

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-370 (C.P.C. No. 88CR02-385)
Donald L. Harding,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 8, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Keith A. Yeazel, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Donald L. Harding, appeals from a judgment entry of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} In 1988, a Franklin County grand jury indicted appellant with one count of aggravated murder and one count of aggravated robbery. The aggravated murder count

contained a death penalty specification pursuant to R.C. 2929.04(A)(7). The charges arose out of the murder of Charles Root. Appellant initially entered a not guilty plea to the charges. After the trial court denied appellant's motion to suppress evidence, appellant withdrew his not guilty plea and entered a no contest plea to both charges as well as to the death penalty specification. A three-judge panel of the trial court accepted appellant's plea and found him guilty.

{¶3} In 1989, after a mitigation hearing, the panel declined to sentence appellant to death. Instead, the panel sentenced appellant for the aggravated murder conviction to a prison term of life with parole eligibility after serving 20 years. The panel also sentenced appellant to a consecutive prison term of 10 to 25 years for his aggravated robbery conviction for a total prison sentence of 30 years to life. Appellant did not timely appeal his convictions and sentence. However, appellant later filed a motion for leave to file a delayed appeal. This court denied that motion.

{¶4} In 2004, the state asked the trial court to resentence appellant in order to correct what it termed an "illegal" sentence. Specifically, the state alleged that the three-judge panel improperly sentenced appellant to serve a term of "[l]ife imprisonment with parole eligibility after serving twenty (20) years of imprisonment" instead of a sentence of "20 full years to life."¹ This error, the state alleged, allowed appellant to earn "good-time"

¹ Appellant was found guilty of aggravated murder and a death penalty specification. Pursuant to former R.C. 2929.03(C)(2), an offender found guilty of aggravated murder and a death penalty specification, but not sentenced to death or life imprisonment without parole, could only be sentenced to life imprisonment with parole eligibility after serving a full 20 or 30 years. An offender that had only been found guilty of aggravated murder would receive a term of life imprisonment with parole eligibility after serving 20 years. Former R.C. 2929.03(A)(1) and 2929.03(C)(1).

credit, which made him eligible for parole in 2008 (having served less than 20 years).²

Appellant objected to the state's request.

{¶5} Apparently, before the trial court addressed the state's request, the parole board conducted an initial hearing in December 2007 to consider releasing appellant on parole. The timing of the hearing was based on the sentence appellant received in 1989. The board refused to release appellant and informed him that the board would revisit his parole in 2014, after he served seven more years in prison.³

{¶6} The trial court finally considered the state's request to resentence appellant when a three-judge panel held a hearing on March 24, 2010. Following that hearing, the panel filed an entry (consistent with the state's request) that changed appellant's sentence for the aggravated murder conviction to a term of "[l]ife imprisonment with parole eligibility after serving twenty (20) **full** years." (Emphasis sic.) The entry made no other changes to appellant's sentence.

{¶7} Appellant appeals from that entry and assigns the following errors:

I. THE TRIAL COURT ERRED BECAUSE APPELLANT'S RESENTENCING WAS BARRED BY THE DOCTRINE OF LACHES.

II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS.

{¶8} Appellant concedes that his original sentencing entry was contrary to law because it failed to specify that he was eligible for parole only after serving a full 20 years of imprisonment. Nor does he dispute the proposition that a trial court retains jurisdiction to correct a void sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-

² See Ohio Adm.Code 5120-2-10(B).

³ See Ohio Adm.Code 5120:1-1-10(B)(2).

Ohio-5795, ¶19. Instead, appellant argues in his first assignment of error that the doctrine of laches barred his resentencing. We disagree.

{¶9} " 'Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It signifies delay independent of limitations in statutes. It is lodged principally in equity jurisprudence.' " *Bank One Trust Co., N.A. v. LaCour* (1999), 131 Ohio App.3d 48, 54 (quoting *Smith v. Smith* (1957), 107 Ohio App. 440, 443-44). "Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." *Smith v. Smith* (1959), 168 Ohio St. 447, paragraph three of the syllabus. A determination on a defense based upon laches is primarily a question of fact to be resolved based upon special circumstances of each case. *Bitonte v. Tiffin Sav. Bank* (1989), 65 Ohio App.3d 734, 739. Accordingly, a trial court's resolution on the issue of laches will not be reversed absent an abuse of discretion. *LaCour*.

{¶10} Appellant claims that laches barred his resentencing because of the state's delay in seeking his resentencing. We disagree. First, we note that the doctrine of laches generally does not apply against the state. *Cosby v. Franklin Cty. Dept. of Job & Family Servs.*, 10th Dist. No. 07AP-41, 2007-Ohio-6641, ¶30 (citing *Gold Coast Realty, Inc. v. Cleveland Bd. of Zoning Appeals* (1971), 26 Ohio St.2d 37, 39). Second, even if the doctrine were applicable, laches fails because appellant cannot demonstrate that he was materially prejudiced by the state's delay in seeking his resentencing.

{¶11} The parole board denied appellant parole following a 2007 hearing. The parole board scheduled appellant's second parole hearing for 2014. Appellant notes that pursuant to his new sentence, he would not have been eligible for a first parole hearing until 2008. Assuming the parole board would still require appellant to serve seven more years in prison before a second parole hearing, appellant argues that he will not be reconsidered for parole until 2015—one year later than his currently scheduled second hearing. This argument is based on pure speculation. Appellant has not identified anything in the record that indicates the parole board will reschedule his 2014 parole hearing for a later date due to his new sentence.⁴

{¶12} Because the doctrine of laches generally does not apply against the state, and because appellant did not demonstrate prejudice, the trial court did not abuse its discretion by rejecting appellant's claim of laches. Accordingly, we overrule appellant's first assignment of error.

{¶13} Appellant contends in his second assignment of error that the trial court erred by denying his motion to suppress. Before reaching the merits of this assignment of error, we must address the state's argument that the law of the case doctrine requires us to overrule this assignment of error. The state's argument is premised on the unique procedural history of this case.

{¶14} In 1989, appellant did not timely appeal his convictions to this court. As a result, he filed a motion pursuant to App.R. 5 for leave to file a delayed appeal. In that motion, his only putative assignment of error alleged that the trial court erred by denying

⁴ We also note that the state filed its motion to have appellant resentenced in 2004, three years before his initial parole hearing in 2007. Thus, the state's delay in filing its motion did not cause the parole board to hold a hearing in 2007 rather than in 2008. Moreover, appellant proceeded with his parole hearing in 2007 with full knowledge of the potential problem in his sentence.

his motion to suppress. This court denied appellant's motion, concluding in relevant part that "the partial transcript of proceedings submitted in support of appellant's motion indicates that the inevitable result in this case is the affirmance of the trial court's judgment." *State v. Harding* (Jan. 8, 1991), 10th Dist. No. 90AP-770 (memorandum decision).

{¶15} The state contends that this decision is now the "law of the case" in regards to the merits of appellant's motion to suppress argument, and is, therefore, dispositive of appellant's second assignment of error. We agree.

{¶16} 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." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. The law of the case doctrine is rooted in principles of res judicata and issue preclusion. *State v. Fischer*, ___ Ohio St.3d ___, 2010-Ohio-6238, ¶35 (slip opinion).

{¶17} Appellant contends that this court's prior decision denying his motion for delayed appeal does not prevent him from challenging the trial court's denial of his motion to suppress in this appeal. He argues that because his original void sentence⁵ is a nullity, his previous attempted appeal from that sentence is also a nullity. Because this is his first appeal from a valid sentence, appellant argues he is entitled to raise any issues arising from his convictions. However, the Supreme Court of Ohio recently considered and rejected this argument in *Fischer*.

⁵ This court has noted that the omission of the word "full" in appellant's scenario renders the sentence void. *State v. Berry*, 10th Dist. No. 08AP-762, 2009-Ohio-1557, ¶22-23.

{¶18} In *Fischer*, the defendant's convictions were initially affirmed on appeal. However, Fischer was subsequently resentenced because his original sentence was void. Fischer appealed his resentencing and sought to raise issues regarding his original conviction in that appeal. The appellate court refused to consider those issues, basing its decision on the law of the case doctrine. *Id.* at ¶4. The Supreme Court of Ohio affirmed, noting that "having already had the benefit of one direct appeal, [Fischer] could not raise any and all claims of error in a second, successive appeal." *Id.* at ¶33. The court concluded that Fischer's claims that did not involve his resentencing were barred by res judicata. *Id.* at ¶36. See also *id.* at ¶40 ("The scope of an appeal from a resentencing hearing * * * is limited to issues arising at the resentencing hearing.").

{¶19} In light of *Fischer*, res judicata bars this court's review of appellant's second assignment of error, which raises an issue that did not arise at appellant's resentencing. Accordingly, we overrule appellant's second assignment of error.

{¶20} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
