REL: February 11, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0322

Anthony Lacy Couch

v.

State of Alabama

Appeal from Baldwin Circuit Court
(CC-18-2620, CC-18-2621, CC-18-2622, CC-18-2623, CC-18-2624, CC-18-2625, and CC-18-2626)

MINOR, Judge.

A jury convicted Anthony Lacy Couch of one count of first-degree rape, see § 13A-6-61(a)(3), Ala. Code 1975; three counts of first-degree sodomy, see § 13A-6-63(a)(3), Ala. Code 1975; one count of second-degree sodomy, see § 13A-6-64(a)(1), Ala. Code 1975; one count of sexual abuse of a child less than 12 years old, see § 13A-6-69.1, Ala. Code 1975; and one count of second-degree sexual abuse, see § 13A-6-67(a)(2), Ala. Code 1975. For the first-degree-rape conviction and each first-degree-sodomy conviction, the circuit court sentenced Couch to 99 years' imprisonment. For the second-degree-sodomy conviction and for the sexual-abuse-of-a-child-less-than-12-years-old conviction, the circuit court sentenced Couch to 20 years' imprisonment. For the second-degree-sexual-abuse conviction, the circuit court sentenced Couch to 10 years' imprisonment. The circuit court ordered that Couch's sentences be served consecutively.[1]

[1]For the first-degree-rape convictions and each first-degree-sodomy conviction, the circuit court ordered Couch to pay court costs, a $5,000 fine, a $1,000 crime-victims-compensation assessment, and $1,000 in attorney fees. For the second-degree-sodomy conviction and for the sexual-abuse-of-a-child-less-than-12-years-old conviction, the circuit court ordered Couch to pay court costs, a $2,000 fine, a $1,000 crime-victims-compensation assessment, and $200 in attorney fees. For the second-degree-sexual-abuse conviction, the circuit court ordered Couch to pay

On appeal, Couch argues solely that the circuit court erred when it denied his challenge for cause to remove potential juror D.S. from the jury venire. We hold that there is no merit to Couch's claim, but, because the circuit court did not suspend or split Couch's sentence for his second-degree-sexual-abuse conviction under §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, we must remand this case for the circuit court to resentence Couch for that conviction.

Because Couch does not challenge the sufficiency of the evidence, a brief recitation of the facts will suffice. The State's evidence showed that Couch lived with his girlfriend, M.R., and that M.R.'s daughters, A.W. and C.W., stayed with M.R. and Couch for at least a month during the summer of 2017 when A.W. was 10 years old and C.W. was 12 years old. At various times while A.W. and C.W. were visiting M.R., Couch subjected A.W. to vaginal intercourse, anal intercourse, oral intercourse, and sexual contact, and he subjected C.W. to oral intercourse and sexual contact.

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court costs, a $1,000 fine, a $1,000 crime-victims-compensation assessment, and $100 in attorney fees.

I.

Couch argues that the circuit court erred when it denied his challenge for cause to remove potential juror D.S. from the jury venire because D.S. was married to a Baldwin County Assistant District Attorney. Couch claims that § 12-16-150(4) and (11), Ala. Code 1975, required the court to remove potential juror D.S. for cause and that the court's failure to do so "denied [Couch] his Constitutional right under the Sixth and Fourteenth Amendments of the United States Constitution to a fair and impartial jury." (Couch's brief, p. 10.)

Potential juror D.S. stated during voir dire examination that he was married to an Assistant District Attorney who worked in the Baldwin County District Attorney's Office–i.e., the office prosecuting Couch on behalf of the State.[2] When the circuit court asked D.S., "[D]o you think that your relationship with your wife would prevent you from being fair

[2]The record shows that D.S.'s wife was not a prosecutor in Couch's case.

and impartial in this case?," D.S. replied, "It would not, Judge. I'd be just fine." (Second Supp. R. 16.)[3]

Couch later moved the circuit court to strike D.S. for cause:

> "[Defense counsel]: No, [D.S.]. I mean, [D.S.] is a friend of mine. I've had dinner with [D.S.].
>
> "[The State]: I was his teacher.
>
> "[Defense counsel]: Yeah. He's so involved with all the parties, as far as being married to an Assistant D.A., he's a good friend of mine. I would almost say let's both agree to strike him for cause is my opinion.
>
> "[The State]: And he really didn't say anything that justifies it.
>
> "[Defense counsel]: I know that.
>
> "THE COURT: I'm not going to strike [D.S.]. If anybody understands the standard from which he needs to say, hey, I can't be fair and impartial, he understood it. I'm not going to strike him for cause. I mean, if one of y'all wants to use your strikes, that's fine. But I'm not going to strike him for cause because I felt like he stated sufficiently to the Court and very clearly and unequivocally that he could be fair and impartial.

[3]Throughout this opinion we refer to the first supplemental record as "First Supp."; the second supplemental record as "Second Supp."; and the third supplemental record as "Third Supp."

> "[Defense counsel]: He did. It's just how connected he is to all parties.
>
> "THE COURT: I know. I understand, but that does not automatically disqualify him from service."

(Second Supp. R. 91-92; emphasis added.) Couch exercised one of his peremptory strikes to remove D.S. from the jury.[4]

" ' "To justify a challenge of a juror for cause there must be a statutory ground (Ala. Code Section 12-16-150 (1975)), or some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court." ' " Revis v. State, 101 So. 3d 247, 305 (Ala. Crim. App. 2011) (quoting McGowan v. State, 990 So. 2d 931, 951 (Ala. Crim. App. 2003), cert. denied, 555 U.S. 861 (2008), quoting in turn, Nettles v. State, 435 So. 2d 146, 149 (Ala. Crim. App. 1983), aff'd, 435 So. 2d 151 (Ala.

[4]Although the record is silent about which party used its peremptory strikes against which potential jurors, in his brief on appeal, Couch asserts that he used a peremptory strike to remove D.S., and the State does not dispute that assertion. See Johnson v. Stewart, 854 So. 2d 544, 551-52 (Ala. 2002) ("Where the appellee makes no correction or addition to the appellant's statement of the facts, '[t]he statements made by the appellant ... will be taken to be accurate and sufficient for decision.' " (quoting Taylor v. First Nat'l Bank of Tuskaloosa, 279 Ala. 624, 628, 189 So. 2d 141, 144 (1966))).

1983)). "Notwithstanding those instances where a clear-cut interest [in the conviction or acquittal of the defendant] exists, ... the question whether to sustain a challenge for cause on the ground of interest or bias is one addressed to the sound discretion of the trial court." Glenn v. State, 395 So. 2d 102, 107 (Ala. Crim. App. 1980).

Section 12-16-150, Ala. Code 1975, provides, in relevant part:

> "It is good ground for challenge of a juror by either party:
>
> "....
>
> "(4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor or the person alleged to be injured.
>
> "....
>
> "(11) That the juror, in any civil case, is plaintiff or defendant in a case which stands for trial during the week he is challenged or is related by consanguinity within the ninth degree or by affinity within the fifth degree, computed according to the rules of the civil law, to any attorney in the case to be tried or is a partner in business with any party to such a case."

Couch's reliance on § 12-16-150(11) fails because that subsection addresses jurors in civil cases and thus is inapplicable to Couch's case, a criminal prosecution. Couch's reliance on § 12-16-150(4) likewise fails because the record does not show that D.S.'s wife had any connection to Couch's case.

> "In McGahee v. State, 885 So. 2d 191, 213 (Ala. Crim. App. 2003), cert. denied, 885 So. 2d 230 (Ala. 2004), we stated the following concerning a similar issue: 'Veniremember H.O. stated that he was the father-in-law of a prosecutor in the district attorney's office. That attorney was not involved in McGahee's prosecution, and Alabama law did not require that H.O. be excused on that ground. § 12-16-150(4), Ala. Code 1975.' "

Brown v. State, 11 So. 3d 866, 888 (Ala. Crim. App. 2007). Section 12-16-150(4), Ala. Code 1975 "does not require the removal of veniremembers related to people employed by the prosecutor's office but not involved in the prosecution of the case on which the veniremember might sit." Wimbley v. State, 191 So. 3d 176, 220 (Ala. Crim. App. 2014), vacated on other grounds, 578 U.S. 1009 (2016). There was thus no statutory ground to justify Couch's challenge to remove D.S. for cause.

The record also does not show that D.S. was biased or partial toward either party. "'"[A] proper challenge for cause exists only when a prospective juror's opinion or bias is so fixed that he or she could not ignore it and try the case fairly and impartially according to the law and the evidence."'" Oryang v. State, 642 So. 2d 979, 987 (Ala. Crim. App. 1993) (quoting Siebert v. State, 562 So 2d 586, 595 (Ala. Crim. App. 1989), aff'd, 562 So. 2d 600 (Ala. 1990), cert. denied, 498 U.S. 963 (1990)). When questioned whether his relationship with his wife would affect his ability to serve as a juror, D.S. affirmed that he would be fair and impartial. In fact, defense counsel admitted that D.S. did not make any statements during voir dire that would justify his removal for cause. (Second Supp. R. 91-92.) The circuit court did not abuse its discretion when it denied Couch's challenge to remove D.S. for cause.

Even if the circuit court had erred in failing to remove D.S. for cause, that error was harmless. "'[T]he Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike.'" Albarran v. State, 96 So. 3d 131, 162 (Ala. Crim. App. 2011) (quoting Pace v. State, 904 So. 2d 331, 341

(Ala. Crim. App. 2003)). Because Couch used a peremptory strike to remove potential juror D.S., any resulting error was harmless.[5] Thus, Couch is due no relief on this claim.

II.

Although Couch does not argue on appeal that his sentence for his second-degree-sexual-abuse conviction is unauthorized under §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, this Court may take notice of an unauthorized sentence on direct appeal even though the issue has not been raised. See Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994) ("Matters concerning unauthorized sentences are jurisdictional."); McCall v. State, 74 So. 2d 1243, 1244 (Ala. Crim. App. 2000) ("[W]e may take notice of an illegal sentence even though [the appellant] did not raise the issue in the trial court or in his brief on appeal.").

[5]In his brief on appeal, Couch contends generally: "Due to the court failing to strike [D.S.] for cause, and the trial court holding Couch's jury trial during the major part of the COVID-19 pandemic, Couch was denied a jury of his peers. This was anything but harmless error." (Couch's brief, p. 11.) Couch's argument in this regard does not conform to Rule 28(a)(10), Ala. R. App. P., and is deemed waived. See Hooks v. State, 141 So. 3d 1119, 1124 (Ala. Crim. App. 2013).

Second-degree sexual abuse, a Class A misdemeanor offense, becomes a Class C felony offense when "a person commits a second or subsequent offense of sexual abuse in the second degree within one year of another sexual offense." § 13A-6-67(b), Ala. Code 1975; Pettibone v. State, 91 So. 3d 94, 122 (Ala. Crim. App. 2011) (holding that the sentence enhancement under § 13A-6-67(b) applies when "a defendant's first offense of second-degree sexual abuse ... follows, within 12 months, the commission of any other sexual offense.").[6] When Couch committed that offense, the sentencing range for a Class C felony was "not more than 10

[6]The indictment against Couch charging him with second-degree sexual abuse stated that "this offense was a second or subsequent sexual abuse offense committed within one year of another sexual abuse offense." (Third Supp. C. 63.) In its oral charge to the jury, the circuit court did not include the enhancement language that was stated in the indictment. (R. 525-26.) The verdict form shows that the jury found Couch guilty of second-degree sexual abuse "as charged in the indictment." (First Supp. C. 60.) Any argument that Couch's sentence should not have been enhanced from a Class A misdemeanor offense to a Class C felony offense is not properly before this Court because Couch has not raised a challenge to the sufficiency of the evidence or to the correctness of the jury instructions. See Muhammad v. Ford, 986 So. 2d 1158, 1165 (Ala. 2007) (" 'An argument not made on appeal is abandoned or waived.' " (quoting Avis Rent a Car Sys., Inc. V. Heilman, 876 So. 2d 1111, 1124 n. 8 (Ala. 2003))).

years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8[, Ala. Code 1975,] unless sentencing is pursuant to Section 13A-5-9[, Ala. Code 1975]."[7] § 13A-5-6(a)(3), Ala. Code 1975.[8]

When Couch committed the offense, § 15-18-8(b) provided:

> "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."

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[7]The circuit court did not sentence Couch as a habitual felony offender under § 13A-5-9, Ala. Code 1975.

[8]In 2019 the Alabama Legislature amended § 13A-5-6(a)(3) to add that a sentence for a Class C felony offense does not have to comply with § 15-18-8(b) if "the offense is a sex offense pursuant to Section 15-20A-5." See Act No. 2019-465, Ala. Acts 2019. Because the law in effect at the time of the offense controls, we review this issue under the version of § 13A-5-6 in effect in 2017. See Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005).

This Court has stated:

> "[Sections] 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, do not allow a trial court to impose a 'straight' sentence for a Class C felony when the Habitual Felony Offender Act does not apply. Instead, under § 13A-5-6(a)(3), once the trial court imposes on a defendant a sentence length between 1 year and 1 day and 10 years, the trial court must either:
>
> > "(1) Sentence the defendant to probation, drug court, or a pretrial diversion program; or
> >
> > "(2) 'Split' the confinement portion of the defendant's sentence to a period not exceeding two years, suspend the remainder of the defendant's sentence, and impose a term of probation on the defendant that does not exceed three years."

Jackson v. State, 317 So. 3d 1018, 1024-25 (Ala. Crim. App. 2020).

The circuit court sentenced Couch to 10 years' imprisonment for his second-degree-sexual-abuse conviction, and that sentence was within the statutory range. The circuit court did not, however, suspend or split Couch's sentence for second-degree sexual abuse under § 15-18-8(b), so we must remand this case to the circuit court for it to impose a sentence for that conviction that complies with §§ 13A-5-6(a)(3) and 15-18-8(b).

In remanding this case, we note that Couch's 10-year sentence is valid and that the circuit court cannot alter the underlying sentence. See

Jackson, 317 So. 3d at 1025; Moore v. State, 871 So. 2d 106, 110 (Ala. Crim. App. 2003). We also note that, if the circuit court imposes a split sentence on remand, it must impose a probationary period that complies with § 15-18-8(b). See Goldsmith v. State, 200 So. 3d 45, 46 (Ala. Crim. App. 2015) ("[A] trial court lacks jurisdiction to split a defendant's sentence 'without ordering a probationary period to follow the confinement portion of the sentence.' ") (quoting Moore, 871 So. 2d at 109.).

This cause is remanded to the circuit court for that court to impose a sentence that complies with §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975. Due return should be made to this Court within 28 days of the release of this opinion.

AFFIRMED AS TO CONVICTIONS; REMANDED WITH INSTRUCTIONS AS TO SENTENCING.

Windom, P.J., and McCool and Cole, JJ., concur. Kellum, J., concurs in the result.