Rel: June 12, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1190105

Ex parte James Antuam Blackman

PETITION FOR WRIT OF MANDAMUS

(In re: James Antuam Blackman

v.

State of Alabama)

(Mobile Circuit Court, CC-18-4329, CC-18-4330, CC-18-4480, CC-18-4481, and CC-18-4482)

PER CURIAM.

James Antuam Blackman petitions this Court for a writ of mandamus directing Judge James Patterson of the Mobile Circuit Court ("the trial court") to set aside an order setting Blackman's case for trial, to reinstate Blackman's guilty plea

that the trial court withdrew sua sponte, and to proceed to sentencing Blackman on his guilty-plea convictions. Because the trial court's sua sponte withdrawal of Blackman's guilty plea subjects Blackman to double jeopardy and thus divests the trial court of jurisdiction to conduct a trial, we grant the petition and issue the writ.

Facts and Procedural History

Blackman, an employee of the City of Prichard, was indicted by the Mobile County grand jury on 47 separate charges, including 22 counts of first-degree theft of property, 9 counts of second-degree theft of property, 9 counts of third-degree theft of property, 3 counts of fourth-degree theft of property, and 4 counts of using his official position for personal gain. At a hearing on March 7, 2019, Blackman entered a blind guilty plea to all counts.[1] Blackman, his attorney, and the trial court signed the "Explanation of Rights and Plea of Guilty" form, commonly known as an Ireland form.[2] The trial court entered an order

[1]A blind guilty plea is defined as "[a] guilty plea made without the promise of a concession from either the judge or the prosecutor." Black's Law Dictionary 1392(11th ed. 2019)

[2]See Ireland v. State, 47 Ala. App. 65, 250 So. 2d 602 (Ala. Crim. App. 1971).

accepting Blackman's plea and adjudicating him guilty, stating:

> "This Court having ascertained that [Blackman] understands his constitutional rights, the nature of the crimes charged in the indictment and the consequences of his Best Interest Plea of Guilty, [Blackman] understandingly and voluntarily waives his constitutional rights and pleads guilty. [Blackman] with the assistance of his attorney informed the Court that there are no issues reserved for appeal."

The trial court set a sentencing hearing for May 6, 2019, and ordered a presentence investigation. According to Blackman, the convictions are subject to Alabama's presumptive sentencing standards, see § 12-25-30 et seq., Ala. Code 1975, which, he states, mandate a non-prison sentence for his convictions.

On March 9, 2019, the State of Alabama filed a motion seeking the trial court's consent to prove aggravating factors at sentencing to depart from the non-prison-sentence recommendation in the presumptive sentencing standards.[3]

[3]The term "aggravating factors" is defined in § 12-25-34.2(a)(1), Ala. Code 1975, as "[s]ubstantial and compelling reasons justifying an exceptional sentence whereby the sentencing court may impose a departure sentence above the presumptive sentence recommendation for an offense. Aggravating factors may result in dispositional or sentence range departures, or both, and shall be stated on the record by the court."

Citing the Presumptive and Voluntary Sentencing Standards Manual, effective October 1, 2016, promulgated by the Alabama Sentencing Commission ("the sentencing-standards manual"), the State acknowledged that the prosecutor is generally required to give the defendant notice of intent to present aggravating factors seven days before trial but that the sentencing-standards manual allows the trial court to consent to notice at any time for good cause shown if the defendant is provided an opportunity to research and rebut the prosecutor's request.[4] The State asserted that it could establish good cause because, it says, Blackman "unexpectedly rejected the State's [plea-deal] offer" at the March 7, 2019, hearing,

[4]As of the date of this opinion, the sentencing-standards manual is published at the following Web address: https://sentencingcommission.alacourt.gov/. The sentencing-standards manual at page 29 states as follows regarding notice of aggravating factors:

> "The prosecutor shall give the defendant notice of aggravating factors no less than seven (7) days before trial. Once given, notice is deemed sufficient for any future trial settings. For good cause shown, notice may be given at any time with the consent of the trial court, provided the defendant is given an opportunity to research and rebut the aggravating factor. Notice can be waived."

The aggravating factors that may justify departure from the standards are set forth at page 30 of the sentencing-standards manual.

which, it asserted, negated the customary triggering event of the trial. The State also asserted that Blackman had waived the seven-day notice requirement by pleading guilty prior to his trial date. The State further asserted that consenting to the State's notice of aggravating factors would not prejudice Blackman because, it argued, the grounds for the aggravating factors were apparent from the indictments and Blackman would have the opportunity to research and rebut the aggravating factors before the sentencing hearing. On March 12, 2019, without a response from Blackman, the trial court granted the State's motion.

On April 12, 2019, Blackman filed an objection to the State's motion, arguing that the State's notice of its intent to prove aggravating factors was untimely and that allowing the State the opportunity to prove aggravating factors after the trial court's acceptance of the guilty plea would render that plea involuntary because, he asserted, he was not given proper notice of the sentencing range before pleading guilty. Blackman stated that he

> "entered his plea believing that the [presumptive sentencing standards] would apply since the State had not given notice of intent to assert aggravating factors. However, aggravating factors -- if proven -- would give the [trial] court the option of a departure sentence pursuant to the statutory

> sentencing range. If the State is excused from its failure to give timely notice (or at least any notice prior to the plea), then it would mean Mr. Blackman could not have knowingly, intelligently, and voluntarily entered his pleas. Accordingly, a sentence outside the presumptive [sentencing standards] would be unconstitutional ...."

Blackman, however, did not request an opportunity to withdraw his guilty plea, and he did not otherwise seek to set aside his guilty-plea convictions entered by the trial court.

On April 15, 2019, the trial court entered an order setting aside its March 12, 2019, order allowing the State to prove aggravating factors. The trial court further stated that "Mr. Blackman's plea was obviously not entered 'freely, voluntarily, and knowingly.' Therefore, the court considers it WITHDRAWN, and so orders." The trial court reset a disposition date for May 2, 2019. On April 16, 2019, Blackman filed a motion to set aside the trial court's April 15, 2019, order insofar as it sua sponte withdrew his guilty plea. Blackman asserted that he did not request that his guilty plea be withdrawn and that he did not intend for the trial court to withdraw his guilty plea. Blackman cited Rule 14.4(e), Ala. R. Crim. P.,[5] among other legal authority, in arguing that the

[5]Rule 14.4(e) states:

"The court shall allow withdrawal of a plea of

trial court acted beyond its authority in sua sponte ordering the withdrawal of his guilty plea. Blackman further argued that the trial court's withdrawal of his guilty plea provided the State "another 'bite at the apple'" and an opportunity to pursue a departure from the presumptive sentencing standards.[6]

On April 18, 2019, the trial court entered an order denying Blackman's motion to set aside its April 15 order. The trial court stated, among other things:

> "Because Mr. Blackman correctly pointed out that a defendant must be apprised of the correct maximum and minimum sentences for his guilty plea to be 'knowingly, intelligently, and voluntarily' entered, and because this court may have mistakenly granted the state's motion to prove aggravating factors after Mr. Blackman had already pled guilty, and after reviewing the principles set forth in Boykin v. Alabama, 395 U.S. 238, 240 (1969), and the frankly 'goofy' procedural posture of this case now, undersigned decided to go back in time and do a 'do over' and therefore ordered Mr. Blackman's plea vacated as well."

> guilty when necessary to correct a manifest injustice. Upon withdrawal of a guilty plea, the charges against the defendant as they existed before any amendment, reduction, or dismissal made as part of a plea agreement shall be reinstated automatically."

[6]Blackman also states in his petition that, after the trial court vacated his guilty plea, the State filed another notice of intent to prove aggravating factors, which, he states, the trial court granted on April 22, 2019.

The trial court noted that, because Blackman had stated in his motion to set aside that he "'could not have knowingly, intelligently, and voluntarily entered his pleas'" and that "'a sentence outside of presumptive [sentencing standards] would be unconstitutional,'" Blackman was "obviously ... telling [the trial court] ... that his plea was not given freely, voluntarily, and knowingly." The trial court concluded: "Because of these facts, and because I am supposed to facilitate and not prevent justice, this Court ... VACATED Mr. Blackman's prior guilty plea." The trial court went on to explain that "[t]his is essentially a 'do-over' like kids used to do on the play yard. We are back to where we were before Mr. Blackman decided to plead to anything."

According to Blackman, at a hearing on May 2, 2019, he informed the trial court that he stood on his previously entered guilty plea, and he renewed his argument that the trial court lacked the authority to set it aside. That same day, the trial court entered an order setting Blackman's case for trial on November 12, 2019.

On October 29, 2019, Blackman filed a petition for a writ of mandamus in the Court of Criminal Appeals. On October 31, 2019, that court, by order, dismissed Blackman's petition as

untimely. Ex parte Blackman (CR-19-0080, Oct. 31, 2019), ___ So. 3d ___ (Ala. Crim App. 2019)(table). On November 4, 2019, Blackman filed in this Court a petition for a writ of mandamus and a motion to stay the trial-court proceedings. On November 8, 2019, a majority of this Court granted Blackman's motion to stay the trial-court proceedings.

Standard of Review

"This Court has held that an accused's constitutional right[] against being twice placed in jeopardy cannot be adequately protected by appellate review and that the writ of mandamus is appropriate in a case in which the petitioner argues that former jeopardy bars a retrial on the charges against him." Ex parte Head, 958 So. 2d 860, 865 (Ala. 2006)(citing Ex parte Roberts, 662 So. 2d 229, 231 (Ala. 1995)).

Under Rule 21(e)(1), Ala. R. App. P., a decision of the Court of Criminal Appeals on an original petition for a writ of mandamus may be reviewed de novo by this Court.[7]

[7]Rule 21(e)(1) provides:

> "A decision of a court of appeals on an original petition for writ of mandamus or prohibition or other extraordinary writ (i.e., a decision on a petition filed in the court of appeals) may be

> "Mandamus is a drastic and extraordinary writ that will be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court. Ex parte AmSouth Bank, N.A., 589 So. 2d 715 (Ala. 1991); Ex parte Day, 584 So. 2d 493 (Ala. 1991)."

Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993).

Discussion

At issue in this case is whether the trial court's sua sponte withdrawal of Blackman's guilty plea has subjected Blackman to further jeopardy in violation of the double-jeopardy protections of the Fifth Amendment to the United States Constitution. The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same

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> reviewed de novo in the supreme court, and an application for rehearing in the court of appeals is not a prerequisite for such review. If an original petition for extraordinary relief has been denied by the court of appeals, review may be had by filing a similar petition in the supreme court (and, in such a case, in the supreme court the petition shall seek a writ directed to the trial judge). ..."

offense after conviction, and against multiple punishments for the same offense." Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306–07 (1984). See also Arizona v. Washington, 434 U.S. 497, 503 (1978) ("A State may not put a defendant in jeopardy twice for the same offense."). This Court has also held that "[j]eopardy attaches on a guilty plea when the plea is accepted and entered by a court with jurisdiction." Ex parte Wright, 477 So. 2d 492, 493 (Ala. 1985)(citing Odoms v. State, 359 So. 2d 1162, 1164 (Ala. Crim. App. 1978)).

In his petition, Blackman contends that jeopardy attached when the trial court accepted and entered his guilty plea on March 7, 2019. Blackman argues that the trial court's sua sponte withdrawal of his guilty plea was unauthorized under the law and that, as a consequence, his constitutional right against being subjected to prosecution again for the same offense has been violated by the trial court's order setting the case for trial. Blackman argues that his double-jeopardy claim divests the trial court of jurisdiction to conduct a trial and that his guilty plea is due to be reinstated.

As a threshold matter, we must determine whether Blackman's petition for the writ of mandamus filed in the

Court of Criminal Appeals on October 29, 2019, was untimely, thus depriving that court of jurisdiction and, in turn, depriving this Court of jurisdiction to review his mandamus petition filed in this Court. Pursuant to Rule 21(a)(3), Ala. R. App. P., a mandamus petition

> "shall be filed within a reasonable time. The presumptively reasonable time for filing a petition seeking review of an order of a trial court or of a lower appellate court shall be the same as the time for taking an appeal. If a petition is filed outside this presumptively reasonable time, it shall include a statement of circumstances constituting good cause for the appellate court to consider the petition, notwithstanding that it was filed beyond the presumptively reasonable time."

Under Rule 4(a)(1), Ala. R. App. P., an appeal must generally be taken within 42 days of the entry of the order or judgment being appealed. Blackman challenges the trial court's authority to enter the April 15, 2019, order in which it sua sponte ordered the withdrawal of Blackman's guilty plea and the April 18, 2019, order in which it denied his motion to reinstate his guilty plea and to proceed with sentencing. He further challenges the trial court's jurisdiction to proceed with a trial, thus attacking the trial court's authority to enter the May 2, 2019, order setting the case for trial.

Blackman further asserts that he does not have an adequate remedy by way of an appeal. See Ex parte Head, supra.

The State correctly notes that Blackman filed his mandamus petition in the Court of Criminal Appeals well outside the presumptively reasonable time after the trial court's April 15, 2019, April 18, 2019, and May 2, 2019, orders. Accordingly, the State contends that Blackman's petition in this Court is due to be dismissed. The State also contends that, even if Blackman's petition is not time-barred, Blackman has an adequate remedy by way of appeal and that, therefore, mandamus relief is unavailable.

Blackman, however, argues that, pursuant to this Court's decision in Ex parte K.R., 210 So. 3d 1106 (Ala. 2016), he was not required to file his petition within the presumptively reasonable time prescribed by Rule 21(a)(3) because his petition implicates the trial court's jurisdiction.[8] In Ex parte K.R., this Court held that the timeliness of a petition for a writ of mandamus challenging the trial court's

[8]Blackman also included in his petition a statement of circumstances that he asserts constitutes good cause for this Court to consider his untimely petition. Because we determine that Blackman's claims are jurisdictional, we pretermit discussion of those circumstances.

jurisdiction was filed beyond the presumptively reasonable time is "insignificant because 'we take notice of the lack of jurisdiction ex mero motu.'" 210 So. 3d at 1112 (quoting Ruzic v. State ex rel. Thornton, 866 So. 2d 564, 568-69 (Ala. Civ. App. 2003), citing also Lawrence v. Alabama State Pers. Bd., 910 So. 2d 126, 128 (Ala. Civ. App. 2004)). See also Ex parte Madison Cty. Dep't of Human Res., 261 So. 3d 381, 385 (Ala. Civ. App. 2017)("[A] petition for the writ of mandamus that challenges the jurisdiction of the trial court to enter the order sought to be vacated need not be filed within the presumptively reasonable period prescribed by Rule 21." (citing Ex parte K.R., 210 So. 3d at 112)). Thus, in accordance with this Court's decision in Ex parte K.R., a petition for a writ of mandamus filed outside the presumptively reasonable time set forth in Rule 21(a)(3) nonetheless may be considered by an appellate court insofar as the petitioner challenges the jurisdiction of the trial court. We must determine whether Blackman's double-jeopardy claim is jurisdictional. If it is jurisdictional, we will consider the merits of his petition pursuant to K.R. If it is not

jurisdictional, then his untimely filing of a petition constitutes a waiver of his right to mandamus review.

This Court and the Court of Criminal Appeals have recognized that certain, but not all, double-jeopardy claims are jurisdictional and are not subject to waiver by the defendant. See, e.g., Heard v. State, 999 So. 2d 992 (Ala. 2007)(concluding that a double-jeopardy claim pertaining to simultaneous convictions for greater and lesser-included offenses was jurisdictional and, therefore, that the defendant did not waive his double-jeopardy claim). See also Ex parte Benefield, 932 So. 2d 92 (Ala. 2005); Ex parte Robey, 920 So. 2d 1069 (Ala. 2004); Straughn v. State, 876 So. 2d 492 (Ala. Crim. App. 2003); and Rolling v. State, 673 So. 2d 812 (Ala. Crim. App. 1995). In Ex parte Benefield, this Court concluded that a defendant's double-jeopardy claim was directed to the jurisdiction of the trial court to enter a judgment convicting him of first-degree sexual abuse and first-degree rape because first-degree sexual abuse was a lesser-included offense of first-degree rape. In a special concurrence, Justice Stuart addressed the scope of jurisdictional double-jeopardy claims:

> "I note that today's holding should not be interpreted as establishing that all double-jeopardy

> claims are jurisdictional. For example, if a double-jeopardy claim is viable before trial, then the defendant must object by pretrial motion, or the double-jeopardy claim is foreclosed. Rolling v. State, 673 So. 2d 812, 815 (Ala. Crim. App. 1995). Judge Shaw recognized the consistent application of this distinction between jurisdictional and nonjurisdictional double-jeopardy claims in Straughn v. State, 876 So. 2d 492, 508–09 (Ala. Crim. App. 2003), stating:
>
> > "'Since the decision in Rolling[v. State, 673 So. 2d 812 (Ala. Crim. App. 1995)], this Court has continued to hold that certain double-jeopardy claims implicate the jurisdiction of the trial court and, therefore, are not subject to waiver. Like Rolling, most of those decisions involved simultaneous convictions for both a greater and a lesser-included offense.
> >
> > "'However, caselaw from both this Court and the Alabama Supreme Court recognizes that generally other double-jeopardy claims are singularly constitutional in nature and are, therefore, subject to waiver.'"

932 So. 2d at 94–95 (citations and emphasis omitted).

The present case does not involve simultaneous convictions for both a greater and a lesser-included offense; it involves the continued prosecution of the same offenses to which the defendant has already pleaded guilty. The Court of Criminal Appeals has addressed this as a jurisdictional issue in Jackson v. State, 659 So. 2d 994 (Ala. Crim. App. 1994). In

Jackson, the Court of Criminal Appeals held that an involuntary withdrawal of a defendant's guilty plea invokes a double-jeopardy claim that divests the trial court of jurisdiction to retry a defendant on the same charge to which the defendant pleaded. In Jackson, the defendant, who had initially been charged with escape in the first degree, pleaded guilty to escape in the second degree, and the trial court accepted his plea. The State moved to withdraw the defendant's guilty plea, and the trial court granted the motion and tried the case. The defendant was found guilty of escape in the first degree, and the trial court sentenced him to 15 years in prison. On appeal of the conviction, the Court of Criminal Appeals stated that Rule 14.4(e), Ala. R. Crim. P.,

> "contemplates that only the party pleading guilty may request to withdraw the plea. We agree with the Nevada Supreme Court, which stated in Parker v. State, 100 Nev. 264, [265,] 679 P.2d 1271, 1272 (1984): 'Like the decision to enter a plea of guilty, the decision to seek withdrawal of the plea and proceed to trial is personal to the accused.' (Emphasis added.)."

Jackson, 659 So. 2d at 995. The court held that the defendant's "constitutional protection against double jeopardy was violated. Jeopardy attached when the [defendant's] plea

was 'accepted and entered by the court with jurisdiction.' Ex parte Hergott, 588 So. 2d 911 (Ala. 1991)." 659 So. 2d at 995. The Court of Criminal Appeals concluded: "Consequently, any proceedings following the restoration of the case to the trial docket by the court on the state's motion were beyond the court's jurisdiction; the judgment of conviction of escape in the first degree and the sentence imposed as a result of that conviction are to be set aside." Id. The court remanded the cause to the trial court with instructions to conduct a new sentencing hearing on the defendant's original conviction pursuant to his guilty plea of escape in the second degree. Id. See also Wright v. State, 664 So. 2d 240 (Ala. Crim. App. 1995)(relying on Jackson to conclude that the trial court impermissibly granted the State's motion to withdraw the defendant's guilty plea and remanding the cause to the trial court to set aside the defendant's conviction and sentence, to reinstate the defendant's guilty plea, and to conduct a new sentencing hearing). See also State v. Savage, 961 So. 2d 181, 187 (Ala. Crim. App. 2006)(concluding, among other things, that the trial court had "no grounds to invalidate the guilty-plea proceedings and to dismiss the indictment" as a

result of misnomer of the defendant in the indictment, that jeopardy had attached when the defendant's guilty plea was accepted, and that the only matter to be resolved by the trial court after entry of the guilty plea was the defendant's sentence).

Applying the aforementioned authority, we conclude that Blackman's double-jeopardy claim is aimed directly at the trial court's jurisdictional authority to proceed with a trial on the very counts to which Blackman has pleaded guilty. Once Blackman's guilty plea was accepted and entered by the trial court, jeopardy attached. See Ex parte Wright, 477 So. 2d at 493. See also Ex parte Peterson, 890 So. 2d 990, 993 (Ala. 2004)(explaining that, after a defendant entered a valid guilty plea to felony murder, "jeopardy attached to the felony-murder conviction, prohibiting any further prosecution" of the defendant for the same offense). Absent a voluntary withdrawal of his guilty plea, Blackman was not subject to further prosecution by the State, and the trial court is without jurisdiction to proceed with the trial. The ultimate question presented by Blackman's petition, therefore, is whether the trial court lacked jurisdiction to set the matter for and to proceed with the trial. Because his double-jeopardy

claim implicates the trial court's jurisdiction, his petition for a writ of mandamus is not procedurally barred as untimely. Ex parte K.R., 210 So. 3d at 1112.

Whether Blackman was appropriately advised of the potential minimum and maximum sentences for his convictions, whether his guilty plea was truly voluntarily entered, and whether the State provided adequate notice of its intent to prove aggravating factors at sentencing are not questions currently before this Court.[9] The subject of our review is whether the trial court's sua sponte withdrawal of Blackman's guilty plea and subsequent decision to set his case for trial has subjected Blackman to twice being put in jeopardy in violation of the Fifth Amendment. We conclude that it has. The

[9]See Durr v. State, 29 So. 3d 922, 925 (Ala. Crim. App. 2009)(holding the defendant's plea to be involuntary when the defendant was not advised of the applicable sentencing range and remanding the cause so that defendant would "have the opportunity to withdraw his guilty plea and to enter another plea after he has been informed of the applicable sentencing range" (emphasis added)). See also Williams v. State, 155 So. 3d 326, 330 (Ala. Crim. App. 2014), and Laakkonen v. State, [Ms. CR-17-1146, April 12, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019). See further Hyde v. State, 185 So. 3d 501, 512-13 (Ala. Crim. App. 2015)(holding that the trial court exceeded its discretion in imposing a prison sentence and departing from the presumptive sentencing standards when there were no aggravating factors or other evidence before it justifying a departure from the non-prison recommendation).

trial court lacked the authority to withdraw Blackman's guilty plea on its own motion. No provision for such a procedure exists in the law. The decision whether to withdraw the guilty plea and to proceed to trial was a decision only Blackman was entitled to make. Jackson, 659 So. 2d at 995. That decision-making power does not shift to the trial court in the face of what the trial court perceives to be an involuntary guilty plea. In addition, as discussed supra, the acceptance and entry of Blackman's guilty plea has divested the trial court of jurisdiction to set the matter for a trial. After accepting and entering Blackman's guilty plea, the only remaining matter pending under the trial court's jurisdiction was the imposition of Blackman's sentences. See Savage, 961 So. 2d at 183. Accordingly, Blackman's guilty plea entered and accepted by the Court on March 7, 2019, is due to be reinstated, the trial court must vacate its May 2, 2019, order setting the case for trial, and the trial court must proceed to sentencing.

Conclusion

Blackman has demonstrated a clear legal right to the relief he seeks. Accordingly, we issue the writ and direct the trial court to set aside its May 2, 2019, order setting the

case for trial, to reinstate Blackman's guilty plea, and to proceed to sentencing on Blackman's guilty-plea convictions.

PETITION GRANTED; WRIT ISSUED.

Bolin, Wise, Bryan, Stewart, and Mitchell, JJ., concur.

Parker, C.J., and Sellers and Mendheim, JJ., concur in the result.

Shaw, J., dissents.

SHAW, Justice (dissenting).

I respectfully dissent. This Court is directing the trial court to reinstate the guilty plea of the petitioner, James Antuam Blackman, who contends that it was not knowingly, intelligently, and voluntarily entered. I do not believe that the petitioner has demonstrated a clear legal right to such relief.

This petition was filed too late. The timeliness of a petition for a writ of mandamus can be excused if it challenges the trial court's jurisdiction. The decision in Ex parte Jackson, 659 So. 2d 994 (Ala. Crim. App. 1994), appears to indicate that Blackman's claim is jurisdictional in nature. In that case, the defendant pleaded guilty to escape in the second degree. The State filed a motion to withdraw that plea, which the trial court granted. Rule 14.4(e), Ala. R. Crim. P., states, in pertinent part: "The court shall allow withdrawal of a plea of guilty when necessary to correct a manifest injustice." The court in Jackson construed this to mean that "[t]he rule contemplates that only the party pleading guilty may request to withdraw the plea" and that the trial court thus erred in granting the State's motion to set

it aside. 659 So. 2d at 995.[10] The court went on to hold that further proceedings violated the defendant's double-jeopardy rights and that the trial court also lacked jurisdiction:

> "The appellant's constitutional protection against double jeopardy was violated. Jeopardy attached when the appellant's plea was 'accepted and entered by the court with jurisdiction.' Ex parte Hergott, 588 So. 2d 911 (Ala. 1991). Consequently, any proceedings following the restoration of the case to the trial docket by the court on the state's motion were beyond the court's jurisdiction ...."

Jackson, 659 So. 2d at 995.

I have concerns that Jackson was incorrectly decided. As discussed in the main opinion, some double-jeopardy claims are jurisdictional in nature; those generally involve claims of "simultaneous convictions for both a greater and a lesser-included offense." Straughn v. State, 876 So. 2d 492, 508 (Ala. Crim. App. 2003). Generally, the "failure to file a pretrial motion raising a double jeopardy claim forecloses subsequent assertion of that issue"; this rule applies "only if the double jeopardy claim is viable prior to trial." Rolling v. State, 673 So. 2d 812, 815 (Ala. Crim. App. 1995).

[10]I see nothing in the rule strictly limiting who may be allowed to withdraw the plea and would be cautious in finding a rigid rule that, if the trial court notices a manifest injustice, it is barred from acting to correct that injustice without a formal motion to withdraw filed by the defendant.

Further, in Ex parte Ziglar, 669 So. 2d 133, 135 (Ala. 1995), this Court held that because the defendant in that case did not raise a double-jeopardy objection in the trial court, his challenge to a third trial on the same charge was waived: "A defense of double jeopardy must be timely raised at trial, or else it is waived."

Blackman's claim that jeopardy attached when he pleaded guilty and that he cannot be placed in jeopardy again, like the claim in Jackson, is essentially the same type of claim in Ziglar: he is twice being placed in jeopardy for the same offense. Such claims fall into the category of waivable double-jeopardy issues that do not impact the jurisdiction of the trial court. The contrary rationale behind the holding in Jackson, however, is unclear. The Jackson court held that "[j]eopardy attached when the appellant's plea" was entered and that the trial court was without jurisdiction to proceed to withdraw the plea without the defendant's consent. 659 So. 2d at 995. This suggests that the defendant essentially waives the attachment of jeopardy and the denial of further jurisdiction when the defendant withdraws his or her guilty plea. But if the attachment of jeopardy is waivable by a defendant, then it does not create a jurisdictional barrier to

further proceedings contrary to the plea. See Heard v. State, 999 So. 2d 992, 1006 (Ala. 2007) (holding that violations of double-jeopardy rights that implicate a trial court's jurisdiction "could not be waived").[11] In other words, if the trial court retains jurisdiction over the case when a defendant, after jeopardy attaches, consents to the withdrawal of his plea, then the attachment of jeopardy similarly would not deprive the trial court of jurisdiction if the plea is withdrawn without the defendant's consent. A trial court's act of withdrawing a plea without a defendant's consent might be erroneous, but I see no rationale for holding that it deprives the trial court of jurisdiction.[12]

The decision in Jackson is precedent, but it is not binding on this Court. Cf. Diversicare Leasing Corp. v. Hubbard, 189 So. 3d 24, 39 n.1 (Ala. 2015), and Ala. Code

[11]The decision in Ex parte Hergott, 588 So. 2d 911 (Ala. 1991), which Jackson cites, contains nothing suggesting that a double-jeopardy violation stemming from a trial court's erroneous decision to withdraw a guilty plea implicates its jurisdiction.

[12]This Court has recognized that, in the past, the appellate courts of this State have erroneously categorized issues as affecting jurisdiction when they do not. See generally Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013), and Ex parte Seymour, 946 So. 2d 536 (Ala. 2006).

1975, § 12-3-16. Further, its substantive holding is not applied in this case; rather, it is used to bypass a procedural barrier to Blackman's petition. Consequently, I do not believe that Jackson excuses the tardiness of the petition here.

As to the substantive issue in this case, Blackman contends that the trial court erred by sua sponte withdrawing his guilty plea. As noted in the main opinion, after Blackman pleaded guilty, the State sought consent from the trial court to show aggravating factors that would allow departure from the non-prison sentence specified in the presumptive sentencing standards, which consent the trial court granted. Blackman filed an objection in which he argued, among other things:

> "As discussed at length above, a defendant must be apprised of the correct maximum and minimum sentences for his guilty plea to be knowingly, intelligently, and voluntarily entered. Mr. Blackman entered his plea believing that the sentencing guidelines would apply since the State had not given notice of intent to assert aggravating factors. However, aggravating factors -- if proven -- would give the Court the option of a departure sentence pursuant to the statutory sentencing range. If the State is excused from its failure to give timely notice (or at least any notice prior to the plea), then it would mean Mr. Blackman could not have knowingly, intelligently, and voluntarily entered his pleas. Accordingly, a sentence outside

> the presumptive guidelines would be unconstitutional under the aforementioned case law."

(Citation omitted; emphasis added.)

The trial court could have construed this as an argument that, if the trial court intended to allow the State to show aggravating factors, then the plea had not been knowingly, intelligently, and voluntarily entered because Blackman arguably did not know the correct possible minimum and maximum range of punishment. In such circumstances, I believe that a trial court, considering the substance of the filing, could have construed it as a motion to withdraw the plea.

However, the trial court, in its April 15, 2019, order withdrawing the plea, also set aside its consent to allow the State to prove aggravating factors. Thus, it removed the very basis for making the plea involuntary and subject to withdrawal. Further, in a subsequent order denying a motion by Blackman to set aside its April 15 order, the trial court seemed to make clear that it was acting on its own motion.

That aside, according to Blackman, the State later sought consent again to prove aggravating factors, and the trial court "granted" consent on April 22, 2019. So, under those circumstances, Blackman is asking this Court to reinstate a

guilty plea that, as the case stands, he argues was not knowing, intelligent, and voluntary when entered. He contends that he may waive the issue concerning the involuntariness of his plea; indeed, by having this Court reinstate it, he may have waived his ability to withdraw it in the future or have it set aside if he is sentenced to prison. But I disagree that he has a clear legal right to seek reinstatement of the plea in an untimely petition for a writ of mandamus. Thus, I respectfully dissent from granting the petition and issuing the writ.