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Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-20-0326

Terry Leavon Camp

v.

State of Alabama

Appeal from Winston Circuit Court
(CC-16-133.71)

MINOR, Judge.

Terry Leavon Camp appeals from the circuit court's revocation of his probation. He argues that his sentence is illegal because, he says, the split portion of his original sentence does not comply with § 15-18-8(b),

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Ala. Code 1975. He says that, under Ex parte McGowan, [Ms. 1190090, April 30, 2021] ___ So. 3d ___ (Ala. 2021), the circuit court lacked the authority to revoke his probation. We agree.

Camp pleaded guilty in June 2016 to second-degree assault, see § 13A-6-21, Ala. Code 1975. The circuit court sentenced him to 15 years in prison, split to serve 3 years followed by 4 years of probation.¹

Nearly a year after he began serving his probation Camp "absconded supervision," and, in October 2020, the circuit court revoked Camp's probation and "re-split" his sentence, ordering him to serve another 45 days in jail, followed by probation.

¹Although the record does not show whether the circuit court sentenced Camp as a habitual felony offender, a 15-year sentence for a second-degree-assault conviction is appropriate for a defendant sentenced as a habitual felony offender under § 13A-5-9, Ala. Code 1975. See Norwood v. State, 424 So. 2d 1351, 1352 (Ala. Crim. App. 1982) (" 'On appeal the judgment of the primary court is presumed to be correct.' Hopkins v. State, 51 Ala. App. 510, 514, 286 So. 2d 920 (1973). In reviewing sentences on convictions this Court will indulge all reasonable presumptions in favor of the trial court. Howard v. State, 36 Ala. App. 191, 192, 54 So. 2d 87 (1951). '(O)n appeal we presume that the trial court in imposing such sentence acted wholly within the law.' Yates v. State, 31 Ala. App. 362, 363, 17 So. 2d 776, cert. denied, 245 Ala. 490, 17 So. 2d 777 (1944).").

A few weeks after Camp got out of jail, his probation officer moved to revoke his probation, alleging that he had violated the conditions of his probation by committing the new offense of unlawful possession of a controlled substance. After a hearing, the circuit court revoked Camp's probation and ordered him to serve his full sentence. Camp appealed.

On appeal, Camp argues that the circuit court's revocation of his probation in October 2020 and the "re-splitting" of his sentence, adding 45 days to his confinement, was an illegal sentence. Because this split sentence was unauthorized, he says, the circuit court lacked the authority to later revoke the probation imposed as part of that sentence.²

We agree with Camp that the split portion of his sentence does not comply with § 15-18-8. But we conclude that the sentencing error

²Camp asserts this argument in a footnote in his brief on appeal. He noted, though, that he was raising the issue out of "an abundance of caution" because, he said, he recognized that, under this Court's decision in McGowan v. State, [Ms. CR-18-0173, July 12, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019), "the removal of the illegal manner of execution of a sentence renders the illegality moot." (Camp's brief, p. 2.) Following the Alabama Supreme Court's decision in Ex parte McGowan, Camp filed a notice of supplemental authority arguing that his sentence is illegal and that the circuit court lacked the authority to revoke a probationary period imposed as part of an unauthorized sentence.

occurred, not when the circuit court added 45 days to Camp's confinement, but when it first split Camp's 15-year sentence and ordered him to serve 3 years' imprisonment on a Class C felony conviction.³

Second-degree assault is a Class C felony offense. § 13A-6-21, Ala. Code 1975. When Camp committed that offense in 2016 and when the circuit court sentenced him for that conviction in June 2016, the sentencing range for a Class C felony was "not more than 10 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8 unless sentencing is pursuant to Section 13A-5-9 [Ala. Code 1975]." § 13A-5-6(a)(3), Ala. Code 1975.⁴ Under § 13A-5-9, when a defendant who has been previously convicted of a Class A, Class B, or

³Although Camp does not argue that his original 15-year sentence could not be split so that he would serve 3 years in prison, this Court may take notice of an unauthorized sentence on direct appeal, whether the issue is raised or not. Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994); Pender v. State, 740 So. 2d 482 (Ala. Crim. App. 1999).

⁴In 2019 the legislature amended § 13A-5-6(a)(3), Ala. Code 1975, to add that "a sex offense pursuant to Section 15-20A-5" is not subject to the sentencing requirements of § 15-18-8. That change is immaterial here. And because "the law in effect at the time of the commission of the offense controls the prosecution," see Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005), we review Camp's claim under the version of § 13A-5-6 in effect in 2016.

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Class C felony is convicted of a Class C felony, "he or she must be punished for a Class B felony." § 13A-5-9(a)(1), Ala. Code 1975. The sentencing range for a Class B felony is 2 to 20 years. § 13A-5-6(a)(2), Ala. Code 1975.

Section 15-18-8(b) provides:

"Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C or D felony offense and receives a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense ... for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the execution of 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 a period not exceeding three years and upon such terms as the court deems best."

(Emphasis added.) The circuit court sentenced Camp to 15 years in prison for his Class C felony conviction. That sentence was within the statutory range for a defendant sentenced as a habitual felony offender under § 13A-5-9. The circuit court's imposition of a three-year split, though, was not authorized by § 15-18-8.

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Although § 13A-5-9 did not require the circuit court to split the 15-year sentence it imposed on Camp, any split it imposed had to comply with § 15-18-8(b). See Shugart v. State, [Ms. CR-20-0067, May 28, 2021] ___ So. 3d ___ (Ala. Crim. App. 2021). And under § 15-18-8(b), a defendant who is convicted of a Class C felony and who receives a 15-year sentence cannot receive a split sentence with imprisonment exceeding 2 years. That is because the limit for the length of a split term for a Class C felony conviction "turn[s] on the classification of the felony conviction, not ... the length of the imposed base sentence." Smith v. State, [Ms. CR-19-0621, Sept. 11, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020). Thus, because the circuit court did not have the authority under § 15-18-8(b) to order Camp to serve 3 years in jail on a 15-year sentence for a Class C felony conviction, Camp's sentence is unauthorized.

Because Camp's original split sentence is an unauthorized sentence, the circuit court's orders revoking Camp's probation are void. Ex parte McGowan, supra.

"In Ex parte McGowan, the Alabama Supreme Court explained:

" '[A] sentence unauthorized by statute exceeds the jurisdiction of the trial court and is void. See Ex parte Batey, 958 So. 2d [339] at 342 [(Ala. 2006)] (citing Rogers v. State, 728 So. 2d 690, 691 (Ala. Crim. App. 1998)). Except for taking measures to cure a jurisdictional defect in sentencing and to sentence the defendant in accordance with the law, a trial court has no jurisdiction to act on an unauthorized sentence, including conducting revocation proceedings and entering a revocation order addressing the portion of the sentence that was unauthorized in the first place. It matters not that a revocation order purports to remove an unauthorized portion of a sentence; the trial court must first have subject-matter jurisdiction to conduct the proceedings under Rule 27.6, Ala. R. Crim. P., and to enter the order of revocation.'

" ___ So. 3d at ___ (emphasis added). The Alabama Supreme Court held that, when a circuit court purports to revoke a defendant's probation when that defendant's sentence 'was unauthorized in the first place,' the circuit court's order purporting to revoke probation 'is void' and must be vacated. Id."

Shugart, ___ So. 3d at ___. Thus, under Ex parte McGowin, we order the circuit court to vacate its probation-revocation orders. As for the circuit court's next steps,

"[w]e note that, 'at this juncture,' the only thing the circuit court may do is

""'conduct another sentencing hearing and ... reconsider the execution of [[Camp's] 15]-year sentence[]. Because the [15]-year sentence[] [was] valid, the circuit court may not change [it].'" Enfinger[v. State], 123 So. 3d [535] at 538 [(Ala. Crim. App. 2012)] (quoting Austin v. State, 864 So. 2d 1115, 1118 (Ala. Crim. App. 2003), and Moore v. State, 871 So. 2d 106, 109-10 (Ala. Crim. App. 2003)).'

"Ex parte McGowan, ___ So. 3d at ___."

Shugart v. State, supra. Because "a void order will not support an appeal," see Ex parte Butler, 295 So. 3d 1115, 1117 (Ala. Crim. App. 2019), we dismiss Camp's appeal from the circuit court's revocation order.⁵

APPEAL DISMISSED.

Windom, P.J., and Kellum, McCool, and Cole, JJ., concur.

⁵Camp also argues (1) that the officers' search resulting in the seizure of drugs from Camp's pocket exceeded the scope of a pat-down search under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); and (2) that in revoking Camp's probation the circuit court should have ordered a less onerous sanction than confinement. Because we hold that the circuit court's order revoking Camp's probation is void, we do not address the other issues Camp raises on appeal. See Shugart v. State, [Ms. CR-20-0067, May 28, 2021] ___ So. 3d ___ (Ala. Crim. App. 2021).