

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

State of Ohio

Court of Appeals No. L-11-1020

Appellee

Trial Court No. CR06-3796

v.

Damiene Boles

DECISION AND JUDGMENT

Appellant

Decided: February 3, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

James F. Schaller, II, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Damiene Boles appeals a July 28, 2010 judgment of the Lucas County Court of Common Pleas denying him postconviction relief from a conviction for murder, a violation of R.C. 2903.02(A) and 2929.02 and an unclassified felony. Appellant was tried for the offense and a jury returned a guilty verdict on July 19, 2007. The trial court filed its judgment on July 23, 2007, finding in the judgment entry that Boles had been

convicted of murder and sentencing him to imprisonment for 15 years to life. The July 23, 2007 judgment, however, did not state that the conviction was pursuant to a jury verdict.

{¶ 2} A direct appeal to this court followed. Transcripts of trial court proceedings were filed on appeal on January 14, 2009. While the appeal was pending, Boles filed his first petition for postconviction relief on July 7, 2008. The trial court denied that petition in a judgment journalized on October 10, 2008. This appeal concerns a subsequent petition for postconviction relief filed by appellant on June 14, 2010, and denied by the trial court in a judgment of July 28, 2010.

{¶ 3} A detailed description of the history of this case can be gained through a review of decisions and judgments issued by this court in *State v. Boles*, 6th Dist. No. L-07-1255, 2009-Ohio-512 (“*Boles I*”) and *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417 (6th Dist.) (“*Boles II*”).

{¶ 4} In *Boles I*, this court affirmed appellant’s conviction on direct appeal in a judgment issued on February 6, 2009. Subsequently, appellant challenged the judgment on *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163 and Crim.R. 32(C) grounds. We remanded the case for the trial court to issue a *Baker* and Crim.R. 32(C) compliant final judgment. The trial court filed a nunc pro tunc judgment entry, journalized on October 9, 2009, amending the original judgment of conviction to state that appellant was found guilty by a jury. *Boles II* involved a subsequent appeal from the October 9, 2009 nunc pro tunc judgment.

{¶ 5} In its July 28, 2010 judgment, the trial court denied appellant's second petition for postconviction relief on the grounds that it was untimely under R.C. 2953.23(A)(2) as the petition was filed more than 180 days after the date on which trial transcripts were filed in the court of appeals on direct appeal. The court held that R.C. 2953.23(A)(2) as applied in this case required appellant to file a petition for postconviction relief within 180 days of the date the trial court transcripts were filed in the *Boles I* appeal.

{¶ 6} Appellant has appealed the July 28, 2010 judgment to this court. Appellant asserts one assignment of error on appeal:

Assignment of Error

I. The trial court erred finding that appellant's petition for post-conviction relief was filed outside of the 180 day time limit. Findings of Fact, Conclusions of Law and Judgment Entry (July 28, 2010).

{¶ 7} Appellant contends that the original judgment of conviction, filed on July 23, 2007, was void under *Baker* and Crim.R. 32(C) because the judgment did not state the manner of conviction. Appellant argues that a valid judgment of conviction did not exist until issuance of the October 9, 2009 nunc pro tunc judgment adding the fact that the conviction was pursuant to a jury verdict. Appellant contends that the petition for postconviction relief was not untimely because it was filed within 180 days of the October 9, 2009 nunc pro tunc judgment.

{¶ 8} The state disagrees. It argues first that a trial court's failure to include the manner of conviction in its July 23, 2007 judgment did not render the judgment void and the trial court was correct that the petition was untimely under R.C. 2953.21(A)(2). The state has also argued that the dismissal was appropriate on other grounds, arguing the petition was an impermissible successive petition for postconviction relief and that appellant's claims in the petition are barred by res judicata.

{¶ 9} The Ohio Supreme Court issued its decision in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142 during the pendency of this appeal. In our view, the decision in *Lester* is dispositive of the central issues in this appeal.

{¶ 10} In *Lester*, the defendant was found guilty by a jury verdict at trial of various crimes and, as here, the original trial court judgment included a statement that the defendant had been convicted of the offenses but did not state the manner of conviction. *Id.* at ¶ 2.

{¶ 11} On direct appeal, the court of appeals vacated part of the sentence and remanded for resentencing with respect to postrelease control. On remand, the trial court's resentencing judgment entry also failed to include a statement as to the manner of conviction. *Id.* at ¶ 3. The defendant in *Lester* appealed the trial court judgment on remand and the court of appeals affirmed. *Id.* at ¶ 4.

{¶ 12} Subsequently the trial court sua sponte filed a nunc pro tunc judgment entry adding a sentence to the original sentencing judgment entry stating that the defendant had

been convicted pursuant to a verdict at jury trial. *Id.* at ¶ 5. The defendant in *Lester* also filed an appeal from the nunc pro tunc judgment.

{¶ 13} In *Lester*, the Ohio Supreme Court modified its decision in *Baker* and identified the following substantive requirements under Crim.R. 32(C) for a judgment entry of conviction to constitute a final judgment for purposes of appeal:

We hold that a judgment of conviction is a final order subject to appeal under R.C. 2505.02 when the judgment entry sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. *Lester* at ¶ 14.

{¶ 14} Accordingly, under *Lester* it is a substantive requirement under Crim.R. 32(C) that the judgment entry set forth the fact of conviction. The finality of a judgment of conviction is not affected by a trial court's failure to include a statement of the manner of conviction in the judgment entry. *Lester* at ¶ 12. The requirement under the rule that a judgment of conviction state the manner of conviction is to be understood as a requirement of form, rather than substance. *Id.*

{¶ 15} With respect to further appeal of a nunc pro tunc entry amending the judgment of conviction to include a statement as to the manner of conviction, the court in *Lester* held that “a nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken.” *Lester* at ¶ 20.

{¶ 16} Applying the Ohio Supreme Court’s decision in *Lester*, we conclude that the July 23, 2007 judgment of conviction complied with the substantive requirements of Crim.R. 32(C) and constituted a valid, final appealable judgment. The absence of a statement as to the manner of conviction in the judgment failed to comply with the requirements of Crim.R. 32(C) as to form, not substance. That deficiency did not prevent the judgment from constituting a valid final and appealable judgment.

{¶ 17} Accordingly, we hold that the trial court did not err in dismissing appellant’s petition for postconviction relief as untimely under R.C. 2953.21(A)(2) as the petition was not filed within 180 days after trial transcripts were filed on direct appeal from the judgment of conviction and appellant has not contended that any exception to the 180 time limit applies.

{¶ 18} We appreciate that the doctrine of the law of the case generally applies to appellate courts and under the doctrine “the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 4, 462 N.E.2d 410 (1984). We reached a different conclusion as to the validity of the July 23, 2007 judgment of conviction in a judgment issued on October 27, 2009, in an earlier appeal in this case. However, an intervening decision by the Ohio Supreme Court presents an exception to the law of the case doctrine. *Nolan v. Nolan* at 5.

{¶ 19} We find appellant’s Assignment of Error is not well-taken.

{¶ 20} Justice having been afforded the party complaining, we affirm the trial court judgment. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
