

SUPREME COURT OF ARKANSAS

No. 11-220

DAVID A. KELLY

APPELLANT

v.

LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

APPELLEE

Opinion Delivered February 28, 2013

APPEAL FROM THE JACKSON
COUNTY CIRCUIT COURT [CV 10-
33]

HON. HAROLD S. ERWIN, JUDGE

AFFIRMED.**PER CURIAM**

Appellant David A. Kelly is incarcerated in the Arkansas Department of Correction, serving an aggregate sentence of 240 months that was imposed as a result of a 2011 conviction in Lawrence County Circuit Court on charges of third-degree battery and two counts of rape. He appeals the denial of his petition for writ of habeas corpus that was filed in the county where he was, and is, currently incarcerated. We affirm the denial of relief on the petition.

Appellant was first charged in 1997 with the crimes reflected in the judgment challenged in the habeas petition. In 1998, appellant entered a negotiated guilty plea to those charges. In accord with that plea agreement, he received a sentence of 300 months' incarceration on the incest charge, and the other charges that had been filed were nol-prossed. In 2001, the Jefferson County Circuit Court found that the judgment entered on the plea imposed an illegal sentence, and the court granted a petition for writ of habeas corpus on that basis. That court's order provided that the writ would issue unless the Lawrence County Circuit Court either reduced the sentence in accord with the findings in the order or set aside

the guilty plea, permitting the prosecuting attorney to refile the charges. The Lawrence County prosecuting attorney refiled the original charges, and, following a jury trial, the circuit court entered a judgment that reflected the sentence that appellant now serves.

Appellant raised claims in the petition that the judgment was a violation of the prohibition against double jeopardy, that he was denied due process because the prosecution was allowed to refile the charges and the trial was conducted in violation of the rules requiring a speedy trial, that the trial court lacked jurisdiction to set aside the guilty plea and thereby allow the prosecution to refile the charges, and that the court issuing the writ did not have authority to order anything other than resentencing. In the order denying the petition, the circuit court found that the issues raised in the petition had previously been settled under the law-of-the-case doctrine or were not cognizable as trial-level error.

This court has reviewed the denial of a previous petition by appellant for habeas relief in *Kelly v. Norris*, 03-1295 (Ark. Apr. 28, 2005) (unpublished per curiam). The law-of-the-case doctrine dictates that an issue raised and concluded in a prior appellate decision may not be revisited in a subsequent appeal, as the matter becomes res judicata. *Mosley v. Norris*, 2010 Ark. 501 (per curiam). If the merits of the claim were addressed, and the claim was adjudicated, resolution of that issue is settled. *Id.* In this case, the merits of some, but not all, of the claims at issue were addressed.

In the previous proceedings in this court, appellant argued that the trial court lacked jurisdiction to do more than reduce his sentence to the statutory minimum on the bases that to do so would violate double jeopardy and that the court that ordered habeas relief did not

have authority to issue an order that did anything other than reduce his sentence. Two of the three bases appellant raises in his appeal differ from the bases for relief in the previous proceedings.

Appellant contends in his first argument on appeal that a new trial was barred in his case because the new trial violated his right to a speedy trial. The second argument on appeal concerns limitations on the trial court's ability to set aside the plea under our rules of procedure. Appellant's third argument on appeal is that the court that ordered habeas relief did not have authority to direct that the plea be withdrawn as a possible remedy.¹ While this last issue was addressed in our previous decision, the first two were not raised, and the law-of-the-case doctrine does not apply to those arguments.

Appellant's argument concerning a speedy-trial violation fails because the claim is not one cognizable in proceedings for a writ of habeas corpus. See *Rodgers v. Hobbs*, 2011 Ark. 443 (per curiam); *Daniels v. Hobbs*, 2011 Ark. 192 (per curiam); *Davis v. State*, 2011 Ark. 6 (per curiam). Appellant concedes that this court has previously held that a speedy-trial violation was not a claim cognizable in a proceeding for the writ, but he asserts that this case should be an exception to the general rule because there is nothing in the record to establish that appellant waived his right to a speedy trial, and he should not be penalized if counsel failed to raise the objection.

¹Appellant intertwines the arguments in his brief without reference to separate points, and he appears to conflate the claims. To the extent that he presented a separate claim concerning the ability of the court that granted the writ to order that the plea be vacated as an alternate remedy, the issues presented in his petition are double-jeopardy claims similar to those in his prior appeal.

Appellant's argument misconstrues or ignores the reasoning that forms the basis for the rule. See *Willis v. Hobbs*, 2011 Ark. 312 (per curiam) (citing *Barker v. Wingo*, 407 U.S. 514 (1972) (holding that deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself)). A defect that results from a speedy-trial violation is not sufficient to void a judgment and is not jurisdictional. See *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007) (citing *Locklear v. State*, 290 Ark. 70, 716 S.W.2d 766 (1986) (per curiam)). A petitioner who seeks the writ must plead either the facial invalidity of the judgment or lack of jurisdiction under the applicable statutes. *Girley v. Hobbs*, 2012 Ark. 447 (per curiam). A claim of a speedy-trial violation does not fall within either category, and appellant has not explained how an alleged failure to waive the issue at trial might convert the issue into one that is jurisdictional.

Appellant's final argument on appeal concerns whether the trial court had jurisdiction to vacate the guilty plea. He asserts that Arkansas Rule of Criminal Procedure 26.1 (2012) did not permit the trial court to vacate the plea once the sentence had been placed into execution. It is true that the rule does not provide jurisdiction for a court to grant a motion to withdraw a plea under the rule outside of its specified time limitations, but appellant fails to develop this argument. The court did not vacate the plea in response to a motion by the defendant, and appellant does not explain how the rule would apply to a situation where the trial court has vacated the plea in response to an order granting a petition for a writ of habeas corpus. Further, appellant did not raise this issue in the petition below. Because appellant has not developed a jurisdictional argument on the issue, we are precluded from considering

appellant's final argument raised for the first time on appeal. *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003).

Affirmed.

Dana A. Reece, for appellant.

Dustin McDaniel, Att'y Gen., by: *Christian Harris*, Ass't Att'y Gen., and *Sydney Butler*, Law Student No. 1595 Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Supreme Court under the supervision of *Darnisa Evans Johnson*, Deputy Att'y Gen., for appellee.