

REL: May 27, 2022

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Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0801

Cary Trant Jefferson

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-16-1084.60)

COLE, Judge.

Cary Trant Jefferson appeals the Madison Circuit Court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief.

Facts and Procedural History

In 2017, Jefferson was convicted of murder, a violation of § 13A-6-2, Ala. Code 1975, and was sentenced to 30 years' imprisonment. The evidence at Jefferson's trial tended to establish the following:

"In August 2015, Jefferson and Doris Timmons were in a romantic relationship. They had been living together for several months when the relationship began to deteriorate. Timmons was in the process of packing her things to move out when Jefferson shot her. After shooting her, Jefferson called emergency 911 for help. Police and medical personnel responded to the residence. Timmons was transported to the hospital. Within a couple of hours of the shooting, Investigator Stacey Rutherford spoke to Timmons while she was in the hospital emergency room. Investigator Rutherford testified that Timmons told him that she had been out with her family that evening and had returned home. Her boyfriend, Jefferson, was intoxicated and started yelling at her, telling her to leave the residence. Timmons told Jefferson that she would leave in the morning. Timmons went into a separate bedroom and got into bed. Timmons told Inv. Rutherford that Jefferson entered the room, pulled the blanket off of her, and told her to get out. Jefferson then left the room and, shortly thereafter, Timmons heard a gunshot. Jefferson returned to the room and shot her. Timmons told Inv. Rutherford that she did not want to die. The next day, Inv. Rutherford returned to the hospital and spoke with Timmons again. Timmons gave another statement to Inv. Rutherford. This statement essentially reiterated the facts provided in her previous statement but included a few more details. Timmons was paralyzed from the chest down and lived in that condition for almost three months before dying from complications resulting from her injury.

"Jefferson testified on his own behalf. He admitted to consuming alcoholic beverages on the day of the shooting but denied being intoxicated. He stated that he had no knowledge that Timmons was in the process of moving out at the time. Jefferson testified that when Timmons came home that evening, he had just gotten out of the shower. He asked her if she was coming to bed, and Timmons told him that she would be in later. Timmons, instead, went to bed in another room. When Jefferson used the restroom in the hallway, he looked into the other bedroom, which was dark, and saw a light indicating that Timmons was using her cell phone. When Timmons became aware of Jefferson's presence, she covered the phone up. Jefferson testified that he went around on the side of the bed and pulled the comforter back to see what Timmons was doing. Jefferson thought that maybe she was texting another man. Jefferson stated that he asked her who she was texting and tried to grab the phone. The phone flipped onto the bed. According to Jefferson, Timmons then got out of the bed and pulled a knife from under her pillow. She told Jefferson she was seeing someone else and to go away. Jefferson testified that he feared she might stab him so he went to his room and grabbed his pistol. He fired the pistol to the floor in the hallway as 'a warning shot' for Timmons to put the knife down. (R. 189.) Jefferson walked back into Timmons's room. Timmons was standing by the bed. Jefferson told her to put the knife down. Jefferson testified that she continued to hold the knife and that 'she was standing like right there in the corner and she said something, Father, God or something and she stepped toward me and that's when I fired the shot.' (R. 190.) Timmons fell to the floor. Jefferson tried to use the land line to call for help, but he could not get a dial tone. Jefferson went back to Timmons's room and used her cell phone to call emergency 911."

Jefferson v. State (No. CR-17-0275, Aug. 3, 2018), 286 So. 3d 13 (Ala. Crim. App. 2018) (table).

On direct appeal, Jefferson argued, among other things, that "the trial court erred by admitting into evidence a copy of the autopsy report" because the "admission of the report in lieu of testimony violated his right to confront the witnesses against him." Id. This Court noted that Jefferson's trial counsel argued that the admission of the autopsy report "deprives Mr. Jefferson of his right to confront the witnesses against him under the Sixth Amendment of the United States constitution," but it rejected Jefferson's argument on the basis that, under Perkins v. State, 897 So. 2d 457 (Ala. Crim. App. 2004),

"the report was admitted under the business-record exception to hearsay, which ... 'is a firmly rooted exception to the hearsay rule.' Perkins, 897 So. 2d at 464. Additionally, the autopsy report was non-testimonial; consequently, its admission did not violate Jefferson's right to confront the witnesses against him."

Jefferson, supra. This Court further explained that, even so, the admission of the autopsy report was harmless error because Jefferson admitted that he shot Timmons, albeit under a claim of self-defense, and because Jefferson did not challenge the cause of death during the trial.

Thereafter, Jefferson sought certiorari review in the Alabama Supreme Court. The Alabama Supreme Court granted Jefferson's petition on November 8, 2018, but it quashed the writ on March 15, 2019.

See Ex parte Jefferson, 283 So. 3d 769 (Ala. 2019). Justice Shaw authored a special concurrence, which Justice Bolin joined, in which Justice Shaw concluded that Jefferson's trial counsel's "bare-bones objection" did not preserve for appellate review his Confrontation Clause argument. Ex parte Jefferson, 283 So. 3d at 771 (Shaw, J., concurring specially). Justice Sellers filed an opinion dissenting from the Supreme Court's decision, which Justices Mendheim and Mitchell joined. In his dissenting opinion, Justice Sellers concluded that Jefferson's Confrontation Clause argument was preserved for appellate review and entitled him to relief. This Court issued a certificate of judgment on March 15, 2019, making Jefferson's conviction and sentence final.

On July 31, 2019, Jefferson filed the instant Rule 32 petition. (C. 10-20.) In his petition, Jefferson alleged that his trial counsel was ineffective for failing to preserve his Confrontation Clause argument for appellate review. (C. 15-17.) Jefferson also alleged that newly discovered evidence exists that requires that his conviction and sentence be vacated. Jefferson alleged that he had obtained a toxicology report through a public-records request made during the appeal process, which "revealed the presence of diazepam (270 ng/g), nordiazepam, (460 ng/g), and

oxycodone (1200 ng/g)" in Timmons's liver. (C. 18.) Jefferson further alleged that he had "consulted with a toxicologist and retired Professor of Pharmacology, Dr. Jimmie Valentine," who had opined "'that oxycodone and the other drugs/metabolites had a role in [Timmons's] death.'" (C. 18.)

On August 21, 2019, the State moved to dismiss Jefferson's petition, arguing, among other things, that Jefferson's claims were insufficiently pleaded. (C. 82- 84.) On the same day the State moved to dismiss his petition, Jefferson filed a "Reply to State's Response," in which Jefferson argued that his claims were sufficiently pleaded but asked the circuit court, if the circuit court agreed with the State's argument, for leave to amend his petition "in lieu of a summary dismissal." (C. 88.)

On August 26, 2019, the circuit court issued an order giving Jefferson 10 days to amend his petition. (C. 95.) On September 5, 2019, at 9:53 a.m., before the expiration of that 10-day period, the circuit court issued an order summarily dismissing Jefferson's petition. (C. 96.) This appeal follows.¹

¹Jefferson filed a motion asking the circuit court to reconsider its summary dismissal of his petition, which the circuit court granted after it lost jurisdiction over Jefferson's petition. Thereafter, the circuit court

Discussion

On appeal, Jefferson argues that the circuit court erred when it summarily dismissed his petition "without holding an evidentiary hearing, and without allowing [him] to amend" his petition. (Jefferson's brief, p. 24.) The State argues that the circuit court properly dismissed Jefferson's petition because it "was insufficiently pleaded and any error in denying the petition without allowing him to amend was harmless." (State's brief, p. 11.) For the following reasons, we reverse the circuit court's summary dismissal of Jefferson's petition and we remand this case for further proceedings.

In Ex parte Rhone, 900 So. 2d 455 (Ala. 2004), the Alabama Supreme Court addressed amending Rule 32 petitions as follows:

"[A]lthough '[l]eave to amend a Rule 32 petition is within the discretion of the trial court, ... it should be freely granted.' Ex parte Allen, 825 So. 2d 271, 273 (Ala. 2002) (emphasis added) (quoted with approval in Ex parte Nesbitt, 850 So. 2d 228, 232 (Ala. 2002)).

allowed Jefferson to amend his petition, conducted an evidentiary hearing on his petition, and denied his petition. Jefferson then appealed to this Court. This Court dismissed Jefferson's appeal as untimely because Jefferson filed his notice of appeal "over four months after the court's September 5, 2019, order summarily dismissing his petition was entered." See Jefferson v. State, (CR-19-0448). Thereafter, Jefferson filed a Rule 32 petition requesting an out-of-time appeal, the circuit court granted Jefferson's petition, and Jefferson filed a timely notice of appeal.

"This Court's statements concerning the amendment of Rule 32 petitions are supported by the plain language of Rule 32.7, Ala. R. Crim. P. Subsection (b) of that rule unambiguously grants discretion to the trial court, providing that '[a]mendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment." (Emphasis added.) Guiding the exercise of that discretion is the mandate of subsection (d) that '[l]eave to amend shall be freely granted." (Emphasis added.) However, because the trial court has discretion to refuse an amendment to a Rule 32 petition, we must consider the nature of the factors that would provide a proper basis for such a refusal.

"In Ex parte Allen, this Court cited Talley v. State, 802 So. 2d 1106, 1107 (Ala. Crim. App. 2001), in support of our statement of the principles relevant to the amendment of Rule 32 petitions. In Talley, the Court of Criminal Appeals stated:

""[A]mendments should be freely allowed and ... trial judges must be given discretion to allow or refuse amendments.... The trial judge should allow a proposed amendment if it is necessary for a full determination on the merits and if it does not unduly prejudice the opposing party or unduly delay the trial.' Record Data International, Inc. v. Nichols, 381 So. 2d 1, 5 (Ala. 1979) (citations omitted). 'The grant or denial of leave to amend is a matter within the sound discretion of the trial judge....' Walker v. Traugher, 351 So. 2d 917 (Ala. Civ. App. 1977)."

"'Cochran v. State, 548 So. 2d 1062, 1075 (Ala. Crim. App. 1989).'

"802 So. 2d at 1107-08 (emphasis added). The statements in Talley are consistent with this Court's prior decisions, as well as with Rule 32.7. Thus, it is clear that only grounds such as actual prejudice or undue delay will support a trial court's refusal to allow, or to consider, an amendment to a Rule 32 petition."

Ex parte Rhone, 900 So. 2d 455, 457-58 (Ala. 2004).

Here, the circuit court, by granting Jefferson's motion to allow him to amend his Rule 32 petition and giving him 10 days to do so, implicitly found that allowing Jefferson to amend his petition would neither unduly prejudice the State nor unduly delay the proceedings. In other words, the circuit court concluded that there was no basis on which to preclude Jefferson from amending his petition. But instead of allowing Jefferson to amend his petition within 10 days, the circuit court dismissed Jefferson's petition before the expiration of that 10-day period. Because the circuit court implicitly found that allowing Jefferson to amend his petition would neither unduly prejudice the State nor unduly delay the proceedings, the circuit court's summary dismissal of Jefferson's petition before the expiration of the 10-day period it had allowed Jefferson to file an amended petition was an abuse of discretion. But that abuse of discretion does not end our analysis.

As the State argues in its brief on appeal, a circuit court's erroneous refusal to accept or consider an amended Rule 32 petition may be harmless. "This Court has held that the refusal to accept an amendment is harmless when the claim or claims raised in the amendment would not entitle the petitioner to relief." Bishop v. State, [Ms. CR-19-0726, July 9, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021) (citing Spain v. State, [Ms. CR-19-0708, October 16, 2020] ___ So. 3d ___, ___ (Ala. Crim. App. 2020), Wynn v. State, 246 So. 3d 163, 171 (Ala. Crim. App. 2016), and Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005)). Under the unique facts of this case, however, this Court cannot conclude that the circuit court's refusal to consider Jefferson's amended petition in this case was harmless error.

Indeed, although this Court has used a harmless-error analysis to determine whether a circuit court's refusal to accept or consider an amended Rule 32 petition is harmless, this Court has done so only in cases where the amended petition was filed with the circuit court while that court still had subject-matter jurisdiction to consider the amended petition. See, e.g., Bishop, ___ So. 3d at ___ ("Bishop filed his motion to amend on April 9, 2020, five days before the circuit court dismissed his

petition."); Spain, ___ So. 3d at ___ ("Spain filed the motion [to amend his petition] months before the circuit court summarily dismissed the petition."); Wynn, 246 So. 3d at 169 ("Wynn first argues that the circuit court erred in refusing to allow him to amend his postconviction petition to add a new ... claim 45 days before the scheduled evidentiary hearing."); and Wilson, 911 So. 2d at 44-45 (explaining that Wilson's motions to amend were filed before the circuit court dismissed Wilson's petition).

Here, unlike in Bishop, Spain, Wynn, and Wilson, the circuit court summarily dismissed Jefferson's petition and it lost subject-matter jurisdiction over Jefferson's case long before Jefferson filed his amended petition. See Loggins v. State, 910 So. 2d 146, 148 (Ala. Crim. App. 2005) (recognizing that a circuit court retains jurisdiction to modify its judgment in a Rule 32 proceeding for 30 days). The circuit court's loss of jurisdiction over Jefferson's case before he filed his amended petition means that every part of that proceeding after the loss of jurisdiction, including Jefferson's filing of his amended petition, the evidentiary hearing, and the circuit court's order denying Jefferson's petition, was void for lack of jurisdiction. See, e.g., Matthews v. State, [Ms. CR-20-0462, October 8, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021)

("Therefore, the circuit court's August 28, 2019, order and all subsequent orders and proceedings in this case, including the evidentiary hearing and the circuit court's March 8, 2021, order purporting to deny Matthews's petition after the hearing, are void for lack of jurisdiction.") and Petrey v. State, 989 So. 2d 1128, 1133 (Ala. Civ. App. 2008) ("[B]ecause that order was void, this court cannot consider it.").

The State's argument that the circuit court's refusal to accept Jefferson's amended petition was harmless is premised on its belief that the claims raised in that amended petition are insufficiently pleaded and meritless. But, under the facts of this case, Jefferson's amended petition (i.e., the document this Court would need to examine to determine whether the circuit court's refusal to consider it was harmless error) is a nullity, and this Court cannot consider it in this appeal. Consequently, this Court cannot examine Jefferson's amended petition to determine whether the circuit court's decision to summarily dismiss Jefferson's petition before the expiration of the 10-day period it gave him to file his amended petition was harmless error.

To be clear, this Court does not hold that Jefferson's amended petition was sufficiently pleaded or that it entitles him to an evidentiary

hearing. Rather, this Court holds only that the circuit court's decision to allow Jefferson 10 days to amend his Rule 32 petition and its subsequent decision to summarily dismiss his petition before the expiration of that 10-day period was error that cannot be reviewed for harmless error because the circuit court lost jurisdiction over Jefferson's case before he filed his amended petition.

Accordingly, this Court reverses the circuit court's summary dismissal of Jefferson's petition and remands this case to the circuit court for that court to allow Jefferson to file his amended petition. On remand, after Jefferson files his amended petition, the circuit court may take whatever action it deems necessary to proceed with this case, including summary dismissal under Rule 32.7(d), Ala. R. Crim. P., if Jefferson's claims, as amended, may be dismissed under that rule, or conducting an evidentiary hearing if his claims, as amended, entitle him to such.

Conclusion

Based on these reasons, the circuit court's judgment summarily dismissing Jefferson's Rule 32 petition is reversed, and we remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CR-20-0801

McCool and Minor, JJ., concur. Kellum, J., concurs in the result.

Windom, P.J., dissents, with opinion.

WINDOM, Presiding Judge, dissenting.

The circuit court granted Cary Trant Jefferson 10 days to amend his Rule 32, Ala. R. Crim. P., petition for postconviction relief but dismissed his petition before the 10-day period had expired.² I agree with the main opinion that the circuit court should have allowed Jefferson a full 10 days to amend his petition and that the failure to do so was an abuse of discretion. I do not agree, however, that, under the particular facts presented here, a reversal of the circuit court's judgment is necessary. Jefferson raised two claims in his petition, and neither merits further proceedings. Accordingly, I believe that the circuit court's error was harmless.

First, Jefferson asserted that trial counsel was ineffective for failing to adequately preserve for appellate review a claim that the autopsy report violated his Sixth Amendment right to confrontation. This claim is meritless on its face, and no amended pleading can salvage it.³

²The circuit court dismissed Jefferson's petition on the morning of the 10th day.

³Additionally, Jefferson has failed to mention this claim in the argument portion of his brief on appeal. Therefore, I would hold that any challenge to the circuit court's dismissal of this claim is deemed

Jefferson argued on the direct appeal of his conviction that the trial court erred by admitting into evidence a copy of the autopsy report. Jefferson raised several arguments in support of this claim, including that the admission of the autopsy report, absent the testimony of the forensic examiner who conducted the autopsy, violated his Sixth Amendment right to confront the witnesses against him. This Court held in its unpublished memorandum affirming Jefferson's conviction and sentence that this claim was without merit and, moreover, that any error would be harmless beyond a reasonable doubt because Jefferson did not challenge the cause of Doris Timmons's death.

Jefferson filed a petition for writ of certiorari with the Alabama Supreme Court. The Supreme Court initially granted certiorari review but later quashed the writ. Justice Shaw and Justice Sellers each issued a special writing when the Court quashed the writ. Justice Shaw, joined by Justice Bolin, concurring specially, stated that he concurred with quashing the writ of certiorari because he did not believe Jefferson had adequately preserved for review the claim that the admission of the

abandoned. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

autopsy report violated his right to confrontation. See Ex parte Jefferson, 283 So. 3d 769, 770-71 (Ala. 2019). Justice Sellers, joined by Justice Mendheim and Justice Mitchell, dissented and stated that he believed that Jefferson's Confrontation Clause claim had been adequately preserved for review, that the claim was meritorious, and that he would reverse this Court's judgment.

Jefferson relied on these writings in his Rule 32 petition to support his assertion that trial counsel had been ineffective for failing to adequately preserve his Confrontation Clause claim for appellate review. Jefferson, however, focuses on the writings while ignoring the more salient fact – that the Alabama Supreme Court denied certiorari review. Consequently, the holdings in this Court's unpublished memorandum are the "law of the case." "[U]nder the 'law of the case' doctrine, 'whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case.'" ..."Walden v. ES Capital, LLC, 89 So. 3d 90, 107 (Ala. 2011) (quoting Miller & Miller Constr. Co. v. Madewell, 920 So. 2d 571, 572-73 (Ala. Civ. App. 2005)). "The law-of-the-case doctrine

provides that when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the same case, thereby hastening an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided.'" Id. (quoting Martin v. Cash Express, Inc., 60 So. 3d 236, 249 (Ala. 2010)). This naturally includes this Court's holding that Jefferson's Confrontation Clause claim was without merit, and trial counsel cannot be held ineffective for failing to raise a meritless claim. Carruth v. State, 165 So. 3d 627, 642 (Ala. Crim. App. 2014). Because Jefferson's claim of ineffective assistance of trial counsel is meritless on its face, the circuit court's dismissing it without allowing him an opportunity to amend was harmless error. See Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005) ("Although the trial court erred when it denied the motion to file the third amended petition, that error was harmless.").

Unlike Jefferson's first claim, Jefferson's second claim, which is based on newly discovered evidence, is not foreclosed by this Court's decision on direct appeal. Even so, I do not believe further proceedings are necessary here.

Jefferson alleged in his petition that newly discovered evidence exists, in the form of a toxicology report created after Jefferson's trial, that indicates the presence of oxycodone and other drugs in Timmons's liver at the time of her death.⁴ Jefferson pleaded that Dr. Jimmie Valentine, a toxicologist and professor of pharmacology, was prepared to offer testimony that oxycodone and the other drugs in Timmons's system had a role in her death. Jefferson also offered an affidavit from trial counsel, who averred that, had he been aware of the toxicological findings, he would have tried the case differently. Specifically, trial counsel asserted that he would have challenged the cause of death, hired an expert in toxicology, and subpoenaed the forensic examiner who performed the autopsy.

Thirty-two days after the circuit court dismissed his petition, Jefferson filed a timely motion to reconsider, see Rule 1.3, Ala. R. Crim. P.,⁵ challenging, in part, the circuit court's dismissing his petition before

⁴Oxycodone is an opioid analgesic drug approved by the United States Food and Drug Administration for the management of moderate to severe pain. Howland v. Purdue Pharma L.P., 104 Ohio St. 3d 584, 584, 821 N.E.2d 141, 142-43 (2004).

⁵The thirtieth day – October 5, 2019 – fell on a Saturday.

the expiration of the 10 days allotted for him to file an amendment. On the following day, the circuit court granted Jefferson's motion to reconsider. The circuit court then allowed Jefferson to amend his petition, and subsequently granted Jefferson an evidentiary hearing on his petition. At the hearing, Jefferson offered the testimony of Dr. Valentine, who testified that studies existed that established a correlation between oxycodone and the other drugs in Timmons's system and death from pneumonia.⁶ Dr. Valentine opined that the drugs in Timmons's system should "be considered to be somewhat contributory to [Timmons's] death." (R. 35.) Following the evidentiary hearing, the circuit court issued a detailed order denying relief. (C. 233-35.) The circuit court noted Dr. Valentine's testimony that Timmons was prescribed oxycodone, which was a common prescription for paraplegics at the time Timmons was receiving treatment for her injury, and that there was no evidence of opioid abuse before her injury. Given that it was Jefferson who rendered Timmons a paraplegic, Jefferson's evidence at the evidentiary hearing merely reinforced the conclusion in the

⁶Dr. Valentine explained that opioids slow respiration, which impedes the body's ability to eliminate water vapor.

autopsy report "that the state of the victim at death all ties back to the gunshot wound." (C. 234.) The circuit court denied relief on this claim, finding that it was not probable that Jefferson's newly discovered evidence would have changed the outcome of his trial. See Rule 32.1(e)(4), Ala. R. Crim. P.

As the main opinion correctly notes, the circuit court had lost jurisdiction of the case before ruling on Jefferson's motion to reconsider; thus, that order is void. See Loggins v. State, 910 So. 2d 146, 148 (Ala. Crim. App. 2005) (recognizing that a court retains jurisdiction to modify a judgment on a Rule 32 petition for 30 days). The circuit court's order denying relief is likewise void. Regardless, further proceedings are, in my opinion, unnecessary because the "further proceedings" have already been conducted. This Court already knows the contents of Jefferson's amendment to his petition, already knows the evidence Jefferson would offer in support of that petition, and already knows the circuit court's view of the evidence. Remanding this case to give Jefferson a second chance to pursue the wholly unremarkable claim that Timmons, a paraplegic due to Jefferson's shooting her, had a commonly prescribed pain medication in her system at the time of death "would amount to a

formality and would be a waste of judicial resources and time." Banks v. State, 845 So. 2d 9, 19 (Ala. Crim. App. 2002).

Thus, although I agree with the main opinion that the circuit court, in accordance with its order, should have allowed Jefferson a full 10 days to amend his petition, I would nonetheless affirm the circuit court's judgment. Therefore, I respectfully dissent.