

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 09-0897
	:	
Plaintiff-Appellee,	:	On Appeal from the Summit
	:	County Court of Appeals
vs.	:	Ninth Appellate District
	:	
LONDEN K. FISCHER,	:	C.A. Case No. CA-24406
	:	
Defendant-Appellant.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LONDEN K. FISCHER**

SHERRI B. WALSH #0030038
Summit County Prosecutor

OFFICE OF THE
OHIO PUBLIC DEFENDER

HEAVEN DiMARTINO #0073423
Assistant Summit County Prosecutor
Counsel of Record

CLAIRE R. CAHOON #0082335
Assistant State Public Defender
Counsel of Record

53 University Ave., 7th Floor
Safety Building
Akron, OH 44308
(330) 643-2800
(330) 643-2137 – Fax

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
claire.cahoon@opd.ohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE
STATE OF OHIO

COUNSEL FOR DEFENDANT-APPELLANT
LONDEN K. FISCHER

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

As this Court has long held, a void sentence is a legal nullity and should be treated as though it never took place. *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-68. For that reason, a criminal defendant who takes a direct appeal from a void sentence has an invalid and untenable direct appeal. When that defendant is granted a resentencing to correct the void judgment, the proceeding is de novo. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶6. Therefore, the defendant has a right to a new direct appeal, which would be that defendant's only valid direct appeal as of right.

This Court has issued a lengthy line of cases dealing with trial court's failure to advise criminal defendants about postrelease control. See *State v. Boswell*, Slip Opinion No. 2009-Ohio-1577, at ¶1; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus; *Bezak*, 2007-Ohio-3250, at syllabus; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶23. See, also, *State v. Beasley* (1984), 14 Ohio St.3d 74. Because of that long history, there is no question that a trial court's failure to advise a criminal defendant about postrelease control results in a void sentence. A criminal defendant who directly appeals his or her conviction following a *Bezak* resentencing is in the same position as any defendant who initiates a direct appeal from an initial conviction. Such a defendant is not barred from litigating any cognizable issues from his trial or sentence. Res judicata operates only to prevent defendants from raising claims that "[were] raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.3d 175, paragraph nine of the syllabus (emphasis added). When a void sentence results in no valid judgment of conviction, a criminal defendant does not have a valid direct appeal until he or she is resentenced. The defendant must then initiate a direct appeal from the resentencing.

Londen K. Fischer's original sentence was void because the trial court failed to properly advise him regarding postrelease control. Although he took a direct appeal from his void sentence, that appeal – just like the sentence – is a legal nullity. Therefore, this case should be treated as Mr. Fischer's first appeal as of right.

Assessing the affects of a void sentence is complex, as is evidenced by the Ninth District Court of Appeals' incorrect application the law-of-the-case doctrine to circumstances like Mr. Fischer's. *State v. Fischer*, 9th Dist. No. 24406, 2009-Ohio-1491, at ¶6-8. Ohio's courts of appeals need guidance in analyzing what can be litigated in a direct appeal from a resentencing following a void judgment. Criminal defendants across Ohio would be prejudiced by a bar of their direct appeal as of right if courts of appeals refuse to recognize that an appeal from a void judgment is invalid. Therefore, this Court must grant jurisdiction in this case.

Additionally, Mr. Fischer's constitutional right to due process and a fair trial were violated when the trial court allowed an officer to interpret gun shot residue results outside the scope of admissible lay witness testimony. In Mr. Fischer's case, there was a central question as to who instigated the violence by pulling out a gun. By allowing the officer to testify at trial that the residue results indicated that Mr. Fischer held the gun, the jury was given an impermissible and unreliable basis for convicting Mr. Fischer. This Court should grant jurisdiction and clarify the appropriate use of lay witness testimony under Evid.R. 701.

STATEMENT OF THE CASE

On July 9, 2001, Londen K. Fischer was indicted by a Summit County grand jury on three counts of aggravated robbery, violations of R.C. 2911.01(A); two counts of aggravated burglary, violations of R.C. 2911.11(A)(2); one count of felonious assault, a violation of R.C. 2903.11(A)(2); and one count of intimidation of a crime victim or witness, a violation of R.C.

2921.04. All counts included firearm specifications under R.C. 2941.145. On September 19, 2001, a supplemental indictment was filed against Mr. Fischer, which included one count of having weapons while under disability, a violation of R.C. 2923.13(A)(3), and a related firearm specification. The charges stemmed from two separate robberies that allegedly occurred on June 24 and June 25, 2001.

Following trial, the jury returned a verdict of not guilty on two counts of aggravated robbery and one count of intimidation, as well as their related firearm specifications. Mr. Fischer was found guilty on the remaining counts. Mr. Fischer was sentenced to an aggregate term of fourteen years of incarceration and a mandatory five-year term of postrelease control. The trial court did not advise Mr. Fischer that a violation of postrelease control could lead to additional incarceration. Mr. Fischer timely appealed his conviction, arguing that his convictions on all counts were against the manifest weight of the evidence. The Ninth District Court of Appeals affirmed Mr. Fischer's conviction. *State v. Fischer*, 9th Dist. No. 20988, 2003-Ohio-95.

On July 11, 2007, this Court decided *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at syllabus, holding that when postrelease control is not properly included in a sentence, that sentence is void. Mr. Fischer filed a pro se motion for resentencing with the trial court, citing *Bezak*, and was resentenced on August 6, 2008. At his resentencing hearing, Mr. Fischer was advised of postrelease control and the same sentence of imprisonment was imposed.

Mr. Fischer timely appealed his resentencing, arguing that, because his original sentence was void, he was not barred from raising trial issues in this direct appeal. Specifically, Mr. Fischer argued that he should be granted a new trial because of an officer's inadmissible lay testimony which required specialized knowledge. That issue was not raised in his first appeal. The Ninth District Court of Appeals affirmed Mr. Fischer's conviction, holding that the only

issues that could be reviewed in this direct appeal stemmed from his resentencing, as his trial issues were barred by the law-of-the-case doctrine. *State v. Fischer*, 9th Dist. No. 24406, 2009-Ohio-1491, at ¶8. This timely appeal follows.

STATEMENT OF THE FACTS

On June 24, 2001, Milo Tolbert and Haven Tomlin reported a robbery and assault at their Akron residence. Mr. Fischer stated at trial that he knew Tolbert because he had frequently purchased marijuana from him, but denied robbing Tolbert. On June 25, 2001, Eric Patten reported that three men, including Mr. Fischer, approached his home that evening and that Mr. Fischer forced his way into the home. Patten testified that Mr. Fischer produced a gun and demanded money. Patten testified that he then reached for the gun, the two men struggled, and the gun went off. Both men were struck.

Mr. Fischer testified at trial that he went to Patten's house to purchase drugs but that they started to argue about the amount on the scale and Patten pulled out a gun. Akron Police found a scale on the scene, as well as what appeared to be marijuana. Mr. Fischer stated that he wrestled for the gun and it went off several times. Additionally, Mr. Fischer stated that he got control of the gun during the struggle and fired, but he did not know if he hit Patten.

Patten and Mr. Fischer both went to City Hospital for gunshot wounds that night. During an interview with the police at the hospital, Mr. Fischer initially said that he was shot on a street corner by a passing car. Mr. Fischer explained at trial that he was afraid to tell the police that he was at Patten's house to buy drugs. Upon further questioning, Mr. Fischer told the police that he had been at Patten's home to buy drugs. While at the hospital, Akron Police performed gunshot residue swabs on both men's hands and submitted the swabs to the Bureau of Criminal Investigation and Identification ("BCI").

At trial, Sergeant John B. Callahan testified about the gunshot residue test that he performed on Patten's hands, as well as the results of both men's swabs. Although he told the court numerous times that he was trained in doing the swab but was not an expert on gunshot residue, Callahan was asked to read and then interpret BCI's report on the gunshot residue results. He was then asked, over objection, to opine as to what the results meant. Callahan then testified regarding who was likely holding the gun based on the gun shot residue test results.

ARGUMENT

PROPOSITION OF LAW I

A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a *Bezak* resentencing is the first direct appeal as of right from a valid sentence. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

When postrelease control is not properly imposed in a criminal sentence, that sentence is void. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at syllabus. This Court subsequently defined a void judgment as "one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶12; citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. In keeping with its decision in *Bezak*, the *Simpkins* Court held that a sentence is void when a trial court does not properly impose postrelease control during sentencing. *Id.*, at syllabus. This Court's *Simpkins* opinion harkened back to the long-held rule that a sentence lacking a statutorily mandated term is void. *Id.* at ¶14, citing *State v. Beasley* (1984), 14 Ohio St.3d 74. See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶23; *State v. Boswell*, Slip Opinion No. 2009-Ohio-1577, at ¶1.

This Court has provided affirmative direction to Ohio's court of appeals regarding how to treat void sentences. The effect of a void sentence is "as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had

been no judgment.” *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-68. Absence of a sentence means that a conviction is not final. *State v. Henderson* (1979), 58 Ohio St.2d 171, 178-79.

1. Limiting appellate review to the first direct appeal when taken from a void sentence denies a criminal defendant a valid direct appeal as of right.

Here, Londen K. Fischer was resentenced because when the trial court originally failed to advise him regarding statutorily mandated postrelease control under *Bezak*. That failure rendered his original sentence void. Mr. Fischer subsequently appealed his conviction in a direct appeal, although he also appeal from his invalid conviction. Because his original sentence was void, the resentencing hearing was the first time that Mr. Fischer was subject to a valid sentence under the *Bezak* line of cases. As a result, Mr. Fischer’s original direct appeal was from an invalid sentence; therefore, it was also a legal nullity. See, also, *Romito*, 10 Ohio St.2d at 266-67. The instant appeal constitutes Mr. Fischer’s direct appeal as of right, and he must be permitted to raise any and all trial errors cognizable on direct appeal.

2. When a defendant pursues a direct appeal following a resentencing that stems from a void judgment, the law-of-the-case doctrine is not a bar to trial issues.

The Ninth District Court of Appeals erred in holding that Mr. Fischer’s appeal is barred under the law-of-the-case doctrine. *State v. Fischer*, 9th Dist No. 24406, 2009-Ohio-1491. The law-of-the-case doctrine implicates res judicata because it “precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal.” *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404-05. “Res judicata is a substantive rule of law that applies to a final judgment, whereas the law-of-the-case doctrine is a rule of practice analogous to estoppel.” *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, at ¶22. But collateral estoppel means “that when an issue of ultimate fact has been determined

by a valid and final judgment, that issue cannot again be litigated....” *State v. Lovejoy*, 79 Ohio St.3d 440, 443, 1997-Ohio-371 (emphasis added). If the law-of-the-case doctrine is analogous to collateral estoppel, then it follows that the doctrine only applies in light of a valid and final judgment. Therefore, it does not apply in Mr. Fischer’s case, as his first appeal was from a void judgment.

Likening the doctrine to res judicata yields the same results. This Court declined to apply res judicata to void sentences. *Simpkins*, 2008-Ohio-1197, at ¶30. The *Simpkins* court recognized that res judicata is a doctrine of “fundamental and substantial justice,” and it should not be used to allow the State to “bind the people or the court to an unlawful or otherwise void sentence by failing to appeal it correctly.” *Id.* at ¶25, 28. This Court has recognized that res judicata operates only to prevent defendants from raising claims that “[were] raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.3d 175, paragraph nine of the syllabus (emphasis added). The logical inverse is that when there is no valid judgment of conviction, a defendant is not precluded from raising such claims. As res judicata is a substantive rule, it is logical that if res judicata does not apply to bar subsequent appeals from a void sentence, then the law-of-the-case doctrine does not apply either.

The law-of-the-case doctrine was never intended to preclude criminal defendants from pursuing appellate issues from valid sentencing when their original sentences were void. “The doctrine [of law-of-the-case] is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.” *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. It does not apply here. In fact, the doctrine’s application here would lead to unjust results, as Mr. Fischer would be denied a merit review of his direct appeal from a valid

sentence. Because the law-of-the-case doctrine is not intended to bar appeals from valid judgments, this Court must hold that this is Mr. Fischer's first direct appeal as of right and remand his case to the court of appeals for a decision on the merits.

PROPOSITION OF LAW II

A criminal defendant is denied due process and a fair trial when the trial court admits lay witness opinion testimony that is unrelated to that witness' perceptions and calls for specialized knowledge. Evid.R. 701; Evid.R. 702(A); Section 16, Article I, Ohio Constitution; Fifth and Fourteenth Amendments, United States Constitution.

Mr. Fischer was denied due process and a fair trial when a police officer, who was not qualified as an expert, read to the jury the results of a stipulated gunshot residue test performed by experts, and then offered his own opinion as to what the results meant. Such testimony is inadmissible from a lay person, as it requires specialized knowledge about the subject. Evid.R. 701, 702. The testimony was admitted over defense counsel's objections, which makes the standard of review abuse of discretion. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219; quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Additionally, the decision to admit or exclude testimony from an expert should be reviewed under an abuse of discretion standard. *Kumho Tire Co. v. Carmichael* (1999), 526 U.S. 137, 152; *State v. Drummond*, 111 Ohio St.3d 4, 2006-Ohio-5084, at ¶114.

Under Evid.R. 701, if a witness is not testifying as an expert, the lay witness's opinion testimony is limited to "opinions or inferences which are 1) rationally based on the perception of the witness and 2) helpful to a clear understanding of the witness testimony or the determination of a fact in issue." An expert can testify to "matters beyond the knowledge or experience possessed by lay persons." Evid.R. 702(A). Before an expert may testify, a threshold

determination must be made under Evid.R. 104(A) as to whether he or she qualifies as an expert. *State v. Baston*, 85 Ohio St.3d 418, 423, 1999-Ohio-280. Essentially, an expert relies on specialized knowledge, while lay opinion is based on the witness's "personal knowledge and experience." *State v. McKee*, 91 Ohio St.3d 292, 297, 2001-Ohio-41.

Here, the State impermissibly elicited expert testimony from a lay witness. Akron Police Sergeant John B. Callahan testified that he collected swabs from Eric Patten's hands using a gunshot residue kit. The State asked Callahan if he had training in gunshot residue, to which he responded that he had collected several samples, but stated that he was not an expert. Callahan reiterated that he was not an expert on gunshot residue during cross-examination and redirect examination.

On redirect examination, the prosecutor gave Callahan the test results from the gunshot residue testing performed by the Ohio Bureau of Criminal Investigation and Identification ("BCI") and asked Callahan to identify them. Defense counsel objected to the questioning, maintaining that Callahan was not an expert and was not the individual who tested the samples or made the report. The trial court overruled the objection and allowed Callahan to read the results of the test for the jury. Later, the State asked Callahan to interpret the BCI report by asking him what it might mean for gunshot residue to be on the back of the hands versus the front. Again, defense counsel's objection to Callahan's lack of expertise was overruled. Callahan then opined as to what the results meant regarding who was holding the gun at the time that it was fired.

An expert witness may testify to subjects that require specialized knowledge but a lay witness may not. Evid.R. 701, 702. This Court has held that two BCI technicians were qualified experts to testify to gunshot residue test results, as they performed the actual testing of the sample. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, at ¶58-60. Similarly in *State v.*

Moreland (1990), 50 Ohio St.3d 58, 62-63, this Court held that a properly qualified expert could testify not only to the levels of chemicals found in a gunshot residue test, but also what that result meant regarding whether the defendant fired a gun. When lay witness' testimony encompasses the expression of a conclusion, instead of a description of an observation, it is inadmissible. *State v. Jells* (1990), 53 Ohio St.3d 22, 29. Compare *State v. Hawn* (2000), 138 Ohio App.3d 449, 464-66 (holding that the trial court improperly allowed an officer to give his lay opinion that defendant's crying and remorse were fake because she saw no tears).

Contrarily, a lay witness is qualified to testify about his or her own opinion or perceptions. For example, this Court has recognized that a police officer can properly give opinion and perception testimony as a lay witness about whether someone appeared drunk. *State v. Schmidtt*, 101 Ohio St.3d 79, 2004-Ohio-37, at ¶12. Such observations are distinct from testimony interpreting the results of a scientific test, which requires an expert.

In the instant case, Callahan testified that, while he knew how to perform the swab to send to the lab, he was not an expert in gunshot residue. An expert's specialized knowledge was required to interpret the meaning of the BCI test results. By offering a baseless expert opinion as to what the results meant, Callahan improperly testified outside the scope of a lay witness. That testimony was unreasonably admitted over objection and against the spirit of Evid.R. 701. Therefore, this Court must grant jurisdiction in Mr. Fischer's appeal to clarify the proper use of lay witness testimony.

PROPOSITION OF LAW III

The remedy that this Court set forth in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, violates the Ex Post Facto and Due Process Clauses of the United States Constitution.

On February 27, 2006, this Court found portions of R.C. 2929.14 and R.C. 2929.19 to be unconstitutional. *Foster*, at paragraphs one, three, and five of the syllabus. In order to remedy the constitutional violations, this Court severed the portions of the statutes that were declared to be unconstitutional. *Id.* at paragraphs two, four, and six of the syllabus. Ohio Revised Code Sections 2929.14(B), 2929.14(C), and 2929.14(E)(4) were among the sections that were determined to be unconstitutional and therefore severed. *Id.* at ¶¶61, 64, and 67, respectively.

Revised Code Section 2929.14(B) previously stated that a minimum sentence must have been imposed unless specific findings were made. With some exceptions not relevant to this case, a maximum sentence was permitted to be imposed only when the trial court found that the defendant committed the worst form of the offense, or that he or she posed the greatest likelihood of committing future crimes. R.C. 2929.14(C). Additionally, before *Foster* was decided, consecutive, non-mandatory sentences could only be imposed on defendants in specific instances. R.C. 2929.14(E)(4).

On June 24 and 25, 2001—the time frame in which the alleged offenses occurred in this case—the factual findings mandated by R.C. 2929.14(B), R.C. 2929.14(C), and R.C. 2929.14(E)(4) were required to be made at a sentencing hearing and in a journal entry of conviction. R.C. 2929.14; R.C. 2929.19; *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110; *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. As such, during Mr. Fischer’ resentencing hearing, the trial court was required to sentence him under the Senate Bill 2 provisions that were in effect at the time of his purported crimes. And any sentence that included non-minimum,

maximum, or consecutive prison terms—but omitted the findings required by R.C. 2929.14(B), 2929.14(C), and R.C. 2929.14(E)(4)—violated the Ex Post Facto and Due Process Clauses of the United States Constitution.

Although the constitutional prohibition against ex post facto laws is applicable only to legislative enactments, judicial enlargement of a statute implicates the same concerns expressed by the Ex Post Facto Clause. *State v. Garner*, 74 Ohio St.3d at 57. This Court’s severance of the unconstitutional statutes operates retrospectively and disadvantages Mr. Fischer. According to the sentencing statutes that were in effect on June 24 and 25, 2001, there was a presumption that Mr. Fischer would be sentenced to minimum, concurrent sentences, unless a judge made the findings required by statute. R.C. 2929.14(A)-(E). By severing the statutes, this Court allowed Mr. Fischer to be sentenced to non-minimum, maximum, and consecutive terms, without the trial court’s having to make any of the findings on the record, as was required under R.C. 2929.14(B), R.C. 2929.14(C), and R.C. 2929.14(E)(4). Additionally, the remedy that was adopted by this Court in *Foster* was unexpected. During the time frame in which the alleged offenses occurred, Mr. Fischer could not have foreseen that this Court would replace the portions of Senate Bill 2 that gave a trial court “guided discretion” with unfettered, unreviewable discretion. *Foster* at ¶89.

The United States Supreme Court recently upheld an Oregon sentencing statute allowing trial courts to engage in fact finding when imposing consecutive sentences. *Oregon v. Ice* (2008), 129 S. Ct. 711. Similarly, Ohio’s former R.C. 2929.14(E)(4) mandated that trial courts find specific facts before ordering a defendant to serve consecutive sentences. If those factors could not be determined, the presumption of concurrent sentences could not be overcome. R.C. 2929.41. Although small variances exist between the Oregon and Ohio statutes, this Court most

likely severed a constitutional sentencing presumption in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Mr. Fischer was entitled to receive minimum and concurrent prison terms. *Blakely v. Washington*, 542 U.S. 296; R.C. 2929.14(A)(1); R.C. 2929.14(A)(2); R.C. 2929.14(A)(4); R.C. 2929.14(B); R.C. 2929.14(C); and R.C. 2929.14(E)(4).

PROPOSITION OF LAW IV

Trial counsel provides ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to object to a trial court's retroactive application of the remedy that this Court set forth in *Foster*.

Mr. Fischer's counsel at resentencing was ineffective in failing to object when the trial court imposed non-minimum, maximum, and consecutive sentences in violation of the Ex Post Facto and Due Process Clauses of the United States Constitution. (See Proposition of Law III, supra). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Had Mr. Fischer's trial attorney objected during resentencing, non-minimum, maximum, and consecutive sentences would not have been imposed. *Strickland* at 694-695. Alternatively, had Mr. Fischer's attorney objected to the non-minimum, maximum, and consecutive sentences, the issue regarding the constitutionality of the retroactive application of the remedy adopted in *Foster* would have been properly preserved for appeal. *Id.* As such, Mr. Fischer was denied the effective assistance of counsel.

CONCLUSION

This case includes substantial constitutional questions, as well as questions of public and great general interest. Therefore, this Court should grant jurisdiction in the above-captioned case.

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER



CLAIRE R. CAHOON #0082335
Assistant State Public Defender
Counsel of Record

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – FAX
claire.cahoon@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLANT
LONDEN K. FISCHER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Londen K. Fischer** was forwarded by regular U.S. Mail, postage pre-paid, to Heaven DiMartino, Summit County Assistant Prosecutor, 53 University Avenue, 7th Floor, Safety Building, Akron, Ohio 44308, on this 15th day of May, 2009.



CLAIRE R. CAHOON #0082335

Assistant State Public Defender

Counsel of Record

COUNSEL FOR DEFENDANT-APPELLANT
LONDEN K. FISCHER

#300272

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Summit
vs.	:	County Court of Appeals
	:	Ninth Appellate District
LONDEN K. FISCHER,	:	
	:	C.A. Case No. CA-24406
Defendant-Appellant.	:	

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LONDEN K. FISCHER**

STATE OF OHIO
COUNTY OF SUMMIT

COURT OF APPEALS
DANIEL J. ROZEGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CLERK: 3/31/09 7:55

STATE OF OHIO

SUMMIT COUNTY
COURT OF COURTS

C. A. No. 24406

Appellee

v.

LONDEN K. FISCHER

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 01 06 1593

DECISION AND JOURNAL ENTRY

Dated: March 31, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Londen Fischer ("Fischer"), appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On July 9, 2001, Fischer was indicted on three counts of aggravated robbery in violation of R.C. 2911.01(A)(1), two counts of aggravated burglary in violation of R.C. 2911.11(A)(2), one count of felonious assault in violation of R.C. 2903.11 and one count of intimidation of a crime victim or witness in violation of R.C. 2921.04. All seven counts had corresponding firearm specifications as set forth in R.C. 2941.145. On September 19, 2001, a supplemental indictment was filed, charging Fisher with one count of having a weapon while under disability in violation of R.C. 2923.13. This count also had a corresponding firearm specification in violation of R.C. 2941.145. Fischer pled not guilty to all of the charges.

{¶3} On January 29, 2002, a jury trial commenced. The jury returned its verdict on February 1, 2002, finding Fischer guilty of one count of aggravated robbery with a firearm specification, two counts of aggravated burglary with firearm specifications, one count of felonious assault with a firearm specification, and one count of having a weapon while under disability with a firearm specification. The jury acquitted Fisher of the two counts of aggravated robbery and one count of intimidation of a crime victim or witness. On February 4, 2002, the trial court sentenced Fischer to a total of 14 years of incarceration. Fischer timely appealed his convictions and sentence, and on January 15, 2003, this Court affirmed the trial court's judgment. On August 4, 2008, the trial court held a resentencing hearing, at which it advised Fischer of post-release control and sentenced him to the same sentences it had previously imposed. Fischer has timely appealed from this resentencing. He has raised four assignments of error for our review, some of which we have combined for ease of review.

II.

ASSIGNMENT OF ERROR I

“AS ¶ FISCHER’S ORIGINAL SENTENCE WAS VOID, HIS INITIAL DIRECT APPEAL WAS ALSO INVALID. THE INSTANT APPEAL IS ¶ FISCHER’S FIRST DIRECT APPEAL FROM A VALID SENTENCE.”

{¶4} In his first assignment of error, Fischer contends that because his original sentence was void, his initial direct appeal was also invalid and therefore, the instant appeal is his first direct appeal from a valid sentence. We do not agree.

{¶5} Specifically, Fischer contends that because his original sentence did not include a notice of post-release control, it was void pursuant to *State v. Bezak*, 114 Ohio St.3d. 94, 2007-Ohio-3250, at syllabus. While we agree with this statement of law, we do not agree with

Fischer's contention that due to this defect, his original direct appeal is invalid and therefore he can now "raise any and all trial errors cognizable on direct appeal."

{¶6} We recently decided a similar issue in *State v. Ortega*, 9th Dist. No. 08CA009316, 2008-Ohio-6053. In that case, Ortega was convicted by a jury and sentenced to 27 years of incarceration to life. He appealed from that decision, and this Court dismissed the appeal as untimely. Ortega subsequently filed a motion for reconsideration, which we granted and affirmed the trial court's ruling.

{¶7} Over a year after his initial appeal was decided, Ortega filed a motion in the trial court to set aside a void judgment. He contended that his sentence was void due to the lack of notice of post-release control. Ortega was resentenced and subsequently appealed to this Court. On appeal, Ortega attempted to raise several issues with regard to his jury trial, held two years prior to his resentencing. We determined that the doctrine of the law of the case governed the appeal.

"The law of the case doctrine 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. Ultimately, "the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." (Internal citations and quotations omitted). *Id.*, at ¶6.

{¶8} As applied to the facts before the Court in *Ortega*, we determined that when a "court affirms the convictions in the First Appeal, the propriety of those convictions becomes the law of the case, and subsequent arguments seeking to overturn them become barred. Thus, in the Second Appeal, only arguments relating to the resentencing are proper." *Id.*, at ¶7, quoting *State v. Harrison*, 8th Dist. No. 88957, 2008-Ohio-921, at ¶9. Accordingly, Fischer's contention

that he may raise any and all issues relating to his conviction in this appeal is without merit. His first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING LAY WITNESS OPINION TESTIMONY, OVER OBJECTION, THAT WAS UNRELATED TO THAT WITNESS’S PERCEPTIONS AND CALLED FOR SPECIALIZED KNOWLEDGE.”

{¶9} In his second assignment of error, Fischer contends that the trial court abused its discretion in admitting lay witness opinion testimony that was unrelated to that witness’ perceptions and called for specialized knowledge.

{¶10} As we explained above, because we already affirmed Fischer’s conviction in his first appeal, *State v. Fisher*, 9th Dist. No. 20988, 2003-Ohio-95, the doctrine of the law of the case limits our review to issues stemming from Fischer’s resentencing hearing. An issue regarding witness testimony is clearly an issue that Fischer could have pursued in his initial appeal. *Ortega*, supra, at ¶6. Accordingly, Fischer’s second assignment of error is overruled.

ASSIGNMENT OF ERROR III

“THE RESENTENCING COURT ERRED BY IMPOSING NON-MINIMUM AND CONSECUTIVE SENTENCES IN VIOLATION OF THE DUE PROCESS AND EX POST FACTO CLAUSES OF THE UNITED STATES CONSTITUTION.”

ASSIGNMENT OF ERROR IV

“TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, FOR FAILING TO OBJECT TO THE RESENTENCING COURT’S RETROACTIVE APPLICATION OF THE OHIO SUPREME COURT’S REMEDY IN STATE V. FOSTER.”

{¶11} In his third and fourth assignments of error, Fischer contends that the resentencing court erred by imposing non-minimum and consecutive sentences in violation of the due process and ex-post facto clauses of the United States Constitution. He further states that his trial

counsel was ineffective for failing to object to this issue at the resentencing hearing. We do not agree.

{¶12} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found that Ohio's sentencing structure was unconstitutional to the extent that it required judicial fact-finding. *Id.*, at paragraphs one through seven of the syllabus. In constructing a remedy, the Court excised the portions of the statute it found to offend the Sixth Amendment and thereby granted full discretion to trial court judges to sentence defendants within the bounds prescribed by statute. See *Id.*; *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶19.

{¶13} Fischer contends that the remedy outlined in *Foster* violates the ex-post facto and due process clauses of the United States Constitution because it allowed him to be sentenced to a non-minimum and consecutive term without the trial court having to make any findings on the record as was previously required by R.C. 2929.14(B), R.C. 2929.14(C), and R.C. 2929.14(E)(4). We have previously determined that the remedy in *Foster* does not violate the due process and ex-post facto clauses of the United States Constitution. *State v. Rowles*, 9th Dist. No. 24154, 2008-Ohio-6631, at ¶10. We have repeatedly stated that “[w]e are obligated to follow the Ohio Supreme Court’s directive and we are, therefore, bound by *Foster*. Furthermore, we are confident that the Supreme Court would not direct us to violate the Constitution.” *State v. McClanahan*, 9th Dist. No. 23380, 2007-Ohio-1821, at ¶7, quoting *State v. Newman*, 9th Dist. No. 23038, 2006-Ohio-4082, at ¶11, citing *U.S. v. Wade* (C.A.8, 2006), 435 F.3d 829, 832 (holding that the Eighth Circuit is required to follow the directive of the U.S. Supreme Court and presumes that the U.S. Supreme Court would not order a court to violate the Constitution). As this Court cannot overrule or modify *Foster*, we decline to consider Fischer’s challenges thereto. Accordingly, we conclude that Fischer was not prejudiced by any alleged failure of his trial

counsel to object to this issue. See *Strickland v. Washington* (1984), 466 U.S. 668, 687 (requiring an appellant to show that he was prejudiced by counsel's deficient behavior). Fischer's third and fourth assignments of error are overruled.

III.

{¶14} Fischer's assignments of error are overruled and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



 CARLA MOORE
 FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶15} Mr. Fischer's first two assignments of error are the logical extension of the Ohio Supreme Court's decisions in *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, and *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250. As noted by Justice Lanzinger in her dissent in *Simpkins*, however, "[t]he holding that a sentence imposed with a missing mandatory term is void rather than voidable . . . obscures the distinction between these two legal concepts in the context of a criminal case." *Simpkins*, 2008-Ohio-1197, at ¶40 (Lanzinger, J., dissenting). The trial court had subject matter jurisdiction when it sentenced Mr. Fischer, and its failure to include a mandatory term in that sentence rendered the sentence voidable, not void.

{¶16} Abraham Lincoln, when accused of changing his position, said he would rather be right some of the time than wrong all the time. I urge the Ohio Supreme Court to again look at the distinction between void and voidable in this context.

APPEARANCES:

CLAIRE R. CAHOON, Assistant State Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.