[Cite as *State v. Pesci*, 2009-Ohio-6385.]

# THE COURT OF APPEALS

## ELEVENTH APPELLATE DISTRICT

## LAKE COUNTY, OHIO

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Appellee, | : | |
| - vs - | : | **CASE NO. 2009-L-032** |
| JAMES E. PESCI, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Court of Common Pleas, Case No. 98 CR 000578.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*James E. Pesci*, P.I.D. 385-424, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

**{¶1}** This appeal arises from the Lake County Court of Common Pleas, wherein appellant, James E. Pesci, was convicted of three counts of burglary in a jury trial.

**{¶2}** Appellant was sentenced on January 16, 2001, to a total of seven years in prison, to be served consecutively to a sentence appellant was serving out of Cuyahoga County. Appellant subsequently filed a direct appeal on February 21, 2001, citing the following five assignments of error for our review:

**{¶3}** "[1.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion to dismiss for a violation of his statutory and constitutional rights to a speedy trial.

**{¶4}** "[2.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion to suppress.

**{¶5}** "[3.] The trial court erred to the prejudice of the defendant-appellant when it allowed two of the state's witnesses to testify to inadmissible hearsay.

**{¶6}** "[4.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29.

**{¶7}** "[5.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

**{¶8}** This court, in *State v. Pesci*, 11th Dist. No. 2001-L-026, 2002-Ohio-7131, at ¶95, found appellant's five assignments of error without merit and affirmed the judgment of the trial court. Appellant appealed this decision to the Supreme Court of Ohio, which declined to review his case. *State v. Pesci*, 98 Ohio St.3d 1566, 2003-Ohio-2242.

**{¶9}** Thereafter, appellant filed a writ of prohibition in this court to stop "the trial court's judicial power" in his criminal case. *State ex rel. Pesci v. Lucci*, 115 Ohio St.3d 218, 2007-Ohio-4795, at ¶3. In his writ of prohibition, appellant alleged that the trial court judge, Judge Lucci, lacked jurisdiction because of an improperly reinstated indictment. Id. Judge Lucci filed a motion to dismiss or, in the alternative, for summary judgment, which was granted by this court. Id. This court denied appellant's writ. Id. The Supreme Court of Ohio affirmed the judgment of this court. Id. at ¶5.

**{¶10}** Appellant then filed a motion to vacate a void, ab initio, judgment on November 2, 2007. In his motion, appellant raised the same issue that was raised in his first assignment of error on appeal in *State v. Pesci*, 2002-Ohio-7131. Treating this motion as a petition for post-conviction relief, the trial court denied appellant's motion on December 14, 2007, as untimely. Appellant appealed this decision in *State v. Pesci*, 11th Dist. No. 2008-L-012, 2008-Ohio-1660. This court dismissed the appeal for failure to file a timely notice of appeal, pursuant to App.R. 4(A) and Loc.R. 3(D)(2). Id. at ¶9.

**{¶11}** In the instant appeal, appellant again appeals the trial court's judgment entry of December 14, 2007, denying his pro se "Motion to Vacate A Void, Ab Initio, Judgment." On appeal, appellant asserts the following assignment of error for our review:

**{¶12}** "The trial court has no valid indictment for personal or for subject matter jurisdiction. ***" (Emphasis omitted.)

**{¶13}** Appellant filed a notice of appeal on March 3, 2009 from the December 14, 2007 judgment denying his "Motion to Vacate a Void, Ab Initio, Judgment." In dismissing appellant's appeal in *State v. Pesci*, 11th Dist. No. 2008-L-012, 2008-Ohio-1660, this court stated:

**{¶14}** "App.R. 4(A) states:

**{¶15}** "'A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day rule period in Rule 58(B) of the Ohio Rules of Civil Procedure.'

**{¶16}** "Loc.R. 3(D)(2) of the Eleventh District Court of Appeals provides:

**{¶17}** "'In the filing of a Notice of Appeal in civil cases in which the trial court clerk has not complied with Ohio Civ.R. 58(B), *and the Notice of Appeal is deemed to be filed out of rule*, appellant shall attach an affidavit from the trial court clerk stating that service was not perfected pursuant to Ohio App.R. 4(A). The clerk shall then perfect service and furnish this Court with a copy of the appearance docket in which date of service has been noted. Lack of compliance shall result in the *sua sponte* dismissal of the appeal under Ohio App.R. 4(A).' (Emphasis sic.)

**{¶18}** "Here, appellant has not complied with the thirty-day rule set forth in App.R. 4(A) nor has appellant alleged that there was a failure by the trial court clerk to comply with Civ.R. 58(B). The time requirement is jurisdictional in nature and may not be enlarged by an appellate court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; App.R. 14(B)."

**{¶19}** Furthermore, appellant's argument has been raised on numerous occasions, including his direct appeal and, as a result, is barred by the doctrine of res judicata.

**{¶20}** "[P]rinciples of *res judicata* prevent relief on successive, similar motions raising issues which were or could have been raised originally." *Brick Processors, Inc. v. Culbertson* (1981), 2 Ohio App.3d 478, paragraph one of the syllabus. As stated by the Supreme Court of Ohio in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus:

**{¶21}** "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of

due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment." (Emphasis sic.)

**{¶22}** Based on the opinion of this court, appellant's assignment of error is without merit, and the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.