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Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0423

John Alford Love

v.

State of Alabama

**Appeal from Morgan Circuit Court
(CC-19-694)**

PER CURIAM.

John Alford Love appeals the trial court's order directing him to pay \$11,137.35 in restitution.

CR-20-0423

In November 2020, pursuant to a plea agreement with the State, Love pleaded guilty to two counts of theft of property in the first degree, see § 13A-8-3(b), Ala. Code 1975, for stealing a Pontiac Firebird automobile owned by Sandra Fuqua and a Ford Taurus automobile owned by Zandra Fennell. In accordance with the plea agreement, the trial court sentenced Love to 24 months' imprisonment for each conviction, to run concurrently, suspended the sentences, and placed Love on unsupervised probation for 24 months. After a restitution hearing on February 1, 2021, the trial court ordered Love to pay \$9,637.35 in restitution to Fuqua and \$1,500.00 in restitution to Fennell. Love timely filed a notice of appeal from the restitution order.

On appeal, Love contends: (1) that the trial court erred in ordering him to pay \$1,500.00 in restitution to Fennell, which was the price she paid for the vehicle when she purchased it 6 years before the theft, instead of an amount equal to the fair market value of the vehicle at the time of the theft; and (2) that the trial court erred in failing to include in its restitution order findings regarding the underlying facts and circumstances leading to the order of restitution, the reasons supporting

CR-20-0423

the amount of restitution, the manner and method of payment, and the court's consideration of Love's financial ability to pay restitution. The State argues that this appeal is due to be dismissed because, it says, Love waived his right to appeal as part of his plea agreement.

As part of his plea agreement with the State, Love agreed to "waive his right to appeal or contest, directly or collaterally, his conviction or sentence on any ground, unless the Court should impose a sentence in excess of the statutory maximum or was without jurisdiction to enter the judgment or impose the sentence." (C. 27.) As the State correctly argues, restitution is part of a defendant's criminal sentence. "A restitution hearing is a component of a criminal sentencing proceeding, and restitution is a component of the criminal defendant's punishment." Ex parte Holderfield, 255 So. 3d 743, 745 (Ala. 2016). "[R]estitution is viewed as being incident to criminal prosecution, see Piggly Wiggly No. 208, Inc. v. Dutton, 601 So. 2d 907 (Ala. 1992), and is a part of the criminal sentence that serves both a compensatory function for the victim and a rehabilitative function for the defendant." Ex parte Stewart, 74 So. 3d

CR-20-0423

944, 950-51 (Ala. 2011). As this Court explained in Roberts v. State, 863 So. 2d 1149 (Ala. Crim. App. 2002):

"[R]estitution is not a claim that belongs to the victim; it is an important measure that the circuit court is statutorily obligated to employ as part of criminal sentencing -- a measure that has both salutary remedial and rehabilitative characteristics. Restitution is a part of the criminal sentence rather than merely a debt between the defendant and the victim. Although one of the purposes of restitution is to make the victim whole, payment of restitution also advances the rehabilitative purposes of sentencing."

863 So. 2d at 1155. Because restitution is part of a criminal sentence, Love's waiver of his right to appeal or to collaterally attack his convictions and sentences encompasses the trial court's restitution order. See, e.g., King v. State, 862 So. 2d 675 (Ala. Crim. App. 2003) (recognizing that a trial court's restitution order is included in a waiver of the right to appeal and to collaterally attack a conviction and sentence).

It is well settled that "a defendant may waive his right to appeal as part of a negotiated plea agreement so long as he is fully advised of its implications and he voluntarily agrees to enter into the agreement." Watkins v. State, 659 So. 2d 688, 689 (Ala. Crim. App. 1994). However, such a waiver does not bar appellate review of a challenge to the

CR-20-0423

voluntariness of the guilty plea or to the voluntariness of the waiver, or of claims of ineffective assistance of counsel. See, e.g., Boglin v. State, 840 So. 2d 926, 929-30 (Ala. Crim. App. 2002) ("The presence of a waiver of the right to collateral review should not bar review of the voluntariness of a guilty plea because, as noted above, an involuntary guilty plea will necessarily render the waiver involuntary and a waiver cannot be enforced if it is not voluntary. For this same reason, the voluntariness of the waiver itself may also be reviewed in a Rule 32 petition. In addition, because ineffective assistance of counsel may, in some circumstances, render a guilty plea involuntary, see Ex parte Blackmon, 734 So. 2d 995 (Ala. 1999), we believe that claims of ineffective assistance of trial counsel may also be raised in a Rule 32 petition, despite a waiver of collateral review."). In addition, the waiver in this case excepts from its operation a challenge to Love's 24-month sentences on the ground that they exceed the statutory maximum and challenges to the trial court's jurisdiction to render the judgments or to impose the sentences.

Because Love has appealed only from the trial court's restitution order, he does not challenge the voluntariness of his guilty pleas or the

CR-20-0423

voluntariness of his waiver of his right to appeal, and he does not argue that his sentences exceed the statutory maximum. He also does not raise any claims of ineffective assistance of counsel. Moreover, the two issues he does raise on appeal are waivable if not properly preserved in the trial court and, as such, do not implicate the trial court's jurisdiction to render the judgments or to impose the sentences. See, e.g., D.W.L. v. State, 821 So. 2d 246, 249 (Ala. Crim. App. 2001); Howard v. State, 639 So. 2d 555, 555-56 (Ala. Crim. App. 1993); and Briggs v. State, 549 So. 2d 155, 160-61 (Ala. Crim. App. 1989) (all recognizing that a challenge to the amount of restitution must be preserved in the trial court or it is waived); and Dollar v. State, 687 So. 2d 207, 208 (Ala. Crim. App. 1996) (holding that a challenge to defects in a restitution order must be preserved in the trial court or it is waived), rev'd on other grounds, 687 So. 2d 209 (Ala. 1996). See also Ex parte Phillips, 887 So. 2d 324, 325 (Ala. Crim. App. 2004) ("Because this issue is waivable on appeal, it does not involve depriving the trial court of its jurisdiction; thus, this issue is not jurisdictional." (citations omitted)); and Mitchell v. State, 777 So. 2d 312, 313 (Ala. Crim.

CR-20-0423

App. 2000) ("Nonjurisdictional issues can be waived; jurisdictional issues cannot.").

This Court has dismissed an appeal from the dismissal of a postconviction petition based on the defendant's waiver of his right to collaterally attack a conviction and sentence when, as here, the defendant's arguments in his petition did not fall within any exceptions to the waiver. See King, 862 So. 2d at 676-77 ("[B]ecause King waived his right to seek postconviction relief as part of his plea agreement, and because King's claim is not jurisdictional and does not concern the voluntariness of his plea, the voluntariness of his waiver, or counsel's effectiveness, there is nothing for this Court to review, and King's appeal is due to be dismissed."). We have likewise dismissed an appeal from the dismissal of a de novo appeal to the circuit court based on the defendant's waiver of his right to appeal when the defendant had not filed in the district court a motion to withdraw his guilty plea to preserve for review challenges to the voluntariness of his guilty plea and the voluntariness of his waiver. See Moffett v. State, 833 So. 2d 89, 92 (Ala. Crim. App. 2001). And in Watson v. State, 808 So. 2d 77, 81 (Ala. Crim. App. 2001), this

CR-20-0423

Court dismissed a direct appeal of a judgment entered on a guilty plea based on the defendant's waiver of his right to appeal when, even though the defendant had filed a motion to withdraw his guilty plea, he had not raised in that motion the challenges to the voluntariness of his guilty plea and the voluntariness of his waiver that he raised on appeal.

Subsequently, in Ex parte Sharpley, 935 So. 2d 1158 (Ala. 2005), the Alabama Supreme Court reviewed this Court's dismissal of a direct appeal of a judgment entered on a guilty plea under circumstances indistinguishable from Watson, supra. Sharpley had waived his right to appeal as part of a plea agreement with the State¹ and had filed a motion to withdraw his guilty plea, without stating any grounds in support. This Court dismissed Sharpley's appeal because, even though he had moved to withdraw his plea, he had not preserved the specific issues he raised on appeal. Sharpley v. State (No. CR-03-0696), 920 So. 2d 610 (Ala. Crim.

¹The record shows that the waiver was "made a part of and [was] given in consideration of the plea agreement reached in this cause by [Sharpley] and the State of Alabama." (Record in CR-03-0696, C. 36.) See Wadsworth v. State, 507 So. 2d 572, 573 (Ala. Crim. App. 1987) ("This Court can take judicial notice of its own records.").

App. 2004) (table). The Supreme Court reversed this Court's dismissal of the appeal on the narrow issue whether Sharpley's timely motion to withdraw his guilty plea was sufficient to invoke his right to appeal. The Court held: "[B]ecause Sharpley filed a timely motion to withdraw his guilty plea, he properly invoked his right to appeal pursuant to Rule 26.9(b)(4)(ii), Ala. R. Crim. P." 935 So. 2d at 1162. The Court remanded the case to this Court, which affirmed the lower court's judgment.

Ex parte Sharpley expressly turned on whether the appellant, by timely moving to withdraw his guilty plea, had "properly invoked his right to appeal pursuant to Rule 26.9(b)(4)(ii), Ala. R. Crim. P." 935 So. 2d at 1162. The Court held that, because Sharpley had timely moved to withdraw his guilty plea, this Court could not simply dismiss the appeal. By its own terms, Ex parte Sharpley does not apply to a case like this in which a defendant has waived his right to appeal and does not move to withdraw his plea.² Thus, Ex parte Sharpley is inapplicable here.

²Because the facts in Watson, supra, in which the defendant moved to withdraw his guilty plea, are indistinguishable from those in Ex parte Sharpley, Watson is no longer valid to the extent Watson requires dismissal of an appeal in such a circumstance. The facts in Moffett, supra,

Because Love waived his right to appeal, did not move to withdraw his guilty plea, and did not preserve any issues for appellate review, this appeal is due to be, and is hereby, dismissed.

APPEAL DISMISSED.

McCool and Cole, JJ., concur. Kellum, J., concurs in the result, with opinion. Minor, J., concurs in the result. Windom, P.J., dissents, with opinion.

are analogous to this case, and thus Ex parte Sharpley does not affect Moffett. Likewise, the facts in King, supra, are analogous to this case, although King involved an appeal of the dismissal of a postconviction petition under Rule 32, Ala. R. Crim. P. As noted above, in King, the petitioner "waived his right to appeal and his right to collaterally attack his conviction on any ground except jurisdictional grounds." 862 So. 2d at 676. Because of that waiver and because King did not allege a postconviction claim challenging the voluntariness of his plea, this Court dismissed the appeal. Cf. State v. Cantu, 660 So. 2d 1026, 1029 (Ala. 1994) ("[E]ven though a defendant could file a motion under the provisions of Rule 14[, Ala. R. Crim. P.,] to withdraw a plea of guilty and could appeal a trial court's ruling on that motion, the defendant would not be precluded from raising, in a timely filed post-conviction proceeding, the question of the voluntariness of the guilty plea.").

CR-20-0423

KELLUM, Judge, concurring in the result.

When a defendant pleads guilty pursuant to a plea agreement with the State, he must abide by the terms of that agreement. If he agrees to waive his right to appeal as part of the agreement, he must abide by that term as well. Of course, because the waiver of any right must be voluntary, issues impacting the voluntariness of the waiver of the right to appeal -- the voluntariness of the waiver itself, the voluntariness of the guilty plea, and ineffective assistance of counsel -- are, as a matter of law, excepted from the waiver. In addition, as in this case, other issues may be expressly excepted from the waiver by agreement. Thus, a defendant who raises in the trial court and properly preserves for appellate review one or more issues excepted from the waiver may, without violating the terms of the plea agreement, appeal an adverse ruling on those issues, and this Court will consider those issues. If, however, a defendant does not properly preserve for appellate review one or more issues excepted from the waiver, the defendant's waiver of his right to appeal is presumed to be valid and the appeal is due to be dismissed based on that waiver. See, e.g., Watson v. State, 808 So. 2d 77 (Ala. Crim. App. 2001); Moffett

CR-20-0423

v. State, 833 So. 2d 89 (Ala. Crim. App. 2001); Boglin v. State, 840 So. 2d 926 (Ala. Crim. App. 2002); and King v. State, 862 So. 2d 675 (Ala. Crim. App. 2003).

In Sharpley v. State (No. CR-03-0696), 920 So. 2d 610 (Ala. Crim. App. 2004) (table), this Court, in an unpublished memorandum, dismissed Sharpley's appeal from his conviction and sentence. Sharpley had pleaded guilty to first-degree robbery and, in addition to signing an Ireland³ form, had signed a "Notice and Waiver of Right to Appeal and Right to Seek Post-Conviction Relief." (Record in case no. CR-03-0696, C. 36.) This Court dismissed the appeal on the authority of Watson, supra, specifically finding that Sharpley had waived his right to appeal and "he did not challenge the voluntariness of his guilty plea or the voluntariness of his waiver in his post-judgment motion" and that, therefore, "his arguments [were] not properly before this court."⁴ In other words, because Sharpley

³Ireland v. State, 47 Ala. App. 65, 250 So. 2d 602 (1971).

⁴Although this Court failed to recognize Boglin, supra, and its holding that claims of ineffective assistance of counsel are also excepted from a waiver of the right to appeal, Sharpley had not raised any claims of ineffective assistance of counsel, either in the trial court or on appeal..

CR-20-0423

had failed to preserve for review any issue impacting the voluntariness of the waiver or any other issue excepted from the waiver, the waiver was presumed valid, and Sharpley's appeal was due to be dismissed based on the waiver. In a somewhat puzzling opinion, the Alabama Supreme Court reversed this Court's judgment and remanded the cause "for consideration of Sharpley's appeal." Ex parte Sharpley, 935 So. 2d 1158, 1162 (Ala. 2005).

As the main opinion correctly recognizes, the Supreme Court reversed this Court's judgment dismissing Sharpley's appeal "on the narrow issue whether Sharpley's timely motion to withdraw his guilty plea was sufficient to invoke his right to appeal." ___ So. 3d at ____.

However, that was not the issue the Supreme Court had granted certiorari review to consider, nor had Sharpley even raised that issue in his certiorari petition. The Supreme Court "granted Sharpley's petition for a writ of certiorari to address his claim that he had reserved his right to appeal the issue whether the application of the firearm-enhancement statute to increase his sentence was proper." Ex parte Sharpley, 935 So. 2d at 1160. Later in its opinion, the Court reiterated that it had "granted

Sharpley's petition for a writ of certiorari to decide the sole issue whether Sharpley had properly reserved the right to appeal the application of the firearm-enhancement statute in determining his sentence." Id. at 1161 (emphasis added.) Thus, the Supreme Court reversed this Court's dismissal of Sharpley's appeal on an issue for which it had not granted certiorari review.⁵

Moreover, this Court did not dismiss Sharpley's appeal because he had not properly invoked his right to appeal. Indeed, we expressly recognized in our unpublished memorandum that Sharpley had timely

⁵In Marshall v. State, 884 So. 2d 900 (Ala. 2003), the Alabama Supreme Court held that this Court had erred in relying on its judgment in Ex parte Fountain, 842 So. 2d 726 (Ala. 2001), affirming that portion of this Court's judgment affirming the trial court's grant of an out-of-time appeal. The Supreme Court had stated in Ex parte Fountain: "[W]e affirm that aspect of the judgment of the Court of Criminal Appeals affirming the grant of the out-of-time appeal" and its judgment line read: "AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS." 842 So. 2d at 730-31. The Court in Marshall described its judgment in Ex parte Fountain partially affirming this Court's judgment as "dicta," 884 So. 2d at 905, because the issue whether the out-of-time appeal had been properly granted "was not raised [in the] certiorari petition; certiorari review was not granted as to it; and it was, therefore, not before [the Supreme Court] in Ex parte Fountain." 884 So. 2d at 903.

CR-20-0423

filed a motion to withdraw his guilty plea. Rather, as noted above, we dismissed the appeal because Sharpley had waived his right to appeal and had failed to properly preserve for review any issue excepted from that waiver. Although the Supreme Court recognized in passing that this Court had relied on Watson, supra, to dismiss Sharpley's appeal, and it briefly mentioned that Sharpley had signed a waiver-of-appeal form, it did not otherwise address Sharpley's waiver or this Court's reliance on Watson in its opinion. Simply put, it did not address whether the reason for this Court's dismissing Sharpley's appeal was legally sound. Thus, in addition to reversing this Court's judgment on an issue it had not granted certiorari review to consider, the Supreme Court reversed this Court's judgment on a ground different than the ground upon which this Court's judgment was based.

That being said, the Supreme Court nonetheless reversed this Court's judgment and directed us to consider Sharpley's appeal, and that judgment must stand for something. According to the main opinion, Ex parte Sharpley stands for the proposition that whenever a defendant properly invokes his right to appeal by timely filing a motion to withdraw

CR-20-0423

his guilty plea, this Court cannot dismiss the appeal even if the defendant has waived his right to appeal as part of a plea agreement with the State. Under that view, a defendant who enters into a plea agreement with the State, a term of which is that he waives his right to appeal his conviction and sentence, is free to violate that agreement and pursue an appeal as long as he invokes the right he agreed to waive by timely filing a motion to withdraw his guilty plea. I do not believe the Supreme Court intended such a result when it reversed this Court's judgment dismissing Sharpley's appeal.

In my view, Ex parte Sharpley should be narrowly interpreted in light of the specific circumstances of that case and Watson and its progeny. Although the main opinion states that Sharpley waived his right to appeal as part of a plea agreement with the State, the record from Sharpley's appeal reflects otherwise. The main opinion is correct that the waiver-of-appeal form signed by Sharpley included language stating that "[t]his waiver is made a part of and is given in consideration of the plea agreement reached in this case." (Record in CR-03-0696, C. 36.) However, that waiver form is a standard preprinted form (it is identical to the form

CR-20-0423

used in this case); the record contains no written plea agreement; and, during the plea colloquy, after advising Sharpley of his rights and explaining the sentencing range, the trial court asked what the plea agreement was, and Sharpley's trial counsel stated "[t]here is none." (Record in CR-03-0696, R. 8.) In Sharpley's application for rehearing in this Court and in his petition for certiorari review in the Supreme Court, Sharpley's appellate counsel also stated that Sharpley had pleaded guilty without a plea agreement with the State.⁶ Additionally, before this Court dismissed Sharpley's appeal, we remanded the cause for the trial court to determine when Sharpley's motion to withdraw his guilty plea had been denied, and the trial court stated in its order on remand, among other things, that Sharpley had pleaded guilty "without a plea agreement." (Record in CR-03-0696, C. 53.) I choose to credit the trial court's finding and counsel's statements to the trial court, to this Court, and to the Supreme Court over the standard language found in a commonly used

⁶Indeed, one of the issues Sharpley raised in his application for rehearing and in his petition for certiorari review was that his waiver of his right to appeal was void because it was not made as part of a plea agreement.

CR-20-0423

preprinted form that may or may not accurately reflect the circumstances in any given case.

Sharpley waived his right to appeal without the benefit of a plea agreement; Watson and its progeny are based on the validity of a waiver of the right to appeal that is part of a plea agreement; and no Alabama court has addressed the validity of a waiver of the right to appeal that is not part of a plea agreement. The Alabama Supreme Court was surely aware of these facts when it reversed this Court's dismissal of Sharpley's appeal. Nothing can be inferred from the Supreme Court's decision not to address the validity or effect of Sharpley's waiver of his right to appeal, but the Court's decision to reverse this Court's dismissal of Sharpley's appeal can certainly be narrowly construed in light of the facts of the case, and I believe it should be. Ex parte Sharpley does not, and should not, apply to cases in which a defendant waives his right to appeal or to seek postconviction relief as part of a plea agreement with the State. Rather, it applies only when a defendant waives his right to appeal or to seek postconviction relief without a plea agreement with the State.

CR-20-0423

I agree that the instant appeal is due to be dismissed. However, because I believe the interpretation of Ex parte Sharpley in the main opinion is overly broad and that Watson remains good law, I concur only in the result.

CR-20-0423

WINDOM, Presiding Judge, dissenting.

Where, as here, restitution is ordered after sentencing, that order is separately appealable. Ex parte Holderfield, 255 So 3d 743, 746 n.2 (Ala. 2016). John Alford Love timely filed a notice of appeal of the circuit court's restitution order, thereby invoking the appellate jurisdiction of this Court. Thus, I believe Love's appeal of the restitution order is properly before this Court and should not be dismissed. See Ex parte Sharpley, 935 So. 2d 1158, 1162 (Ala. 2005).

Nonetheless, I do believe that Love has waived review of the circuit court's restitution order by virtue of his guilty plea. Because I would affirm the circuit court's judgment, I respectfully dissent.