Rel: July 9, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0714

Craig Ray McGuire

v.

State of Alabama

Appeal from St. Clair Circuit Court
(CC-06-183.60 and CC-06-197.60)

COLE, Judge.

Craig Ray McGuire appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief, challenging his convictions and resulting sentences for third-degree burglary, a

violation of § 13A-7-7, Ala. Code 1975, and for his violation of Alabama's Community Notification Act ("CNA"), see § 15-20-23(a), Ala. Code 1975 (repealed).[1] The convictions and sentences were imposed pursuant to an agreement between the parties. The State asserts that McGuire is not entitled to relief and argues that this case should be remanded with instructions for the circuit court to increase McGuire's sentence in the case involving his violation of the CNA because Alabama's Habitual Felony Offender Act, see § 13A-5-9, Ala. Code 1975 ("HFOA"), was not applied to that conviction.

Facts and Procedural History

On October 5, 2006, McGuire pleaded guilty to third-degree burglary and to a violation of the CNA. Pursuant to a negotiated agreement with the State, McGuire was sentenced to 20 years' imprisonment for his third-degree-burglary conviction, which sentence was split and McGuire was ordered to serve 3 years' imprisonment, followed by 17 years of probation,

[1]The CNA was repealed by Act No. 2011-640, § 49, effective July 1, 2011, and replaced with the Alabama Sex Offender Registration and Community Notification Act.

and to 10 years' imprisonment for his CNA conviction, which sentence was split and he was ordered to serve 3 years' imprisonment, followed by 7 years of probation. (C. 52-64.) The written plea agreement signed by the State, McGuire, and his trial counsel indicates that McGuire had at least six prior felony convictions. (C. 41.) The circuit court's sentencing order for both offenses shows that the HFOA was invoked by the State and granted by the circuit court. (C. 56, 62.) And, although McGuire's third-degree-burglary sentence falls within the range of punishment as provided in the HFOA, McGuire's sentence for his CNA conviction falls below the minimum sentence he could receive under the HFOA, see § 13A-5-9(c)(1), Ala. Code 1975. McGuire did not appeal, and the State did not complain either in the trial court or in this Court about the sentences imposed.

About 15 years after the agreement was accepted and McGuire was convicted and sentenced, he filed a Rule 32 petition, his first. In his petition, McGuire alleged (1) that his CNA conviction and sentence must be vacated because the offense was based on an "out-of-state charge from Florida" that was committed when he was a juvenile and that was the result of "nolo contendere" plea (C. 19-20); (2) that the "State presented

evidence to the Grand Jury of St. Clair County that was wrong, false, ... misleading and prejudicing" (C. 20); (3) that his sentences for his burglary conviction and his CNA conviction are illegal because "[t]he terms of probation given on each case exceed that what is allowable by law" (C. 21); (4) that his sentences are illegal because the "State used [a] nolo contendere plea from Florida to place [him] under [the] Habitual Felony Offender Act (HFOA)" (C. 21); (5) that his CNA conviction "violated the 'Double Jeopardy Clause' " because "the State is relying on [an] out of state nolo contendere plea" to not only charge him with a violation in this case, but also charge him with a second violation on a separate occasion (C. 22); (6) that his trial counsel was ineffective because his trial counsel "refused to argue a fact of law that could have caused a different outcome had they done so" (C. 22); and (7) that requiring him to register as a sex offender for an offense that predates the establishment of the CNA violates the ex post facto clause of the United States Constitution (C. 23-24). To support his allegations, McGuire attached several exhibits to his petition.

On April 9, 2020, the State moved to dismiss McGuire's Rule 32 petition. (C. 46-51.) In its motion, the State alleged that McGuire's claims were meritless, that they were insufficiently pleaded, that they were precluded under Rule 32.2(a)(3) and (5), Ala. R. Crim. P., because they could have been raised at trial or on appeal but were not, and that they were time-barred under Rule 32.2(c), Ala. R. Crim. P. The State also alleged that McGuire's ineffective-assistance-of-counsel claim was precluded under Rule 32.2(d), Ala. R. Crim. P. To support its allegations, the State attached several exhibits to its motion. The State did not argue to the circuit court that McGuire needed to be resentenced for either of his convictions.

On April 15, 2020, the circuit court issued a written order summarily dismissing McGuire's petition. (C. 67-69.) This appeal follows.

Standard of Review

It is well settled that a circuit court may summarily dismiss a Rule 32 petition pursuant to Rule 32.7(d), Ala. R. Crim. P.,

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle

> the petitioner to relief under this rule and that no purpose would be served by any further proceedings...."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992).

When reviewing a circuit court's summary dismissal of a postconviction petition " '[t]he standard of review this Court uses ... is whether the [circuit] court abused its discretion.' " Lee v. State, 44 So. 3d 1145, 1149 (Ala. Crim. App. 2009) (quoting Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005)). If the circuit court bases its determination on a " 'cold trial record,' " however, we apply a de novo standard of review. Ex parte Hinton, 172 So. 3d 348, 353 (Ala. 2012). Moreover, subject to certain exceptions that are not applicable here, "when reviewing a circuit court's rulings made in a postconviction petition, we may affirm a ruling if it is correct for any reason." Bush v. State, 92 So. 3d 121, 134 (Ala. Crim. App. 2009).

Discussion

On appeal, McGuire argues that the circuit court erred when it summarily dismissed his Rule 32 petition because, he says, (1) his trial counsel was ineffective (McGuire's brief, p. 16); (2) "the 2005 Amendment to the SORNA act that specifically targeted people with pleas of Nolo Contendere in their history is illegal and cannot be applied to [him]" (McGuire's brief, pp. 16-17); (3) the State used a prior sex-offense conviction from the State of Florida that, he says, was based on "a plea of Nolo Contendre" to "arrest [him] and charge for failure to register as adult sex offender -- a felony," "used to indict [him] as adult sex offender," and used to "enhance [his] sentence under H.F.O.A." (McGuire's brief, pp. 13-14); and (4) his sentences are illegal because the terms of probation exceed five years (McGuire's brief, p. 15).

The State argues that, although none of McGuire's arguments on appeal entitle him to relief, this Court must remand this case to the circuit court to have that court resentence McGuire because the 10-year sentence for his CNA conviction is illegal because it falls below the minimum sentence he could receive under the HFOA. We first address

McGuire's arguments on appeal and then turn to the State's request to remand this case to the circuit court to increase McGuire's 10-year sentence.

I.

As set out above, McGuire argues that the circuit court erred when it summarily dismissed his claims that his counsel was ineffective, that the CNA is "illegal and cannot be applied to [him]," and that he was improperly arrested, charged, and indicted for failing to register as a sex offender when that sex-offense conviction was based on a sex offense from Florida that was the result of a nolo contendre plea. McGuire's claims, however, are nonjurisdictional and, thus, are subject to the grounds of preclusion set out in Rule 32.2, Ala. R. Crim. P. See, e.g., Ex parte Seymour, 946 So. 2d 536, 539 (Ala. 2006) ("A defendant who challenges a defective indictment is thus subject to the same preclusive bars as one who challenges any other nonjurisdictional error, such as illegal seizure or a violation of the Confrontation Clause."); Griggs v. State, 980 So. 2d 1031 (Ala. Crim. App. 2006) (a challenge to the constitutionality of a statute is a nonjurisdictional claim and is subject to the procedural bars

of Rule 32.2); and Cogman v. State, 852 So. 2d 191, 192 (Ala. Crim. App. 2002) ("An ineffective assistance of counsel claim is not jurisdictional; therefore, it is subject to the two-year limitations period in Rule 32.2(c)."). Because McGuire raised these claims well after the limitations period in Rule 32.2(c), Ala. R. Crim. P., had passed, the circuit court correctly dismissed these claims as time-barred.

II.

McGuire also argues that the circuit court erred when it summarily dismissed his claims that the State used a nolo contendre plea to improperly enhance his sentence[2] under the HFOA and that his sentences are illegal because the terms of probation exceed five years. Although McGuire's claims are jurisdictional, in the sense that they are not subject to the grounds of preclusion set out in Rule 32.2, see, e.g., Ex parte Trawick, 972 So. 2d 782, 783 (Ala. 2007) ("Trawick's claim that his sentence is illegal under the HFOA presents a jurisdictional claim"), and Minshew v. State, 975 So. 2d 395 (Ala. Crim. App. 2007) (holding that a

[2]We note that the HFOA was applied only to McGuire's burglary conviction.

challenge to the length of a term of probation is jurisdictional), neither claim entitles McGuire to relief.

First, McGuire's claim that the State used a prior nolo contendre plea to enhance his sentence under the HFOA is clearly refuted by the record on appeal. In fact, McGuire's claim is refuted by an exhibit he attached to his Rule 32 petition -- namely, the written plea agreement he and his counsel signed. In that written agreement, McGuire admitted that he had the following prior felony convictions and was "thus subject to the HFOA": (1) third-degree burglary in St. Clair County, (2) first-degree receiving stolen property in Shelby County, (3) first-degree receiving stolen property in Jefferson County, (4) first-degree theft of property in Jefferson County, (5) third-degree escape in Jefferson County, and (6) second-degree criminal possession of a forged instrument in Jefferson County. (C. 41.) Thus, contrary to McGuire's assertion, the State did not seek to enhance his sentence under the HFOA based on a prior nolo contendre plea. Because McGuire's claim is clearly refuted by the record on appeal, the circuit court did not err when it summarily dismissed that claim. See Yeomans v. State, 195 So. 3d 1018, 1031 (Ala.

Crim. App. 2013) ("Thus, the record on direct appeal refutes this claim, and the circuit court did not err in summarily disposing of it. Rule 32.7(d), Ala. R. Crim. P.").

Additionally, McGuire's claim that both of his sentences are illegal because the terms of probation exceed five years is meritless. As explained above, McGuire was sentenced to 20 years' imprisonment for his third-degree-burglary conviction, which sentence was split and he was ordered to serve 3 years' imprisonment, followed by 17 years of probation, and to 10 years' imprisonment for his CNA conviction, which sentence was split and he was ordered to serve 3 years' imprisonment, followed by 7 years of probation. (C. 52-64.) Thus, McGuire was sentenced under the Split Sentence Act as outlined in § 15-18-8, Ala. Code 1975.

At the time he committed the offenses and at the time of his sentencing, the Split Sentence Act provided, in pertinent part:

> "(a) When a defendant is convicted of an offense, other than a criminal sex offense involving a child as defined in Section 15-20-21(5), which constitutes a Class A or 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:
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> > "(1) That the convicted defendant 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. In cases involving an imposed sentence of greater than 15 years, but not more than 20 years, the sentencing judge may order that the convicted defendant be confined in a prison, jail-type institution, or treatment institution for a period not exceeding five years, but not less than three years, during which the offender shall not be eligible for parole or release because of deduction from sentence for good behavior under the Alabama Correctional Incentive Time Act, and that 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 the period upon the terms as the court deems best."

§ 15-18-8(a)(1), Ala. Code 1975 (emphasis added). That version of the Split Sentence Act also provided, in pertinent part, that "probation may be granted whether the offense is punishable by fine or imprisonment or both" and that "[p]robation may be limited to one or more counts or

indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment." § 15-18-8(b), Ala. Code 1975 (emphasis added).

In Hatcher v. State, 547 So. 2d 905, 906-07 (Ala. Crim. App. 1989), this Court explained that "the legislature, in enacting the provisions of § 15-18-8, intended to provide that a defendant could be sentenced to mandatory confinement for a period not exceeding three years, after which the defendant would be placed on probation for the remainder of his sentence, even if that sentence were 15 years." In other words, under Hatcher, if the circuit court sentenced a defendant to 15 years' imprisonment and it split that sentence and ordered the defendant to serve 3 years' imprisonment, then the defendant's term of probation could lawfully be 12 years.

Because the version of the Split Sentence Act in effect at the time McGuire committed his offenses allowed the circuit court to impose a term of probation for the remainder of a sentence and because McGuire's terms of probation do not exceed the remainder of his sentences, his terms of

probation were lawfully imposed. Thus, the circuit court properly dismissed McGuire's claim.

III.

We now address the State's argument that McGuire's sentence for his CNA conviction "is illegal." (State's brief, p. 12.) According to the State, its negotiated agreement with McGuire "called for a ten-year base sentence, which is NOT within the fifteen years to life range mandated by the HFOA"; thus, the State concludes, this Court must remand McGuire's case "for the limited purpose of addressing the illegal sentence" for McGuire's CNA conviction. (State's brief, p. 12.) Although the State cites no authority for its position, its argument appears to be rooted in the principle that " 'a challenge to an illegal sentence is jurisdictional and can be raised at any time.' " Ex parte Batey, 958 So. 2d 339, 341 (Ala. 2006) (quoting Ginn v. State, 894 So. 2d 793, 796 (Ala. Crim. App. 2004)). But McGuire's sentence for his CNA conviction is not "illegal" and the failure to impose a sentence-enhancement statute does not implicate the subject-matter jurisdiction of the circuit court.

Recently, in Ex parte McGowan, [Ms. 1190090, April 30, 2021] ___ So. 3d ___, ___ (Ala. 2021), the Alabama Supreme Court explained that an illegal sentence impacts the subject-matter jurisdiction of the circuit court as follows:

> "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 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.')."

At issue in Ex parte McGowan, was whether the circuit court's order revoking McGowan's probation and ordering him to serve the balance of his sentence rendered moot the circuit court's sentencing mistake as to the portion of McGowan's sentence that did not comply with the mandates of the Split Sentence Act. The Supreme Court held that such an order does not render moot such a sentencing mistake because a sentence that the court had no statutory authority to impose exceeds the subject-matter jurisdiction of the court and is void. The Supreme Court explained:

> "[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. ... 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."

___ So. 3d at ___.

In sum, when a circuit court imposes a sentence that is unauthorized by statute -- either because it does not comply with the statute itself, see Ex parte McGowan, supra (finding that the sentence was unauthorized because, although the court had the authority to impose a split sentence under § 15-18-8, the sentence imposed did not fall within the parameters of that statute), or because the circuit court does not have the authority to impose a sentence under a particular statute, see Enfinger v. State, 123 So. 3d 535 (Ala. Crim. App. 2012) (finding that the imposed sentence was unauthorized because the circuit court did not have the authority to impose a split sentence under the circumstances of that case) -- the sentence exceeds the "subject-matter jurisdiction" of the circuit court.

Although the State's argument in this case is premised on its apparent belief that the circuit court did not have "subject-matter jurisdiction" to sentence McGuire to 10 years' imprisonment because the court did not exercise its authority to impose a sentence under the HFOA, we are unaware of any case that holds that a circuit court is without "subject-matter jurisdiction" when the sentence it does impose is

authorized by statute (here, a sentence that complies with § 13A-5-6, Ala. Code 1975, and § 15-18-8) but it declines to exercise its authority to impose a sentence enhancement (here, an enhancement under § 13A-5-9).

It would be odd to hold that a court was without "subject-matter jurisdiction" to act when it was authorized to impose the sentence that it imposed on the defendant and declined to exercise some additional authority. It would be even odder to hold that the circuit court was without "subject-matter jurisdiction" to not impose a sentence enhancement when (1) sentence-enhancement statutes apply only after the State has sufficiently proved the application of that particular sentence enhancement, see, e.g., Craig v. State, 893 So. 2d 1250, 1261 (Ala. Crim. App. 2004) ("The State bears the burden of proving, beyond a reasonable doubt, the existence of a viable prior felony conviction for use as enhancement under the HFOA."), and (2) sentence-enhancement statutes are capable of being waived by the State in the plea-negotiation process, see, e.g., Ex parte Johnson, 669 So. 2d 205 (Ala. 1995) (recognizing that the State may waive the application of the sentencing enhancements found in §§ 13A-12-250 and 13A-12-270, Ala. Code 1975,

during the plea-negotiation process); Durr v. State, 29 So. 3d 922 (Ala. Crim. App. 2009) (recognizing that the State may waive the application of mandatory fines and sentencing enhancements in the plea-negotiation process); and Batts v. State, [Ms. CR-19-0999, Dec. 16, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020) (recognizing that the State may waive all or some of the defendant's prior convictions in the plea-negotiation process). As this Court explained in Hall v. State, 223 So. 3d 977, 981 (Ala. Crim. App. 2016):

> "Both Durr and Johnson explain that, in negotiating a plea agreement, the State may waive 'the application of any mandatory fines and other enhancements -- including the Habitual Felony Offender Act' -- and, if such fines or enhancements are waived in a plea agreement, 'this Court may not order the trial court to impose th[o]se fines.' Durr, 29 So. 3d at 922 n. 1 (emphasis added) (citing Ex parte Johnson, 669 So. 2d 205 (Ala.1995)). Logically, if the State is capable of waiving a mandatory fine in a plea agreement and, if waived, this Court has no power to order the circuit court to impose the mandatory fine, the circuit court's failure to impose such a fine cannot be a jurisdictional defect. Quite simply, the State has no authority to waive a matter that implicates the jurisdiction of the circuit court."

(Some emphasis added.)

To be sure, the HFOA is written in "mandatory" terms, but it is mandatory only if the State proves the existence of the prior convictions beyond a reasonable doubt and the State does not waive the application the HFOA. Simply because a sentencing statute is written in "mandatory" terms does not mean that failing to sentence a defendant under that statute implicates the subject-matter jurisdiction of the circuit court. "[S]tatutes or rules that are written in 'mandatory' terms but that are capable of being waived are not 'jurisdictional.' " Hall, 223 So. 3d at 981. This is true because a court derives its subject-matter jurisdiction from the Alabama Constitution and the Alabama Code, and not the predilections of the State. The State does not wield the power to dictate the circuit court's subject-matter jurisdiction. See, e.g., Ex parte Seymour, 946 So. 2d 536 (Ala. 2006) (holding that a defect in the State's indictment against Seymour had no impact on the circuit court's subject-matter jurisdiction).

In sum, McGuire's 10-year split sentence was not "illegal," because the circuit court had subject-matter jurisdiction to impose it. Furthermore, the State's desire to back out of its plea agreement with

McGuire, in which it waived the application of the HFOA by agreeing to a sentence below the minimum set out in that statute, and its request to have this Court send McGuire's case back to the circuit court to enhance his sentence pursuant to the HFOA is not something that implicates the subject-matter jurisdiction of the circuit court. The State's argument on appeal is that McGuire must be resentenced under the HFOA because, it says, the circuit court is without subject-matter jurisdiction to accept a plea agreement that waives the application of a sentence-enhancement statute. The State's argument is incorrect, and we see no need to remedy what the State now sees as a bad bargain.

Even if the circuit court was required to impose a sentence under the HFOA in this case, the question remains whether Rule 32 can be used in the manner the State requests -- as a means to seek the remedy of greater or harsher punishment on a petitioner simply because he or she chose to file a Rule 32 petition challenging a conviction or sentence. We hold that Rule 32 cannot be used for this purpose.

The scope and purpose of Rule 32, Ala. R. Crim. P., is plain and unambiguous: A "defendant who has been convicted of a criminal offense"

may use Rule 32 "to secure appropriate relief." Rule 32.1, Ala. R. Crim. P. (emphasis added). Recently, Judge Minor in his special concurrence in Washington v. State, [Ms. CR-17-1201, Aug. 16, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019), examined the word "relief" as that word is used in Rule 32.1, Ala. R. Crim. P., and concluded that a defendant requesting harsher punishment in a Rule 32 petition was not seeking "relief." Judge Minor explained:

> " '[I]t simply is not "relief" to obtain the "remedy" of' a harsher sentence or additional punishment. Hall v. State, 223 So. 3d 977, 983 (Ala. Crim. App. 2016) (Joiner, J., concurring specially). 'Relief' is '[t]he redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court. -- Also termed remedy.'[6] Black's Law Dictionary 1482 (10th ed. 2014). 'Remedy' is '[t]he means of enforcing a right or preventing or redressing a wrong.'[7] Id. at 1485. ' "A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged." ' Id. at 1485 (quoting Douglas Laycock, Modern American Remedies 1 (4th ed. 2010)).
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> "Decisions of this Court such as Williams v. State, 203 So. 3d 888 (Ala. Crim. App. 2015), that have permitted a petitioner to use a Rule 32 petition to seek a harsher punishment have not expressly considered the stated purpose of Rule 32 providing a 'remedy' or 'appropriate relief.' To the extent that such decisions permit a petitioner to use Rule 32, Ala. R. Crim. P., to seek a harsher punishment, those decisions are inconsistent with the purpose of Rule 32 as stated in the

> plain meaning of its text. Cf. Hall, 223 So. 3d at 990-91 (Joiner, J., concurring specially) ('Rule 32 exists as a possible key to "unlock the prison doors," see Barton v. City of Bessemer, 27 Ala. App. 413, 417-18, 173 So. 621, 625 (1936) (opinion on rehearing), rev'd on other grounds, 234 Ala. 20, 173 So. 626 (1937), not as a means to subject petitioners to additional or harsher punishment.').
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> "_____
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> "[6] 'Relief' is also defined, in relevant part, as 'a removal or lightening of something oppressive, painful, or distressing.' Merriam-Webster's Collegiate Dictionary 988 (10th ed. 1997).
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> "[7] 'Remedy' is also defined as 'the legal means to recover a right or to prevent or obtain redress for a wrong.' Merriam-Webster's Collegiate Dictionary 989 (10th ed. 1997)."

___ So. 3d at ___ (Minor, J., concurring specially). Judge McCool, in his dissenting opinion in that same case, noted that there could be a scenario in which a defendant's request for harsher punishment results in "appropriate relief." See Washington, ___ So. 3d at ___ (McCool, Judge, dissenting) ("In this case, I believe that Washington is seeking 'relief' by seeking to have an illegal sentence -- and a guilty plea based on that illegal sentence -- set aside."). But we need not decide if this case presents such a scenario because it is not the defendant in this case who

is asking this Court to provide the "relief" of receiving a harsher sentence; it is the State who is seeking that "relief."

As set out above, Rule 32.1 exists to allow a "defendant who has been convicted of a criminal offense" to file a petition "to secure appropriate relief." Rule 32.1, Ala. R. Crim. P. (emphasis added). In other words, although the State views McGuire's filing of a Rule 32 petition as a way for it to seek the "relief" of applying the HFOA to McGuire's CNA conviction 15 years after it reached an agreement with McGuire to waive such a sentence, under Rule 32.1, the only person who can obtain any "relief" from a conviction or sentence in a Rule 32 petition is the defendant who has been convicted of a criminal offense, not the State which prosecutes those offenses. See generally, W.B.S. v. State, 192 So. 3d 417, 419-20 (Ala. Crim. App. 2015) (holding that the plain language of Rule 32.1 precludes "juveniles who have been adjudicated delinquent" from seeking postconviction relief under Rule 32). Put differently, Rule 32 is designed to be a shield that a "defendant" can use to protect himself or herself from the harmful effects of an erroneous decision in the trial court;

it is not designed to be a sword that the State can wield to inflict more punishment on that defendant.

Regardless, even if the circuit court was required to impose the HFOA on McGuire 15 years ago and even if the State could use Rule 32 as a way to secure "relief," we would still be required to reject the State's request to send this case back to the circuit court to increase McGuire's punishment because to do so in this case would violate the United States Constitution. Indeed, even "jurisdictional" errors cannot be fixed when remedying such an error would violate the Constitution. To send this case back to the circuit court now, as the State says we should do, would implicate the same constitutional problem recognized by the Alabama Supreme Court in Ex parte Johnson, 669 So. 2d 205 (Ala. 1995).

In Johnson, the State and the defendant entered into a plea agreement. Under that agreement, the defendant agreed to plead guilty to unlawful distribution of a controlled substance and the State agreed that the defendant would receive a sentence of two years' imprisonment and agreed not to object to the defendant's application for probation. 669 So. 2d at 206. The circuit court accepted the defendant's guilty plea and

entered a judgment in accordance with the agreement. Id. "[W]ithin minutes" after the court accepted the defendant's plea, however, the State realized that it "had forgotten" that the sentencing enhancements found in §§ 13A-12-250 and 13A-12-270, Ala. Code 1975, applied to the defendant's case. Id. The State then "asked the court to rescind the plea agreement." Id. The circuit court declined the State's request and concluded that the State was bound its original plea agreement.

The Alabama Supreme Court agreed with the circuit court's decision enforcing the plea agreement, reasoning that, although "no defendant has a constitutional right to a plea bargain," "if the district attorney makes an offer and that offer is accepted by the accused, either by entering a guilty plea or by taking action to his detriment in reliance on the offer, the plea bargain becomes binding and enforceable under constitutional law." Id. at 206 (second emphasis added). The Alabama Supreme Court explained:

> "The United States Supreme Court first upheld the constitutionality of plea bargains in Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). In Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the Supreme Court recognized the enforceability of a negotiated plea. This Court addressed the issue of plea bargaining in Ex parte Yarber, 437 So. 2d 1330 (Ala.1983),

wherein it held that the State does not have to enter into a plea agreement. However, if the State chooses to do so, the Court held, it should not be allowed 'to repudiate that agreement with impunity.' 437 So. 2d at 1335. To allow the State to dishonor its agreements at will would weaken the plea negotiating system.

"It is clear that no defendant has a constitutional right to a plea bargain. The district attorney may engage in plea bargain negotiations at his sole discretion or, if he chooses, he may go to trial. If the district attorney makes an offer to an accused and the accused takes no action in reliance on the offer, the state may withdraw the offer. However, if the district attorney makes an offer and that offer is accepted by the accused, either by entering a guilty plea or by taking action to his detriment in reliance on the offer, the plea bargain becomes binding and enforceable under constitutional law.

"In Santobello, the Supreme Court stated that 'when a plea [of guilty] rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promises must be fulfilled.' 404 U.S. at 262, 92 S. Ct. at 499. The Court in Santobello did not specifically state where the right to relief from a broken plea agreement arises. However, we believe that the right comes from the due process requirement that guilty pleas be made voluntarily and intelligently, given that a guilty plea is a waiver of fundamental rights such as a jury trial, the right against self-incrimination, and the right to confront accusing witnesses. See, Santobello, 404 U.S. at 261, 92 S. Ct. at 498.

"We also recognize that plea agreements resemble formal contracts and that contract law theories provide a 'useful

> analytical framework,' for dealing with plea agreements but contract law cannot be rigidly applied to plea agreements. Yarber, 437 So. 2d at 1334. It is the Due Process Clause that mandates enforcement of the state's promise when the accused has detrimentally relied on that promise in pleading guilty or in taking action based on the promise."

Ex parte Johnson, 669 So. 2d at 206-07 (emphasis added).

Here, just as in Johnson, McGuire and the State entered into a plea agreement for his CNA conviction that included a sentence that did not account for an applicable sentencing enhancement, the circuit court accepted that agreement, and the circuit court sentenced McGuire in accordance with that agreement. Whether the State forgot that the HFOA applied to that conviction or chose to waive the application of the HFOA to that conviction, the fact remains that the State made a sentencing offer to McGuire that did not include application of the HFOA, and McGuire accepted that offer by pleading guilty. At the point McGuire pleaded guilty, the agreement was "binding and enforceable under constitutional law," and any attempt now to remedy McGuire's sentence by sending this case back to the circuit court to apply the HFOA to his CNA conviction

would violate the Due Process Clause. Ex parte Johnson, 669 So. 2d at 206.

Moreover, assuming that the court should have applied the HFOA to his sentence, sending this case back to the circuit court for that court to apply the HFOA to McGuire's sentence 15 years after that sentence was imposed would violate McGuire's double-jeopardy rights. Recently, this Court in Lanier v. State, 270 So. 3d 304 (Ala. Crim. App. 2018), held that the Double Jeopardy Clause barred a trial court from correcting an illegal sentence on collateral review when that illegal sentence had already expired. This Court explained the application of the Double Jeopardy Clause to sentencing errors as follows:

> " 'The Fifth Amendment's Double Jeopardy Clause protects against a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.' Woods v. State, 709 So. 2d 1340, 1342 (Ala. Crim. App. 1997). 'The clause applies to "multiple punishment" because, if it did not apply to punishment, then the prohibition against "multiple trials" would be meaningless; a court could achieve the same result as a second trial by simply resentencing a defendant after he has served all or part of an initial sentence.' United States v. Fogel, 829 F.2d 77, 88 (D.C. Cir. 1987). '[T]he primary purpose of the Double Jeopardy Clause [i]s to protect the integrity of a final judgment,' United

> States v. Scott, 437 U.S. 82, 92, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), and jeopardy attaches to a sentence when the defendant acquires 'an expectation of finality in the original sentence.' United States v. DiFrancesco, 449 U.S. 117, 139, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980)."

Lanier, 270 So. 3d at 308-09. Based on that explanation, this Court concluded that, not only does "a trial court lose[] jurisdiction to correct an illegal sentence once that sentence expires and the direct appeal has been completed or the time to appeal has lapsed," but also "a trial court's correcting an illegal sentence after the expiration of that sentence violates principles of double jeopardy." Id. at 310.

Although it is not clear from the record before us whether McGuire's sentence for his CNA conviction has expired,[3] and, thus, it is not clear whether our holding in Lanier is directly controlling in this case, the

[3]It is possible that McGuire's sentence has not yet expired. McGuire was sentenced for his CNA conviction on October 5, 2006. As explained above, the agreed-upon and imposed sentence for McGuire's CNA conviction was 10 years' imprisonment, split to serve 3 years' imprisonment, followed by 7 years' probation. If McGuire served all three years of the split portion of his sentence, then his seven-year term of probation would have started in October 2009. If McGuire had served six years of probation and his probation was revoked, then he would have re-entered prison in October 2015 to serve the remaining seven years on his sentence, which would put his end of sentence date around October 2022.

"expectation-of-finality-in-the-original-sentence" rule articulated in United States v. DiFrancesco, 449 U.S. 117 (1980) (and, in turn, Lanier), is not limited to only those sentences that have expired.

The United States Court of Appeals for the Eleventh Circuit explained what happened in DiFrancesco as follows:

> "In DiFrancesco, the defendant was convicted under the federal racketeering laws and sentenced as a dangerous special offender to two ten-year prison terms to be served concurrently with each other and concurrently with a nine-year sentence imposed in unrelated federal proceedings. In other words, the district court imposed the equivalent of only one additional year's incarceration under the dangerous special offender statute. The government appealed the sentence on the ground that the district court abused its discretion by imposing only one additional year. Believing it could not enhance a sentence on an appeal by the government, the court of appeals dismissed the appeal on double jeopardy grounds. The Supreme Court granted certiorari and reversed."

United States v. Jones, 722 F.2d 632, 636 (11th Cir. 1983). The Eleventh Circuit explained that "[w]e are able to draw two lessons from" DiFrancesco: (1) "the Double Jeopardy Clause bars multiple punishment -- i.e., punishment in excess of that permitted by law" and (2) "the Double Jeopardy clause respects the defendant's 'legitimate expectations' as to the

length of his sentence." Jones, 722 F.2d at 637. We recognized the "second lesson" in Lanier.

Concerning the second lesson, which is at issue here, the Eleventh Circuit explained:

> "The second principle, that the 'legitimate expectations' of the defendant are protected by the Double Jeopardy Clause, also is rooted in DiFrancesco. The relevance of the defendant's expectations stems from one of the purposes of the Double Jeopardy Clause -- to avoid repeatedly subjecting the defendant to 'embarrassment, expense, anxiety, and insecurity in the possibility that he may be found guilty even though innocent.' 101 S. Ct. at 437. Although these factors are of less concern in sentencing, after the defendant already has been found guilty, they were nonetheless central to the DiFrancesco decision. There the Court concluded that because a sentence under the dangerous special offender statute is explicitly subject to increase on appeal, DiFrancesco's 'legitimate expectations' were no greater than 'the expectations of the defendant who is placed on parole or probation that later is revoked.' Id. We presume, therefore, that if the legitimate expectations of a defendant in Jones' position are frustrated by resentencing, double jeopardy rights would be implicated."

Jones, 722 F.2d at 638.

In finding that the trial court violated Jones's double-jeopardy rights "with respect to the duration of his sentence" when the trial court

resentenced him before he actually started serving that sentence, the Eleventh Circuit explained:

> "We note initially that both before and after his guilty plea was accepted, Jones cooperated with the authorities .... At no point in the sentencing process did he engage in deception, for he neither affirmatively misrepresented his affairs nor deliberately withheld pertinent information. At the second sentencing proceeding, the district court stressed that neither Jones nor his counsel were responsible for the court's mistaken impression as to the likelihood of restitution. The court declared:
>
> > " 'I think it is appropriate to state at this time that a mistake of fact existed in the mind of the District Judge at the time this sentence was imposed. I was mistaken about the nature and extent of the financial transactions. This was of course not Mr. Jones' fault. That had been made known to a member of this court's staff, Mr. Williams, the Probation Officer. ... I will state again in the record that there is absolutely nothing in these conditions, absolutely nothing in the record, and no fact or inference that I know of that counsel for Mr. Jones has in any way misled the Court. The mistakes of fact which precipitated this new sentence, as it were, are entirely generated from this side of the bench.'
>
> "Tr. 4:26-28 (emphasis added).
>
> "For the purpose of determining the legitimacy of a defendant's expectations, we draw a distinction between one who intentionally deceives the sentencing authority or thwarts

> the sentencing process and one who is forthright in every respect. Whereas the former will have purposely created any error on the sentencer's part and thus can have no legitimate expectation regarding the sentence thereby procured, the latter, being blameless, may legitimately expect that the sentence, once imposed and commenced, will not later be enhanced. Under this analysis, unless the statute explicitly provides for sentence modification, as in DiFrancesco, or the defendant knowingly engages in deception, a sentence may not be altered in a manner prejudicial to the defendant after he has started serving the sentence."

Jones, 722 F.2d at 638-39.

Generally, once a defendant "has started serving [a] sentence" he or she has a legitimate expectation of finality in the duration of that sentence, and a trial court cannot resentence that defendant and increase the duration of that sentence unless (1) the sentencing statute expressly allows for a later modification of sentence or (2) the defendant engages in some conduct that deceives the trial court or "thwarts the sentencing process" when the original sentence is imposed.[4]

[4]Seeking to have a sentence decreased would not result in prejudice to the defendant and, thus, would not run afoul of the Double Jeopardy Clause.

Here, although the State requests that this Court send this case back to the circuit court and order that court to impose the HFOA and to increase McGuire's sentence, nothing in the HFOA expressly allows a circuit court to modify a sentence by applying that sentence-enhancement statute more than 30 days after the original sentence is imposed. As we have explained: "If a motion for a new trial or a request to modify a sentence is not filed within 30 days of sentencing, the trial court loses all jurisdiction to modify the sentence." Massey v. State, 587 So. 2d 448, 449 (Ala. Crim. App. 1991) (citing Ex parte Hayden, 531 So.2d 940 (Ala.1988)). In other words, not only does the HFOA not contemplate a modification to the duration of a sentence after the sentence was imposed, our caselaw expressly forbids a court from making such a modification because a court is without subject-matter jurisdiction to do so. Because McGuire's sentence complies with § 13A-5-6 and § 15-18-8, the circuit court lost all jurisdiction to modify McGuire's sentence 30 days after it was imposed. To modify that sentence now and to increase McGuire's punishment would violate double-jeopardy principles.

Additionally, nothing in the record on appeal shows that McGuire engaged in any conduct that deceived the trial court or "thwart[ed] the sentencing process" when the circuit court did not sentence him under the HFOA. Indeed, as explained above, McGuire and the State entered into a written plea agreement, which was signed by the State, McGuire, and McGuire's trial counsel. That written plea agreement shows that McGuire had at least six prior felony convictions. (C. 41.) And, although the 10-year sentence agreed upon for his CNA conviction did not contemplate a sentence within the range set out in the HFOA, McGuire's sentence for his burglary conviction did. McGuire, from what we can tell in this appeal, did nothing to deceive the circuit court or the State in agreeing to a 10-year sentence.

Based on the record before this Court, McGuire had an expectation of finality in the duration of his sentence that was imposed nearly 15 years ago. To send this case back now to increase McGuire's sentence would, just as was the case in Lanier and in Jones, violate his double-jeopardy rights. Thus, we decline the State's invitation to allow it to back

out of its plea agreement with McGuire and to send this case back to the circuit court to increase McGuire's 10-year sentence.

Conclusion

Based on these reasons, the circuit court's decision to summarily dismiss McGuire's Rule 32 petition is affirmed.

AFFIRMED.

Windom, P.J., and McCool, J., concur in the result. Kellum, J., concurs in part and concurs in the result, with opinion. Minor, J., recuses himself.

KELLUM, Judge, concurring in part and concurring in the result.

I concur in Parts I and II of the main opinion. However, as to Part III of the opinion, I concur only in the result because I believe the judicial gymnastics the main opinion engages in are wholly unnecessary to reject the State's request that we remand this cause for the circuit court to resentence Craig Ray McGuire for his conviction for violating Alabama's Community Notification Act ("CNA"), § 15-20-1 et seq., Ala. Code 1975 (repealed).

This Court has held that when a petitioner raises a jurisdictional issue for the first time on appeal from the denial of a Rule 32, Ala. R. Crim. P., petition, we will not remand the cause for further proceedings on that issue unless the record affirmatively shows a lack of jurisdiction. See Howard v. State, 902 So. 2d 127, 130-31 (Ala. Crim. App. 2004), and Fincher v. State, 837 So. 2d 876, 880-82 (Ala. Crim. App. 2002). Stated differently, this Court will not entertain a jurisdictional issue raised by the petitioner for the first time on appeal from the denial of a Rule 32 petition unless the Rule 32 record affirmatively shows that the petitioner

is entitled to the relief he or she requests. This law applies equally to the State.

In this case, the record before this Court contains the written plea agreement between McGuire and the State, and the Ireland[5] forms and the trial court's sentencing orders for both McGuire's burglary conviction and his CNA conviction. Those documents indicate, contrary to the conclusion in the main opinion, that the Habitual Felony Offender Act ("HFOA"), § 13A-5-9, Ala. Code 1975, was both invoked by the State and applied by the trial court to McGuire's sentence for the CNA conviction.[6] Nevertheless, the State agreed to, and the trial court imposed, a sentence

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

[6]The written plea agreement states that McGuire agreed to plead guilty to third-degree burglary and to violating the CNA and to be sentenced to 10 years' imprisonment for the CNA conviction, and that he admitted that he had six prior felony convictions and that he was "thus subject to the HFOA." (C. 52.) The trial court's sentencing order for the CNA conviction specifically states that the State's motion to sentence McGuire pursuant to the HFOA was granted by the trial court and that the trial court found that McGuire had three or more prior felony convictions. The Ireland form for the CNA conviction properly designates the CNA conviction as a Class C felony, and the sentencing range for a Class C felony with three prior felony convictions, i.e., not less than 15 years' nor more than 99 years' or life imprisonment, is circled.

of 10 years' imprisonment for the CNA conviction, which is below the minimum sentence authorized by law for a Class C felony offense with three or more prior felony convictions. See § 13A-5-9(c)(1), Ala. Code 1975 (providing a minimum sentence of 15 years' imprisonment for a Class C felony when a defendant has three or more prior felony convictions).[7]

Although the record affirmatively shows that McGuire's sentence for his CNA conviction is illegal, that does not, under the circumstances in this case, necessarily entitle the State to the relief it seeks. As the main opinion points out, McGuire was sentenced almost 15 years ago and, although there are scenarios in which it is possible that McGuire's 10-year sentence has not yet expired, there are also scenarios in which it is possible that McGuire's sentence has expired. A sentence, even an illegal one, cannot be changed after it has expired. See Lanier v. State, 270 So. 3d 304, 308-10 (Ala. Crim. App. 2018). Nothing in the Rule 32 record indicates whether McGuire's sentence has expired; thus, it is unclear

[7]Section 13A-5-9 was amended in 2015 by Act No. 2015-185, Ala. Acts 2015. However, the minimum sentence in § 13A-5-9(c)(1) of 15 years' imprisonment was not altered.

whether resentencing McGuire at this point would be permissible. Under these circumstances, I cannot say that the record affirmatively shows that the State is entitled to the relief it seeks. For this reason alone, in accordance with Howard and Fincher, this Court should decline to entertain the State's challenge, raised for the first time on appeal, to the legality of McGuire's sentence for his CNA conviction.