

[Cite as *State v. Keith*, 2015-Ohio-2401.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 102106, 102107 and 102108

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY KEITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-94-316724-ZA, CR-96-333972-ZA, and CR-97-350831-ZA

BEFORE: Laster Mays, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 18, 2015

FOR APPELLANT

Jeffrey C. Keith, pro se
#334-054
Marion Correctional Institution
P.O. Box 57
Marion, Ohio 43301

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

Eric L. Foster
Assistant County Prosecutor
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113

ANITA LASTER MAYS, J.:

I. Introduction

{¶1} Defendant-appellant Jeffrey Keith (“Keith”), pro se, brings this appeal of the trial court’s denial of his motions to “vacate void judgments” in three criminal cases that were brought against him in the 1990’s. This appeal is assigned to the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. The cases have been consolidated for purposes of appeal.

{¶2} We affirm the trial court’s decision on the basis of *res judicata* and warn Keith that his conduct through the continued filing of appeals and original actions, may result in his being declared a vexatious litigator pursuant to Loc.App.R. 23(A) to provide fair warning to Keith of this court’s inherent power to prevent abuse of the appellate process.

II. Facts and Procedural History

{¶3} In 1995, Keith was convicted in Cuyahoga C.P. No. CR-94-316724 on five counts of arson and one count of grand theft of a motor vehicle. He was sentenced to a prison term of 15 to 25 years by Judge Daniel Gaul (“Case I”). We affirmed the convictions in *State v. Keith*, 8th Dist. Cuyahoga No. 69267, 1997 Ohio App. LEXIS 914 (Mar. 13, 1997) (“*Keith I*”).

{¶4} In 1997, in Cuyahoga C.P. No. CR-96-333972, Judge Joseph Cirigliano sentenced Keith for his convictions on one count each of Medicaid fraud, securing writings by deception, forgery, and uttering a forged instrument and on three counts of

theft to a prison term of 10½ years, to run consecutively with the sentence in Case I (“Case II”). We affirmed the convictions in *State v. Keith*, 8th Dist. Cuyahoga No. 72275, 1998 Ohio App. LEXIS 4990 (Oct. 22, 1998) (“*Keith II*”).

{¶5} In 1999, Judge Cirigliano also sentenced Keith to a prison term of five years in Cuyahoga C.P. No. 97-CR-350831-ZA for Keith’s convictions on one count of forgery, two counts of uttering a forged instrument, one count of attempted aggravated theft, one count of tampering with evidence, and one count of grand theft (“Case III”). We affirmed his convictions and sentences in *State v. Keith*, 8th Dist. Cuyahoga Nos. 76469, 76479, 76610, 2000 Ohio App. LEXIS 3757 (Aug. 17, 2000) (“*Keith III*”).

{¶6} In *State v. Keith*, 8th Dist. Cuyahoga No. 81125, 2002-Ohio-7250 (“*Keith IV*”), Keith appealed the trial court’s March 2002 judgment entry signed by Judge Cirigliano that denied Keith’s motion for a new trial in Case I.

{¶7} Our review of the record in *Keith IV* revealed that, during the time that the direct appeal in Case I was pending, the trial court erroneously issued a May 1996 entry indicating that Judge Cirigliano, who presided over Cases II and III, had been appointed by the Ohio Supreme Court to preside over Case I, which was being handled by Judge Gaul. In fact, however, there was no entry in the record of such an order by the Ohio Supreme Court.

{¶8} The trial court journalized a corrective entry on November 1, 1996, that explained that Case I, “should not have been assigned to Judge Cirigliano,” because that case had been heard and disposed of by Judge Gaul. Because the original entry was

void, and no appeal may be taken from a void judgment, this court dismissed the appeal. *Keith IV* at ¶ 8.

{¶9} Keith also filed appeals from the trial court's September 2002 journal entries that denied his motions for a delayed new trial in Cases II and III. Those appeals were dismissed at Keith's request. *State v. Keith*, 8th Dist. Cuyahoga Nos. 81874, 81875 (*"Keith V"*).

{¶10} After this court's decision in *Keith IV*, Keith filed a series of motions over the next 12 years; he sought to have his convictions vacated in the cases as void and requested new trials. Keith's motions were based on his claims that the trial court lacked authority over his cases. On the same basis, Keith also requested multiple writs of mandamus and launched a series of collateral attacks to have the convictions vacated or declared void.¹

{¶11} In August 2005, Keith appealed the denial of his motion to correct the record and void the convictions in the cases, and requested that this court recuse itself. That appeal was dismissed, sua sponte, pursuant to R.C. 2505.02 and App.R. 4(A). *State v. Keith*, 8th Dist. Cuyahoga Nos. 86874, 86875, 86876 (*"Keith VI"*).

{¶12} In 2008, Keith filed appeals of the trial court's denial of his motions challenging the trial court's subject matter jurisdiction; once again, he sought to have his convictions vacated for lack of judicial authority. In *State v. Keith*, 8th Dist. Cuyahoga No. 92020, 92021, and 92022 (*"Keith VII"*), this court dismissed App. Nos. 92020 and

¹See attached Appendix A to this opinion.

92022 sua sponte pursuant to the doctrine of res judicata, and declared the appeal in App. No. 92021 moot.

{¶13} In 2009, Keith filed appeals of the trial court’s denial of his motions to have a judge appointed to vacate his convictions. While those appeals were pending, Keith filed a “motion to dismiss as moot,” based on the assertion that the judgments were void. This court treated his motions as motions to voluntarily dismiss his appeals and granted them. *State v. Keith*, 8th Dist. Cuyahoga Nos. 93017, 93018, and 93019 (“*Keith VIII*”).

{¶14} In 2014, Keith petitioned this court for a writ of mandamus to direct Cuyahoga County Common Pleas Court Judge Joseph D. Russo to grant Keith’s motions, which he filed in his cases in 2008 to vacate void judgments. Because Judge Russo denied Keith’s motions on October 8, 2014, this court declared Keith’s petitions moot. *State ex rel. Keith v. Russo*, 8th Dist. Cuyahoga No. 101901, 2014-Ohio-5346 (“*Keith IX*”).

{¶15} In the instant appeals, Keith now challenges Judge Russo’s denials of the motions to vacate void judgments that were the subject of Keith’s petitions for mandamus in *Keith IX*. In his assignments of error, Keith asserts that “Presiding Judge Joseph Russo abused his discretion by not granting appellant’s motions to vacate the void judgments.”

III. Law and Analysis.

{¶16} We first observe that successive petitions for postconviction relief are governed by R.C. 2953.23. That statute provides that a trial court cannot entertain a

successive petition for postconviction relief unless the petition meets two conditions: (1) the petitioner must show either that “he was unavoidably prevented from discovering the facts upon which he relies in the petition, or that the United States Supreme Court has, since his last petition, recognized a new federal or state right that applies retroactively to the petitioner”; and (2) the petitioner must show “by clear and convincing evidence that a reasonable factfinder would not have found him guilty but for constitutional error at trial.” R.C. 2953.23(A)(1).

{¶17} In this case, Keith neither demonstrated that he was unavoidably prevented from discovering the facts upon which his petitions were based, nor claimed a new retroactive right that has been recognized by the United States Supreme Court. *See* R.C. 2953.23(A). Thus, the trial court lacked statutory authority to consider Keith’s petitions and, accordingly, properly denied the petitions.

{¶18} As to application of the doctrine of res judicata to these cases, Keith has, on the same basis, repeatedly sought to vacate his convictions or to receive new trials. Once again, in apparent reliance upon this court’s opinion in *Keith IV*, Keith asserts in the instant cases that his convictions are void.

{¶19} This court’s decision in *Keith IV* is, however, specific and concise: i.e., that Judge Cirigliano, who properly presided over Cases II and III, lacked authority to issue only the March 2002 entry in Case I. The Ohio Supreme Court clarified this point for Keith in *Keith v. Bobby*, 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067.

{¶20} In *Bobby*, Keith appealed the dismissal by the Ninth District Court of Appeals of his petition for habeas corpus; the appellate court held that his petition lacked a cognizable claim for relief. One of Keith's claims was that, based upon *Keith IV*, Judges Cirigliano and Gaul lacked jurisdiction to convict and sentence him. However, the Ohio Supreme Court thoroughly explained:

First, as the [Ninth District] court of appeals correctly concluded, the appellate judgment in [*Keith IV*] merely held that Judge Cirigliano's order granting a motion to dismiss Keith's motion for leave to file a motion for new trial in his first criminal case was void; the court of appeals did not hold that Judge Gaul's sentence of Keith to an aggregate prison term of 15 to 25 years in that criminal case was void.

Second, because Keith's initial sentence is not void and has not expired, Keith is not entitled to a writ of habeas corpus. "[H]abeas corpus is proper in the criminal context only if the petitioner is entitled to immediate release from prison or some other physical confinement." *Scanlon v. Brunsman*, 112 Ohio St.3d 151, 2006-Ohio-6522, 858 N.E.2d 411, ¶ 4.

Third, even assuming the invalidity of Keith's second and third criminal sentences, he is not entitled to the writ, because he is still properly incarcerated on his first sentence. "Where a petitioner is incarcerated for several crimes, the fact that the sentencing court may have lacked jurisdiction to sentence him on one of the crimes does not warrant his release in habeas corpus." *Swiger v. Seidner*, 74 Ohio St.3d 685, 687, 1996-Ohio-237, 660 N.E.2d 1214; see also *Haynes v. Voorhies*, 110 Ohio St.3d 243, 2006-Ohio-4355, 852 N.E.2d 1198, ¶ 7.

Fourth, as we held in another writ case involving Keith, "he has or had an adequate remedy by appeal from [the trial court's] rulings to raise his claim that Judge Gaul and Judge Cirigliano were improperly assigned to his criminal cases." *State ex rel. Keith v. McMonagle*, 106 Ohio St.3d 61, 2005-Ohio-3669, 831 N.E.2d 433, ¶ 7; see also *State ex rel. Key v. Spicer* (2001), 91 Ohio St.3d 469, 2001 Ohio 98, 746 N.E.2d 1119 ("a claim of improper assignment of a judge can generally be adequately raised by way of appeal"); *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 30, 451 N.E.2d 225 (1983) (mandamus and prohibition are not substitutes for appeal to contest alleged improper assignment of judge).

Bobby at ¶ 11-14.

{¶21} Simply put, Keith exhausted his direct appeal rights in *Keith I*, *Keith II*, and *Keith III*. His subsequent assertions of claims against valid final judgments of convictions involve issues that have been, could have been, or should have been raised on appeal and, therefore, are barred by the doctrine of res judicata. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶22} Based upon the foregoing, this court directs Keith's attention to Loc.App.R. 23. That rule authorizes this court, sua sponte, to find a party to be a vexatious litigator where that party habitually, persistently, and without reasonable cause engages in frivolous conduct. Pursuant to Loc.App.R. 23(A):

An appeal or original action shall be considered frivolous if it is not reasonably well-grounded in fact, or warranted by existing law, or by a good faith argument for the extension, modification or reversal of existing law.

Loc.App.R. 23(A).

{¶23} We recently exercised our inherent power under this rule to prevent abuse of the judicial process in *State v. Henderson*, 8th Dist. Cuyahoga No. 100374, 2014-Ohio-2274, after warning Henderson of the potential impact of his repeated meritless filings.² Despite the warning, Henderson was not deterred; he filed yet another appeal advancing the same arguments. We therefore declared Henderson to be a

²*Henderson v. Saffold*, 8th Dist. Cuyahoga No. 100406, 2014-Ohio-306.

vexatious litigator based on his filing of “ten appeals and eighteen original actions since 1999, several of which were not reasonably grounded in fact or warranted by existing law.” *Henderson* at ¶ 7.

{¶24} In a similar manner, Keith continuously has taxed the limited resources of this court and other courts through his filings of numerous appeals and original actions. Even viewed in a light most favorable to Keith, his court filings are neither grounded in fact nor warranted by existing law. Keith is hereby forewarned that his continued filing of appeals or original actions that are not reasonably grounded in fact or warranted by existing law shall result in being declared a vexatious litigator pursuant to Loc.App.R. 23(B).

{¶25} The trial court’s orders are affirmed.

It is, therefore, ordered that appellee recover from appellant costs herein taxed.

The court finds there were no reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

Appendix A
to
State v. Keith

See, e.g.,

1. State ex rel. Keith v. McMonagle, 103 Ohio St.3d 430, 2004-Ohio-5580, 816 N.E.2d 597;
2. State ex rel. Keith v. McMonagle, 106 Ohio St.3d 61, 2005-Ohio-3669, 831 N.E.2d 433;
3. *Keith v. Bobby*, 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067;
4. *Keith v. Kelley*, 11th Dist. Trumbull No. 2009-T-0056, 2009-Ohio-6711;
5. *Keith v. Kelley*, 125 Ohio St.3d 161, 2010-Ohio-1807, 926 N.E.2d 646;
6. State ex rel. Keith v. Corrigan, 8th Dist. Cuyahoga No. 78461, 2000 Ohio App. LEXIS 4874 (Oct. 12, 2000), *aff'd*, 91 Ohio St.3d 405, 2001-Ohio-81, 746 N.E. 2d 602;
7. State ex rel. Keith v. McMonagle, 8th Dist. Cuyahoga No. 83050 (December 4, 2003) (writ dismissed).