[Cite as *State v. Arega*, 2017-Ohio-5610.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 17AP-112 (C.P.C. No. 11CR-1145)
v.	:	(ACCELERATED CALENDAR)
Tizazu F. Arega,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 29, 2017

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

On brief: *Tizazu F. Arega*, pro se.

APPEAL from the Franklin County Court of Common Pleas

BROWN, J.

{¶ 1} Tizazu F. Arega, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas in which the court denied his motion for resentencing.

{¶ 2} On February 3, 2012, appellant was convicted of rape by vaginal intercourse and sexual battery pursuant to a jury trial. The trial court merged the two counts for purposes of sentencing and sentenced appellant to nine years incarceration. We reversed his conviction for sexual battery and affirmed the conviction for rape in *State v. Arega*, 10th Dist. No. 12AP-263, 2012-Ohio-5774. We noted that sentence modification was not required because of the merger of offenses but remanded the matter to the trial court with instructions to enter a judgment of acquittal on the charge for sexual battery.

{¶ 3} In 2014, appellant filed multiple motions for production of documents for purposes of post-conviction relief, which the trial court denied on November 13, 2014.

{¶ 4} In early 2015, appellant filed a petition for post-conviction relief, an amended petition for post-conviction relief, and numerous other motions, including another discovery-related motion. In April 2015, the trial court dismissed appellant's petition for post-conviction relief as untimely filed and denied his other motions. Appellant filed a motion for delayed notice of appeal, which this court denied in *State v. Arega*, 10th Dist. No. 15AP-591 (June 22, 2015) (Journal Entry). Approximately one year later, appellant filed a request for leave to file a delayed appeal with the Supreme Court of Ohio, which denied the motion in *State v. Arega*, 145 Ohio St.3d 1469, 2016-Ohio-3028.

{¶ 5} On May 23, 2016, appellant filed a motion to compel disclosure of exculpatory material and demand for discovery. On June 2, 2016, he filed a motion to unseal his criminal record, seeking certain documents. On June 7, 2016, the trial court denied appellant's motions. This court affirmed the trial court's decision in *State v. Arega*, 10th Dist. No. 16AP-455, 2016-Ohio-8074. Upon further appeal, the Supreme Court declined jurisdiction in *State v. Arega*, 148 Ohio St.3d 1412, 2017-Ohio-573.

{¶ 6} On January 3, 2017, appellant filed a motion for leave to resentence in the trial court, in which he claimed he was a first-time offender and should have been sentenced to the minimum sentence pursuant to H.B. No. 86. On January 23, 2017, the trial court denied appellant's motion, finding it to be a nullity, barred by res judicata, and meritless. Appellant appeals, asserting the following assignment of error:

> THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY DENYING HIS MOTION FOR RESENTENCING AND/OR SET ASIDE HIS SENTENCE AND SENTENCES JOURNAL ENTRY BECAUSE THE TRIAL COURT RELIED IN PART ON FABRICATED AND FALSE STATEMENT OF MATERIAL FACTS IN SENTENCE HEARING AND HIS SENTENCE IS CONTRARY TO LAW AND NOT AUTHORIZED BY LAW.

{¶ 7} Appellant argues in his sole assignment of error that the trial court erred when it denied his motion for resentencing because the trial court relied in part on a

fabricated and false statement of material fact at the sentencing hearing and his sentence was contrary to law. Appellant spends much of his brief arguing the assistant prosecuting attorney committed fraud on the court in his original trial, and the trial court used the false information in sentencing him to more than the minimum sentence. Appellant argues that, although the prosecutor contended the victim's description of what happened was consistent with rape, the prosecutor failed to disclose the sexual assault nurse exam notes, which would have revealed the victim's description did not describe rape.

{¶ 8} In addition to his fraud-upon-the-court argument, appellant also makes the following arguments in his brief: his sentence was void because it was unauthorized by statute, due to the trial court's failure to comply with R.C. 2929.11, 2929.12, 2929.13, and 2929.14; the trial court erred by failing to compel the State of Ohio, plaintiff-appellee, to produce discoverable materials pursuant to Crim.R. 16; the trial court erred when it denied the jury's request to see a detective's interview with the victim; the trial court erred when it failed to clarify the definition of "force" for the jury; and the trial court erred when it allowed inconclusive and perhaps false chemical testing results regarding the presence of semen.

{¶ 9} We first note appellant failed to raise any argument in his motion for leave to resentence with regard to the prosecutor's alleged fraud on the court; the state's failure to produce discoverable materials, pursuant to Crim.R. 16; the jury's request to see the detective's interview with the victim; the trial court's failure to clarify the definition of "force" for the jury; and the trial court's improper allowance of chemical testing results regarding the presence of semen. A party who fails to raise an argument in the trial court waives the right to raise it on appeal. *Harding Pointe, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 13AP-258, 2013-Ohio-4885, ¶ 43, citing *Betz v. Penske Truck Leasing Co., L.P.*, 10th Dist. No. 11AP-982, 2012-Ohio-3472, ¶ 34. "A fundamental rule of appellate review is that an appellate court will not consider any error that could have been, but was not, brought to the trial court's attention." *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.*, 91 Ohio App.3d 76, 80 (9th Dist.1993). Moreover, "[a] party may not change its theory of the case and present new arguments for the first time on appeal." *Clifton Care Ctr. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-709, 2013-Ohio-2742, ¶ 13. Thus, appellant has waived these arguments.

{¶ 10} Notwithstanding waiver, the trial court gave three separate rationales for denying appellant's motion for leave to resentence: the motion was a nullity, the motion was barred by res judicata, and the motion was meritless. However, the trial court's determination that appellant's motion was a nullity disposes of the entire appeal before us. In essence, appellant's motion for leave to resentence was a motion for reconsideration of his sentence. "A motion to modify a sentence after it has begun is akin to a motion for reconsideration after a final appealable order has been rendered." *State v. Young*, 2d Dist. No. 20813, 2005-Ohio-5584, ¶ 6. The Ohio Rules of Civil Procedure do not provide for motions for reconsideration after a final judgment in a trial court. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378 (1981), paragraph one of the syllabus. Such motions are considered a nullity. *State ex rel. Pendell v. Adams Cty. Bd. of Elections*, 40 Ohio St.3d 58, 60 (1988); *McCualsky v. Appalachian Behavioral Healthcare*, 10th Dist. No. 16AP-442, 2017-Ohio-1064, ¶ 11, citing *BAC Home Loans Servicing, L.P. v. Ferguson*, 10th Dist. No. 12AP-350, 2012-Ohio-5670, ¶ 13; *Kelley v. Stauffer*, 10th Dist. No. 10AP-235, 2010-Ohio-4522, ¶ 6; *Estate of Millhon v. Millhon Clinic, Inc.*, 10th Dist. No. 07AP-413, 2007-Ohio-7153, ¶ 38; *Miller v. Anthem, Inc.*, 10th Dist. No. 00AP-275 (Dec. 12, 2000). Likewise, the Ohio Rules of Criminal Procedure provide no authority for motions for reconsideration; thus, they are also a nullity. *State v. Dunn*, 4th Dist. No. 06CA23, 2007-Ohio-854, ¶ 12, citing *State v. Whaley*, 4th Dist. No. 96CA17 (July 9, 1997), citing *Cleveland Heights v. Richardson*, 9 Ohio App.3d 152, 154 (8th Dist.1983); *State v. Hicks*, 8th Dist. No. 60985 (May 30, 1991), fn. 1; *State v. Carpenter*, 3d Dist. No. 1-88-58 (June 15, 1990); *Geneva v. Zendarski*, 11th Dist. No. 1305 (June 26, 1987).

{¶ 11} " ' " '[I]t follows that a judgment entered on a motion for reconsideration is also a nullity and a party cannot appeal from such a judgment.' " ' " *McCualsky* at ¶ 11, quoting *Levy v. Ivie*, 195 Ohio App.3d 251, 2011-Ohio-4055, ¶ 15 (10th Dist.), quoting *Rutan v. Collins*, 10th Dist. No. 03AP-36, 2003-Ohio-4826, ¶ 7, quoting *Primmer v. Lipp*, 5th Dist. No. 02-CA-94, 2003-Ohio-3577, ¶ 7. *See also Aicher v. Aicher*, 10th Dist. No. 08AP-859, 2009-Ohio-1268, ¶ 19, quoting *Pendell* at 60 ("[A]ny judgment or final order that results from a motion for reconsideration 'is a nullity itself.' "). *See also Kauder v. Kauder*, 38 Ohio St.2d 265, 267 (1974) (a judgment that enters on a motion for reconsideration is also a nullity). Therefore, in the present case, given that appellant's

motion asked the trial court to reconsider the sentence it previously imposed on him, the motion was a nullity because the trial court lacked jurisdiction to reconsider its own valid final judgment, and the trial court's entry itself ruling on the motion was a nullity.

{¶ 12} In *McCualsky*, this court explained the consequences of a trial court's null entry denying a null motion for resentencing:

> Ohio appellate courts have jurisdiction to review only final, appealable orders of lower courts within their districts." *K.B. v. City of Columbus*, 10th Dist. No. 14AP-315, 2014-Ohio-4027, ¶ 8, citing Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2501.02. "If an order is not a final, appealable order, the appellate court lacks jurisdiction and the appeal must be dismissed." *K.B.* at ¶ 8, citing *Production Credit Ass'n. v. Hedges*, 87 Ohio App.3d 207 * * * (4th Dist.1993). See also *Whipps v. Ryan*, 10th Dist. No. 12AP-509, 2013-Ohio-4334, ¶ 22, citing *Kopp v. Associated Estates Realty Corp.*, 10th Dist. No. 08AP-819, 2009-Ohio-2595, ¶ 6, citing *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 186 * * * (1972). Consequently, appellate courts may raise, sua sponte, the jurisdictional question of whether an order is final and appealable. *Whipps* at ¶ 22, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 87, * * * (1989); *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544 * * * (1997).
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> As set forth above, under Ohio law, a motion for reconsideration of a final order in a civil case is a nullity and all judgments or final orders from said motion are also a nullity. *Levy*; *Rutan*; *Aicher*. Because a trial court order denying reconsideration of a final order is a nullity and not subject to appeal, the Court of Claims' May 10, 2016 entry denying appellants' motion for reconsideration is not a final, appealable order. *Boulware v. Chrysler Group, L.L.C.*, 10th Dist. No. 13AP-1061, 2014-Ohio-3398, ¶ 13; *Franklin Univ. v. Ellis*, 10th Dist. No. 13AP-711, 2014-Ohio-1491, ¶ 8. Because the order appealed from is not a final, appealable order, this court lacks jurisdiction, and we must dismiss the appeal. *Id*.

Id. at ¶ 12-13.

{¶ 13} Therefore, as we explained in *McCualsky*, because a motion for reconsideration of a final order is a nullity, and all orders from said motion are also a nullity and not subject to appeal, the trial court's January 23, 2017 entry denying appellant's motion for leave to resentence in the present case is not a final, appealable

order. Because the entry was not a final, appealable order, this court is without jurisdiction in this appeal, and we must dismiss the appeal.

{¶ 14} Accordingly, we dismiss appellant's appeal, and appellant's single assignment of error is rendered moot.

Appeal dismissed.

KLATT and HORTON, JJ., concur.

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