

SUPREME COURT OF ALABAMA

Ex parte Davis

9 So. 3d 537 (Ala. 2007) · No. 1051719 · Decided August 3, 2007

SUMMARY

The Supreme Court of Alabama held that, under Ex parte Clemons, procedural bars in Rule 32.2(a), Ala. R. Crim. P., are nonjurisdictional and may be waived. The court reversed the Court of Criminal Appeals' sua sponte application of those bars to Jimmy Davis's ineffective-assistance-of-counsel claims and remanded for consideration of the claims on their merits.

CASE DETAILS

COURT	Supreme Court of Alabama
WRITING FOR THE COURT	Lyons, Justice; Lyons; See; Woodall; Smith; Bolin; Parker; Murdock; Stuart; Cobb
JURISDICTION	Alabama
DECIDED	August 3, 2007
DOCKET	1051719
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	On rehearing ex mero motu, the Supreme Court of Alabama reviewed whether its intervening decision in Ex parte Clemons required reversal of the Court of Criminal Appeals' judgment procedurally barring Davis's ineffective-assistance-of-counsel claims in his Rule 32 post-conviction proceeding.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Jimmy Davis, Jr. v. State of Alabama

TOPICS

- state post-conviction relief
- post-conviction relief
- ineffective assistance
- appellate procedure
- criminal procedure

PRACTICE AREAS

- Alabama criminal post-conviction practice
- capital post-conviction litigation
- ineffective assistance of counsel
- appellate procedure

QUESTIONS PRESENTED

1. Whether *Ex parte Clemons*'s holding that Rule 32.2(a) procedural bars are nonjurisdictional and waivable required reversal of the Court of Criminal Appeals' judgment.
2. Whether the Supreme Court of Alabama should decide the merits of Davis's ineffective-assistance-of-counsel claims or direct the Court of Criminal Appeals to grant relief based on that court's prior dictum regarding penalty-phase counsel.

HOLDINGS

1. Because Rule 32.2(a) procedural bars are nonjurisdictional and waivable, the Court of Criminal Appeals erred by sua sponte applying those bars to Davis's ineffective-assistance-of-counsel claims after the State had not raised them in the trial court.
2. The Supreme Court declined to decide issues not previously considered on the merits by the Court of Criminal Appeals and declined to direct that court to adopt its prior dictum regarding Davis's penalty-phase ineffective-assistance claim; instead, the Court of Criminal Appeals was required to consider all of Davis's ineffective-assistance claims on their merits.

KEY QUOTATIONS

"We decline to address issues not previously considered on the merits by the Court of Criminal Appeals, nor are we disposed to direct that court to embrace previous dictum as to Davis's claim regarding ineffective assistance of counsel at the penalty phase." (9 So. 3d at 539)

"We reverse the judgment of the Court of Criminal Appeals and remand the case for that court to consider all Davis's ineffective-assistance-of-counsel claims on their merits." (9 So. 3d at 539)

FACTUAL BACKGROUND

Davis was convicted of capital murder in 1993 and sentenced to death. In his Rule 32 petition, he alleged ineffective assistance of counsel, including failures relating to the investigation and presentation of mitigation evidence at sentencing. The trial court addressed and rejected those claims on their merits, but the Court of Criminal Appeals later invoked Rule 32.2(a) sua sponte to bar them.

PROCEDURAL HISTORY

Davis was convicted of capital murder and sentenced to death in 1993. After the conviction and sentence were affirmed on direct review, Davis filed a Rule 32 petition in 2000 alleging, among other claims, ineffective assistance of counsel. The trial court denied the petition on the merits, but the Court of Criminal Appeals sua sponte held that the ineffective-assistance claims were barred under Rule 32.2(a)(3) and (a)(5). The Supreme Court initially denied certiorari, then withdrew its certificate of judgment and granted rehearing after deciding in *Ex parte Clemons* that Rule 32.2(a) procedural bars were nonjurisdictional and waivable.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand to the Alabama Court of Criminal Appeals to consider all of Davis's ineffective-assistance-of-counsel claims on their merits.

CASES CITED

- Ex parte Clemons, [Ms. 1041915, May 4, 2007] (Ala. 2007)
- Davis v. State, 9 So. 3d 514 (Ala. Crim. App. 2006)
- Ex parte Davis, 718 So. 2d 1166 (Ala. 1998)
- Davis v. State, 718 So. 2d 1148 (Ala. Crim. App. 1995)
- Davis v. State, 718 So. 2d 1148, 1152-1153 (Ala. Crim. App. 1995)

OPINION

PER CURIAM.

9 So. 3d 537 (2007) Ex parte Jimmy DAVIS, Jr. (In re Jimmy Davis, Jr. v. State of Alabama). 1051719. Supreme Court of Alabama. August 3, 2007. Nicole Townsend Bartow of Pillsbury Winthrop Shaw Pittman, LLP, Palo Alto, California; Richard L. Sharff, Jr., of Bradley *538 Arant Rose & White, LLP, Birmingham; Jack L. Lahr of Foley & Lardner, LLP, Washington, D.C.; William F. Abrams of Bingham McCutchen, LLP, East Palo Alto, California; and Joy L. Langford of Chadbourne & Parke, LLP, Washington, D.C., for petitioner.

Troy King, atty. gen., and Corey L. Maze, asst. atty. gen., for respondent. On Rehearing Ex Mero Motu LYONS, Justice. Jimmy Davis, Jr. was convicted in 1993 of capital murder and was sentenced to death. After two remands to the trial court by the Court of Criminal Appeals,[1] the Court of Criminal Appeals affirmed his conviction and sentence. Davis v. State, 718 So.

2d 1148, 1153 (Ala.Crim.App.1995) (opinion on return to second remand). This Court affirmed the judgment of the Court of Criminal Appeals, and the United States Supreme Court denied certiorari review. Ex parte Davis, 718 So. 2d 1166 (Ala.1998), cert. denied, 525 U.S. 1179, 119 S. Ct. 1117, 143 L. Ed. 2d 112 (1999). Davis filed a Rule 32, Ala. R.Crim. P., petition on January 20, 2000, alleging, among other things, ineffective assistance of counsel.

The State did not raise in the trial court defenses to Davis's ineffective-assistance-of-counsel claims based on Rule 32.2(a), Ala. R.Crim. P., which establishes grounds for the preclusion of claims for postconviction relief.

The trial court's order denying Davis's Rule 32 petition included determinations on the merits adverse to Davis on each of his ineffective-assistance-of-counsel claims. Davis appealed the trial court's denial to the Court of Criminal Appeals; that court held, sua sponte, that Davis's ineffective-assistance-of-counsel claims were procedurally barred by Rule 32.2(a)(3) and 32.2(a)(5), i.e., that they could have been raised at trial or on appeal but were not.

Davis v. State, 9 So. 3d 514 (Ala.Crim.App.2006). This Court denied Davis's petition for certiorari on February 16, 2007. Ex parte Davis (No. 1051719). On May 4, 2007, this Court released its opinion in Ex parte Clemons, [Ms. 1041915, May 4, 2007] ___ So.3d ___ (Ala. 2007).

In Ex parte Clemons, this Court held that the procedural bars to postconviction relief contained in Rule 32.2(a), Ala. R.Crim. P., were not jurisdictional and therefore could be waived, abrogating the Court of Criminal Appeals' holding in this case.

On the same day it released its decision in Ex parte Clemons, this Court withdrew the certificate of judgment it had issued in Ex parte Davis, placed Ex parte Davis on rehearing ex mero motu, and granted Davis's petition for a writ of certiorari limited solely to the issue whether the rule announced in Ex parte Clemons, dealing with waiver of grounds of preclusion, requires the reversal of the Court of Criminal Appeals' judgment in Davis's appeal from his Rule 32 petition.

The State now concedes that Ex parte Clemons requires reversal of the Court of Criminal Appeals' judgment in this case and urges this Court to remand the case to the Court of Criminal Appeals for the limited purpose of reviewing the merits of the ineffective-assistance-of-counsel claims raised in Davis's appeal to that court.[2]*539 Davis opposes the State's view of the appropriate further proceedings and argues that the Court of Criminal Appeals has already addressed the merits of his claims.

Davis points to dictum in the affirmance by the Court of Criminal Appeals of the trial court's judgment denying his Rule 32 petition as to one of Davis's ineffective-assistance-of-counsel claims. The court stated: "Davis's most troubling claim is that counsel failed to investigate and present mitigation evidence at the penalty phase.

The evidence Davis alleges should have been discovered and presented is powerful. Had this issue not been procedurally barred we would be compelled to grant relief and order a new sentencing hearing." 9 So.3d at 522 (emphasis added). Davis urges that this Court either (a) address all of his claims on their merits and reverse the judgment of the Court of Criminal Appeals and order that court to remand the case for a new trial, or (b) remand the case with instructions to the Court of Criminal Appeals to grant relief on Davis's claim that counsel rendered ineffective assistance at the penalty phase of his trial, the issue addressed by the Court of Criminal Appeals in dictum, and to consider the merits of Davis's claims that his counsel rendered ineffective assistance at the guilt phase of his trial.

We agree with the State that these alternatives should be rejected. We decline to address issues not previously considered on the merits by the Court of Criminal Appeals, nor are we disposed to direct that court to embrace previous dictum as to Davis's claim regarding ineffective assistance of counsel at the penalty phase.

We reverse the judgment of the Court of Criminal Appeals and remand the case for that court to consider all Davis's ineffective-assistance-of-counsel claims on their merits. REVERSED AND REMANDED. SEE, WOODALL, SMITH, BOLIN, PARKER, and MURDOCK, JJ., concur. STUART, J., concurs specially. COBB, C.J., recuses herself. STUART, Justice (concurring specially). I recognize the principle of stare decisis, and, in light of this Court's holding in *Ex parte Clemons*, [Ms.

1041915, May 4, 2007] ___ So.3d ___ (Ala.2007), I concur in the majority's decision. I, however, adhere to my writing in *Clemons*, in which I maintained "if the sua sponte application of the waived procedural bar does not 'probably injuriously affect[] substantial rights' of the petitioner or the State, it is appropriate for the appellate court to apply the procedural bar." ___ So.3d at ___ (Stuart, J., concurring in the result).

NOTES [1] See *Davis v. State*, 718 So. 2d 1148 (Ala. Crim.App.1995), 718 So.2d at 1152 (July 3, 1996, opinion on return to remand), and 718 So.2d at 1153 (March 21, 1997, opinion on return to second remand). [2] Although this Court recognized in *Ex parte Clemons* that extraordinary circumstances could permit the sua sponte invocation of procedural bars by an appellate court, the State expressly disavows the presence of any such circumstances in this proceeding.

LYONS, J.

On Rehearing *Ex Mero Motu* LYONS, Justice. Jimmy Davis, Jr., was convicted in 1993 of capital murder and was sentenced to death. After two remands to the trial court by the Court of Criminal Appeals,¹ the Court of Criminal Appeals affirmed his conviction and sentence. *Davis v. State*, 718 So.2d 1148, 1153 (Ala.Crim.App.1995) (opinion on return to second remand).

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