**REL:02/06/2009**



# SUPREME COURT OF ALABAMA

**OCTOBER TERM, 2008-2009**

---

**1061237**

---

**Ex parte George Fidel Martinez**

**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS**

**(In re: Fidel Martinez**

**v.**

**State of Alabama)**

**(Dale Circuit Court, CC-02-392.60; Court of Criminal Appeals, CR-06-0020)**

BOLIN, Justice.

On May 14, 2003, George Fidel Martinez was convicted of intentional murder, a violation of § 13A-6-2, Ala. Code 1975,

and was sentenced to 30 years' imprisonment. Martinez appealed, and the Court of Criminal Appeals affirmed his conviction and sentence in an unpublished memorandum. Martinez v. State (No. CR-02-2218, Feb. 20, 2004), 910 So. 2d 836 (Ala. Crim. App. 2004)(table). That court issued a certificate of judgment on March 10, 2004. On September 28, 2005, Martinez filed a petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P. On July 13, 2006, the trial court dismissed Martinez's Rule 32 petition after an evidentiary hearing. On April 20, 2007, the Court of Criminal Appeals, sua sponte applying the limitations period of Rule 32.2(c), Ala. R. Crim. P., affirmed the trial court's order of dismissal in an unpublished memorandum. Martinez v. State (No. CR-06-0020, April 20, 2007), ___ So. 2d ___ (Ala. Crim. App. 2007)(table). We granted certiorari review to determine whether the Court of Criminal Appeals was correct in sua sponte applying the limitations period of Rule 32 to Martinez's petition.

Rule 32 Proceeding and Appeal

In his Rule 32 petition, Martinez argued that the trial court was without jurisdiction to render a judgment and impose

sentence because, he says: (1) a fatal variance existed between the charge in the indictment and the proof offered at trial; (2) the jury instruction on aiding and abetting was a constructive amendment of the indictment, adversely affecting Martinez; (3) the indictment failed to allege aiding and abetting; and (4) Martinez was denied allocution at the time of sentencing. Martinez also argued that the time limitation of Rule 32.2(c), Ala. R. Crim. P., should not apply in his case because he, as a native of Guatemala who does not speak English, faced significant obstacles in pursuing postconviction review. Additionally, he argued that his counsel was ineffective: (1) for requesting a jury charge on aiding and abetting; (2) for failing to consult with Martinez before requesting a charge on aiding and abetting; and (3) for failing to adequately cross-examine witnesses.

The State filed a motion to dismiss Martinez's petition. The circuit judge who had presided over Martinez's trial conducted a hearing on Martinez's Rule 32 petition. At the hearing, Martinez was represented by counsel, and he testified though the use of an interpreter. The focus of the hearing was Martinez's assertion that his conviction was obtained in

part because he did not understand English. After the hearing, the trial court entered an order disposing of Martinez's claims and denying his petition.

On appeal, the Court of Criminal Appeals, in its unpublished memorandum, stated that in reviewing the trial court's denial of Martinez's petition, it would affirm the trial court's judgment if the court was correct for any reason, even though it may not be the reason stated in the trial court's order. The Court of Criminal Appeals then held that Martinez's claims were barred by the limitations period of Rule 32.2(c), because the petition was filed more than one year after the Court of Criminal Appeals had issued its certificate of judgment in Martinez's direct appeal. The court further held that the limitations period of Rule 32.2(c) was mandatory and jurisdictional and that Martinez's petition, which was filed outside of the applicable one-year limitations period, was clearly untimely.

Martinez petitioned this Court for certiorari review, arguing that the Court of Criminal Appeals erred: (1) in sua sponte applying the limitations period of Rule 32.2(c) to his ineffective-assistance-of-counsel claims; (2) in holding that

the limitations period of Rule 32.2(c) was mandatory and jurisdictional and that it could not be waived by the State; and (3) in holding that the doctrine of equitable tolling does not apply to the limitations period for a petition for postconviction relief in Rule 32.2(c).

Discussion

While Martinez's application for rehearing of the Court of Criminal Appeals' decision on his appeal from the denial of his Rule 32 petition was pending and then while his petition for certiorari review of that court's decision was pending, this Court issued two opinions that are dispositive of the issues raised. On May 4, 2007, this Court issued its opinion in Ex parte Clemons, [Ms. 1041915, May 4, 2007] ___ So. 2d ___ (Ala. 2007), in which we held that a reviewing court could not apply a procedural bar sua sponte. In Clemons, Eugene Clemons was convicted of the capital murder in the death of a drug-enforcement officer during the course of a robbery. After finding Clemons guilty of capital murder, the jury recommended that the death penalty be imposed; the trial court followed the jury's recommendation and sentenced Clemons to death. The Court of Criminal Appeals affirmed Clemons's

conviction and sentence on direct appeal. Clemons v. State, 720 So. 2d 961 (Ala. Crim. App. 1996), aff'd, 720 So. 2d 985 (Ala. 1998). Clemons then filed a Rule 32, Ala. R. Crim. P., petition alleging, among other things, ineffective assistance of trial counsel. Ultimately, the trial court denied Clemons's allegations of ineffective assistance of counsel on the merits. On appeal from the denial of the Rule 32 petition, the Court of Criminal Appeals affirmed the trial court's order on the ground that Clemons's ineffective-assistance-of-counsel claims were barred by Rule 32.2(a)(2), because Clemons's appellate counsel had raised the issue of trial counsel's effectiveness in a motion for a new trial and Rule 32.2(a)(2) provides that no petitioner will be granted relief on a ground that was raised or addressed at trial. This Court granted certiorari review to determine whether the Court of Criminal Appeals erred in sua sponte applying a procedural bar to preclude Clemons's ineffective-assistance-of-counsel claims. We held that although Rule 32.2(a) is mandatory, the procedural bar is not jurisdictional and, therefore, can be waived by the State.

Subsequently, on June 1, 2007, in Ex parte Ward, [Ms. 1051818, June 1, 2007] ___ So. 2d ___ (Ala. 2007), this Court addressed the limitations period of Rule 32.2(c), Ala. R. Crim. P., as follows:

> "The Court of Criminal Appeals, in its unpublished memorandum [in Ward v. State (No. CR-05-0655, Aug. 18, 2006)], held that equitable tolling is unavailable to suspend the running of the Rule 32.2(c) limitations period. Ward appears to be correct that this Court has never addressed this issue.
>
> "Although we today hold that the limitations provision in Rule 32.2(c) is not a jurisdictional bar, it is nonetheless written in mandatory terms. Rule 32.2(c) provides that 'the court shall not entertain any petition for relief from a conviction or sentence' that is not timely. In prior cases in which it concluded that equitable tolling is unavailable, the Court of Criminal Appeals based its holding on the mandatory 'shall' language found in Rule 32.2(c) and the fact that no Alabama court has ever held that there is an exception to the limitations period. See, e.g., Arthur v. State, 820 So. 2d 886, 889-90 (Ala. Crim. App. 2001)(holding that there is no exception to Rule 32.2(c) and that the limitations period is jurisdictional). However, this Court has never held that equitable tolling is not available in a case such as this one. Moreover, because Rule 32.2(c) does not establish a jurisdictional bar, the trial court has the power to hear an untimely petition because the running of the limitations period would 'not divest the circuit court of the power to try the case.' Ex parte Seymour, 946 So. 2d 536, 539 (Ala. 2006).
>
> "Further, as Ward points out, under federal habeas corpus practice, the federal courts have held

that equitable tolling is available for a § 2244 petition, notwithstanding that the word 'shall' appears in 28 U.S.C. § 2244(d)(1)(establishing procedures for petitions for the writ of habeas corpus). See, e.g., Baldayaque v. United States, 338 F.3d 145, 153 (2d Cir. 2003)(holding that equitable tolling may be available where the attorney's behavior was outrageous or the attorney's incompetence was extraordinary); Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)(allowing equitable tolling where the petitioner's attorney failed to file the petition and failed to return the petitioner's file despite multiple requests from the petitioner); Sandvik v. United States, 177 F.3d 1269 (11th Cir. 1999)(allowing equitable tolling in cases of extraordinary circumstances beyond the petitioner's control and unavoidable even with the exercise of diligence).

"We hold that equitable tolling is available in extraordinary circumstances that are beyond the petitioner's control and that are unavoidable even with the exercise of diligence. We recognize that '[i]n a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of "equity would make the rigid application of a limitation period unfair" and whether the petitioner has "exercised reasonable diligence in investigating and bringing [the] claims."' Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (quoting Miller v. New Jersey Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998)). Nevertheless, 'the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule.' United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000).

"Finally, we must address the petitioner's burden of demonstrating that he or she is entitled to the relief afforded by the doctrine of equitable tolling. Rule 32.7(d), Ala. R. Crim. P., allows the trial court to summarily dismiss a Rule 32 petition

that, on its face, is precluded or fails to state a claim, and we have held that the trial court may properly summarily dismiss such a petition without waiting for a response to the petition from the State. Bishop v. State, 608 So. 2d 345, 347-48 (Ala. 1992) ('"Where a simple reading of a petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition without requiring a response from the district attorney."'). Although the Rules of Criminal Procedure initially place the burden on the State to plead any ground of preclusion, the ultimate burden is on the petitioner to disprove that a ground of preclusion applies. Rule 32.3, Ala. R. Crim. P.

"Because the limitations provision is mandatory and applies in all but the most extraordinary of circumstances, when a petition is time-barred on its face the petitioner bears the burden of demonstrating in his petition that there are such extraordinary circumstances justifying the application of the doctrine of equitable tolling. See Spitsyn v. Moore, 345 F.3d at 799 (holding that the burden is on the petitioner for the writ of habeas corpus to show that the exclusion applies and that the 'extraordinary circumstances' alleged, rather than a lack of diligence on his part, were the proximate cause of the untimeliness); Drew v. Department of Corr., 297 F.3d 1278, 1286 (11th Cir. 2002)('The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner.'). Thus, when a Rule 32 petition is time-barred on its face, the petition must establish entitlement to the remedy afforded by the doctrine of equitable tolling. A petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may

> be summarily dismissed without a hearing. Rule 32.7(d), Ala. R. Crim. P."

___ So. 2d at ___.

We recognize that the present case presents unique circumstances in that, at the trial court level, the State did argue that Martinez's petition was barred by the applicable one-year limitations period of Rule 32.2(c), Ala. R. Crim. P. However, the trial court heard Martinez's petition on the merits and issued its ruling; it did not reference the limitations bar of Rule 32.2(c) in its order. The Court of Criminal Appeals, sua sponte, applied the limitations period of Rule 32.2(c) to Martinez's claims. While Martinez's application for rehearing to the Court of Criminal Appeals was pending, this Court issued its opinion in Ex parte Clemons, addressing a court's sua sponte application of a procedural bar, and while Martinez's certiorari petition was pending, this Court issued its opinion in Ex parte Ward, addressing equitable tolling of the limitations period. Under the facts of this case, Martinez did not have the benefit of this Court's recent rulings in Clemons and Ward to afford him the opportunity to argue the equitable tolling of the limitations period. Accordingly, we reverse the judgment of the Court of

Criminal Appeals and remand the case to that court for consideration of Martinez's claim that he is entitled to the remedy afforded by the doctrine of equitable tolling and, if it decides that he is, whether the trial court was correct in denying Martinez's petition.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Lyons, Woodall, and Smith, JJ., concur.

Stuart, Parker, and Murdock, JJ., concur in the result.

Cobb, C.J., and Shaw, J., recuse themselves.

MURDOCK, Justice (concurring in the result).

The main opinion reasons that, because the trial court did not reference the bar of the limitations period of Rule 32.2(c), Ala. R. Crim. P., in its judgment, the Court of Criminal Appeals "sua sponte" applied that bar. From this premise, the main opinion deems Ex parte Clemons, [Ms. 1041915, May 4, 2007] ___ So. 2d ___ (Ala. 2007), to be one of two Supreme Court precedents "dispositive" in this case. I do not agree that the issue of the Rule 32.2(c) limitations period was raised "sua sponte" by the Court of Criminal Appeals in the same sense addressed in Ex parte Clemons. Accordingly, I find Ex parte Clemons to be inapposite.

In Ex parte Clemons, the State did not raise as an affirmative defense in the trial court the procedural bar at issue in that case, namely, a preclusive bar under Rule 32.2(a). The issue this Court addressed, therefore, was whether a preclusive bar under that rule is jurisdictional and thus could properly be raised and addressed by the Court of Criminal Appeals despite the fact that the State had failed to raise it in the trial court. We held in Ex parte Clemons that, when such an issue has been waived in the trial court by

the State, the appellate court may not raise it sua sponte. See Ex parte Clemons, ___ So. 2d at ___.

Here, however, the State did not waive the procedural bar at issue (namely, the limitations period of Rule 32.2(c)) in the trial court. To the contrary, the State expressly raised this defense in the motion to dismiss that it filed in the trial court.

The raising of this issue by the Court of Criminal Appeals, therefore, was not sua sponte in the sense addressed in Ex parte Clemons. Rather, the Court of Criminal Appeals, without implicating in any way the holding of Ex parte Clemons, was able to raise the issue of the limitations period under the general principle of appellate review that a trial court's judgment can be affirmed on any legal ground even if that ground was not relied upon by the trial court. See A.G. v. State, 989 So. 2d 1167 (Ala. Crim. App. 2007).[1]

[1]As Justice Shaw, then serving as a judge on the Court of Criminal Appeals and writing for that court, wrote in A.G. v. State, 989 So. 2d at 1180-81,

> "[t]his case ... is fundamentally different than Ex parte Clemons, and the due-process protections that have been recognized in the Rule 32 context are not implicated here. In Ex parte Clemons, the State expressly waived any preclusion ground. In this case, however, the State expressly asserted the

preclusion grounds in Rule 32.2(a)(3) and (5). In Ex parte Clemons, because of the State's waiver of the preclusion ground, Clemons had no notice of, nor an opportunity to disprove, the preclusion ground that was ultimately applied by this Court for the first time on appeal. In this case, however, A.G. was provided with notice that the State was asserting Rule 32.2(a)(3) and (5) as preclusion grounds and he had an opportunity to attempt to disprove the existence of those preclusion grounds. Indeed, A.G. filed a reply to the State's response in which he specifically argued that none of his claims, including the indictment claim [i.e., that counsel was ineffective for not objecting to an allegedly void indictment], should be precluded under any of the provisions in Rule 32.2. Thus, the due-process concerns that were present in Ex parte Clemons are not present in this case, and Ex parte Clemons is not controlling here.

"Because due process is not implicated and Ex parte Clemons is not applicable in this case, this Court may apply the well-settled rule that an appellate court may affirm a circuit court's judgment if that judgment is correct for any reason. As the Alabama Supreme Court explained in Liberty National Life Insurance Co. v. University of Alabama Health Services Foundation, P.C., 881 So. 2d 1013 (Ala. 2003):

> "'Nonetheless, this Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court. Ex parte Ryals, 773 So. 2d 1011 (Ala. 2000), citing Ex parte Wiginton, 743 So. 2d 1071 (Ala. 1999), and Smith v. Equifax Servs., Inc., 537 So. 2d 463 (Ala. 1988).

Despite my disagreement with the main opinion as to the relevance of Ex parte Clemons to this case, I believe the result reached by that opinion is correct, and I therefore concur in that result.

Stuart and Parker, JJ., concur.

---

> This rule fails in application only where due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment, Ameriquest Mortgage Co. v. Bentley, 851 So. 2d 458 (Ala. 2002), or where a summary-judgment movant has not asserted before the trial court a failure of the nonmovant's evidence on an element of a claim or defense and therefore has not shifted the burden of producing substantial evidence in support of that element, Rector v. Better Houses, Inc., 820 So. 2d 75, 80 (Ala. 2001) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and Kennedy v. Western Sizzlin Corp., 857 So. 2d 71 (Ala. 2003)).'

"881 So. 2d at 1020."