

Court of Appeals of Kansas.

Juan CHAVARRIA, Appellant,

v.

STATE of Kansas, Appellee.

No. 97,559.

March 14, 2008.

Appeal from Sedgwick District Court; Paul W. Clark, judge. Opinion filed March 14, 2008. Reversed and remanded with directions.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Boyd K. Isherwood, assistant district attorney, Nola Tedesco Foulston, district attorney, and Paul J. Morrison, attorney general, for appellee.

**Before MCANANY, P.J., CAPLINGER and BUSER, JJ.**

## MEMORANDUM OPINION

### **PER CURIAM.**

\*1 Juan Chavarria challenges his second-degree murder conviction on the grounds that the court lacked subject matter jurisdiction to try and convict him because of his age at the time of the crime.

Reginaldo L. Cruz, Jr. was murdered in 1991. The State charged Chavarria with the crime and provided the district court with an affidavit of probable cause which stated that Chavarria was age 16 at the time of the crime. Because Chavarria was age 16 at the time of the crime and otherwise satisfied the requirements of K.S.A.1991 Supp. 38-1602(b)(3), he did not qualify as a juvenile offender. Had he been under the age of 16 at the time, the court would have been required to hold a hearing pursuant to K.S.A.1991 Supp. 38-1636(c)-(g) to determine whether he should be tried as a juvenile or as an adult. Since that apparently was not the case, Chavarria was ordered to be tried as an adult without the court conducting a hearing.

Years passed with no action taken since Chavarria fled and could not be located. In 1999 he was located in a federal prison in Texas. Upon his return to Kansas, a preliminary hearing was held and Chavarria was bound over to stand trial on a charge of first-degree murder. At the time, Chavarria signed a financial affidavit stating he was born on December 7, 1974, which would have made him age 16 at the time of the Cruz murder. Chavarria then entered into a plea agreement whereby he agreed to plead guilty to the reduced charge of second-

degree murder. At his plea hearing in September 1999, Chavarria advised the court and stated in the plea agreement that he was born on December 7, 1975, and was now 23 years of age. At the time, no one noticed this discrepancy which, if true, would have meant that Chavarria was age 15 at the time of the murder, not age 16.

The court sentenced Chavarria to a prison term of 15 to 45 years. Chavarria appealed his sentence, claiming the district court abused its discretion in imposing a sentence consecutive to the federal sentence he was currently serving. In its opinion affirming Chavarria's sentence this court noted that Chavarria was age 16 at the time of the crime and was tried as an adult pursuant to K.S.A. 38-1602(b)(3). Chavarria made no claim about his age and did not attack the district court's subject matter jurisdiction. *State v. Chavarria*, No. 84,320, unpublished opinion filed February 9, 2001.

In December 2005 Chavarria moved for relief pursuant to K.S.A. 60-1507. He claimed for the first time that his sentence was illegal because he was age 15 at the time of the crime. Thus, he concluded, the district court lacked subject matter jurisdiction to impose his adult prison sentence without a hearing to determine that he should be tried as an adult. He also claimed his trial and appellate counsel were ineffective for failing to raise the issue at his sentencing and on appeal.

The district court held a preliminary hearing in June 2006. Chavarria's attorney told the court that Chavarria's mother wanted to provide a valid birth certificate, but it had yet to arrive. Instead, Chavarria provided a translated copy of the certificate. The district court denied relief, ruling that Chavarria's petition was untimely under the 1-year statute of limitations in K.S.A. 60-1507(f); that the doctrine of laches barred Chavarria's claim; and that Chavarria could not explain why he waited so long to bring his true age to the attention of the court. Chavarria's appeal of that ruling is now before us.

\*2 Chavarria's jurisdiction argument is an issue of law over which our review is unlimited. *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764, 774, 148 P.3d 538 (2006). The district court erred in applying the 1-year limitation of K.S.A. 60-1507(f) to Chavarria's jurisdiction argument. Subject matter jurisdiction may be raised at any time, whether for the first time on appeal or even on the appellate court's own motion. *Vorhees v. Baltazar*, 283 Kan. 389, 397, 153 P.3d 1227 (2007). Further, the district court erred in applying the doctrine of laches to Chavarria's claim. The district court relied on *Roach v. State*, 27 Kan.App.2d 561, 7 P.3d 319, *rev. denied* 270 Kan. 899 (2000), to support the application of the doctrine of laches. In *Roach*, we concluded that the doctrine of laches is available in a K.S.A. 60-1507 proceeding upon a showing that the State did not suffer prejudice by the delay. 27 Kan.App.2d at 564-65, 7 P.3d 319. Nevertheless, we acknowledged that jurisdictional defects may be raised at any time. 27 Kan.App.2d at 566, 7 P.3d 319. "Parties cannot confer subject matter jurisdiction by consent, waiver, or estoppel, nor can parties convey jurisdiction on a court by

failing to object to its lack of jurisdiction. [Citation omitted.]” *Bruch*, 282 Kan. at 773, 148 P.3d 538. Accordingly, Chavarria's failure to raise the issue earlier does not result in his claim being barred by the doctrine of laches. The subject matter jurisdiction of our courts is defined by statute. The conduct of the parties cannot cloak the court with subject matter jurisdiction not otherwise granted to it by the legislature. *Bruch*, 282 Kan. at 773, 148 P.3d 538.

If Chavarria was age 15 at the time of the crime, the district court lacked jurisdiction to try him as an adult absent a hearing and the requisite findings in conformity with K.S.A.1991 Supp. 38-1636(c)-(g). See *State v. Mayfield*, 241 Kan. 555, 561, 738 P.2d 861 (1987). The district court never made a determination of Chavarria's correct age at the time of the crime. Accordingly, we must reverse the district court's ruling on the motion and remand the case for further proceedings.

Finally, we need address only briefly Chavarria's claims of ineffective assistance of trial and appellate counsel. We need not restate the familiar standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as adopted by our courts in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). If Chavarria was age 16 at the time of the crime, his trial and appellate counsel obviously cannot be found deficient. If Chavarria was age 15 at the time of the crime, the sentence predicated on his incorrect age will be vacated, thereby vitiating any prejudice. In either event Chavarria's ineffective assistance claims fail.

Reversed and remanded for further proceedings.