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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2011-2012

CR-10-1271

John Charles Yocum

v.

State of Alabama

Appeal from St. Clair Circuit Court
(CC-2006-167.60)

On Return to Remand

WELCH, Judge.

On November 4, 2011, this case was remanded by order with directions for the circuit court to hold an evidentiary hearing and make written findings of fact regarding John Charles Yocum's allegation in his Rule 32, Ala. R. Crim. P.,

petition that his counsel was ineffective for failing to file a speedy-trial motion.

On remand, after conducting an evidentiary hearing, the circuit court found that Yocum's claim alleging ineffective assistance of counsel was not meritorious. We affirm.

In the hearing, the only evidence taken was Yocum's testimony. After the hearing, the circuit court issued the following order:

"This matter was called for hearing on the 21st day of December 2011. [Yocum] and counsel for the State were present. The Court received testimony from [Yocum] on his own behalf. Counsel for the State then cross-examined [Yocum]. No other witnesses were called or requested by either party. The Court received physical exhibits into evidence. Arguments were made to the Court.

"After review of the pleadings, the testimony, exhibits, and arguments, the Court finds as follows:

"[Yocum] has failed to establish that attorney Theresa Terrabonne was ineffective under the standards set out by Strickland v. Washington. [Yocum] has failed to meet his burden of showing a deficiency in the representation of [Yocum] by attorney Terrabonne. [Yocum] has failed to demonstrate that any of the alleged errors attributed to his counsel were a result of deficient professional judgment or conduct rather than a part of a reasonable pre-trial strategy. [Yocum] has admitted that he chose to plead guilty without ever mentioning to his attorney the existence of an allegedly exculpatory witness he now claims to exist. The Court does not find credible [Yocum's]

claim of an alleged exculpatory witness and indeed believes that [Yocum] has made misrepresentations to the Court in regards to this allegedly exculpatory witness. [Yocum] confessed to police in a written statement shortly after the theft that he stole approximately \$20,000 that belonged to the victim. He never mentioned this alleged witness in his statement, to his attorney or to the Court until this Rule 32 petition.

"Based on the testimony, the Court does not find credible [Yocum's] claim that he had no knowledge that he had an active charge. The Court notes that [Yocum] had his probation revoked in federal court and his parole revoked in state court based on this theft charge. The Court further notes that [Yocum] claims being given a more restrictive classification because of this charge and yet he says he made no effort to find if this charge was active. [Yocum] never raised a speedy trial claim himself and never requested his attorney do so. Instead, [Yocum] opted to plead guilty upon the settlement agreement. Further, [Yocum] has not said that he would have forgone the plea agreement to pursue a speedy trial claim and the Court does not find it credible that he would have done so. And this Court would not have granted a speedy trial claim based on the evidence presented to the Court.

"This Court went through a plea colloquy with [Yocum] at the time of his plea and [Yocum] indicated to this Court that he was satisfied with Ms. Terrabonne's services and his plea, Further, the petitioner signed an explanation of rights (Ireland [v. State, 47 Ala. App. 65, 250 So. 2d 602 (1971)) form and a satisfaction of attorney form indicating he was satisfied with the services of Ms. Terrabonne and his plea.

"[Yocum] has failed to show prejudice to his case by the delay. The Court finds no evidence that [Yocum's] ability to defend himself was impaired by

the delay. As stated above, the Court does not find credible and indeed disbelieves [Yocum's] claim of an alleged exculpatory witness. The Court further finds that [Yocum's] claim that he lost the ability to receive concurrent time without merit. This Court could have given [Yocum] credit for time served in those other cases toward this sentence if it thought appropriate. The Court notes that this felony conviction was [Yocum's] 18th felony conviction in Alabama State Courts alone and that he received the minimum sentence under the habitual felony offender act for this offense."

(R.R. 43-44.)

To prevail on a claim of ineffective assistance of counsel, the petitioner must ultimately prove (1) that counsel's performance was deficient and (2) that the deficient performance actually prejudiced the defense. Strickland v. Washington, 466 U.S. 668 (1984).

The circuit court issued a thorough order addressing each of the allegations presented by Yocum, finding that Yocum had failed to prove his claim that counsel was ineffective for failing to file a speedy-trial motion.

"The burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State." Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). "[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking

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post-conviction relief to establish his grounds for relief by a preponderance of the evidence." Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that "[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." "[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). "However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)).

The circuit court found that had Yocum's counsel presented a speedy-trial claim it would have been properly denied. An analysis of the Barker v. Wingo, 407 U.S. 514 (1972), factors -- (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his

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right to a speedy trial; and (4) the degree of prejudice to the defendant -- supports this conclusion.

The length of delay found to exist was 45 months. This factor is unchanged by the evidentiary hearing; however, the length of the delay is merely a starting point for a balancing of the remaining factors if the delay is presumptively prejudicial and is itself not dispositive.

Yocum offered no evidence that the State sought to gain an unfair advantage by the delay, and the delay appears to be the result of mere negligence or indifference; therefore, this factor weighs against the State but not as heavily as if there had been an attempt to gain an advantage.

Yocum offered no evidence indicating that he asserted his right to a speedy trial. The record is silent regarding the date when counsel was appointed. Yocum alleged in his petition that counsel was appointed after August 2009 and he pleaded guilty on February 17, 2010. The circuit court found that he received the minimum sentence that could have been imposed as a habitual offender with eighteen prior Alabama felonies.

Yocum offered no evidence that he suffered oppressive pretrial incarceration or anxiety and concern. Yocum also testified that his assertion in the Rule 32 petition that his ability to defend himself was impaired because he lost the ability to locate an exculpatory witness was in fact a lie. Yocum did not prove which of his 18 prior felonies he was serving time for when he could have been brought to trial and did not show that he lost the opportunity to have his sentence run concurrently with that sentence.

After a consideration of the Barker v. Wingo factors, the trial court determined that Yocum had failed to prove that he received ineffective assistance of counsel. Although it would have been prudent for counsel to have filed a speedy-trial motion, the circuit court's finding that Yocum was not denied a speedy trial is supported by the evidence. A consideration of the factors set out above also convinces this court that Yocum suffered no prejudice as a result of his counsel's failure to file a speedy-trial motion.

The circuit court resolved the disputed issues of fact and decided that Yocum had not met his burden of proof. In so doing the court acted within its discretion. Based on the

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record before us, the circuit judge exercised sound discretion in denying Yocum's petition.

AFFIRMED.

Windom, P.J., and Kellum and Burke, JJ., concur. Joiner, J., concurs in the result.