

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

State of Ohio

Court of Appeals No. L-10-1158

Appellee

Trial Court No. CR0200401437

v.

Timothy Triplett

DECISION AND JUDGMENT

Appellant

Decided: April 8, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Jeffrey M. Gamso and Jeffrey L. Helmick, for appellant.

* * * * *

PER CURIAM.

{¶1} This matter is before the court on appellee's, state of Ohio, "Motion to Dismiss Re-Appeal." Appellee argues that the recent Supreme Court of Ohio decisions *State ex rel. Dewine v. Burge*, Slip Opinion No. 2011-Ohio-235, and *State v. Fischer*, 128

Ohio St.3d 92, 2010-Ohio-6238, require the court to find appellant's, Timothy Triplett, "re-appeal" of his conviction is barred by res judicata and dismiss this appeal.

{¶2} Appellant filed an opposition memorandum to the state's motion. Appellant argues that his re-appeal is not barred by res judicata and relies principally on this court's holdings in *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766, and *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971. Based upon our review of the record and parties' memoranda, we find appellee's argument well-taken and dismiss this appeal.

Background

{¶3} This appeal arises from the Lucas County Court of Common Pleas' correction of a noncompliant Crim.R. 32(C) sentencing entry under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. Appellant was convicted by a jury of rape and sentenced on May 3, 2004. The May 3 judgment erroneously omitted the required Crim.R. 32(C) language that appellant was "found guilty by a jury" of rape. Instead, the May 3 judgment stated that appellant "has been convicted [of rape];" therefore it did not comply with Crim.R. 32(C) and *Baker*. See *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, ¶ 2. However, appellant timely appealed his May 3 conviction; this court affirmed appellant's conviction. See *State v. Triplett*, 6th Dist. No. L-04-1135, 2006-Ohio-5465.

{¶4} On March 17, 2010, appellant filed a motion with the trial court seeking a *Baker* compliant sentencing entry. The trial court issued a nunc pro tunc entry on May 11, 2010, correcting the May 3 sentencing judgment to read that appellant was "found Guilty by a Jury of * * * Rape." This created a compliant Crim.R. 32(C)/*Baker* sentencing entry. Appellant does not contend otherwise.

Re-appeals, Res Judicata, and Final Judgments

{¶5} Appellant timely appealed the May 11, 2010 judgment and is seeking to re-appeal the merits of his conviction, even though this court has already affirmed his conviction. *Triplett*, 2006-Ohio-5465. This court, like other courts, has struggled to reconcile the implications of the Ohio Supreme Court's holdings in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, which this court perceived as eliminating the distinction between "void" and "voidable" judgments, with the procedural complexities arising from noncompliant Crim.R. 32(C)/*Baker* sentencing entries. This court echoed concerns that these decisions had created the framework for seemingly endless litigation resulting from the widespread existence of noncompliant postrelease control and Crim.R. 32(C)/*Baker* sentencing entries. See *Mitchell*, 2010-Ohio-1766, ¶ 25-29.

{¶6} In *State v. Mitchell*, citing an earlier decision by this court in *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971, the court concluded that res judicata did not bar a subsequent appeal of a corrected *Baker*/Crim.R. 32(C) sentencing entry, even though a court had already affirmed the defendant's conviction in a previous appeal

under a noncompliant *Baker*/Crim.R. 32(C) sentencing entry. *Id.* at ¶ 16. The court found that a noncompliant *Baker* entry is not a final appealable order, and the first reviewing court initially lacked jurisdiction to affirm the conviction during that initial appeal. *Id.* at ¶ 15, citing *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971.

{¶7} As part of its analysis, the court also concluded that the "void" judgment analysis employed by the Ohio Supreme Court in *Bezak* and other post release control cases extended to noncompliant Crim.R. 32(C)/*Baker* entries, and therefore, noncompliant Crim.R. 32(C)/*Baker* judgment entries were also void. *Id.* at ¶ 18. Similarly, the court also concluded that an appeal of a noncompliant *Baker*/Crim.R. 32(C) entry was not a final judgment for purposes of establishing res judicata and permitted the defendant to re-appeal the merits of his conviction once the error was corrected, even though the court had already affirmed the conviction.

{¶8} The *Mitchell* court concluded by foreshadowing that the Ohio Supreme Court would soon clarify the ambiguities arising from these sentencing issues:

{¶9} "The court concurs with *Mitchell*. While the practical implications indeed may be 'onerous' and 'messy,' this court is bound by the rulings of the Ohio Supreme Court, and we believe that today's result is consistent with, and mandated by, the court's decisions in *Baker*, *Culgan*, and *Simpkins*.

{¶10} "The Ohio Supreme Court may also reexamine these issues in the near future. The court is mindful that on March 30, 2010, the Ohio Supreme Court heard

arguments on appeal of the case of *State v. Fischer*, 9th Dist. No. 24406, 181 Ohio App.3d 758, 2009-Ohio-1491, 910 N.E.2d 1083. The proposition of law before the court in *Fischer* is "[a] direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a * * * resentencing is the first direct appeal as of right from a valid sentence." Id. at ¶ 29-30.

Interim Supreme Court of Ohio Decisions

{¶11} The *Mitchell* court was correct. In two recent cases, *State ex rel. Dewine v. Burge*, 2011-Ohio-235, and *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, the Supreme Court of Ohio clarified and narrowed its void judgment and *Baker* jurisprudence, and reaffirmed that res judicata remains a bar to previously litigated appeals.

{¶12} First, in *State ex rel. Dewine v. Burge*, the court expressly rejected the *Mitchell* holding that a noncompliant *Baker* entry is a "void" judgment:

{¶13} "Any failure to comply with Crim.R. 32(C) was a mere oversight that vested the trial court with specific, limited jurisdiction to issue a new sentencing entry to reflect what the court had previously ruled and not to issue a new sentencing order reflecting what, in a successive judge's opinion, the court should have ruled. These circumstances are thus distinguishable from egregious defects, such as an entry that is not journalized, that permit a court to vacate its previous orders. Cf. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 337-338, 686 N.E.2d 267. Moreover, the technical failure to comply

with Crim.R. 32(C) by not including the manner of conviction in Smith's sentence is not a violation of a statutorily mandated term, so it does not render the judgment a nullity. Cf. State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 10-12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 39 O.O.2d 414, 227 N.E.2d 223; see also *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 39 ('fact that the sentence was illegal does not deprive the appellate court of jurisdiction to consider and correct the error')." (Emphasis added and emphasis in original.) *Burge*, 2011-Ohio-235, ¶ 19. Cf. *Mitchell*, 2010-Ohio-1766, ¶ 18.

{¶14} Second, in *State v. Fischer*, 2010-Ohio-6238, the Supreme Court of Ohio also rejected the reasoning espoused in *Mitchell* and *Lampkin*, and concluded that a previous appeal litigated under the auspices of a faulty sentencing entry does not preclude the application of law of the case or res judicata:

{¶15} "Fischer's theory is that because the trial court did not properly apply postrelease-control sanctions, his sentence was void under *Bezak*. Because his sentence was void, he contends, there was no sentence, and without a sentence, no conviction and no final order. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182 ('a "conviction" consists of a guilty verdict *and* the imposition of a sentence or penalty' [emphasis sic]); *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, syllabus (to be a final, appealable order, a judgment of conviction must include the sentence). In *Fischer's* view, the absence of a conviction means the absence of a final,

appealable order, and the absence of such an order deprived the court of appeals of its jurisdiction over the initial appeal, thereby rendering that appeal invalid. The argument, though creative, fails." (Emphasis added.) Id. at ¶ 38. Cf. *Lampkin*, 2010-Ohio-1971, ¶ 12, and *Mitchell*, 2010-Ohio-1766, ¶ 12-15.

{¶16} The court went on to hold that because Fischer already had the benefit of one direct appeal, res judicata applied to preclude him from re-appealing the merits of his conviction once the trial court corrected the postrelease control sentencing error:

{¶17} "The court of appeals correctly ruled that Fischer, having already had the benefit of one direct appeal, could not raise any and all claims of error in a second, successive appeal. 181 Ohio App.3d 758, 2009-Ohio-1491, 910 N.E.2d 1083. The court of appeals based its decision on the law-of-the-case doctrine, which provides that 'the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 11 OBR 1, 462 N.E.2d 410.

{¶18} "* * *

{¶19} "* * * In light of our holding, the court of appeals in this case correctly held that Fischer's remaining claims, which did not involve a void sentence or judgment, were barred by res judicata." *Fischer*, 2010-Ohio-6238, ¶ 33-36.

{¶20} Thus, given the Supreme Court of Ohio's intervening decisions in *Burge* and *Fischer*, this court finds that the reasoning espoused in *Mitchell* and *Lampkin* for not

applying res judicata and the law of the case doctrine to previously litigated noncompliant Crim.R. 32(C)/*Baker* sentencing and postrelease entries are no longer persuasive.

{¶21} In this case, appellant is appealing the May 11, 2010 judgment correcting his noncompliant *Baker*/Crim.R. 32 (C) sentencing entry. The parties agree the trial court has now issued a compliant entry. This court previously affirmed appellant's conviction in *State v. Triplett*, 2006-Ohio-5465, and the record reflects Triplett is seeking to re-appeal the merits of his conviction. Accordingly, we find that pursuant to *Burge* and *Fischer*, appellant's arguments are barred by the law of the case doctrine and res judicata. Appellee's motion to dismiss is found well-taken and granted.

Pending Conflict

{¶22} This court is aware that the Supreme Court of Ohio recently accepted a certified conflict between *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-1971, *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-4934, and *State v. Lester*, July 12, 2010, 3d Dist. No. 2-10-20, for review. See *State v. Lampkin*, 127 Ohio St.3d 1546, 2011-Ohio-647. See, also, *State v. Lester*, 126 Ohio St.3d 1579, 2010-Ohio-4542. The certified questions presented are : (1) Is a nunc pro tunc judgment filed for the purpose of correcting a clerical omission in a prior sentencing judgment by adding "means of conviction" language, which was readily apparent throughout the record and to the parties but not originally included as required by Crim.R. 32(C), a final order subject to appeal;

(2) May a trial court utilize a 'nunc pro tunc' judgment to correct a void judgment entry under *State v. Baker*, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008-Ohio-3330; and (3) Is a nunc pro tunc judgment filed to correct a void judgment entry as required by *State v. Baker*, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008-Ohio-3330 a final, appealable order, despite any prior appeals that may have been taken from the first judgment entry?

{¶23} While the Ohio Supreme Court may provide some additional clarification on these issues, we find that significant questions unanswered at the time of *Mitchell* and *Lampkin* have been answered by the court's intervening decisions in *Burge* and *Fischer* to our satisfaction for purposes of these proceedings.

{¶24} This appeal is dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. It is so ordered.

APPEAL DISMISSED.

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, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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>.