

Rel: June 23, 2023

**Notice:** This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is published in Southern Reporter.

# Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

---

CR-2023-0079

---

State of Alabama

v.

Sonya Nicole Cross

Appeal from Jefferson Circuit Court  
(CC-10-2678.60)

WINDOM, Presiding Judge.

The State of Alabama appeals the circuit court's order granting Sonya Nicole Cross postconviction relief pursuant to Rule 32, Ala. R. Crim. P.

On June 21, 2022, Cross filed a Rule 32 petition in which she attacked her 2011 guilty-plea conviction for identity theft, see § 13A-8-192(a), Ala. Code 1975, and her resulting sentence, as a habitual felony offender, to 20 years in prison. In her petition, Cross pleaded that she received had ineffective assistance of counsel, that her guilty-plea was not knowingly and voluntarily entered, and that her 20-year sentence constituted cruel and unusual punishment under the Eighth Amendment because the sentence was disproportionate to sentences imposed under the current voluntary sentencing standards. On July 6, 2022, the circuit court gave the State 30 days to respond to Cross's petition; the State did not file a response within 30 days. On August 31, 2022, the circuit court granted Cross 60 days to amend her petition. A second extension of seven days was granted to Cross on October 28, 2022. On November 3, 2022, Cross filed her amended Rule 32 petition in which she reiterated her previous claims. Cross stated that the relief she sought was to be resentenced to time served pursuant to the voluntary sentencing guidelines.<sup>1</sup>

---

<sup>1</sup>Cross's claims that she had received ineffective assistance of counsel and that her guilty plea was involuntary related back to her claim regarding the length of her sentence.

On November 7, 2022, the circuit court held an evidentiary hearing on Cross's petition, during which Cross, appearing from a prison in North Carolina via a video-teleconferencing platform, testified that she was not informed that the Habitual Felony Offender Act ("the HFOA") could be applied to her sentence or that she could be sentenced to 20 years in prison.<sup>2</sup> She also testified that she should receive a lighter sentence because if the voluntary sentencing standards had been in effect at the time of her guilty plea she would not have received such a disproportionately harsh sentence. The State introduced the Explanation of Rights form, signed by Cross, which explained the applicable sentencing range for her conviction as a habitual felony offender.

At the conclusion of the hearing, Cross's attorney requested that the circuit court grant him 30 days to attempt to work with the State to reach a mutual agreement in the case. The circuit court responded:

"I am going to go forward – I'm going to allow you the 30 days, but I'm going to go ahead and indicate where I will be.

---

<sup>2</sup>The transcript of the hearing is dated January 19, 2023; however, other portions of the record indicate that the hearing occurred on November 7, 2022. The date on the hearing transcript appears to be a typographical error.

"....

"... I'm going to enter an order actually granting the Rule 32. I think that 20 years on an identity theft is absolutely cruel and unusual punishment, regardless of the fact of whether she – and I take your argument well. But regardless of the fact of whether she had three or more prior felonies, a 20-year sentence on a nonviolent case, according to this court, is what I consider cruel and unusual.

"I'm not giving a slap on the wrist. She did serve time. She still has time to serve and I don't know what the time actually is. But I think had the trial judge actually taken this case into what this court considers reasonable, that a 20-year sentence would have never been imposed. And so based on that, I am going to grant the petition and I'm going to enter a time served order.

"I will give you the 30 days you're asking for. I will put a written notice just so that it is in writing and the State has the opportunity to appeal that. But I do want to put in writing what I think and why I am actually entering this order, okay?

"....

"Ms. Cross ... I'm not saying that anything you did was right. All of your actions and all of your crimes were absolutely wrong. I just think that a 20-year sentence on something of this nature amounts to what this court believes is cruel and unusual. The Court of Appeals might absolutely disagree with me, because it is within the range of punishment. I just do not think that a property crime deserves a 20-year sentence.

"And so I'll enter this order and I will await anything else from the State as well as the defense. But I'll get this order entered in the next week or two. All right."

(R. 36-38.)

On November 15, 2022, the State filed a motion to dismiss Cross's petition, arguing that Cross's claims were procedurally barred by Rules 32.2(a)(5) and 32.2(c), Ala. R. Crim. P. The State further argued that Cross's 20-year sentence is a legal sentence. Cross filed a motion in which she requested that the circuit court strike the State's motion to dismiss, arguing that the State had failed to respond by the deadline imposed by the circuit court and that the motion was untimely because an evidentiary hearing had been held. The circuit court did not rule on Cross's motion.

On January 19, 2023, the circuit court entered a written order granting Cross's Rule 32 petition. In its written order, the circuit court reiterated its oral statements made at the hearing and resentenced Cross to 15 years in prison, split to time served, followed by 2 years of unsupervised probation. The State appealed.

On appeal, the State claims that the circuit court erroneously granted Cross's petition. Specifically, the State argues that Cross's petition was procedurally barred pursuant to Rules 32.2(c) and 32.2(a)(5),

and that the circuit court erred in determining that Cross's 20-year sentence was cruel and unusual punishment.

"When the circuit court conducts an evidentiary hearing, '[t]he burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State.' Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). '[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence.' Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that '[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' '[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). 'However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992))."

Marshall v. State, 182 So. 3d 573, 581 (Ala. Crim. App. 2014). Here, there are no disputed facts. The State challenges only the circuit court's application of the law to the facts. Consequently, this Court will review the circuit court's ruling de novo, with no presumption of correctness.

The State first asserts that Cross's petition was due to be dismissed because, it says, the claims raised in it were procedurally barred. Cross

asserted in her petition that she had received ineffective assistance of counsel, that her guilty plea was involuntary, and that her sentence violated the Eighth Amendment. These are nonjurisdictional claims subject to the procedural bars of Rule 32.2, Ala. R. Crim. P. See State v. Hurst, 223 So. 3d 941, 950 (Ala. Crim. App. 2015) ("Initially, we note that, in his petition, Hurst raised an ineffective-assistance-of-counsel claim, which is a 'nonjurisdictional' claim that is subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P."); Fincher v. State, 837 So. 2d 876, 878 (Ala. Crim. App. 2002) ("Claims relating to the voluntariness of guilty pleas are not jurisdictional and, therefore, are subject to the procedural bars of Rule 32.2, Ala. R. Crim. P."); Tarver v. State, 761 So. 2d 266, 268 (Ala. Crim. App. 2000) ("Constitutional claims are subject to the [one]-year limitation period set forth in Rule 32.2(c), Ala. R. Crim. P."). Specifically, these claims are procedurally barred because they were asserted after the time limitation in Rule 32.2(c), Ala. R. Crim. P., had expired.

Of course, the procedural bars of Rule 32.2, Ala. R. Crim. P., are not jurisdictional, and they may be waived if the State neglects to assert them. Ex parte Clemons, 55 So. 3d 348, 354 (Ala. 2007). Cross argues

that the State did waive the procedural bars because the State failed to respond to her petition in a timely manner. Although the State did not file a response within the time initially set forth by the circuit court, a circuit court implicitly extends the time for filing a response when it accepts an untimely response. See Owens v. State, 659 So. 2d 977, 978 (Ala. Crim. App. 1994); see also Rule 32.7(a), Ala. R. Crim. P. (directing that the State should respond "[w]ithin thirty (30) days after the service of the petition, or within the time otherwise specified by the court"). The record does not indicate that the circuit court rejected the response. In fact, at the conclusion of the evidentiary hearing, the circuit court stated that it would wait to hear from the parties before entering a written order.

In its order granting Cross relief, the circuit court referenced the applicability of Rule 32.2(c). The circuit court noted that Rule 32.2(c) is not a jurisdictional bar and that it was "within [the circuit court's] authority and jurisdiction to hear an out of time petition." (C. 14.) While this is true, the circuit court may not ignore a procedural bar properly asserted by the State:

"Although Baker correctly recognizes that the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P., have been



characterized as 'not jurisdictional,' that phrase does not mean, as Baker contends, that the circuit court may choose to disregard a ground of preclusion that has been properly asserted by the State and has not been subsequently disproved by the petitioner by a preponderance of the evidence. Instead, the phrase 'not jurisdictional,' as that phrase is used regarding the grounds of preclusion, means only that the State's failure to properly raise a ground of preclusion constitutes a waiver of that affirmative defense. This principle is clearly espoused in the Alabama Supreme Court's decision in Ex parte Clemons, 55 So. 3d 348 (Ala. 2007).

"....

" Although the Court in Clemons concluded that the grounds of preclusion are 'not jurisdictional' and may be waived by the State, Clemons did not hold that a properly asserted ground of preclusion, which is not subsequently disproved, could be simply disregarded by a circuit court if it so chose. Indeed, the grounds of preclusion set forth in Rule 32.2 are written in mandatory terms."

State v. Baker, 172 So. 3d 860, 866-67 (Ala. Crim. App. 2015) (emphasis in original, footnote omitted). Here, the State's response asserted, in part, that Cross's claims were nonjurisdictional claims filed after the time limitation in Rule 32.2(c) had expired. Once properly asserted by the State, application of the time bar was mandatory, and it was error for the circuit court to disregard it. See Baker, 172 So. 3d at 866-67.

Nevertheless, even if this Court were to ignore the applicability of Rule 32.2(c), the State would still be entitled to relief because the circuit

court erred by finding that Cross's sentence constituted cruel and unusual punishment.

Initially, this Court notes that the entire premise of Cross's claim regarding her sentence is flawed. Cross's argument centers on her belief that had she been sentenced today, she would be eligible to be sentenced under the voluntary sentencing standards and would receive a lesser sentence. The circuit court agreed, stating that "changes in sentencing laws have resulted in sentencing disparities and inequalities in imposed sentences. This Court cannot ignore the fact that since Petitioner's original sentencing [in 2011], Alabama's criminal and sentencing jurisprudence has evolved considerably." (C. 16.) The circuit court went on to state that it was confident that, were Cross to be sentenced under today's sentencing standards, she would receive a dramatically shorter sentence. Cross pleaded that, under the current voluntary sentencing standards, the sentencing range for a Class C felony involving a property offense would be 22 months to 69 months.

Both Cross and the circuit court have ignored the fact that the voluntary sentencing standards, upon which Cross's argument relied, have been in effect for "felony offenses sentenced on or after October 1,

2006, and committed before the effective date of the voluntary truth-in-sentencing standards." § 12-25-34(a)(3), Ala. Code 1975. Further, identity theft is not an offense to which the voluntary sentencing standards apply. Sentencing Standards Manual. Although the presumptive sentencing standards were not in effect until October 1, 2013, which was after Cross's offense, Cross would also not be eligible for sentencing under the presumptive sentencing standards because identity theft is not an offense to which the presumptive sentencing standards apply. Sentencing Standard Manual.

Regardless, Cross's claim that her 20-year sentence as a habitual felony offender constitutes cruel and unusual punishment is simply without merit. In Ware v. State, 66 So. 3d 830 (Ala. Crim. App. 2010), this Court 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.

Cross was convicted of identity theft, a Class C felony, and was sentenced, as a habitual felony offender with three prior felony convictions, to 20 years in prison. See § 13A-8-192(a), Ala. Code 1975. Section 13A-5-9(c)(1), Ala. Code 1975, provided, at the time of Cross's offense:

"(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies ... he or she must be punished as follows:

"(1) On conviction of a Class C felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years."<sup>3</sup>

Thus, Cross's 20-year sentence was within the statutory range and, notably, toward its lower end. Cross's original sentence was not disproportionate, and the circuit court erred in granting Cross's petition. See Guster v. State, 439 So. 2d 794 (Ala. Crim. App. 1983) (25-year sentence for third-degree burglary where defendant had two prior felony convictions was proportional and did not constitute cruel and unusual punishment); Callahan v. State, 644 So. 2d 1329 (Ala. Crim. App. 1994) (25-year sentence for illegal transportation of alcohol, a Class C felony, where defendant had two prior felony convictions was not disproportionate or excessive).

---

<sup>3</sup> The exact date of the offense does not appear in the record; however, Cross was indicted in September 2010. Section 13A-5-9 was amended effective January 30, 2016. The amendment changed some wording in § 13A-5-9(c)(1) but made no substantive change.

Accordingly, the judgment of the circuit court is reversed, and this case is remanded to the circuit court to set aside its order granting Cross's Rule 32 petition and to issue an order in accordance with this opinion.

**REVERSED AND REMANDED.**

McCool, Cole, and Minor, JJ., concur. Kellum, J., concurs in the result.