Rel: April 30, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190090

Ex parte Walter McGowan

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Walter McGowan

v.

State of Alabama)

(Jefferson Circuit Court, CC-16-3124, CC-16-3125, CC-16-3126, and CC-16-3127; Court of Criminal Appeals, CR-18-0173)

STEWART, Justice.

This Court granted certiorari review to determine whether the Court of Criminal Appeals erred in affirming the order of the Jefferson Circuit Court ("the trial court") revoking Walter McGowan's probation. We conclude that the trial court was without jurisdiction to conduct probation-revocation proceedings and to enter the probation-revocation order. Therefore, we reverse the Court of Criminal Appeals' judgment and remand the cause.

Facts and Procedural History

McGowan, a habitual felony offender, pleaded guilty in the trial court to first-degree burglary, a violation of § 13A-7-5, Ala. Code 1975; first-degree robbery, a violation of § 13A-8-41, Ala. Code 1975; second-degree assault, a violation of § 13A-6-21, Ala. Code 1975; obstruction of justice, a violation of § 13A-8-194, Ala. Code 1975; and third-degree escape, a violation of § 13A-10-33, Ala. Code 1975. Adhering to the voluntary sentencing guidelines, the trial court sentenced McGowan to 15 years' imprisonment for each conviction, but it split the sentences, ordering McGowan to serve 5 years in prison followed by 2 years' supervised probation for each conviction. The trial court also ordered the

sentences to run concurrently. Subsequently, the State filed a "Motion to Revoke Split Sentence," in which it specifically requested that McGowan's probation be revoked, based on the fact that McGowan had been charged with new felony offenses. The trial court held a revocation hearing and then entered an order revoking McGowan's probation. McGowan appealed to the Court of Criminal Appeals.

Before the Court of Criminal Appeals, McGowan asserted that his sentences -- 15 years, split to serve 5 years in prison followed by 2 years' probation -- were illegal sentences because they did not comply with § 15-18-8(a)(1) or (b), Ala. Code 1975. McGowan argued that, because his split sentences were unauthorized under § 15-18-8, commonly referred to as the Split-Sentence Act, the trial court had lacked subject-matter jurisdiction to conduct a revocation hearing and to enter an order revoking his probation. Citing Enfinger v. State, 123 So. 3d 535 (Ala. Crim. App. 2012), in which the Court of Criminal Appeals concluded that resentencing the defendant was the sole remedy to cure an unauthorized split sentence, McGowan argued that, because the trial court had lacked jurisdiction, the probation-revocation order was due to be vacated.

The Court of Criminal Appeals held that the split sentences were unauthorized under § 15-18-8; however, it declined to follow Enfinger, concluding that the trial court's probation-revocation order imposing the original 15-year sentences had remedied the illegality of the split sentences. The Court of Criminal Appeals explicitly overruled Enfinger, concluding that the probation-revocation order had remedied the illegal manner in which McGowan's sentences were being executed, thus rendering the illegality of the split sentences moot. McGowan v. State, [Ms. CR-18-0173, July 12, 2019] ___ So. 3d ____ (Ala. Crim. App. 2019). Judge McCool disagreed with the majority's conclusion and issued a dissenting opinion stating that Enfinger is "a well-reasoned decision" and that the doctrine of stare decisis should compel the court from overruling Enfinger. McGowan, ___ So. 3d at ____ (McCool, J., dissenting). The Court of Criminal Appeals overruled McGowan's application for rehearing. This Court granted McGowan's petition for the writ of certiorari to review the Court of Criminal Appeals' decision.

Standard of Review

"'"This Court reviews pure questions of law in criminal cases de novo."'" Ex parte Knox, 201 So. 3d 1213, 1216 (Ala. 2015)(quoting Ex parte Morrow, 915 So. 2d 539, 541 (Ala. 2004), quoting in turn Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003)).

Discussion

I.

At issue in this case is whether the trial court's revocation of McGowan's probation cures the jurisdictional defect arising from the imposition of split sentences that are not authorized under § 15-18-8. The Court of Criminal Appeals correctly concluded that the split sentences imposed by the trial court were not authorized by § 15-18-8. Section 15-18-8 provides, in relevant part:

> "(a) When a defendant is convicted of an offense, other than a sex offense involving a child as defined in Section 15-20A-4 [(26), Ala. Code 1975], that constitutes a Class A or Class B felony and receives a sentence of 20 years or less in any court having jurisdiction to try offenses against the State of Alabama and the judge presiding over the case is satisfied that the ends of justice and the best interests of the public as well as the defendant will be served thereby, he or she may order:

> "(1) That a defendant convicted of a Class A or Class B felony be confined in a prison, jail-type institution, or treatment institution for a period not exceeding three years in cases where the imposed sentence is not more than 15 years, and that the execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for such period and upon such terms as the court deems best.
>
> "....
>
> "(b) Unless a defendant is sentenced to probation, drug court, or a pretrial diversion program, when a defendant is convicted of an offense that constitutes a Class C or D felony offense and receives a sentence of not more than 15 years, the judge presiding over the case shall order that the convicted defendant be confined in a prison, jail-type institution, treatment institution, or community corrections program for a Class C felony offense ... for a period not exceeding two years in cases where the imposed sentence is not more than 15 years, and that the execution of the remainder of the sentence be suspended notwithstanding any provision of the law to the contrary and that the defendant be placed on probation for a period not exceeding three years and upon such terms as the court deems best. ..."[1]

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[1]McGowan committed the robbery, assault, obstruction-of-justice, and escape offenses in May 2016, and, as noted by the Court of Criminal Appeals: "McGowan committed the burglary offense in 2015. Although the timing of McGowan's burglary offense made his sentencing [for that offense] subject to a prior version of § 15-18-8, the portion of that former version of § 15-18-8(a)(1) relevant to his sentencing for the burglary

Although the 15-year sentences imposed on McGowan were within the authorized range for the offenses to which McGowan pleaded guilty, the trial court had no authority to impose split sentences under § 15-18-8(a)(1) that included a term of confinement in prison for a period exceeding three years for his burglary and robbery convictions and had no authority to impose split sentences under § 15-18-8(b) that included a term of confinement in prison for a period exceeding two years for his assault, obstruction-of-justice, and escape convictions. Accordingly, the trial court improperly imposed split sentences of five years' imprisonment followed by two years' probation.

II.

A circuit court derives its jurisdiction from the Alabama Constitution of 1901 and the Alabama Code. Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006). Alabama courts have recognized that "[m]atters concerning

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offense is substantially similar to the version quoted herein." McGowan, ___ So. 3d at ____ n.2. Section 15-18-8 has been amended several more times since 2016; however, the relevant portions of the statute remain unchanged, except that, in subsection (a), the version in effect in 2016 specifically cited § 15-20A-4(26), rather than just § 15-20A-4.

unauthorized sentences are jurisdictional." Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994). " '[A] trial court does not have [subject-matter] jurisdiction to impose a sentence not provided for by statute.' " Ex parte Butler, 972 So. 2d 821, 825 (Ala. 2007)(quoting Hollis v. State, 845 So. 2d 5, 6 (Ala. Crim. App. 2002)). This Court has routinely held that the imposition of a sentence in a criminal case that is not authorized by statute creates a jurisdictional defect that is nonwaivable and that can be raised at any time. See Ex parte Batey, 958 So. 2d 339, 341 (Ala. 2006)("A challenge to an illegal sentence ... is a jurisdictional matter that can be raised at any time."). See also Ex parte Casey, 852 So. 2d 175 (Ala. 2002)(concluding that the convictions for which a defendant received a full pardon were not valid for use as a sentencing enhancement and, thus, that a jurisdictional issue existed regarding the legality of the defendant's sentence, which had been enhanced based on the pardoned convictions); Ex parte Brannon, 547 So. 2d 68, 68 (Ala. 1989) ("[W]hen a sentence is clearly illegal or is clearly not authorized by statute, the defendant does not need to object at the trial level in order to preserve that issue for appellate review."). Although the legality of the underlying

15-year sentences in this case are not in question, the trial court's imposition of the split sentences, which were unauthorized by § 15-18-8, implicates the trial court's jurisdiction not only to impose those sentences, but also to hold subsequent revocation proceedings and to revoke McGowan's probation.

The Court of Criminal Appeals, however, concluded that the revocation of McGowan's probation and the imposition of the original 15-year sentences had remedied the unauthorized portion of the sentences, thus curing any jurisdictional defect. The probation-revocation order, the Court of Criminal Appeals held, rendered moot any error in the trial court's initial decision to split the sentences in a manner contrary to § 15-18-8. In reaching that conclusion, the Court of Criminal Appeals expressly overruled its decision in Enfinger v. State, 123 So. 3d 535 (Ala. Crim. App. 2012), and the line of cases flowing therefrom,[2] in which that

[2]See Scott v. State, 148 So. 3d 458, 462-63 (Ala. Crim. App. 2013); Hicks v. State, 138 So. 3d 338 (Ala. Crim. App. 2013); Pardue v. State, 160 So. 3d 363 (Ala. Crim. App. 2013); Brown v. State, 142 So. 3d 1269 (Ala. Crim. App. 2013); Adams v. State, 141 So. 3d 510 (Ala. Crim. App. 2013); Holley v. State, 212 So. 3d 967 (Ala. Crim. App. 2014); Mewborn v. State, 170 So. 3d 709 (Ala. Crim. App. 2014); McNair v. State, 164 So. 3d 1179

court had concluded that the imposition of a split sentence not authorized under § 15-18-8 divests a trial court of jurisdiction to conduct a revocation hearing and to revoke a defendant's probation or split sentence. Enfinger, 123 So. 3d at 538.

In Enfinger, the defendant pleaded guilty to sexual abuse of a child under the age of 12, a violation of § 13A-6-69.1, Ala. Code 1975. The Baldwin Circuit Court sentenced the defendant to 20 years' imprisonment, but it ordered that the defendant's sentence be split. Later, the circuit court revoked the defendant's probation. On appeal of the probation-revocation order, the Court of Criminal Appeals held that the circuit court had lacked the authority to impose a split sentence or a term of probation because the defendant had been convicted of a criminal sex offense involving a child and § 15-18-8 specifically precludes imposition of a split sentence for defendants convicted of such an offense. Enfinger, 123 So. 3d at 537. In concluding that revocation of the defendant's probation did not

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(Ala. Crim. App. 2014); and Belote v. State, 185 So. 3d 1154 (Ala. Crim. App. 2015).

remedy the unauthorized portion of the sentence, the Court of Criminal Appeals stated:

> "[B]ecause the nature of Enfinger's guilty-plea conviction exempts him from application of the Split-Sentence Act, the circuit court had no authority to apply the Split-Sentence Act to Enfinger and no authority to impose a term of probation on Enfinger. See § 15-18-8(a) and (b), Ala. Code 1975. Because the circuit court had no authority to split Enfinger's sentence or to impose a term of probation, it likewise had no authority to conduct a probation-revocation hearing and revoke Enfinger's probation under § 15-18-8(c) [now § 15-18-8(g)], Ala. Code 1975, which provides, in part, that under the Split-Sentence Act the circuit court 'may revoke or modify any condition of probation or may change the period of probation.' Because the circuit court had no authority to impose a term of probation or to revoke probation, the circuit court's order revoking Enfinger's probation is void."

Enfinger, 123 So. 3d at 538. The court in Enfinger thus concluded that the proper method of remedying the unauthorized split sentence would be to remand the case to the circuit court for that court to remove the split portion of the sentence and to conduct another sentencing hearing to reconsider the execution of the 20-year sentence.

In the present case, the Court of Criminal Appeals reexamined its holding in Enfinger and determined that "the decision in Enfinger was an unnecessary departure from this Court's previous position that the

removal of the illegal manner of execution of a sentence renders the illegality moot." McGowan, ___ So. 3d at ____ (citing Kenney v. State, 949 So. 2d 192, 193 n.1 (Ala. Crim. App. 2006), and Williams v. State, 535 So. 2d 197, 198 (Ala. Crim. App. 1988)). That court concluded:

> "In circumstances such as those presented in this case and in Enfinger, the circuit court's authority to revoke the defendant's probation or a split sentence is not affected by the illegal manner of execution of the initial sentence. By revoking McGowan's split sentences and removing the illegal splits, the circuit court remedied the illegality of the manner in which McGowan's sentences were being executed, and McGowan is now properly serving legal 15-year sentences. Consequently, the circuit court's error in splitting his sentences is moot."

McGowan, ___ So. 3d at ____.

As noted above, however, a sentence unauthorized by statute exceeds the jurisdiction of the trial court and is void. See Ex parte Batey, 958 So. 2d at 342 (citing Rogers v. State, 728 So. 2d 690, 691 (Ala. Crim. App. 1998)). Except for taking measures to cure a jurisdictional defect in sentencing and to sentence the defendant in accordance with the law, a trial court has no jurisdiction to act on an unauthorized sentence, including conducting revocation proceedings and entering a revocation order addressing the portion of the sentence that was unauthorized in the

first place. It matters not that a revocation order purports to remove an unauthorized portion of a sentence; the trial court must first have subject-matter jurisdiction to conduct the proceedings under Rule 27.6, Ala. R. Crim. P., and to enter the order of revocation. Accordingly, we conclude that the rationale in Enfinger was sound and that the Court of Criminal Appeals was incorrect in rejecting it. McGowan's split sentences were illegal, and the trial court, therefore, was without jurisdiction to revoke McGowan's probation that had been imposed as a part of the unauthorized sentences. The probation-revocation order, therefore, is void.

Contrary to the State's assertion to this Court, the procedure employed in Enfinger and adopted by this Court now does not require the doing of a futile act. Minshew v. State, 975 So. 2d 395, 398 (Ala. Crim. App. 2007)(" 'The law does not require the doing of a futile thing.' " (quoting Strickland v. State, 280 Ala. 34, 37, 189 So. 2d 774, 776 (1966))). Rather, our decision today, in addition emphasizing the necessity of adhering strictly to the express language of § 15-18-8, underscores the importance of the very concept that provides our courts with the authority to act -- subject-matter jurisdiction. Moreover, the court in Enfinger aptly

noted the impact that application of the doctrine of mootness would have on the voluntariness of the defendant's plea:

> "We recognize that the circuit court's revocation of Enfinger's probation in this case appears to reach a result that is no different than the result that was obtained in Simmons [v. State, 879 So. 2d 1218 (Ala. Crim. App. 2003),] and Morris [v. State, 876 So. 2d 1176 (Ala. Crim. App. 2003)] -- i.e., the probation revocation in essence removed the unauthorized split. Those cases, however, did not involve merely the removal of an improper split. In each of those cases, the circuit court was instructed to consider on remand whether the removal of the split would affect the voluntariness of the defendant's guilty plea. Further, the circuit court in each case was instructed that, if the defendant moved to withdraw his guilty plea, it should allow the defendant to do so. See Simmons, supra; Morris, 876 So. 2d at 1178 ('Because the split sentence was a term of the appellant's plea agreement, if the appellant moves to withdraw his guilty plea, the circuit court should grant the motion. See Austin v. State, 864 So. 2d 1115 (Ala. Crim. App. 2003).') To hold that the circuit court can remedy the imposition of an unauthorized split sentence by revoking a defendant's probation, however, would prevent that defendant from being able to move to withdraw his guilty plea and thus would treat him differently than the defendants in Simmons and Morris were treated -- i.e., after the circuit court conducts a resentencing, the defendant would not have the assistance of appointed counsel to move to withdraw his guilty plea under Rule 14.4(e), Ala. R.Crim. P.; instead, an indigent defendant would have to raise, pro se in a Rule 32[, Ala. R. Crim. P.,] petition, the issue that the defendant's guilty plea was involuntary."

Enfinger, 123 So. 3d at 538-39. As an additional concern, the court noted:

> "[H]olding that a circuit court can remedy the imposition of an improper split sentence by revoking a defendant's probation could lead to an absurd result. For example, a defendant serving a sentence that is improper under the Split-Sentence Act could be charged with violating the terms and conditions of his probation and the circuit court could thereafter revoke that defendant's probation. On appeal, the defendant could contend that the evidence was insufficient to support the revocation of his probation, and if, after a review of the record, this Court determined that the defendant is, in fact, correct, we would be forced to hold that, although the evidence was insufficient to support the revocation, the imposition of the remainder of his sentence is correct because the circuit court could not have imposed a split sentence. Such a result is unsound and untenable."

Enfinger, 123 So. 3d at 539. We agree with the Enfinger court's analysis.

III.

The split sentences the trial court imposed on McGowan were unauthorized under § 15-18-8. In addition to vacating the probation-revocation order, the proper procedure at this juncture would be for the trial court to " 'conduct another sentencing hearing and ... reconsider the execution of [McGowan's 15]-year sentence[s]. Because the [15]-year sentence[s] [were] valid, the circuit court may not change [them].' " Enfinger, 123 So. 3d at 538 (quoting Austin v. State, 864 So. 2d 1115, 1118

(Ala. Crim. App. 2003), and Moore v. State, 871 So. 2d 106, 109-10 (Ala. Crim. App. 2003)).

Conclusion

The judgment of the Court of Criminal Appeals is reversed, and this case is remanded to that court for the entry of an order consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bryan, Sellers, and Mitchell, JJ., concur.

Shaw, J., concurs specially.

Bolin, Wise, and Mendheim, JJ., dissent.

SHAW, Justice (concurring specially).

I concur in the main opinion. I write specially to note the following.

The petitioner, Walter McGowan, argues that the Court of Criminal Appeals erred in overruling Enfinger v. State, 123 So. 3d 535 (Ala. Crim. App. 2012). As the main opinion notes, under Enfinger, when a split sentence is void, the trial court has no authority to conduct a probation-revocation hearing. Revoking probation, which the trial court explicitly purported to do in this case, does not moot the illegality of a split sentence. Thus, the Court of Criminal Appeals erred in overruling Enfinger.

I also believe that additional prudential concerns would support the holding of Enfinger. Specifically, revoking the probation portion of a split sentence will not, in all cases, moot the illegality of the split sentence and or the need for a resentencing hearing regarding the proper execution of the sentence. A probation revocation, which is purportedly what occurred in this case, does not vacate or set aside an illegal split sentence. When a split sentence is vacated, it is actually removed as part of the sentence. Without an order vacating or setting aside his split sentences, McGowan's

sentencing order reflects that he received split sentences and that he was sentenced to probation; his records further reflect that his probation was revoked for a violation of its terms. But his split sentences were illegal; thus, probation was unauthorized, and its revocation was void. None of this is remedied through the probation-revocation process. Although the revocation of probation may result in returning a defendant to the term of incarceration required by the underlying sentence, it does not actually vacate or set aside the invalid split sentence. Revoking probation is a penalty for violating the terms of probation; in revoking probation, the trial court does not correct the illegality of the sentence but, instead, acts to enforce its terms.

Additionally, when the illegality of a split sentence has been recognized, there is often a need for further proceedings:

> "In the absence of a plea agreement, when the length of a split sentence was within the statutory sentencing range, but the execution of the sentence was improper, i.e., an illegal split sentence was imposed, the trial court may resentence the offender by setting aside the illegal portion of the sentence, and imposing a legal sentence. See Wood v. State, 602 So. 2d 1195 (Ala. Crim. App. 1992). However, when the split sentence was the product of a plea agreement accepted by the court that called for an illegal sentence, i.e., the length of a split sentence

> was within the statutory sentencing range, but the execution of the sentence was improper, and the illegal split sentence was imposed by the court in accordance with the plea agreement, the offender may withdraw his plea of guilty."

Williams v. State, 203 So. 3d 888, 895 (Ala. Crim. App. 2015); see Moore v. State, 871 So. 2d 106, 109-10 (Ala. Crim. App. 2003) (recognizing that the trial court did not have jurisdiction to order an improper split sentence and remanding the case "for the circuit court to conduct another sentencing hearing and to reconsider the execution of" the sentence).

Recognizing for the first time on appeal from an order revoking probation that a split sentence placing the offender on probation was improper, but declaring the issue moot, does not provide the further proceedings that would occur when the same issue is raised in Rule 32, Ala. R. Crim. P., proceedings, see Williams, supra, or on direct appeal. When a trial court actually rules upon the illegality of its split sentence, it can then act to resentence the offender. But in the process set forth by the Court of Criminal Appeals in this case -- determining that an illegal split sentence is cured by the revocation of probation and that the issue of the illegality of the split sentence is deemed moot -- defendants in

McGowan's circumstances are treated differently than defendants before a trial court that correctly recognizes the illegality of the split sentence. In other words, when a trial court intentionally acts to correct an illegal split sentence, it must resentence the defendant. But under the Court of Criminal Appeals' holding, when a trial court errs by revoking probation without recognizing the illegality of the split sentence and providing a resentencing hearing, the issue becomes "moot."

Further, although a trial court's attempt to split a sentence may be invalid or unauthorized, the trial court had reasons for exercising its discretion to elect to execute the underlying sentence pursuant to § 15-18-8, and those reasons might not be found in the record. The trial court which is in a better position than an appellate court to impose the proper sentence, should have the opportunity to remedy its error or otherwise impose a sentence that the circumstances require.

Revoking probation is not an appropriate mechanism for remedying an illegal split sentence. Therefore, I agree that the decision of the Court of Criminal Appeals affirming the trial court's probation-revocation order is due to be reversed and the cause remanded. See Ex parte Hitt, 778 So.

2d 159, 162 (Ala. 2000) (holding that the trial court's order modifying a sentence was void, reversing the Court of Criminal Appeals' affirmance of that order, and remanding the cause "for an order or proceedings consistent with this opinion"). The Court of Criminal Appeals should vacate the trial court's order and dismiss the appeal. See Russell v. Fuqua, 176 So. 3d 1224, 1229 (Ala. 2015) ("A void judgment will not support an appeal. It is [an appellate court's] obligation to vacate such a judgment and dismiss the appeal." (internal citation omitted)), and Edwards v. City of Fairhope, 945 So. 2d 479, 485 (Ala. Crim. App. 2006). The trial court then "has 'not only the power, but the duty' to set aside [the] void sentence and resentence as mandated by the statute." Johnson v. State, 716 So. 2d 745, 751 (Ala. Crim. App. 1997) (quoting Sorrells v. State, 667 So. 2d 142, 143 (Ala. Crim. App. 1994)). The trial court may only reconsider the execution of McGowan's sentences, and not the underlying 15-year sentences, which remain valid. Austin v. State, 864 So. 2d 1115, 1118 (Ala. Crim. App. 2003).

Finally, I think it is time for this Court in a proper case to reexamine the accuracy of the notion that an illegal or unauthorized sentence impacts the subject-matter jurisdiction of a court.

> "Jurisdiction is '[a] court's power to decide a case or issue a decree.' Black's Law Dictionary 867 (8th ed. 2004). Subject-matter jurisdiction concerns a court's power to decide certain types of cases. Woolf v. McGaugh, 175 Ala. 299, 303, 57 So. 754, 755 (1911) ('"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought." ' (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316, 19 L. Ed. 931 (1870))). That power is derived from the Alabama Constitution and the Alabama Code. See United States v. Cotton, 535 U.S. 625, 630-31, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (subject-matter jurisdiction refers to a court's 'statutory or constitutional power' to adjudicate a case)."

Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006).

A circuit court has the subject-matter jurisdiction to hear a felony case. Ala. Const. 1901 (Off. Recomp.), art. VI, § 142; Ala. Code 1975, § 12-11-30(2); Ex parte Seymour, 946 So. 2d at 538. It is unclear how a circuit court loses subject-matter jurisdiction -- jurisdiction over the "type" of case -- when it sentences a defendant to a term of imprisonment that is shorter or longer than what is required by statute. Specifically, a trial court does not lose the general authority to sentence in such case; it has simply acted

beyond its authority by imposing a sentence that is outside the possible range of sentences provided by statute. Instead, the result should be that "when a sentence is clearly illegal or is clearly not authorized by statute, the defendant does not need to object at the trial level in order to preserve that issue for appellate review." Ex parte Brannon, 547 So. 2d 68, 68 (Ala. 1989). Further, it would appear that such an issue should then be subject to a harmless-error analysis. However, those concerns are not raised in the instant case and, therefore, must await another day.

MENDHEIM, Justice (dissenting).

I respectfully dissent.

I agree with the main opinion insofar as it concludes that the trial court's order entered under the Split-Sentence Act, § 15-18-8, Ala. Code 1975, altering the manner in which Walter McGowan's legal sentences are to be executed, is illegal and, thus, void. I disagree, however, with the decision to reverse the Court of Criminal Appeals' judgment and to remand the case for the trial court, ultimately, to conduct further proceedings; no further proceedings are necessary to remedy the trial court's now moot illegal order regarding the execution of McGowan's sentences. I believe that the Court of Criminal Appeals properly overruled Enfinger v. State, 123 So. 3d 535 (Ala. Crim. App. 2012), in determining that the trial court's action reinstating the execution of McGowan's underlying 15-year sentences rendered moot any illegality in the order entered pursuant to § 15-18-8, and I would affirm the Court of Criminal Appeals' judgment.

My disagreement with the main opinion concerning the remedy in this case is based on the reasoning set forth in the Court of Criminal

Appeals' decision below, which is largely based on the reasoning set forth in Presiding Judge Windom's dissent in Enfinger, supra. In short, because the illegal split sentences have been removed and McGowan is now properly serving legal 15-year sentences, the trial court's error in originally splitting his sentences is moot. The main opinion reasons that, because the trial court's order imposing the split sentences was void, the "trial court has no jurisdiction to act on the unauthorized sentence[s], including conducting revocation proceedings and entering a revocation order," and, thus, could not use the mechanism of a probation revocation to correct the order illegally splitting the sentences. ___ So. 3d at ___.[3] I believe that such reasoning elevates form over substance. It is irrelevant what the trial court called the proceeding it utilized to remedy the jurisdictional defect, all that matters is that the trial court did, in fact, remedy the jurisdictional defect. As explained in Enfinger:

> "[W]hen the circuit court does not have the authority to split a sentence under the Split-Sentence Act, § 15-18-8, Ala. Code

[3]Justice Shaw's writing similarly states that "[r]evoking probation is not an appropriate mechanism for remedying an illegal split sentence." ___ So. 3d at ___ (Shaw, J., concurring specially).

> 1975, 'the manner in which the [circuit] court split the sentence is illegal[,]' Austin v. State, 864 So. 2d 1115, 1118 (Ala. Crim. App. 2003), and ... '[m]atters concerning unauthorized sentences are jurisdictional.' Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994). Thus, this Court may take notice of an illegal sentence at any time. See, e.g., Pender v. State, 740 So. 2d 482 (Ala. Crim. App. 1999)."

123 So. 3d at 537. Therefore, I disagree with the main opinion insofar as it determines that the mechanism the trial court used to correct the jurisdictional defect was inadequate to actually correct the jurisdictional defect.

Moreover, I disagree with the main opinion insofar as it concludes that there is a need for further proceedings to remedy the trial court's illegal order imposing the split sentences. The main opinion relies upon the following reasoning set forth in Enfinger:

> "In cases where the circuit court had no authority to impose the Split-Sentence Act, the proper remedy has been to remand the case to the circuit court for that court to remove the split portion of the sentence. See e.g., Simmons [v. State, 879 So. 2d 1218 (Ala. Crim. App. 2003)] (holding that the circuit court had no authority to split a sentence and remanding the case to the circuit court for that court to set aside the split portion of the sentence), Morris v. State, 876 So. 2d 1176 (Ala. Crim. App. 2003) (same); cf., Moore v. State, 871 So. 2d 106 (Ala. Crim. App. 2003) (holding that, although the circuit court had authority to split the sentence, the circuit

> court split the sentence in an improper manner and remanding the case to the circuit court for that court to 'reconsider the execution' of the sentence); Austin [v. State, 864 So. 2d 1115 (Ala. Crim. App. 2003)] (same)."

123 So. 3d at 537-38. The authority relied upon by the Enfinger court in support of its assertion that a case such as this one must be remanded to the trial court for it to remove the void order illegally splitting the underlying sentence is readily distinguishable from the present case. In each of the cases relied upon in Enfinger, the trial court had not yet taken action to remove the illegal order modifying the execution of the underlying sentence at issue; in other words, the illegal split sentence was still in effect.[4] However, in the present case, the trial court had already vacated the illegal order modifying the execution of McGowan's underlying sentences. The matter is now moot and there is no further action required.

For these reasons, I respectfully dissent from the main opinion and would affirm the Court of Criminal Appeals' decision.

Bolin, J., concurs.

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[4]This is also true of Williams v. State, 203 So. 3d 888 (Ala. Crim. App. 2015), a case relied upon by Justice Shaw in his special writing. See ___ So. 3d at ___ (Shaw, J., concurring specially).