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# Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

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CR-2023-0287

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**Antuan Deteiro Johnson**

v.

**State of Alabama**

**Appeal from Montgomery Circuit Court  
(CC-19-502.61)**

KELLUM, Judge.

Antuan Deteiro Johnson 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 requested an out-of-time appeal from the summary dismissal of a previous Rule 32 petition.

In 2019, Johnson was convicted of felony murder, and the trial court sentenced him to 99 years' imprisonment. This Court affirmed Johnson's conviction and sentence in an unpublished memorandum issued on August 7, 2020. Johnson v. State (No. CR-19-0073), 339 So. 3d 261 (Ala. Crim. App. 2020) (table). The Alabama Supreme Court denied certiorari review, and this Court issued a certificate of judgment on October 16, 2020.

It is undisputed that Johnson filed a Rule 32 petition challenging his conviction and sentence sometime after his conviction and sentence were affirmed and that the circuit court summarily dismissed that petition on January 12, 2021. On November 19, 2021, Johnson, through counsel, filed the Rule 32 petition that is the subject of this appeal. In that petition, Johnson alleged that he was in prison during the pendency of his 2020 petition, that he never received a copy of the circuit court's January 12, 2021, order dismissing his 2020 petition, and that he did not learn of the court's dismissal of the 2020 petition "until May 25, 2021, when his friend contacted the [circuit] clerk's office. (alacourt.com does not show an entry for service of the order upon Antuan Deteiro Johnson.)" (C. 7.) Therefore, Johnson argued, his failure to appeal the circuit court's

dismissal of his 2020 petition was through no fault of his own and he was entitled to an out-of-time appeal.

On March 9, 2023, the State filed a response to the petition, arguing that the petition was precluded as successive by Rule 32.2(b), Ala. R. Crim. P., and that Johnson had "failed to present any evidence that he was unaware of the dismissal of his petition." (C. 11.) The State also argued that Johnson "admittedly had the ability to contact the clerk's office and in fact did so, but waited to do so until his time for appeal had lapsed." (C. 11.) On March 10, 2023, the circuit court summarily dismissed Johnson's petition on each of the grounds asserted by the State.

On appeal, Johnson argues that the circuit court erred in finding that his petition was successive and in summarily dismissing his petition without affording him an opportunity to prove his claim, and he reasserts the claim raised in his petition that his failure to appeal the dismissal of his 2020 petition was through no fault of his own. The State agrees that the circuit court erred in finding Johnson's petition to be precluded as successive but argues that the circuit court's summary dismissal of the petition was proper because, it says, Johnson failed to plead sufficient

facts to show that he was entitled to relief. Specifically, the State argues that a party has a duty to monitor his or her own case and that, in his petition, Johnson "alleged no reasons or circumstances why he could not have called or written the clerk's office to inquire about the status of his case himself or why his friend could not or did not do so." (State's brief, p. 6.)<sup>1</sup>

The circuit court erred in finding that Johnson's petition was precluded as successive by Rule 32.2(b). Although this is the second petition Johnson has filed, it is the first petition in which he requested an out-of-time appeal from the dismissal of his 2020 petition. Therefore, the instant petition is not successive.

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<sup>1</sup>The State also argues that Johnson's assertion that Alacourt, the Alabama judicial electronic-filing system, does not contain an entry showing he was served with a copy of the order dismissing his 2020 petition is incorrect. According to the State, Alacourt shows that notice was sent to Johnson on January 12, 2021, at an address in Montgomery and "Johnson does not assert that the reported address was not his address at the time or that it had been his address and he had moved." (State's brief, p. 7.) The information from Alacourt on which the State relies is not included in the record on appeal; therefore, it cannot be considered by this Court. See, e.g., Carden v. State, 621 So. 2d 342, 346-47 (Ala. Crim. App. 1992) ("An appellate court may only consider the facts contained in the record on appeal."). We note, however, that the specific address the State asserts the notice was mailed to is not the address of a correctional facility and that Johnson did, in fact, allege in his petition that he was in prison during the pendency of his 2020 petition.

The circuit court also erred in summarily dismissing Johnson's petition on the ground that he failed to present evidence to prove that he was unaware of the dismissal of his 2020 petition. In a Rule 32 proceeding, the petitioner has both the burden of pleading and the burden of proof. However:

"[A]t the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a preponderance of the evidence. Rather, at the pleading stage, a petitioner must provide only 'a clear and specific statement of the grounds upon which relief is sought.' Rule 32.6(b), Ala. R. Crim. P. Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof."

Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001). "A claim may not be summarily dismissed because the petitioner failed to meet his burden of proof at the initial pleading stage, a stage at which the petitioner has only the burden to plead." Johnson v. State, 835 So. 2d 1077, 1080 (Ala. Crim. App. 2001). Indeed, a circuit court cannot find that a petitioner has failed to present evidence to satisfy his burden of proof, as the circuit court did here, when the circuit court never afforded the petitioner the opportunity to present that evidence.

The circuit court also erred in finding that Johnson had the ability to contact the circuit clerk's office to monitor his case but had failed to do so until after the time for filing an appeal had lapsed, and we reject the State's similar argument on appeal that Johnson failed to sufficiently plead his claim because he did not plead facts in his petition demonstrating that he could not have contacted the circuit clerk's office to monitor his case within the time for filing a timely notice of appeal. The State is correct that "[t]his Court has long recognized that it is a defendant's duty to monitor the status of his or her case." Nelson v. State, [Ms. CR-20-0645, July 8, 2022] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2022). However, "a prison inmate, unlike a free person, is unable to monitor the status of his case on a regular basis." Ex parte Johnson, 806 So. 2d 1195, 1197 (2001) (Stuart, J., concurring in the result and concurring in part as to the rationale).<sup>2</sup>

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<sup>2</sup>We note that, in this case, Johnson alleged that he did monitor his case by having a friend contact the circuit clerk in May 2021. We cannot say it was unreasonable for Johnson to wait until May 2021 to contact the circuit clerk about the petition he filed in the latter half of 2020. The time a Rule 32 petition remains pending before a ruling by a circuit court is highly variable, as this case demonstrates. Johnson's first petition was pending no more than a few months before the circuit court summarily dismissed it. The instant petition, however, was pending for well over a year before the circuit court summarily dismissed it.

Moreover, Rule 34.5, Ala. R. Crim. P., provides that, "[u]pon the entry of any order in a criminal proceeding made in response to a motion, other than an order made in open court, the clerk shall, without undue delay, furnish all parties a copy thereof by mail or by other appropriate means approved by the judge." In Presley v. State, 978 So. 2d 63 (Ala. Crim. App. 2005), this Court recognized that, pursuant to Rule 34.5, the circuit court, acting through its clerk, has a duty to notify a Rule 32 petitioner of orders issued in a Rule 32 proceeding and that the failure to do so is a violation of procedural due process. In Ex parte Johnson, *supra*, and again in Ex parte Miles, 841 So. 2d 242 (Ala. 2002), the Alabama Supreme Court held that denying a Rule 32 petitioner the ability to have the ruling on his or her Rule 32 petition reviewed on appeal violates the petitioner's right to procedural due process when the petitioner's inability to perfect a timely appeal is caused by the circuit court's failure to provide adequate notice of its ruling. Compare Ex parte Maples, 885 So. 2d 845 (Ala. 2004) (holding that a Rule 32 petitioner was not entitled to an out-of-time appeal from the denial of the previous petition when one of his three attorneys had received timely notice of the denial of the petition, even though the other two attorneys did not).

Here, Johnson pleaded facts that, if true, would entitle him to an out-of-time appeal from his 2020 petition. He alleged that he was in prison during the pendency of his 2020 petition, that he never received a copy of the circuit court's January 12, 2021, order summarily dismissing that petition, and that he did not learn of that dismissal until a friend contacted the circuit clerk on May 25, 2021, a little over four months after the dismissal order had been entered. See King v. State, 881 So. 2d 542, 543-44 (Ala. Crim. App. 2002) ("In his petition, King pleaded facts that, if true, would entitle him to relief, i.e., an out-of-time appeal from the denial of his first Rule 32 petition. King alleged that he did not receive the circuit court's order denying his first Rule 32 petition until August 2000, five months after the order was entered."). The State did not refute these allegations in its response to the petition; therefore, they must be accepted as true. See, e.g., Palmer v. State, 842 So. 2d 751, 753 (Ala. Crim. App. 2002) (holding that, when the State does not refute a Rule 32 petitioner's allegations, those allegations must be accepted as true), Because Johnson alleged facts in his petition that, if true, would entitle him to the relief he seeks, he was entitled to an opportunity to present evidence to prove those facts. See Ford, 831 So. 2d at 644.



Accordingly, we remand this cause for the circuit court to allow Johnson an opportunity to present evidence to support his claim that he failed to appeal the summary dismissal of his 2020 petition through no fault of his own. The court shall either conduct an evidentiary hearing or accept evidence in the form of affidavits, written interrogatories, or depositions. See Rule 32.9(a), Ala. R. Crim. P. After receiving and considering the evidence presented, the circuit court shall issue specific written findings of fact regarding Johnson's claim, and may grant appropriate relief if necessary. Due return shall be filed within 63 days of the date of this opinion, and shall include the circuit court's written findings of fact, a transcript of the evidentiary hearing, if one is conducted, and any other evidence received and/or relied on by the court in making its findings.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.