'s being transported to court for the hearing because of the COVID-19 pandemic and its accompanying restrictions, arguing that if K.D.D. left the juvenile facility for the hearing, he may face quarantine on his return or the facility could refuse his return. The State asserted that K.D.D. could attend the hearing using a video-communication service, such as Zoom or Facetime. K.D.D. then objected to not being present in person at the hearing, arguing that his physical absence would violate his constitutional rights. However, nothing in K.D.D.'s objection could be construed as indicating that he did not want a hearing on his petition. Therefore, the doctrine of invited error is not applicable here.

II.

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court articulated two criteria that must be satisfied to show ineffective assistance of counsel. A defendant has the burden of showing (1) that his or her counsel's performance was deficient and (2) that the deficient performance actually prejudiced the defense. "To meet

the first prong of the test, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. The performance inquiry must be whether counsel's assistance was reasonable, considering all the circumstances." Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. To meet the second prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Ricter, 562 U.S. 86, 112 (2011).

"Challenges based on the inadequacy of counsel constitute grounds for coram nobis." Summers v. State, 366 So. 2d 336, 341 (Ala. Crim. App. 1978). See also W.B.S. v. State, 244 So. 3d 133, 144 (Ala. Crim. App. 2017) ("[A]n ineffective-assistance-of-counsel claim is cognizable in a petition for a writ of error coram nobis."). Challenges to the legality of a

sentence are likewise properly raised in a petition for a writ of error coram nobis. See, e.g., Williams v. State, 478 So. 2d 1, 2 (Ala. Crim. App. 1984) (holding that petitioner was entitled to an evidentiary hearing on his claim that his sentence was illegal). In addition, a request for an out-of-time appeal is properly raised in a coram nobis petition. See Jones v. State, 495 So. 2d 722, 723-24 (Ala. Crim. App. 1986) ("The traditional relief available on coram nobis has been expanded to include a belated or out of time appeal where necessary to insure justice and fairness.").

"[A]n evidentiary hearing must be held on a coram nobis petition which is meritorious on its face, i.e., one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief." Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985).

> "A petition for a writ of error coram nobis is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts), Thomas v. State, [274 Ala. 531, 150 So. 2d 387 (1963)]; Ex parte Phillips, 276 Ala. 282, 161 So. 2d 485 (1964); Stephens v. State, 420 So. 2d 826 (Ala. Crim. App. 1982), sufficient to

> show that the petitioner is entitled to relief if those facts are true."

Ex parte Clisby, 501 So. 2d 483, 486 (Ala. 1986) (emphasis omitted). "[A] petition for a writ of error coram nobis must contain more than mere naked allegations that a constitutional right has been denied." Id. at 485-86. With respect to claims of ineffective assistance of counsel, a petitioner has the burden "to show on the face of the petition that he was entitled to relief under the Strickland test." Id. at 487.

> "To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

With these principles in mind, we address each of K.D.D.'s claims.

A.

K.D.D. first alleged in his petition that his trial counsel was ineffective for not moving to transfer the delinquency proceedings from Pickens County to Tuscaloosa County, where he resided, pursuant to § 12-15-206, Ala. Code 1975.[2] The entirety of this claim in K.D.D.'s petition reads:

> "The Child has been a resident of Tuscaloosa County, Alabama since September 2016. Nevertheless, [trial counsel] failed to make a motion for the Court to transfer the case to the Tuscaloosa County Juvenile Court for disposition, pursuant to § 12-15-206, Code of Alabama (1975)."

(C. 70.)

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[2]That section provides, in relevant part:

> "If a child resides in a county of the state and the delinquency or child in need of supervision proceeding is commenced in a juvenile court of another county, the juvenile court in the county in which the proceeding was commenced, on its own motion or a motion of a party and after consultation with the receiving juvenile court, may transfer the proceeding to the county of the residence of the child for such further action or proceedings as the juvenile court receiving the transfer may deem proper."

K.D.D. clearly failed to satisfy his burden of pleading so as to warrant an evidentiary hearing on this claim. This claim is nothing more than a naked allegation that his trial counsel did not move to transfer the delinquency proceeding to the county of his residence, without any specific facts showing that K.D.D. would be entitled to relief under Strickland. Of particular import, K.D.D. failed to allege any facts indicating that he suffered prejudice from counsel's alleged omission, i.e., that, but for counsel's not moving to transfer the delinquency proceedings, the outcome of the proceedings would have been different. Therefore, the juvenile court's summary dismissal of this claim of ineffective assistance of counsel was proper.

B.

K.D.D. also alleged in his petition that the juvenile court erred in imposing a determinate commitment without adjudicating him a serious juvenile offender and without complying with the requirements in Ex parte R.E.C., 678 So. 2d 1041 (Ala. 1995), and that his trial counsel was ineffective for not objecting to this alleged error. In Ex parte R.E.C., the Alabama Supreme Court held:

> "[A]n order of commitment for a definite period does not offend the [Alabama Juvenile Justice] Act, even though the juvenile has not been adjudicated a serious juvenile offender, provided that the order is accompanied by specific findings of fact and a reasoned analysis as to how the determinate period is calculated to benefit the juvenile or to further his or her rehabilitation; and provided, further, that the court's intent to incorporate its order into the [DYS Individual Service] Plan plainly appears in the order."

678 So. 2d at 1045. K.D.D. alleged in his petition that the juvenile court's order failed to include specific findings of fact and a reasoned analysis as to how the determinate commitment was calculated to benefit him and failed to plainly state the court's intent to incorporate its order into DYS's service plan.

In Ex parte R.E.C., the juvenile court had committed the juvenile to the custody of DYS until his 18th birthday and additionally stated in its order that, if DYS disregarded its order and released the juvenile before his 18th birthday, the juvenile would be returned to the county juvenile-detention facility. The court had declined to adjudicate the juvenile as a serious juvenile offender. The Alabama Supreme Court held that the determinate commitment was "outside the juvenile court's statutory authority" because the court had failed to make the requisite findings, and

it reversed this Court's judgment affirming the sentence. Ex parte R.E.C., 678 So. 2d at 1045. Similarly, in T.D.B. v. State, 195 So. 3d 314 (Ala. Crim. App. 2015), Q.S. v. State, 188 So. 3d 710 (Ala. Crim. App. 2015), T.L.S. v. State, 153 So. 3d 829 (Ala. Crim. App. 2013), and T.C. v. State, 989 So. 2d 1181, 1182 (Ala. Crim. App. 2007), the juvenile courts had committed the juveniles to the custody of DYS for terms of six months in T.B.D. and Q.S., and one year in T.L.S. and T.C., but had not adjudicated the juveniles as serious juvenile offenders. This Court held in each case that the juvenile courts had imposed determinate commitments but had failed to make the findings required by Ex parte R.E.C., and we remanded the causes for the juvenile courts to set aside the commitment orders and to resentence the juveniles.

In this case, however, the juvenile court did not impose a determinate commitment. In its order, the juvenile court committed K.D.D. to the custody of DYS with "a recommendation" of 18 months' confinement at the Mt. Meigs juvenile facility. (C. 51.) As the State correctly argues in its brief, a recommendation that DYS maintain custody of the juvenile for a certain period is not the equivalent of a determinate

commitment to the custody of DYS. Because the juvenile court did not impose a determinate commitment, it was not required to make the findings required by Ex parte R.E.C., and the juvenile court's summary dismissal of K.D.D.'s substantive challenge to his sentence was proper. Moreover, "[b]ecause the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue," Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009), and the juvenile court's summary dismissal of K.D.D.'s claim of ineffective assistance of counsel in this regard was also proper.

C.

K.D.D. further alleged in his petition that the juvenile court erred in banishing him from Pickens County as a condition of his probation and that his trial counsel was ineffective for not objecting to the banishment.

" 'Banishment' or 'exile' has generally been defined as ' "a punishment inflicted on criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life." ' " Vann v. State, 143 So. 3d 850, 868-69 (Ala. Crim. App. 2013) (quoting McBride v. State,

484 S.W.2d 480, 483 (Mo. 1972), quoting in turn 8 C.J.S. Banishment p. 593). Article I, § 30, Ala. Const. 1901, provides, in pertinent part, that "no citizen shall be exiled." "[A] judge may not banish a defendant from a city, county, or state as a condition of granting probation." Beavers v. State, 666 So. 2d 868, 871 (Ala. Crim. App. 1995). See also Bullock v. State, 392 So. 2d 848, 851 (Ala. Crim. App. 1980). "Our statutes do not permit courts to impose sentences of banishment." Brown v. State, 660 So. 2d 235, 236 (Ala. Crim. App. 1995). See also Warren v. State, 706 So. 2d 1316, 1318 (Ala. Crim. App. 1997).

As noted above, in its order of probation, the juvenile court imposed as a condition of probation that K.D.D. was "[n]ot to return to Pickens County." (C. 54.) K.D.D. argues that this condition constituted banishment. The State argues, on the other hand, that the juvenile court's order "is unclear" and is "not a conclusive statement preventing K.D.D. from ever returning to Pickens County." (State's brief, p. 16.) However, a directive "not to return" to a certain county cannot get any clearer. The State likens the order in this case to Yadyaser v. State, 430 So. 2d 888 (Ala. Crim. App. 1983), in which the trial court conditioned the

defendant's probation on a requirement that the defendant present to the court a one-way airplane ticket to a foreign destination. We held that the requirement was not the equivalent of banishment because the trial court did not prohibit the defendant from returning to the United States or to Alabama at any point in time, including immediately upon his arrival at the foreign destination. 430 So. 2d at 891. Unlike Yadyaser, the juvenile court in this case did not direct K.D.D. to leave Pickens County as a condition of probation, it directed K.D.D. "[n]ot to return to Pickens County." (C. 54.) It is irrelevant that the court's directive did not specifically state that K.D.D. was prohibited "from ever" returning to Pickens County, because prohibiting K.D.D. from returning to Pickens County constitutes banishment, whether it was for a specified period or for life.

Because banishment is illegal as a condition of probation, the juvenile court erred in denying K.D.D. relief on these claims. K.D.D. is entitled to have the banishment condition of his probation set aside.[3]

[3]We reject K.D.D.'s assertion in his brief that he is entitled to have his delinquency adjudication set aside on the basis that his sentence is

D.

Finally, K.D.D. alleged in his petition that his trial counsel was ineffective for not appealing his delinquency adjudication after K.D.D. requested that he do so and that, therefore, he is entitled to an out-of-time appeal. Specifically, K.D.D. alleged in his petition that, "[i]mmediately after adjudication," he and his mother met with trial counsel and "specifically instructed [him] to take the steps necessary to appeal," but that counsel failed to do so. (C. 70.)

" 'Appeal to this court has been ruled to be a matter of right. Failure to file a timely appeal to this court is a classic example of ineffective assistance of counsel.' " Seay v. State, 881 So. 2d 1065, 1067 (Ala. Crim. App. 2003) (quoting Mancil v. State, 682 So. 2d 501, 502 (Ala. Crim. App. 1996)). In Roe v. Flores-Ortega, 528 U.S. 470 (2000), the United States Supreme Court stated:

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illegal. The imposition of an illegal condition of probation has no bearing on the validity of K.D.D.'s underlying delinquency adjudication. Cf., Lanier v. State, 296 So. 3d 341, 343 (Ala. Crim. App. 2019) ("[T]he legality or illegality of a sentence has no bearing whatsoever on the validity of the underlying conviction.").

> "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See Rodriquez v. United States, 395 U.S. 327 (1969); cf. Peguero v. United States, 526 U.S. 23, 28 (1999) ('[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit'). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes."

528 U.S. at 477.

K.D.D. alleged sufficiently specific facts in his petition indicating that his trial counsel was ineffective for not appealing K.D.D.'s delinquency adjudication. If the facts alleged in K.D.D.'s petition are true, he would be entitled to an out-of-time appeal. Therefore, K.D.D. is entitled to an evidentiary hearing on this claim of ineffective assistance of counsel.

III.

Based on the foregoing, we affirm the juvenile court's summary dismissal of the claims addressed in Parts II.A. and II.B. of this opinion; we reverse the juvenile court's summary dismissal of the claims addressed

in Part II.C. of this opinion; and we remand this cause for the juvenile court: (1) to grant K.D.D.'s petition to the extent it challenged his banishment from Pickens County as a condition of probation and to set aside that condition of probation; and (2) to conduct an evidentiary hearing on K.D.D.'s claim that his trial counsel was ineffective for not appealing the delinquency adjudication after K.D.D. requested that he do so and to make specific written findings of fact regarding that claim. If the court determines that counsel was ineffective for not appealing the adjudication, the court may grant K.D.D. an out-of-time appeal. Due return shall be filed with this Court within 63 days of the date of this opinion and shall include the juvenile court's orders on remand, a transcript of the evidentiary hearing, and any other evidence received or relied on by the court in making its findings.

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

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