

Rel: December 17, 2021

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Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0104

Brian Jerome Lindsey

v.

State of Alabama

Appeal from Etowah Circuit Court
(CC-95-146.60; CC-99-1307.60; CC-00-678.60;
CC-00-814.60; and CC-01-473.60)

COLE, Judge.

APPEAL DISMISSED BY UNPUBLISHED MEMORANDUM.

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

CR-20-0104

WINDOM, Presiding Judge, dissenting.

The majority dismisses Brian Jerome Lindsey's appeal in an unpublished memorandum, holding that his notice of appeal, filed on November 9, 2020, was untimely. The majority states in its memorandum that "the only order from which Lindsey could have appealed is the circuit court's June 2, 2020, order summarily dismissing his petition." I, however, do not view the circuit court's order of June 2, 2020, as summarily dismissing Lindsey's petition, nor do I view it as a final, appealable order.

The circuit court's order of June 2 purportedly "dismissed without prejudice" Lindsey's petition for failing to comply with the provisions of Rule 32.6(a), Ala. R. Crim. P. (C. 49.) The circuit court provided Lindsey with the opportunity to refile his petition within 30 days so long as it was in compliance with Rule 32.6(a), and further directed Lindsey to address several pleading deficiencies in his claims.

The circuit court found Lindsey's original filing to be noncompliant with Rule 32.6(a). Rule 32.6(a) states: "The petition should be filed by using or following the form accompanying this rule. If that form is not

CR-20-0104

used or followed, the court shall return the petition to the petitioner to be amended to comply with the form." Regardless of the circuit court's framing of the order, the circuit court was returning the petition to Lindsey in accordance with Rule 32.6(a). Additionally, the circuit court, consistent with Garrett v. State, 644 So. 2d 977, 980 (Ala. Crim. App. 1994), overruled on other grounds by Ex parte Jenkins, 972 So. 2d 159, 165 (Ala. 2005), allowed Lindsey 30 days to amend his petition.

Of course, Lindsey did not refile his petition within that 30 days. The circuit court, at that point, would have been free to dismiss Lindsey's petition for failing to comply with an order of the court. See, e.g., Jones v. State, 601 So. 2d 1155, 1155-56 (Ala. Crim. App. 1992) (affirming a circuit court's dismissing a postconviction petition for failing to comply with its previous order). It did not. Instead, when Lindsey did refile an amended petition on August 12, 2020, the circuit court accepted it, thereby implicitly amending its June 2 order allowing only 30 days to refile. The circuit court dismissed Lindsey's petition on October 13, 2020, and Lindsey filed his notice of appeal on November 9, 2020.

The majority, citing Loggins v. State, 910 So. 2d 146 (Ala. Crim. App. 2005), holds that the circuit court lacked jurisdiction to dismiss Lindsey's petition on October 13 because more than 30 days had elapsed since the circuit court's order of June 2. However, Loggins would apply only if the order of June 2 were a final order, which, in my opinion, it was not. Consistent with Rule 32.6(a), the circuit court, in its order of June 2, was merely returning Lindsey's petition to him. Consequently, the circuit court had discretion to accept Lindsey's refiled petition on August 12, and it had jurisdiction to dismiss Lindsey's petition on October 13, 2020. Because Lindsey filed a notice of appeal within 42 days of October 13, I believe he properly invoked the appellate jurisdiction of this Court. See Rule 4(a)(1), Ala. R. App. P.

I believe the appeal of Lindsey's Rule 32 petition is properly before this Court. Further, I agree with the State that the circuit court's judgment dismissing Lindsey's petition is due to be affirmed. Therefore, I respectfully dissent.

McCool, J., concurs.