

SUPREME COURT OF ARKANSAS

Allen v. Kelley

2016 Ark. 70 (2016) · No. CV-15-573 · Decided February 18, 2016

SUMMARY

The Arkansas Supreme Court dismissed David Lee Allen’s appeal from the denial of his petition for a writ of habeas corpus, concluding that he could not prevail. The court held that Allen’s ineffective-assistance, sentencing-age, and jury-selection claims either were not cognizable in habeas proceedings or did not establish that the judgment was facially invalid or that the trial court lacked jurisdiction. His motion to file a belated brief was deemed moot.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                               |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Arkansas                                                                                                                                                                                                                                     |
| WRITING FOR THE COURT | Per Curiam                                                                                                                                                                                                                                                    |
| JURISDICTION          | Arkansas                                                                                                                                                                                                                                                      |
| DECIDED               | February 18, 2016                                                                                                                                                                                                                                             |
| DOCKET                | CV-15-573                                                                                                                                                                                                                                                     |
| DISPOSITION           | dismissed                                                                                                                                                                                                                                                     |
| PROCEDURAL POSTURE    | Appeal from the Lee County Circuit Court's dismissal of a petition for writ of habeas corpus; the appellant also moved to file a belated brief.                                                                                                               |
| STANDARD OF REVIEW    | A denial of habeas relief is not reversed unless the circuit court's findings are clearly erroneous. An appeal from an order denying post-conviction relief, including habeas relief, will not proceed when it is clear that the appellant could not prevail. |
| PRECEDENTIAL VALUE    | Published Arkansas Supreme Court opinion; precedential.                                                                                                                                                                                                       |
| PARTIES               | David Lee Allen v. Wendy Kelley, Director, Arkansas Department of Correction                                                                                                                                                                                  |

TOPICS

- state post-conviction relief
- habeas corpus
- appellate procedure
- ineffective assistance
- cruel and unusual punishment

PRACTICE AREAS

## QUESTIONS PRESENTED

1. Whether Allen's ineffective-assistance claims were cognizable in a habeas proceeding.
2. Whether Allen's age-based challenge to his life sentence established that the judgment was facially invalid or that the sentence was illegal under *Graham v. Florida*.
3. Whether Allen's claims concerning the use of peremptory challenges established a basis for habeas relief.
4. Whether the appeal should be dismissed because Allen could not prevail and, consequently, whether his motion to file a belated brief was moot.

## HOLDINGS

1. An appeal from an order denying a petition for post-conviction relief, including habeas relief, will not be permitted to proceed when it is clear that the appellant could not prevail.
2. Claims alleging ineffective assistance of trial counsel are not cognizable in a habeas proceeding.
3. A petitioner who was older than eighteen at the time of the offense cannot invoke *Graham v. Florida*'s juvenile-sentencing rule merely by asserting that a twenty-one-year-old has diminished culpability comparable to a juvenile; such a claim did not establish that Allen's judgment was invalid or his sentence illegal.
4. Claims concerning counsel's and the State's use of peremptory challenges do not support habeas relief when they do not show that the judgment is facially invalid or that the trial court lacked jurisdiction.

## KEY QUOTATIONS

*"An appeal from an order that denied a petition for postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward when it is clear that the appellant could not prevail."* (at 1)

*"A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a trial court lacked jurisdiction over the cause."* (at 1)

*"A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case or argue issues that were, or could have been, settled at trial or on the record on direct appeal from the judgment."* (at 4)

## FACTUAL BACKGROUND

Allen was convicted of aggravated robbery after a third trial and received a life sentence, along with a concurrent six-year sentence for possession of a firearm by a felon. In his habeas petition, he alleged ineffective assistance of trial counsel, challenged his life sentence based on his age and *Graham v. Florida*, and asserted that the use of peremptory challenges violated his right to a fair and impartial jury. He did not allege that his sentence exceeded the statutory maximum or that the judgment was facially invalid, and he did not establish that the trial court lacked jurisdiction.

## PROCEDURAL HISTORY

Allen was convicted of aggravated robbery and sentenced to life imprisonment, with a concurrent six-year sentence for possession of a firearm by a felon. In 2015, he filed a habeas petition in the Lee County Circuit Court, which dismissed the petition. After the circuit court entered a supplemental order, Allen lodged an appeal and moved to file a belated brief. The Supreme Court of Arkansas dismissed the appeal because Allen could not prevail and held the motion moot.

## DISPOSITION

dismissed

## CASES CITED

- Allen v. State, 277 Ark. 380, 641 S.W.2d 710 (1982)
- Allen v. State, 281 Ark. 1, 660 S.W.2d 922 (1983)
- Daniels v. Hobbs, 2011 Ark. 192 (per curiam)
- Hobbs v. Gordon, 2014 Ark. 225, 434 S.W.3d 364
- Fields v. Hobbs, 2013 Ark. 416
- Young v. Norris, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam)
- Woodson v. Hobbs, 2015 Ark. 304, 467 S.W.3d 147 (per curiam)
- McConaughy v. Lockhart, 310 Ark. 686, 840 S.W.2d 166 (1992)
- Graham v. Florida, Graham v. Florida, 560 U.S. 48 (2010)
- Hobbs v. Turner, 2014 Ark. 19, 431 S.W.3d 283
- Hobbs v. Hodge, 2015 Ark. 207, 461 S.W.3d 704
- Atkins v. State, 2014 Ark. 393, 441 S.W.3d 19 (per curiam)
- Grissom v. State, 2013 Ark. 417 (per curiam)
- Tucker v. Hobbs, 2014 Ark. 449 (per curiam)
- Meny v. Norris, 340 Ark. 418, 13 S.W.3d 143 (2000)
- Benton v. State, 2013 Ark. 385 (per curiam)
- Quezada v. Hobbs, 2014 Ark. 396, 441 S.W.3d 910 (per curiam)

## OPINION

Allen v. Kelley

2016 Ark. 70

PER CURIAM.

Cite as 2016 Ark. 70 SUPREME COURT OF ARKANSAS. No. CV-15-573 DAVID LEE ALLEN

Opinion Delivered February 18, 2016

APPELLANT

PRO SE MOTION TO FILE BELATED

V. BRIEF

[LEE COUNTY CIRCUIT COURT,  
WENDY KELLEY, DIRECTOR, NO. 39CV-15-24 ]  
ARKANSAS DEPARTMENT OF  
CORRECTION HONORABLE CHRISTOPHER W.  
APPELLEE MORLEDGE, JUDGE  
SUBSTITUTED OPINION ON  
DENIAL OF REHEARING; APPEAL  
DISMISSED; MOTION MOOT.  
PER CURIAM

In 1981, appellant David Lee Allen was found guilty of aggravated robbery by a Crittenden County jury. He was sentenced to life imprisonment. Allen appealed, and this court reversed and remanded for a new trial. *Allen v. State*, 277 Ark. 380, 641 S.W.2d 710 (1982). A second trial resulted in a hung jury, and, at a third trial, Allen was again found guilty and sentenced to life imprisonment for aggravated robbery and to a concurrent six-year sentence for possession of a firearm by a felon. Allen appealed, and this court affirmed. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983). On March 20, 2015, Allen filed a pro se petition for writ of habeas corpus in the Lee County Circuit Court, the county in which he is incarcerated.<sup>1</sup> On April 23, 2015, the circuit court entered an order dismissing Allen's petition for writ of habeas corpus. On that same day, Allen, as of the date of this opinion, remains incarcerated in Lee County. Cite as 2016 Ark. 70 day, Allen filed a notice of appeal from the order, and, on May 5, 2015, Allen filed a motion for clarification and reconsideration. On May 20, 2015, the circuit court entered a supplemental order stating that the court's previous denial of relief was based on the face of the pleadings and that Allen failed to establish cause to move forward. Allen lodged an appeal from the order in this court. Now before us is Allen's motion to file a belated brief. Because it is clear from the record that Allen could not prevail on appeal, we dismiss the appeal, and the motion is therefore moot. An appeal from an order that denied a petition for postconviction relief, including a petition for writ of habeas corpus, will not be permitted to go forward when it is clear that the appellant could not prevail. *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam). A circuit court's denial of habeas relief will not be reversed unless the court's findings are clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Hobbs v. Gordon*, 2014 Ark. 225, at 5, 434 S.W.3d 364, 367. Here, the circuit court correctly determined that Allen did not allege grounds in his petition on which the writ could be granted. A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a trial court lacked jurisdiction over the cause. *Fields v. Hobbs*, 2013 Ark. 416. The burden is on the petitioner in a habeas-corpus petition to establish that the trial court lacked jurisdiction or that the judgment-and-commitment order was invalid on its face; otherwise, there is no basis for a finding

that a writ of habeas corpus should issue. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam). The petitioner must plead either the facial 2 Cite as 2016 Ark. 70 invalidity of the judgment-and-commitment order or the lack of jurisdiction and make a “showing by affidavit or other evidence [of] probable cause to believe” that he is illegally detained. *Id.* at 221, 226 S.W.3d at 798. In his petition for writ of habeas corpus, Allen argued that trial counsel was ineffective for advising him to not accept a plea offer, which prejudiced him because he “ha[d] to stand trial” and because his sentence was more severe than the one proposed in the plea offer and that trial counsel was ineffective for not presenting mitigating factors, including his complete social history, his troubled childhood, his “slow schooling,” and his abuse of drugs and alcohol.<sup>2</sup> Allen’s claims that his trial counsel was ineffective are not cognizable in a habeas proceeding. *Woodson v. Hobbs*, 2015 Ark. 304, 467 S.W.3d 147 (per curiam) (citing *McConaughy v. Lockhart*, 310 Ark. 686, 840 S.W.2d 166 (1992)). With reference to *Graham v. Florida*, 560 U.S. 48 (2010), Allen claimed that, although he was twenty-one years old, he was still a juvenile with diminished culpability and should not be subject to a sentence of life imprisonment without parole just as an eighteen year old cannot be so sentenced for a nonhomicide offense, as it violates the Eighth Amendment prohibition against cruel and unusual punishment and the Equal Protection Clause of the United States Constitution. Notably, Allen made no claim, nor does the record reflect, that he was, in fact, <sup>2</sup>Allen made no claim that his sentence exceeded the statutory minimum or was illegal on its face. A sentence is illegal on its face when it exceeds the statutory maximum for the offense for which the defendant was convicted. *Atkins v. State*, 2014 Ark. 393, 441 S.W.3d 19 (per curiam). If a sentence is within the limits set by statute, it is legal. *Grissom v. State*, 2013 Ark. 417 (per curiam). Accordingly, Allen’s judgment-and-commitment order was not invalid on its face. <sup>3</sup> Cite as 2016 Ark. 70 a juvenile at the time of crimes. He essentially claimed he should be treated the same as a juvenile because there is not any real difference between someone who is eighteen years old and someone who is twenty-one years old. To the extent Allen’s claims challenge the validity of his sentence of life imprisonment based on his age, *Graham* “does not mandate a resentencing procedure that takes into account a juvenile offender’s age.” *Hobbs v. Turner*, 2014 Ark. 19, at 11, 431 S.W.3d 283, 289. Cases such as *Graham* and its progeny clearly state that a juvenile is considered a person younger than eighteen at the time the offense was committed. See *Hobbs v. Hodge*, 2015 Ark. 207, 461 S.W.3d 704. Because *Graham* is inapplicable, Allen made no convincing claim that his sentence is invalid or void, and he failed to demonstrate that his sentence exceeded the statutory maximum. *Grissom*, 2013 Ark. 417. Allen further argued that his trial counsel’s use of preemptory challenges to exclude white jurors and the State’s use of preemptory challenges to exclude black jurors violated his right to a trial by a fair and impartial jury. However, Allen failed to allege that trial counsel’s and the State’s use of preemptory challenges somehow invalidated the judgment-and- commitment order on its face or implicated the trial court’s jurisdiction. A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case or argue issues that were, or could have been, settled at trial or on the record on

direct appeal from the judgment. *Tucker v. Hobbs*, 2014 Ark. 449 (per curiam); see also *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000).

When a petitioner in a habeas proceeding fails to raise a claim within the purview of a habeas action, the petitioner fails to meet his burden of demonstrating a basis for a writ of habeas corpus to issue. *Benton v. State*, 2013 Ark. 385 (per curiam). Allen clearly did not meet 4 Cite as 2016 Ark. 70 his burden; therefore, he could not prevail on appeal. See *Quezada v. Hobbs*, 2014 Ark. 396, 441 S.W.3d 910 (per curiam). Appeal dismissed; motion moot. 5