

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1204

Appellee

Trial Court No. CR0199307496

v.

James D. Lawson

DECISION AND JUDGMENT

Appellant

Decided: July 11, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

* * * * *

PER CURIAM.

{¶ 1} Appellee, state of Ohio, has filed a motion to dismiss the appeal of appellant, James Lawson, taken from a 2010 nunc pro tunc order of the trial court that corrected its original judgment of conviction from 1994 by adding the statement that Lawson pleaded guilty pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162. This correction was necessitated by a decision of the Ohio Supreme Court, *State v.*

Baker, 119 Ohio St.3d 197, 2008-Ohio-3330. In *Baker* at syllabus, the Ohio Supreme Court held that, pursuant to Crim.R. 32(C), a final appealable judgment of conviction must contain "(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court."

{¶ 2} Appellant has filed a memorandum in opposition to the motion, appellee filed a response to the opposition and appellant filed a second opposition to the motion. The motion is now decisional.

{¶ 3} This case began in 1993 when appellant was indicted on ten counts of rape. In May 1994, at Lawson's plea hearing, he entered an *Alford* plea and the case was continued for sentencing. A judgment was entered reflecting this plea. In July 1994, after the sentencing hearing, Lawson was sentenced to 7 to 25 years incarceration. A judgment was entered reflecting this sentence. However, this judgment did not reiterate that Lawson had pleaded guilty, and thus did not comply with Crim.R. 32(C). The July 1994 judgment was signed by the judge and entered on the journal.

{¶ 4} In 2009, Lawson requested and received a *Baker* compliant nunc pro tunc judgment of conviction from the trial court. The new judgment reiterated the July 1994 judgment and added that Lawson had pleaded guilty pursuant to *North Carolina v. Alford*. Lawson then filed the present appeal, seeking to challenge the validity of his 1994 plea and the constitutionality of the indictment against him. We accepted the appeal

on the basis that Lawson was entitled to appeal the 1994 conviction now¹. See *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, where the court held that a sentencing entry that does not comply with Crim. R. 32(C) is not final and appealable. Thus, this court concluded that since Lawson's 1994 judgment of conviction was not Crim.R. 32(C) compliant and was therefore not appealable, the new 2009 Crim.R. 32(C) compliant judgment of conviction is the first valid conviction and appellant had the right to appeal from that conviction. See *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971, ¶ 12, and *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766, ¶ 9.

{¶ 5} The state filed the instant motion to dismiss arguing that under recent case law from the Ohio Supreme Court, the 1994 judgment of conviction is not void or a nullity, that it was corrected by the nunc pro tunc entry of 2010, that the nunc pro tunc entry relates back to 1994 and that "when a party had an opportunity to appeal from the original judgment entry, but appeals only after a nunc pro tunc correction is made, assignments of error related to the original judgment entry may be properly disregarded."² Appellee also argues that res judicata and laches bar the present appeal.

¹After accepting the appeal, an issue arose concerning the record on appeal. Because of the time that had elapsed, a transcript of the original plea hearing was not obtainable and we remanded the case to the trial court in an effort to recreate a complete record.

²We note that under this analysis, unless otherwise barred, Lawson can now appeal issues related to his plea since the plea was not in the original judgment entry.

{¶ 6} Appellant filed a memorandum in opposition to the motion to dismiss stating that even if the 1994 judgment is not a nullity, it nonetheless was not final and appealable when it was issued, thus, if he was not able to appeal from the judgment in 1994, and he cannot appeal now, he has been denied due process of law. He also argues against the use of res judicata and laches to bar his appeal. Finally, appellant argues that his appeal should not be dismissed because the proceedings that occurred in the trial court upon our remand have rendered the appeal "completed." As to this argument, if appellant believes that his appeal is completed, he may file a voluntary dismissal pursuant to App.R. 28.

{¶ 7} The issue of final appealable orders of conviction under Crim.R. 32(C) was addressed in *State v. Baker*, supra, in 2008. Since that decision was issued, the courts of appeals have tackled the following question: If the original judgment of conviction was not final and appealable when it was entered, once it is corrected, what are a defendant's appellate rights? Can the defendant appeal now and challenge all aspects of his plea, finding of guilt, and sentence? What if the defendant had already appealed his conviction from the non-final and appealable conviction? A case is pending in the Ohio Supreme Court, *State v. Lester*, 126 Ohio St.3d 1546, 2010-Ohio-4542, in which that court will presumably address these questions.

{¶ 8} As pointed out by appellant, the state's appellate courts have treated these cases in many different ways. This appellate court's solution was to treat the new judgment of conviction as the only valid judgment of conviction, and allow a defendant to appeal for the first time, or as if it were the first time, giving any prior appeal no res

judicata effect. See *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971 and *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766.

{¶ 9} Recently, the Ohio Supreme Court decided *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238 and *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235. Regarding the *Fischer* case, we note that it is not a *Baker* resentencing case, but a case that required a resentencing to include the statutorily mandated postrelease control term. Pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, a judgment of conviction that does not contain a term of postrelease control is void. *Fischer* overruled *Bezak* in part, stating "We overrule only that portion of [the *Bezak*] syllabus that requires a complete resentencing hearing rather than a hearing restricted to the void portion of the sentence." *Fischer* at ¶ 36. The *Fischer* court went on to state that the remainder of the original sentence was not void and any appeal from the resentencing order is restricted to the postrelease control term. Although the *Fischer* court discusses *Baker*, it does so to distinguish it as a case that declares a judgment that does not contain all elements of Crim.R. 32(C) to be not final and appealable. The *Fischer* court correctly points out that nothing in *Baker* discussed void or voidable sentences. Finally the court states: "Our decision today is limited to a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of postrelease control." *Fischer* at ¶ 31.

{¶ 10} In the *DeWine* case, the issue is what jurisdiction a trial court has in resentencing a defendant because of a Crim.R. 32(C) violation. In that case, the trial court judge did not merely supply the missing element in the original judgment (in this

case the means of conviction, i.e. that defendant was found guilty by a jury), it entered judgments of acquittal pursuant to Crim.R. 29(C) and discharged the defendants. The Supreme Court of Ohio stated that the trial court judge's jurisdiction was limited to issuing a nunc pro tunc entry correcting the Crim.R. 32(C) deficiency. "The remedy for a failure to comply with Crim.R. 32(C) is a revised sentencing entry rather than a new hearing." The court further stated that failure to issue a Crim.R. 32(C) compliant judgment does not render that judgment a nullity. In her concurring opinion, Justice Lanzinger points out that the decision "leaves open the question whether new appellate rights arise from a new sentencing entry that violates Crim.R. 32(C). We have held that a sentencing entry that violates Crim.R. 32(C) renders that entry nonappealable."

{¶ 11} This court interpreted those cases in *State v. Triplett*, 6th Dist. No. L-10-1158, 2011-Ohio-1713, where we held that we had erred in the past in not applying the doctrines of res judicata and law of the case in *Baker* non-compliant resentencing appeals where the defendant, despite the judgment being non-appealable, nonetheless appealed from the first judgment of conviction and that appeal was heard and decided. Then, finding that Triplett had appealed his conviction when it was first entered, we dismissed his appeal from the resentencing entry as being barred by res judicata.

{¶ 12} The case before us now is in a different position. In this case, Lawson did not appeal from his original sentencing entry. The state argues that the 1994 judgment is not void and since the 2009 nunc pro tunc judgment is merely a clerical correction of information already contained in the record of the case (i.e., that Lawson pleaded guilty

pursuant to *Alford*), then the nunc pro tunc entry relates back to the original judgment and Lawson cannot now challenge that conviction; any such appeal would be untimely. Further, the state alternatively argues that since Lawson's appellate brief only addresses issues relating to the validity of his 1994 *Alford* plea and the validity of his indictment, those issues are res judicata and cannot be appealed now in 2010. Both of these arguments fail to address the fact that the original judgment, while not a nullity, was nonetheless not final and appealable.

{¶ 13} Addressing first the issue that the present appeal is untimely, we find that since the original judgment was not a final appealable order, and the present resentencing order made it appealable, Lawson's notice of appeal filed within 30 days of the resentencing order is timely. As to the res judicata argument, appellee states that "the principles of res judicata * * * operate to bar consideration of issues that could have been raised [in a previous appeal] but were not." This argument also fails. Since the original judgment was not appealable, Lawson could not have raised any issues until now. We note appellee's argument that prior to *State v. Baker*, supra, many defendants appealed from non-final, Crim.R. 32(C) non-complaint, judgments of conviction. The fact that the issue of appealability was not raised in those cases does not mean that the judgments of conviction were final and appealable.

{¶ 14} Finally, appellee raises the issue of laches. The state argues that under the doctrine of laches, when a party does not assert his rights expeditiously and the delay prejudices the opposing party, the proceeding instituted by that party is barred. In *Smith*

v. Smith (1959), 168 Ohio St. 447, paragraph 3 of the syllabus, the Supreme Court explains laches as follows: "Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim."

{¶ 15} The success of a laches argument is founded first and foremost on the fact that a party did not expeditiously assert a right. In the instant case, appellant did not delay in asserting his right to appeal since that right did not exist until he received a Crim.R. 32(C) compliant judgment of conviction.

{¶ 16} We find the motion to dismiss not well-taken and it is denied.

MOTION DENIED.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE