

IN THE SUPREME COURT OF ALABAMA



March 16, 2018

1170456

Ex parte Robert Fitzgerald Rodgers. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Robert Fitzgerald Rodgers v. State of Alabama) (Dale Circuit Court: CC-95-67.62; Criminal Appeals : CR-16-1216).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on March 16, 2018:

Writ Denied. No Opinion. Bolin, J. - Stuart, C.J., and Shaw, Wise, and Sellers, JJ.,
concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 16th day of March, 2018.

A handwritten signature in cursive script that reads "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

**THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS**

CR-16-1216

Robert Fitzgerald Rodgers v. State of Alabama (Appeal from Dale Circuit Court:
CC95-67.62)

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on December 8th 2017:

Affirmed by Memorandum.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 16th day of March, 2018.

D. Scott Mitchell

Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon. Kimberly Clark, Circuit Judge
Hon. Delores Woodham, Circuit Clerk
Robert Fitzgerald Rodgers, Pro Se
Cecil Gordon Brendle, Jr, Asst. Atty. Gen.

REL: 12/08/2017

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals

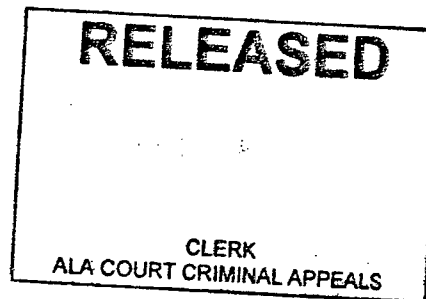
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Presiding Judge
SAMUEL HENRY WELCH
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MEMORANDUM

CR-16-1216

Dale Circuit Court CC-95-67.62

Robert Fitzgerald Rodgers v. State of Alabama

JOINER, Judge.

Robert Fitzgerald Rodgers appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his February 1995 guilty-plea convictions for three counts of attempted first-degree assault, see §§ 13A-4-2 and 13A-6-20, and third-degree robbery, see § 13A-8-43, Ala. Code 1975, and his resulting concurrent sentences of 4 years' imprisonment on each conviction.¹ Rodgers did not file a

¹The circuit court granted Rodgers's in forma pauperis status. (C. 28.) We note, however, that Rodgers's in forma

direct appeal of his guilty-plea convictions or sentences.

On January 12, 2017, Rodgers filed this, his third, Rule 32 petition. In the petition, Rodgers argued that the court was without jurisdiction to render the judgment or to impose the sentence because, he said, the plea agreement called for an "illegal" sentence. (C. 7-18.) Specifically, Rodgers argued that the circuit court failed to impose on him the mandatory minimum sentence of 10 years' imprisonment pursuant to the firearm enhancement of § 13A-5-6(a)(6), Ala. Code 1975. (C. 15.) In response, the State filed a motion to dismiss arguing that Rodgers's petition was time-barred under Rule 32.2(c), Ala. R. Crim. P., precluded under 32.2(b), Ala. R. Crim. P., and without merit. On June 28, 2017, the circuit court granted the motion to dismiss. Rodgers appeals.

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, however, the circuit court bases its determination on a "'cold trial record,'" we apply a de novo standard of review. Ex parte Hinton, 172 So. 3d 348, 353 (Ala. 2012). Moreover, "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

pauperis declaration showed that he had deposited the sum of \$1,300.00 in his inmate account in the 12 months preceding the filing of his in forma pauperis application; this amount is well in excess of the amount necessary to pay the fee associated with filing a petition for postconviction relief, and the circuit court would not have abused its discretion if it had denied Rodgers's request to proceed in forma pauperis. See Ex parte Wyre, 74 So. 3d 479, 482 (Ala. Crim. App. 2011) ("[A]n inmate who has appreciably more than the amount necessary to pay a filing fee deposited in his inmate account in the 12 months preceding the filing of an IFP request is not indigent as that term is defined in Rule 6.3(a), Ala. R. Crim. P. Wyre had \$876.52 deposited to his account in that period--more than twice the amount necessary to pay the filing fee. Thus, he is not indigent.").

So. 3d 121, 134 (Ala. Crim. App. 2009).

Furthermore, 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, the court may either dismiss the petition or grant leave to file an amended petition."

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).

On appeal, Rodgers continues to argue that the circuit court failed to impose on him the mandatory minimum sentence of 10 years' imprisonment pursuant to the firearm enhancement of § 13A-5-6(a)(6), Ala. Code 1975. (Rodgers's brief, p. 2.) According to Rodgers, he was indicted for and pleaded guilty to charges stating that, during the commission of a Class C felony, he was armed with a firearm or deadly weapon. Rodgers argues that he is entitled to have the postconviction "relief" of having additional time added to his sentence. (Rodgers's brief, p. 4.) We disagree.

In Hall v. State, [Ms. CR-15-0273, July 8, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016), this Court rejected a petitioner's claim that he was entitled to use Rule 32 to obtain the "relief" of having an additional fine imposed on him--specifically, he argued that the trial court in 1992 had failed to impose a \$1,000 fine under the Demand Reduction Act. Judge Joiner, in his special concurrence, stated:

"As this Court's opinion explains, Hall's Rule 32 petition challenged his 1992 guilty-plea conviction for unlawful possession of a controlled substance, see § 13A-12-212, Ala. Code 1975, and his resulting sentence of 10 years' imprisonment. In his petition, which was filed nearly 24 years after his 10-year

sentence was imposed, Hall alleged that his 10-year sentence was 'illegal' because, he said, the circuit court failed to impose on him a \$1,000 fine under the Demand Reduction Assessment Act. According to Hall, because the circuit court in 1992 failed to impose the demand-reduction assessment, he was entitled to the postconviction 'relief' of being resentenced by the circuit court so that court could impose on him the demand-reduction assessment.

"Under the text of Rule 32, resolution of Hall's claim is not complicated. First, it simply is not 'relief' to obtain the 'remedy' of an additional fine. See Rule 32.1, Ala. R. Crim. P. ('Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief....' (emphasis added))."

___ So. 3d at ___ (Joiner, J., concurring specially).

Here, as set out above, Rodgers argued that his sentences are "illegal" because the circuit court failed to impose on him the "mandatory" firearm enhancement. This argument, however, does not entitle Rodgers to postconviction relief for two reasons. First, the claim more than 20 years after Rodgers's guilty plea (and after he has completed his sentence on that plea--that the circuit court needs to impose a harsher sentence on Rodgers--is not "relief" contemplated by Rule 32. Second, the record indicates that, in a previous Rule 32 petition wherein Rodgers challenged the legality of his sentences, the circuit court, in denying Rodgers's claim, held as follows:

"In case 00-94-198, [Rodgers] plead guilty to 3 counts of attempted assault in the first degree and in case 00-95-67, [Rodgers] plead guilty to robbery in the third degree, all of which charges are class C felonies. A sentence of 4 years for each offense to run concurrently, is a legal sentence to be imposed by the trial court upon plea of guilty to these charges."

(CR-03-1410, C. 20.)² Accordingly, Rodgers is not entitled to relief on this claim.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Burke, JJ., concur.

²We take judicial notice of the record in this case. See, e.g., Nettles v. State, 731 So. 2d 626 (Ala. Crim. App. 1998).