

Rel: February 11, 2022

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# Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

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CR-19-0978

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Johnny Lee Self

v.

State of Alabama

Appeal from Jefferson Circuit Court  
(CC-03-1269.60 and CC-03-1270.60)

On Remand from the Alabama Supreme Court

COLE, Judge.

Johnny Lee Self pleaded guilty to two counts of first-degree sexual abuse, violations of § 13A-6-66, Ala. Code 1975, in September 2003, and

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the circuit court sentenced him to 25 years' imprisonment on each count. Self did not appeal his guilty-plea convictions or sentences. Over 16 years after he pleaded guilty, Self filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief.

In his petition, Self alleged that the circuit court was without jurisdiction to render judgment or impose the 25-year sentences on him because, he said, he "was not sentenced as an Habitual Offender under the Habitual Felony Offender statute." (C. 42.) Self argued that, because first-degree sexual abuse is a class C felony offense, the circuit court should have sentenced him under § 13A-5-6(a)(3), Ala. Code 1975, "to a term of not more than 10 years" for each conviction. (C. 43.)

Self then filed an amended Rule 32 petition, adding to his petition the claim that newly discovered evidence exists -- namely, an affidavit ostensibly from Self's victim, claiming that Self "did not fumble or touch [her] in any inappropriate manner, nor did he engage in any sexual contact with [her] at anytime during the year 2003." (C. 60-61, 63.) Self also alleged that he "failed to appeal within the prescribed time and that failure was without any fault of the petitioner." (C. 59.)

The State moved to dismiss Self's petition, but it did not address the claim raised in Self's amended petition. The circuit court issued an order summarily dismissing Self's illegal-sentence claim; it did not address the claim raised in Self's amended petition. (C. 27-28.)

On appeal, Self argued, among other things, that the circuit court erred when it summarily dismissed his illegal-sentence claim.<sup>1</sup> This Court rejected Self's argument, holding that his claim, as presented to the circuit court, was nonjurisdictional and thus was properly dismissed as time-barred under Rule 32.2(c), Ala. R. Crim. P. Self v. State, (No. CR-19-0978, Jan. 29, 2021) \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2021) (table). This Court, in an unpublished memorandum, further explained that, even if Self's claim is jurisdictional, Self did not sufficiently plead his claim:

"Here, Self's allegation that he 'was not sentenced as an Habitual Offender under the Habitual Offender statute §

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<sup>1</sup>Self also argued that the circuit court erred when it did not consider his amended petition and when it "failed to rule that [he] failed to appeal within the prescribed time and that failure was without any fault of the petitioner." (Self's brief, pp. 3, 11, 13.) This Court rejected those arguments on direct appeal. Because the Alabama Supreme Court did not grant certiorari review as to those arguments, we do not reconsider them now.

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13A-5-9 [, Ala. Code 1975 ("the HFOA")] and therefore could not be sentenced to a term of 25 years concurrently' is a conclusion that, if true, would entitle him to relief. As set out above, however, it is the pleading of facts, not conclusions, that satisfy the burden of pleading in a Rule 32 petition. In his petition, the only fact Self alleged to support his conclusion that he was not sentenced under the HFOA is that the record does not show that he was sentenced under the HFOA. But that fact, if true, does not necessarily entitle him to relief. Notably, Self did not allege that he did not have any prior felony convictions, he did not allege that he was not subject to the HFOA, and he did not allege that the HFOA was not invoked or applied at his sentencing hearing.

Self v. State, (No. CR-19-0978, Jan. 29, 2021) \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2021) (table).

On May 12, 2021, the Alabama Supreme Court granted Self's petition for a writ of certiorari "to consider whether [this Court's] decision is in conflict with Barnes v. State, 708 So. 2d 217 (Ala. Crim. App. 1997)."

Ex parte Self, [Ms. 1200431, Sept. 10, 2021] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2021). The Alabama Supreme Court explained this Court's decision in Barnes as follows:

"In Barnes, a Rule 32 petitioner alleged 'that he was improperly sentenced to serve fifteen years in prison, because the maximum sentence authorized [under the applicable statute] is 10 years ... and he was not sentenced as a habitual offender.' Barnes, 708 So. 2d at 218. The trial court summarily

dismissed the petition, concluding that it was precluded by operation of Rule 32.2(a), Ala. R. Crim. P. On appeal, the Rule 32 petitioner argued 'that his sentences exceed the maximum authorized by law because he was not sentenced as a habitual felony offender.' Barnes, 708 So. 2d at 218. The State argued that the Rule 32 petitioner's sentence did not exceed the statutory maximum because, it said, the Rule 32 petitioner had been sentenced as a habitual felony offender. The Court of Criminal Appeals noted, however, that there was 'no indication in the record that the provisions of the Habitual Felony Offender Act applied in th[at] case' or that the Rule 32 petitioner had been 'sentenced as a habitual offender.' Id. at 218 and 219. In addressing the Rule 32 petitioner's argument on appeal, the Court of Criminal Appeals stated that the Rule 32 petitioner 'essentially challenge[d] the legality of his sentence.' Id. at 219. Noting that an illegal sentence may be challenged at any time, the Court of Criminal Appeals concluded that the Rule 32 petitioner 'ha[d] alleged facts that, if true, entitle[d] him to relief.' Id. The only fact that was in question in Barnes was whether the Rule 32 petitioner had been sentenced pursuant to the Habitual Felony Offender Act ('HFOA'), § 13A-5-9, Ala. Code 1975. The Court of Criminal Appeals stated that, '[i]f the [Rule 32 petitioner's] allegations [were] true, the sentences exceeded the jurisdiction of the court and [were] therefore void.' Id."

Ex parte Self, \_\_\_ So. 3d at \_\_\_. Then, applying Barnes to this case, the Alabama Supreme Court found that "[t]he present case appears to be identical to Barnes." Id. Thus, the Alabama Supreme Court concluded that Self's claim is both jurisdictional and sufficiently pleaded, and the

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Alabama Supreme Court instructed this Court to "remand this cause to the circuit court for further proceedings consistent with Barnes." Id.

In accordance with the Alabama Supreme Court's instructions, this Court remands this case to the circuit court for that court to conduct further proceedings under Rule 32.9, Ala. R. Crim. P., giving Self the opportunity to prove his illegal-sentence claim, see Rule 32.3, Ala. R. Crim. P.

"If the circuit court determines that Self was not sentenced under the HFOA [Habitual Felony Offender Act] and, consequently, that his sentence exceeds the maximum authorized by law, that court is authorized to resentence Self within the parameters applicable to a conviction for a Class C felony. Conversely, if the circuit court determines that Self was properly sentenced under the HFOA, then Self is not entitled to any relief."

Ex parte Self, \_\_\_ So. 3d at \_\_\_. Regardless of its findings, the circuit court shall make return to this Court within 56 days of this opinion.<sup>2</sup>

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<sup>2</sup>If the circuit court chooses to conduct an evidentiary hearing under Rule 32.9(a), the circuit court's return in this case shall include a transcript of that hearing. If the circuit court chooses, instead, to take evidence by means other than an evidentiary hearing under Rule 32.9(a), the circuit court's return in this case shall include a copy of all evidence it relied on in reaching its decision.

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REMANDED WITH INSTRUCTIONS.

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