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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

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Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama

v.

Jeffery Ray Duncan)

(Clay Circuit Court, CC-16-148 and CC-16-149;
Court of Criminal Appeals, CR-16-0890)

MENDHEIM, Justice.

I. Facts and Procedural History

Jeffery Ray Duncan pleaded guilty to unlawful possession of marijuana in the second degree, a Class A misdemeanor, see § 13A-12-214, Ala. Code 1975, and to unlawful possession of a controlled substance, a Class D felony, see § 13A-12-212, Ala. Code 1975. Before sentencing, Duncan made application to, and was accepted into, the Clay-Coosa Drug Court Program ("the drug-court program"). The Clay Circuit Court set Duncan's case on the next drug-court docket and continued the imposition of Duncan's sentence pending Duncan's successful completion of, or expulsion from, the drug-court program.

Duncan was accepted into the drug-court program in January 2017. Less than a month later, Duncan was sentenced to 48 hours in jail for violating the terms and conditions of the drug-court program. Duncan was subsequently sentenced to jail on three additional occasions for violating the terms and conditions of the drug-court program. In May 2017, the circuit court removed Duncan from the drug-court program, based on a recommendation of the drug-court-program coordinator and on the circuit court's finding that Duncan was "unwilling and/or unable to abide by the rules ... of the

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[drug-court program]."¹ According to the May 2017 order, over the course of four months participating in the drug-court program, Duncan had tested positive for the presence of drugs on three occasions, had "missed court and monitoring sessions," and had "failed to complete an assessment as directed by the court." In addition to removing Duncan from the drug-court program, the circuit court's order required Duncan to appear for a sentencing hearing.

At the sentencing hearing, defense counsel argued that the presumptive sentencing standards applied and that they mandated that Duncan's sentence not include incarceration. See Ala. Code 1975, §§ 12-25-30 to -38; Presumptive and Voluntary Sentencing Standards Manual. Specifically, defense counsel argued that the "sentencing event" in Duncan's case included both drug convictions and that the presumptive sentencing standard applicable to "the most serious offense" in Duncan's case (the class D felony controlled-substance conviction) mandated no jail time. The circuit court determined, however, that Duncan's misdemeanor marijuana

¹Duncan did not challenge the sanctions for violation of the terms and conditions of the drug-court program or his removal from that program.

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conviction was not subject to the presumptive sentencing standards, and it sentenced Duncan to 12 months in jail for that conviction. For the felony controlled-substance conviction, the circuit court applied the presumptive sentencing standards and sentenced Duncan to 23 months' imprisonment, which the court suspended, and placed Duncan on 2 years' supervised probation.² The circuit court ordered that Duncan's sentences were to run concurrently.

Duncan appealed his sentences to the Court of Criminal Appeals. Duncan v. State, [Ms. CR-16-0890, December 15, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017). On appeal, Duncan argued that the sentences imposed by the circuit court "represented an improper departure from the presumptive sentencing standards," Duncan, ___ So. 3d at ___, because the circuit court imposed a period of incarceration, although he says the presumptive sentencing standards did not provide for incarceration under the facts of his case. The State argued that the circuit court "properly sentenced Duncan to jail time pursuant to § 13A-5-8.1, Ala. Code 1975, because Duncan was

²Under the presumptive sentencing standards, the suspended sentence is considered to be a "non-prison" disposition. Presumptive and Voluntary Sentencing Standards Manual 27, 28.

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terminated from a drug-court program for noncompliance."

Duncan, ___ So. 3d at ____.³

The Court of Criminal Appeals reversed the judgment of the circuit court, holding (1) that the presumptive sentencing standards applied to both convictions, (2) that the presumptive sentencing standards did not authorize a sentence of imprisonment in Duncan's case, (3) that the circuit court had no authority to sentence Duncan to jail on the misdemeanor conviction, and (4) that § 13A-5-8.1 required a sentence imposed after termination from a drug-court program to fully comply with the presumptive sentencing standards, including the dispositional component of the sentence. Judge Joiner dissented with an opinion, which Judge Burke joined.⁴

³Section 13A-5-8.1 provides, in pertinent part:

"If a defendant is participating in a court supervised evidence-based treatment program ... or any other court ordered rehabilitative program and is subsequently terminated from that program, the court may then order that the defendant be confined in either a prison [or] jail-type institution The court shall impose a sentence length that complies with either Section 13A-5-6, Section 13A-5-9, or the sentencing guidelines, whichever is applicable. ..."

(Emphasis added.)

⁴Judge Burke also issued a separate dissenting opinion.

II. Analysis

The main opinion of the Court of Criminal Appeals discussed the presumptive sentencing standards as follows:

"In 2012, the legislature enacted § 12-25-34.2, Ala. Code 1975, effective May 15, 2012, to implement presumptive sentencing standards. See Act No. 2012-473, Ala. Acts 2012. See also Hyde v. State, 185 So. 3d 501, 502-04 (Ala. Crim. App. 2015) (detailing the history of the 2012 amendment to the Alabama Sentencing Reform Act of 2003, codified at §§ 12-25-30 to -38, Ala. Code 1975). The presumptive sentencing standards became effective on October 1, 2013, see Clark v. State, 166 So. 3d 147 (Ala. Crim. App. 2014), and were amended on October 1, 2016, to 'incorporate the new Class D felonies,' to add additional nonviolent crimes to the presumptive sentencing standards, and to 'provide information on the new sentencing parameters for all Class C and Class D felony offenses.' See Presumptive and Voluntary Sentencing Standards Manual 15.

"The Presumptive and Voluntary Sentencing Standards Manual, as amended, sets forth the offenses subject to the presumptive sentencing standards and provides circuit courts instructions and worksheets to use in imposing a sentence under the presumptive sentencing standards. ... 'A sentencing event includes all convictions sentenced at the same time, whether included as counts in one case or in multiple cases, regardless of whether offenses are worksheet offenses.' Presumptive and Voluntary Sentencing Standards Manual 23 (emphasis in original). The Presumptive and Voluntary Sentencing Standards Manual sets forth five rules used to determine the 'most serious offense' at a sentencing event. 'Rule 5' provides that, '[w]here a sentencing event includes both a worksheet offense and a non-worksheet offense and the worksheet offense has a higher statutory maximum penalty

governed by the felony offense classification, the worksheet offense is the most serious offense and the Standards are applicable to the convictions in that sentencing event.' Presumptive and Voluntary Sentencing Standards Manual 24.

"In this case, Duncan pleaded guilty to unlawful possession of a controlled substance, a Class D felony, see § 13A-12-212(b), Ala. Code 1975, and unlawful possession of marijuana in the second degree, a Class A misdemeanor, see § 13A-12-214(b), Ala. Code 1975. Possession of a controlled substance is a worksheet offense under the presumptive sentencing standards; however, possession of marijuana in the second degree is a non-worksheet offense. Presumptive and Voluntary Sentencing Standards Manual 21. Duncan was sentenced in both cases and for both convictions at the same time. Because Duncan's sentencing event included both a worksheet offense and a non-worksheet offense and his worksheet offense -- possession of a controlled substance -- carried a higher statutory maximum penalty as a Class D felony than the non-worksheet offense, the worksheet offense constituted the 'most serious offense' and the presumptive sentencing standards were applicable to both convictions when the circuit court sentenced Duncan.

"Furthermore, the record contains worksheets that were prepared in anticipation of the application of the presumptive sentencing standards. The worksheets recommend a sentence disposition and a range of sentence length from which a sentence is chosen. Presumptive and Voluntary Sentencing Standards Manual 16. In Duncan's case, the circuit court received a 'Drug Sentence Length Worksheet' that provided for a sentencing range of 13 to 32 months for a straight sentence and 6 to 14 months for a split sentence. The circuit court also received a 'Drug Prison In/Out Worksheet' that recommended a 'non-prison' sentence based, in part,

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on Duncan's having no prior felony convictions. Pursuant to the presumptive sentencing standards, '[i]f the most serious offense at a sentencing event is a Class D felony and the offender's presumptive Prison In/Out worksheet recommendation is "OUT," a county jail sentence becomes a sentencing option only if the offender has been previously convicted of any three or more felonies, or previously convicted of any two or more felonies that are Class A or Class B felonies.' Presumptive and Voluntary Sentencing Standards Manual 27. ..."

Duncan, ___ So. 3d at ___.

The central question in this case is the proper construction of § 13A-5-8.1. The main opinion of the Court of Criminal Appeals rejected the State's argument and held that, for offenses subject to the presumptive sentencing standards, a sentence imposed pursuant to § 13A-5-8.1 must comply with both the dispositional and durational components of the presumptive sentencing standards, if those standards apply. In Duncan's case, the presumptive sentencing standards did not provide for incarceration.

In his dissent, Judge Joiner disagreed as to the dispositional component, stating:

"I believe that § 13A-5-8.1, Ala. Code 1975, when read in conjunction with the Alabama Sentencing Commission's Presumptive and Voluntary Sentencing Standards Manual (2016), authorizes the sentences the circuit court imposed in this case. Therefore, I respectfully dissent.

". . . .

"Despite having had multiple 'second chances,' Duncan eventually was terminated from the drug court program. The circuit court sentenced Duncan to concurrent sentences of 23 months' imprisonment for the conviction for unlawful possession of a controlled substance and 12 months in jail for the second-degree-marijuana-possession conviction. The circuit court suspended the 23-month sentence on the Class D felony conviction but did not suspend the 12-month jail sentence on the misdemeanor conviction.

". . . .

"The main opinion rejects the State's argument that § 13A-5-8.1, Ala. Code 1975, authorizes the circuit court to depart from the dispositional recommendation of 'non-prison' in the presumptive sentencing standards. I disagree.

"Section 13A-5-8.1, Ala. Code 1975, was created by Act No. 2015-185, Ala. Acts 2015 -- the same legislative act that created the 'Class D' felony classification and that 'further required the Alabama Sentencing Commission to incorporate the new Class D felonies into the Sentencing Standards.' Presumptive and Voluntary Sentencing Standards Manual 15 (2016). The relevant portion of § 13A-5-8.1, Ala. Code 1975, quoted by the main opinion, is as follows:

"'If a defendant is participating in . . . [a] court ordered rehabilitative program and is subsequently terminated from that program, the court may then order that the defendant be confined in either a prison [or] jail-type institution The court shall impose a sentence length that complies with either Section 13A-5-6,

Section 13A-5-9, or the sentencing guidelines, whichever is applicable.'

"The first sentence quoted above addresses disposition of an offender -- that is, it gives a sentencing court the option of ordering confinement for an offender like Duncan who is terminated from a drug court program. The second sentence addresses the durational component of the sentence that may be imposed on that offender.

"As the main opinion notes, the dispositional recommendation for the most serious offense in Duncan's case -- the Class D felony -- is 'non-prison.' Thus, for the disposition in Duncan's case to comply with the Standards, the sentencing court would have to impose a 'non-prison' sentence for both convictions for which Duncan was sentenced at the 'sentencing event.' In other words, the sentencing court would have to impose non-prison sentences on both the Class D felony conviction and the misdemeanor conviction.

"... Thus, if Duncan were being sentenced under the sentencing standards, 'county jail' would not be a dispositional option in his case under ordinary circumstances Duncan's participation in and termination from a drug court program, however, changed the circumstances to those contemplated by § 13A-5-8.1. The first sentence of § 13A-5-8.1 gave the circuit court the discretion to depart from the dispositional requirements of the sentencing standards. That sentence made 'county jail' a sentencing option for the circuit court as to both convictions for which Duncan was sentenced, but it did not require that he be sentenced to jail on both.

"The second sentence of § 13A-5-8.1, as noted above, addresses the durational component of the sentence that may be imposed on Duncan. The main opinion reads this second sentence as rendering § 13A-5-8.1 inapplicable to Duncan's case because

§ 13A-5-8.1 does not specifically list § 13A-5-7[, Ala. Code 1975,] as an option for imposing a sentence duration. The main opinion fails to consider, however, whether the 12-month sentence length imposed on Duncan's misdemeanor conviction 'complies with ... the sentencing guidelines.'

"As to sentence duration in Duncan's case, the Presumptive and Voluntary Sentencing Standards Manual addresses ranges of sentence length for the Class D felony conviction only. The manual does not specifically provide sentence-length ranges for misdemeanors or other 'non-worksheet' offenses. The manual presumes, however, that existing law outside the standards will provide sentence lengths for non-worksheet offenses for which an offender is sentenced at a 'sentencing event' under the sentencing standards. (If that presumption is not the case, there could never be a sentence length imposed on a non-worksheet offense because the standards do not provide sentence lengths for non-worksheet offenses.) Thus, a sentence length imposed on a non-worksheet offense complies with the durational requirements of the sentencing standards if (1) it comports with law outside the standards and (2) it is not longer than what the sentencing standards authorize for the most serious offense. In Duncan's case, the duration of sentence imposed on the misdemeanor conviction -- 12 months -- (1) was authorized by existing law outside the standards, see § 13A-5-7, Ala. Code 1975, and (2) did not exceed the sentence length authorized for the most serious offense. Thus, I would affirm the circuit court's imposition of sentence in this case because it complies with Alabama law."

Duncan, ___ So. 3d at ___ (Joiner, J., dissenting).

We agree with Judge Joiner's analysis of the interplay between the presumptive sentencing standards and § 13A-5-8.1

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and with his conclusion that the circuit court did not exceed its discretion in sentencing Duncan to jail. The first sentence of § 13A-5-8.1 authorizes a circuit court to impose a prison or jail sentence on a defendant who was terminated from a drug-court program. When the presumptive sentencing standards apply, the foregoing authority is not limited to cases in which the dispositional recommendation is "prison." Instead, § 13A-5-8.1 gives the sentencing court the option to order confinement of an offender who is terminated from a drug-court program, without regard to the dispositional component of the presumptive sentencing standards. The second sentence of § 13A-5-8.1 addresses the durational component of the sentence (the court "shall impose a sentence length that complies"). It provides that the duration of the sentence is determined by the presumptive sentencing standards if they apply, or by § 13A-5-6 or § 13A-5-9, Ala. Code 1975. As Judge Joiner discusses, this construction eliminates many illogical results and is a better fit with the actual language of the statute.⁵

⁵In addition to the problems identified by Judge Joiner, this approach avoids the incentive for a defendant to choose termination from a drug-court program and a sentence of probation, rather than a short jail stay, for violating the

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In the present case, § 13A-5-8.1 authorizes (but does not require) the circuit court to impose a prison or jail sentence on Duncan. The duration of the sentence was to be determined as provided in the presumptive sentencing standards. The parties agree that the duration of the sentence imposed on Duncan is consistent with the presumptive sentencing standards.

III. Conclusion

Accordingly, we reverse the judgment of the Court of Criminal Appeals and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, C.J., and Bolin, Parker, Shaw, Main, Bryan, and Sellers, JJ., concur.

rules of the drug-court program.