

[Cite as *State v. Keith*, 2006-Ohio-7253.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 83686

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	AND
	:	OPINION
vs.	:	
	:	
DAVONNE KEITH	:	
	:	
Defendant-Appellant	:	
	:	
DATE OF JOURNALIZATION	:	MAY 12, 2006
CHARACTER OF PROCEEDINGS	:	Application for Reopening,
	:	Motion No. 367167
	:	Lower Court No. CR-439206
	:	Common Pleas Court
JUDGMENT	:	APPLICATION DENIED.
APPEARANCES:		
For plaintiff-appellee:		WILLIAM D. MASON Cuyahoga County Prosecutor BY: KERRY A. SOWUL Assistant County Prosecutor Justice Center - 9 th Floor 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant:		DAVID BODIKER State Public Defender BY: STEPHEN HARDWICK Assistant Public Defender Ohio Public Defenders Comm. 8 East Long Street, 11th Floor Columbus, Ohio 43215-2998
JUDGE FRANK D. CELEBREZZE, JR.:		

{¶ 1} On December 22, 2004, the applicant, Davonne Keith, applied, pursuant to App.R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, to reopen this court's judgment in *State v. Davonne Keith*, Cuyahoga App. No. 83686, 2004-Ohio-5731, in which this court affirmed the trial court's denial of a motion to suppress. He alleged that his appellate counsel was ineffective for not arguing the following: (1) the state did not allege or prove that Keith was reckless in selling drugs near a school,¹ (2) the trial court erred by imposing consecutive sentences, and (3) the trial court erred by imposing non-minimum, consecutive prison terms on Keith without findings from the jury. The state filed a brief in opposition, and Keith filed a reply brief. For the following reasons, this court denies the application to reopen.

{¶ 2} After this court issued its decision, the Supreme Court of Ohio accepted Keith's timely appeal. The Supreme Court then held the case for decisions in *State v. Foster*, Supreme Court of Ohio Case No. 2004-1568 and *State v. Quinones*, Supreme Court of Ohio Case No. 2004-1771; these cases concerned constitutional challenges to Ohio's sentencing scheme under *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.E.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. On February 26, 2006, the Supreme Court ruled that Ohio's

¹ When Keith pleaded no contest to the charges, the state proffered that there was a day care center one block away.

sentencing scheme was unconstitutional. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Then on May 3, 2006, the Supreme Court ruled on Keith's case as follows: "Decision: Dismissed, sua sponte, as improvidently accepted pursuant to rule relating to ineffective assistance of counsel announced in *Strickland v. Washington* (1984), 466 U.S. 668."

{¶ 3} Consequently, res judicata properly bars this application. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. Res judicata prevents repeated attacks on a final judgment and applies to all issues which were or might have been litigated. In *Murnahan* the Supreme Court ruled that res judicata may bar a claim of ineffective assistance of appellate counsel unless circumstances render the application of the doctrine unjust.

{¶ 4} In the present case Keith appealed to the Supreme Court of Ohio, and that court explicitly considered the principles of ineffective assistance of counsel and rejected the appeal. Under such circumstances the application of res judicata is more than appropriate.

{¶ 5} Accordingly, this court denies the application to reopen.

FRANK D. CELEBREZZE, JR.
JUDGE

PATRICIA A. BLACKMON, P.J., CONCURS

ANTHONY O. CALABRESE, JR., J., CONCURS