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Court of Criminal Appeals

State of Alabama
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MEMORANDUM

CR-12-2086 Lauderdale Circuit Court CC-11-485

Shannon Ray Johnson v. State of Alabama

WINDOM, Presiding Judge.

Shannon Ray Johnson appeals his conviction for third-degree escape, see § 13A-10-33, Ala. Code 1975, and his resulting sentence as a habitual offender to life in prison. See § 13A-5-9, Ala. Code 1975.

On March 24, 2011, Johnson pleaded guilty to resisting arrest in the district court of Lauderdale County. The district court judge sentenced Johnson to six months in the Lauderdale County Work Release Center ("LCWRC"). The LCWRC is

operated by the Lauderdale County Community Corrections Authority. Johnson reported to the LCWRC that evening and was given a classification that prevented him from leaving the LCWRC for any reason. Johnson was informed that night of his classification. The next day Johnson was again told that he could not leave the LCWRC.

At 7:00 p.m. on March 31, 2011, an Alcoholics Anonymous meeting was held in a common area of the LCWRC. A corrections officer announced that the meeting was beginning, and Johnson went to the common area along with other inmates. Shortly after the meeting began, Johnson walked out of the common area and off the LCWRC grounds. A corrections officer reported the escape to law enforcement, and the next day, April 1, 2011, Daryl Williams, supervisor of the LCWRC, obtained a warrant for Johnson's arrest.

Later that day, Robbie Howard of the Florence Police Department saw Johnson near a Johnson family business. Johnson got into a vehicle and drove away. Howard followed Johnson before stopping and arresting him without incident.

I.

Johnson first argues that the circuit court erroneously denied his motion to dismiss the indictment, motion for a judgment of acquittal, and motion for a new trial because he should have been convicted of only misdemeanor escape under § 14-8-43, Ala. Code 1975. According to Johnson, because he was a county inmate convicted of a misdemeanor and serving his sentence in work release, he could only be convicted of misdemeanor escape under § 14-8-43, Ala. Code 1975. From there, Johnson argues that he was improperly convicted of third-degree escape under § 13A-10-33, Ala. Code 1975. This Court disagrees.

Section 14-8-42, Ala. Code 1975, provides:

> "The willful failure of an inmate to remain within the extended limits of his confinement or to return to the place of confinement within the time prescribed shall be deemed an escape from a state penal institution in the case of a state inmate and an escape from the custody of the sheriff in the

case of a county inmate and shall be punishable accordingly."

An inmate fails "to remain within the extended limits of his confinement" when he or she fails to remain at work while on work release. Cf. Sommerville v. State, 555 So. 2d 1165, 1167 (Ala. Crim. App. 1989) (recognizing that "[t]he outside work place was an extension of the limits of his confinement"). Further, an inmate fails "to return to the place of confinement" when he or she fails "to return to the ... detention office after leaving work release." Terrell v. State, 621 So. 2d 402, 402 (Ala. Crim. App. 1993). In either of those two circumstances, a county inmate serving a sentence in work release may be charged only with a misdemeanor under § 14-8-43, Ala. Code 1975.

Johnson, however, neither failed to return to the detention center after work nor failed to remain at work while on work release. Rather, he escaped from the detention center itself. In circumstances where an inmate of any type escapes from the detention center itself, § 14-8-42, Ala. Code 1975, does not apply and that inmate may be properly charged with felony escape under §§ 13A-10-31 through 13A-10-33, Ala. Code 1975. See Nichols v. State, 518 So. 2d 851, 852 (Ala. Crim. App. 1987) (holding that an inmate's "conduct in escaping from the work release center itself was beyond the scope and intent of [§ 14-8-42, Ala. Code 1975").

Because Johnson escaped from the common area of the detention center, he was properly charged with and convicted of felony escape under § 13A-10-33, Ala. Code 1975, rather than a misdemeanor under §§ 14-8-42 and 14-8-43, Ala. Code 1975. Therefore, the circuit court did not abuse its discretion by denying Johnson's motions.

II.

Johnson next asserts that the evidence was insufficient to sustain his conviction. He specifically argues that the "the court file [of Johnson's resisting arrest case] does not contain a single document indicating the defendant was incarcerated pursuant to a lawful conviction or court order as required by Alabama Code §[ ]13A-10-33." (Johnson's brief, at 32.) Johnson also contends that the State did not establish a prima facie case of escape because the record does not

establish that his guilty plea to resisting arrest was made knowingly, voluntarily, and intelligently.

"'The test used to determine the sufficiency of the evidence is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt.' Eady v. State, 495 So. 2d 1161, 1164 (Ala. Crim. App. 1986), citing Cumbo v. State, 368 So. 2d 871, 875 (Ala. Crim. App. 1978). '"The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the [finder of fact], at the time the motion was made, from which the [finder of fact] by fair inference could have found the appellant guilty.'" Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993), quoting Thomas v. State, 363 So. 2d 1020 (Ala. Crim. App. 1978).

> "'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the [trier of fact].' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).
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> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985)."

W.C.M. v. State, [Ms. CR-12-1202, November 8, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2013).

Johnson was charged with violating § 13A-10-33(a), Ala. Code 1975, which provides, "[a] person commits the offense of escape in the third degree if he escapes or attempts to escape from custody." "Custody" is defined in § 13A-10-30(b)(1), Ala. Code 1975, as "[a] restraint or detention by a public servant pursuant to a lawful arrest, conviction, or order of court ...."

A.

Johnson contends that the district court file relating to his guilty-plea conviction for resisting arrest "does not contain an order or a case action summary indicating the defendant was ever convicted of anything." (Johnson's brief, at 32.) Thus, according to Johnson, he could not be convicted of escape.

In the instant case, Lauderdale County District Court Judge Carole Medley testified that Johnson had entered into a plea agreement for the charge of resisting arrest. She further testified that she accepted his guilty plea and verbally ordered him to serve a six-month sentence in the LCWRC. On cross-examination, Medley agreed that there was no written sentencing order in Johnson's file for resisting arrest. At the close of the State's case-in-chief, Johnson made a motion for judgment of acquittal based, in part, on the lack of a written order in the district court file relating to his guilty-plea conviction for resisting arrest. The State argued that the "definition of custody does not require a written order" and the circuit court denied Johnson's motion. (R. 304.)

This Court is unaware of any authority requiring a written order to satisfy the definition of "custody" found in § 13A-10-30(b)(1), Ala. Code 1975. District Judge Medley testified that she accepted Johnson's guilty plea and verbally ordered Johnson to serve a six-month sentence at the LCWRC. Accordingly, the State presented sufficient evidence from which the jury could have found that Johnson was lawfully convicted and confined pursuant to a court order. Therefore, Johnson is due no relief on this claim.

B.

Johnson also argues that the State did not establish that his guilty plea to resisting arrest was made knowingly, voluntarily, and intelligently. Johnson reasons that because the State failed to establish that his plea was entered knowingly, voluntarily, and intelligently, he "was not in custody pursuant to a lawful conviction or court order." (Johnson brief, p. 41.)

Whether an error, constitutional or otherwise, occurred

in the proceedings leading to the conviction underlying an escape conviction is not a defense that may be raised in prosecution for escape. See United States v. Smith, 534 F.2d 74, 75 (5th Cir. 1976); Cf. Sturdivant v. State, 643 So. 2d 1013, 1014 (Ala. Crim. App. 1993) (holding that "[t]he proper procedure for challenging the validity of prior felony convictions used for enhancing a sentence under the Habitual Felony Offender Act is to file a Rule 32, [Ala.] R. Crim. P., petition in the court of conviction for the conviction being challenged"). That is, "[t]he doctrine of self help is not available to a prisoner in a penal or correctional institution. Remedies are available for procuring through legal process the release of those who are unlawfully held in custody." Mullican v. United States, 252 F.2d 398, 403 (5th Cir. 1958). Consequently, Johnson's argument that his escape conviction must be reversed because his underlying guilty-plea conviction is invalid and without merit.

III.

Johnson contends that the State failed to provide reasonable notice of its intention to proceed under the Habitual Felony Offender Act ("HFOA").

Section 13A-5-9(c), Ala. Code 1975, provides that "when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must [receive enhanced punishment.]" Rule 26.6(b)(3)(ii), Ala. R. Crim. P. requires that at a "reasonable time" before the sentencing hearing, the State must notify the defendant of its intent to establish prior felony convictions pursuant to § 13A-5-9, Ala. Code 1975.

The Alabama Supreme Court has explained:

> "The HFOA requires enhanced punishment for repeat felony offenders. Ala. Code 1975, § 13A-5-9. See, e.g., McLester v. Smith, 802 F.2d 1330 (11th Cir. 1986). For the HFOA to apply to a particular sentencing, the State must give reasonable notice, prior to the sentencing hearing, of the State's intention to proceed under the HFOA. Rule 26.6(b)(3), Ala. R. Crim. P. (formerly Temp. Rule 6(b)(3)(ii), Ala. R. Crim. P.). Written notice is

> not required; oral notice will suffice. Garrett v. State, 480 So. 2d 58 (Ala. Crim. App. 1985). Determination of the 'reasonableness' of the notice period is left to the trial judge's discretion, because the trial judge is present and is familiar with the circumstances of the case. Humber v. State, 481 So. 2d 452 (Ala. Crim. App. 1985). The notice requirement is eliminated when during the trial the defendant admits the previous felony conviction. Petite v. State, 520 So. 2d 207 (Ala. Crim. App. 1987)."

Connolly v. State, 602 So. 2d 452, 454 (Ala. 1992).

In the instant case, on August 21, 2013, the State filed a notice of prior felony convictions and notified Johnson of its intent to have him sentenced pursuant to the Habitual Felony Offender Act. In the notice, the State informed Johnson that it would offer two prior felony convictions from Georgia. The State filed a motion to continue the sentencing, and the circuit court granted the State's motion. On September 11, 2013, the State filed a second notice of prior felony convictions. In this notice, the State notified Johnson of its intent to offer a total of four prior felony convictions, two of which had been listed in its original notice of prior felony convictions.

At the sentencing hearing, held on September 12, 2013, Johnson objected to the admission of exhibits establishing the four prior felony convictions on the grounds that the State had failed to provide proper notice and that the State had not satisfied the evidentiary grounds for their admission. The circuit court overruled Johnson's objections and the exhibits were admitted. The circuit court sentenced Johnson under the provisions of the HFOA to life in prison.

The circuit court did not abuse its discretion in denying Johnson's objections. See Hobson v. State, 625 So. 2d 1168, 1170 (Ala. Crim. App. 1993) (holding that one day notice "that the State intended to proceed under the Habitual Felony Offender Act and of what prior felony would be used to enhance his sentence" was reasonable). Therefore, Johnson is due no relief on this claim.

IV.

Johnson argues that the State failed to prove that the conduct underlying his Georgia convictions would have constituted felonies in Alabama.

> "'Review on appeal is restricted to questions and issues properly and timely raised at trial.' Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989). 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App. 1992). '[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof.' McKinney v. State, 654 So. 2d 95, 99 (Ala. Crim. App. 1995) (citation omitted). 'The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.' Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987). 'The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury.' Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994)."

Ex parte Coulliette, 857 So. 2d 793, 794-95 (Ala. 2003).

At the sentencing hearing, Johnson made the following objections to the admission of the exhibits establishing his prior felony convictions:

> "First of all I'm going to object and say the State didn't provide proper advanced notice on any of the out of state priors or any of the other previous convictions. Number one. I object to the admissibility of those documents as not being properly authenticated. The State has not laid the proper predicate foundation for the admissibility of those convictions for purposes of enhancement pursuant to Habitual Offender Act."

(R. 336.)

Because Johnson did not timely object to the convictions on the basis that the State had failed to prove that the conduct underlying his Georgia convictions would have constituted felonies in Alabama, this issue is not preserved for this Court's review.

V.

Johnson also asserts that the prosecutor improperly injected the consideration of punishment during closing argument. Johnson asserts, "During closing arguments, the district attorney, after reading the misdemeanor statute of escape said, 'that sounds bad, but it's really not all that bad,' thus signaling to the jury the lesser-included was not a serious offense and they should ignore it." (Johnson's brief, at 50.) The cite to which Johnson directs our attention, however, is a cite not to the prosecutor's closing argument but, rather, to a statement Johnson made at the sentencing hearing in which he discussed the prosecutor's closing argument.

"This court cannot predicate error on matters not shown in the record. Further, the appellant has the responsibility of providing a complete record on appeal. Therefore, there is nothing in this part of the State's closing argument for this court to review." Watkins v. State, 565 So. 2d 1227, 1232 (Ala. Crim. App. 1990)(internal cites omitted).

The record does not contain a transcription of the prosecutor's closing argument nor any objection Johnson may have made to the prosecutor's closing argument. Accordingly, there is nothing for this Court to review.

VI.

Johnson contends that the circuit court erroneously denied his motion for a mistrial he made after the State published a document showing that Johnson had been at the LCWRC on a previous occasion.

"A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice." Hammonds

v. State, 777 So. 2d 750, 767 (Ala. Crim. App. 1999) (citing Ex parte Thomas, 625 So. 2d 1156 (Ala. 1993)), aff'd, 777 So. 2d 777 (Ala. 2000). A mistrial is the appropriate remedy when a fundamental error in a trial vitiates its result. Levett v. State, 593 So. 2d 130, 135 (Ala. Crim. App. 1991). "The decision whether to grant a mistrial rests within the sound discretion of the trial court and the court's ruling on a motion for a mistrial will not be overturned absent a manifest abuse of that discretion." Peoples v. State, 951 So. 2d 755, 762 (Ala. Crim. App. 2006). "A trial judge is allowed broad discretion in determining whether a mistrial should be declared, because he is in the best position to observe the scenario, to determine its effect upon the jury, and to determine whether the mistrial should be granted." Dixon v. State, 476 So. 2d 1236, 1240 (Ala. Crim. App. 1985).

Rule 404(a), Ala. R. Evid., provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion ...." Rule 404(b), Ala. R. Evid., allows for the admission of such evidence if it is offered to establish ""other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

> "Inadvertent slips during a witness's testimony which are prejudicial to the accused need not be cause for mistrial where the trial court acts promptly to tell the jury that the statement is not to be considered by them. Elmore v. State, 414 So. 2d 175, 176 (Ala. Cr. App. 1982). See also Richardson v. State, 374 So. 2d 433 (Ala. Cr. App. 1979) (witness inadvertently made before the jury a statement that he had been cautioned against making during hearing outside presence of jury and mistrial was denied because judge promptly instructed the jury to disregard)."

Campbell v. State, 570 So. 2d 1276, 1281 (Ala. Crim. App. 1990).

The record in the instant case demonstrates that the document was neither offered nor published by the State for any purpose. Accordingly, Rule 404, Ala. R. Evid., is inapplicable to our consideration of Johnson's claim of error.

Rather, the publication of the document was inadvertent on the part of the prosecutor. During the direct examination of Kathy McLaughlin, director of the LCWRC, the prosecutor approached the bench and, outside the presence of the jury, informed the circuit court and Johnson that he had mistakenly published to the jury by use of a projector a document indicating that Johnson had previously been held at the LCWRC.[1] After realizing his mistake, the prosecutor "immediately took [the document] off the screen and approached the bench." (R. 250.) Outside the presence of the jury, Johnson noted that the incorrect "document was published and several questions were asked about that document before either [the prosecutor or defense counsel] realized the error." (R. 251.) Johnson moved for a mistrial on the grounds that the document constituted improper Rule 404(b), Ala. R. Evid., evidence and the circuit court denied Johnson's motion. Johnson asked for a curative instruction and the circuit court gave the instruction Johnson requested. In the instruction the circuit court told the jury that a document that should not have been published had been and that they were to disregard any information they obtained from the document and to strike any notes they had written about it. The circuit court acted promptly to cure the inadvertent display of the document and did not abuse its discretion in denying Johnson's motion for a mistrial. Johnson is, therefore, due no relief on this claim.

Johnson also argues that the cumulative effect of the document's publication combined with a witness having asked the circuit court whether she was "supposed to mention when [Johnson] was in [the LCWRC] before" deprived him of a fair trial. (R. 266.)

> "'Review on appeal is restricted to questions and issues properly and timely raised at trial.' Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989). 'An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.' Pate v. State, 601 So. 2d 210, 213 (Ala. Crim. App.

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[1]Johnson acknowledged that the prosecutor's demeanor and reaction caused him to believe that the publication of the incorrect document was not done maliciously or intentionally.

1992). '[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof.' McKinney v. State, 654 So. 2d 95, 99 (Ala. Crim. App. 1995) (citation omitted). 'The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.' Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987). 'The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury.' Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994)."

Ex parte Coulliette, 857 So. 2d 793, 794-95 (Ala. 2003).

During cross-examination McLaughlin asked the circuit court if she was "supposed to mention when [Johnson] was in [the LCWRC] before" and the circuit court instructed her that she was not. (R. 266.) Johnson did not object to nor move for a mistrial on the basis of McLaughlin's question. This issue is, therefore, not properly before this Court, and Johnson is due no relief on this claim.

VII.

Finally, Johnson argues that a sentence of life in prison constitutes cruel and unusual punishment.

"Where a trial judge imposes a sentence within the statutory range, this Court will not disturb that sentence on appeal absent a showing of an abuse of the trial judge's discretion." Alderman v. State, 615 So. 2d 640, 649 (Ala. Crim. App. 1992).

In Lane v. State, 66 So. 3d 830 (Ala. Crim. App. 2010), this Court concluded that the defendant's 120-year sentence did not constitute cruel and unusual punishment. The defendant in Lane had two prior felony convictions.

In Ware v. State, 66 So. 3d 830 (Ala. Crim. App. 2010), a case on which we relied in Lane, we explained:

> "'It is well settled that "[w]here a trial judge imposes a sentence within the statutory range, this Court will not disturb that sentence on appeal absent a showing of an abuse of the trial judge's discretion." Alderman v. State, 615 So. 2d 640, 649 (Ala. Crim. App. 1992). "The exception to this general rule is that 'the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense charged that it constitutes a violation of a defendant's Eighth Amendment rights.'" Brown [v. State, 611 So. 2d 1194,] 1197, n. 6 [(Ala. Crim. App. 1992)], quoting Ex parte Maddox, 502 So. 2d 786, 789 (Ala. 1986)."

"Adams v. State, 815 So. 2d 583, 585 (Ala. Crim. App. 2001).

"Ware was given a heightened sentence under the Habitual Felony Offender Act, § 13A-5-9, Ala. Code 1975. Legislatively mandated sentences carry a presumption of validity. McLester v. State, 460 So. 2d 870, 874 (Ala. Crim. App. 1984). '"Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes ...."' 460 So. 2d at 874, quoting Solem v. Helm, 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). '"'Where the punishment prescribed by the legislature is severe merely by reason of its extent, as distinguished from its nature, there is no collision with the Eighth Amendment.'"' Wilson v. State, 427 So. 2d 148, 152 (Ala. Crim. App. 1983) (quoting Watson v. State, 392 So. 2d 1274, 1277 (Ala. Crim. App. 1980), quoting in turn Ex parte Messelt v. State, 351 So. 2d 636, 639 (Ala. Crim. App. 1977)). Likewise, this Court has held that the Habitual Felony Offender Act does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. See Watson v. State, 392 So. 2d 1274 (Ala. Crim.

App. 1980)."

Ware, 949 So. 2d at 183.

Johnson was convicted of third-degree escape pursuant to § 13A-10-33, Ala. Code 1975, which is a Class C felony. See § 13A-10-33(b), Ala. Code 1975. Under § 13A-5-9(c)(1), Ala. Code 1975, "a criminal defendant [who] has been previously convicted of any three felonies and after such convictions has committed another felony, he ... must be punished as follows ... [o]n conviction of a Class C felony, he ... must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years."

At sentencing the State presented evidence establishing that Johnson previously had been convicted of four felonies. Thus, Johnson's sentence was within the guidelines imposed by statute. Accordingly, Johnson's argument that his sentence is in violation of the Eighth Amendment's prohibition against cruel and unusual punishment is without merit, and he is not entitled to any relief on this claim.

For the foregoing reasons, the judgment of the circuit court is due to be affirmed.

AFFIRMED.

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