

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 112285
 v. :
 :
 OSIRIS ALI, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 27, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-05-465969-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Sarah E. Hutnik, Assistant Prosecuting Attorney, *for appellee*.

Osiris Ali, *pro se*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Defendant-appellant Osiris Ali — who is serving a life sentence in prison — appeals the denial of a motion requesting leave to file a motion for a new trial which he filed in the Cuyahoga County Court of Common Pleas more than fifteen years after he was convicted. Ali claims that he is entitled to a new trial

because the trial judge, to whom his case was tried, stepped off the bench during trial and sat in the empty jury box in order to better hear a portion of the testimony.

{¶ 2} For the reasons that follow, we affirm the judgment and declare Ali to be a vexatious litigator.

I. Factual Background and Procedural History

{¶ 3} In 2006, Ali was sentenced to five concurrent life terms in prison plus four years after he was convicted after a bench trial of multiple sex offenses committed against two minors. Our court affirmed his convictions and sentence on direct appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 88147, 2007-Ohio-3776.

{¶ 4} On November 3, 2022, Ali filed a motion in the common pleas court requesting leave to move for a new trial. He argued that he was entitled to a new trial under Crim.R. 33 because his convictions were “contrary to law” and “there were irregularities in the proceedings and abuses of [the trial court’s] discretion, which prevented the Defendant from having a fair trial.” He also claimed that there was newly discovered evidence which was not known to him at the time of trial.

{¶ 5} Specifically, Ali asserted that the trial judge “left the bench and sat in the jury box during direct and cross-examination of the alleged victims,” such that the judge was in the jury box “at critical stages of the bench trial.” While the record does not contain a full transcript of the trial,¹ Ali attached one page of the transcript

¹ It is Ali’s duty to ensure the completeness of the record on appeal. *E.g.*, *O’Donnell v. Northeast Ohio Neighborhood Health Servs.*, 8th Dist. Cuyahoga No. 108541, 2020-Ohio-1609, ¶ 75, fn. 6; *Pietrangelo v. Hudson*, 2019-Ohio-1988, 136 N.E.3d 867, ¶ 22 (8th Dist.).

as an exhibit to his motion. In that portion of the transcript, the trial judge invited defense counsel to sit in the jury box in order to facilitate defense counsel's hearing of certain testimony; counsel declined the invitation.² From the briefing and oral argument in this matter, it seems that the parties agree that the judge never left the courtroom during the testimony. Rather, the judge sat in the empty jury box in order to better hear some of the testimony. Ali claimed that these facts constituted newly discovered evidence.

{¶ 6} The state opposed the motion. The trial court summarily denied the motion without a hearing.

{¶ 7} Ali appealed, raising the following two assignments of error for review:

Assignment of Error 1:

The trial court erred, to the prejudice of Appellant, by denying Appellant's motion for new trial, pursuant to Crim.R. 33 and grounded upon irregularity in the proceedings when the trial court's brief absence from the bench during defense counsel's direct and cross-examination of a witness constituted structural error requiring automatic reversal.

Assignment of Error 2:

² Ali also asserted several broad, general complaints about his trial in the motion. He argued, for example, that the trial court "failed to maintain order and decorum but also actively contributed to creating an aura of jocularity inappropriate to the gravity of the proceedings." He further argued that the "[judge's] conduct on and off the Bench strongly suggested that even before the close of the bench trial the Court had already decided to enter a guilty verdict." Ali identified no portion of the record in support of those claimed deficiencies and he seems to have abandoned those arguments on appeal. His appellate argument is solely based on the trial judge's presence in the jury box during a portion of the trial.

The trial court erred by denying leave without a hearing where the paper filings provide prima facie evidence that Appellant has satisfied Crim.R. 33(B).

II. Law and Analysis

A. First and Second Assignments of Error

{¶ 8} We disregard Ali's first assignment of error because it addresses a motion that Ali was never permitted to file. The trial court only ruled on Ali's motion for leave to file a motion for new trial; having done so, the court never addressed the merits of Ali's motion for new trial. *See State v. Hatton*, 169 Ohio St.3d 446, 2022-Ohio-3991, 205 N.E.3d 513, ¶ 30. Therefore, the trial court never denied the motion for a new trial and there is nothing for us to review as to that motion. Having disregarded the first assignment of error, we turn to the second, through which we may fully review the trial court's denial of Ali's motion for leave.

{¶ 9} Ali, in his second assignment of error, contends that the trial court erred by denying his motion for leave to file a new-trial motion without an evidentiary hearing. In considering this assignment of error, we first clarify that the motion only raised an argument under Crim.R. 33(A)(1). We then address the merits of the motion.

1. The motion presents an argument under Crim.R. 33(A)(1)

{¶ 10} Ali's motion conflated two potential grounds for granting a new trial, those being procedural irregularity and newly discovered evidence. Crim.R. 33(A)(1) allows a trial court to grant a new trial, on a defendant's motion, when "irregularity in the proceedings, or in any order or ruling of the court, or abuse of

discretion by the court” materially affected the defendant’s substantial rights and prevented them from having a fair trial. Separately, Crim.R. 33(A)(6) allows a new trial where “new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial” and the defendant’s substantial rights were materially affected.

{¶ 11} Ali’s intermingled argument can be summarized as follows: (1) it was procedurally irregular for the trial judge to sit in the empty jury box for a portion of the bench trial and the irregularity prevented Ali from having a fair trial; (2) while Ali knew that the judge sat in the jury box because he was present at trial, he only recently discovered that this was procedurally irregular and justifies a new trial and (3) because Ali only recently discovered the legal effect of the irregularity, his motion presents newly discovered evidence and he was unavoidably prevented from making his motion sooner.

{¶ 12} While Ali invokes the language of Crim.R. 33(A)(6) by referring to “newly discovered evidence,” he presents no new evidence. The legal effect, if any, of where the judge sat during trial is not evidence; it has nothing to do with Ali’s factual guilt or innocence of the offenses with which he was charged. *E.g.*, Evid.R. 401 (“Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

{¶ 13} Thus, Ali’s motion is properly construed as one made only under Crim.R. 33(A)(1).

2. The trial court acted within its discretion when it denied Ali's motion without a hearing

{¶ 14} A defendant whose case was tried to the court generally must make a motion under Crim.R. 33(A)(1) within 14 days after the trial court renders its decision. *See* Crim.R. 33(B). Where, as here, a defendant misses that window — Ali filed his motion more than fifteen years after he was convicted and sentenced — the defendant must obtain leave from the trial court to file it. To obtain leave, a defendant must show “by clear and convincing proof” that they were “unavoidably prevented” from filing a timely motion. *See id.* Ordinarily, this means that a defendant must show that they “had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence.” *State v. Rodriguez-Baron*, 7th Dist. Mahoning No. 12-MA-44, 2012-Ohio-5360, ¶ 11; *see also State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 21.

{¶ 15} “Clear and convincing evidence” is that “measure or degree of proof” that “produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. “It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *Id.* at 477 (emphasis deleted).

{¶ 16} The Ohio Supreme Court recently instructed as follows:

When a defendant seeks leave to file a motion for a new trial under Crim.R. 33(B), the trial court may not consider the merits of the proposed motion for a new trial until after it grants the motion for leave. The sole question before the trial court when considering whether to grant leave is whether the defendant has established by clear and convincing proof that he was unavoidably prevented from discovering the evidence on which he seeks to base the motion for a new trial.

(Citations omitted.) *State v. Hatton*, 169 Ohio St.3d 446, 2022-Ohio-3991, 205 N.E.3d 513, ¶ 30.

{¶ 17} The decision whether to grant a motion for leave to file a motion for a new trial is committed to the trial court’s discretion and will not be disturbed on appeal absent a showing of an abuse of discretion. *E.g., Hatton* at ¶ 29. A trial court also has discretion to decide whether to hold a hearing on this kind of motion. *E.g., State v. Cannon*, 8th Dist. Cuyahoga No. 103298, 2016-Ohio-3173, ¶ 16. A hearing is only required when “the documents submitted [with the motion] on their face support the defendant’s claim that he was unavoidably prevented from timely discovering” the grounds for the motion. *See, e.g., State v. Cowan*, 8th Dist. Cuyahoga No. 108394, 2020-Ohio-666, ¶ 11.

{¶ 18} A court abuses its discretion when it exercises its judgment in an unwarranted way with respect to a matter over which it has discretionary authority. *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35. An abuse of discretion implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *See, e.g., State v. Musleh*, 8th Dist. Cuyahoga No. 105305, 2017-Ohio-8166, ¶ 36, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d

1140 (1983). “An abuse of discretion also occurs when a court ““applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.”” *Cleveland v. Wanton*, 8th Dist. Cuyahoga No. 109828, 2021-Ohio-1951, ¶ 8, quoting *S. Euclid v. Datillo*, 2020-Ohio-4999, 160 N.E.3d 813, ¶ 8 (8th Dist.), quoting *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.).

{¶ 19} With these standards and instructions in mind, and after careful consideration, we conclude that the trial court exercised its discretion appropriately when it denied Ali’s motion for leave without a hearing. While the trial court did not set forth its reasons for denying the motion, the documents submitted with the motion presented no colorable argument that Ali was “unavoidably prevented” from filing his motion in a timely manner.

{¶ 20} Ali was present at his trial and knew the trial judge sat in the jury box during a portion of the testimony. In other words, he was aware at that time of the ground supporting his motion yet he waited more than fifteen years after his trial ended to raise this fact as error. He offered no explanation for the delay, beyond claiming that he did not realize until recently that the judge’s seat in the jury box was legally significant.³ This bare allegation fails to meet Ali’s burden to show that he was “unavoidably prevented” from discovering the grounds for his motion in a timely manner. Ali was represented by counsel during his trial and direct appeal.

³ We do not consider the merits of Ali’s claim that the trial judge’s seat in the empty jury box carried any legal significance.

He points to no recent intervening legal authority purportedly supporting the error he now raises. “[T]he burden to demonstrate clear and convincing proof of unavoidable delay requires something more than bare allegations or statements in a motion.” *State v. Moore*, 2d Dist. Clark No. 2017-CA-49, 2018-Ohio-318, ¶ 21. Ali’s vague, bare statement that he only recently discovered the legal significance of the trial judge’s seat in the empty jury box does not meet his burden to demonstrate unavoidable delay by clear and convincing proof.

{¶ 21} Moreover, because Ali could have raised the issue in his direct appeal but did not, the claim is barred by res judicata. “Res judicata generally bars a convicted defendant from litigating a postconviction claim that was raised or could have been raised at trial or on direct appeal.” *Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, at ¶ 17. The doctrine applies to motions for a new trial. *Hatton*, 169 Ohio St.3d 446, 2022-Ohio-3991, 205 N.E.3d 513, at ¶ 22.

{¶ 22} Because Ali raises no colorable excuse for failing to file a timely Crim.R. 33(A)(1) motion based on the argument he now raises, and further because his argument is barred by res judicata, he was not entitled to leave to file the new-trial motion. Therefore, the trial court appropriately denied the motion.

{¶ 23} Finally, because the documents submitted with Ali’s motion do not support his claim that he was unavoidably prevented from filing a timely motion, and in fact clearly show the opposite, we conclude that the trial court acted within its discretion when it decided not to hold a hearing on the motion.

{¶ 24} We, therefore, overrule Ali’s second assignment of error.

B. Vexatious Litigator Designation Pursuant to Loc.App.R. 23

{¶ 25} Our court may sua sponte find a party to be a vexatious litigator and impose appropriate sanctions. Loc.App.R. 23(B). A vexatious litigator is a party who “habitually, persistently, and without reasonable cause engages in frivolous conduct.” *Id.* Conduct is 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).

{¶ 26} Ali has continuously taxed the limited resources of this court by filing actions and motions that are 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.

{¶ 27} Ali has filed at least twenty-three cases (including this one) in our court alone, challenging his convictions and sentence.⁴

{¶ 28} After our court affirmed Ali’s conviction and sentence on direct appeal, Ali filed an untimely motion to reopen the appeal, which was denied after Ali failed to show good cause for the delay. *State v. Ali*, 8th Dist. Cuyahoga No. 88147, 2009-Ohio-1233. He then filed a motion to reconsider that denial and our court denied reconsideration. *Id.*, Motion No. 420089 (Mar. 30, 2009).

⁴ While this appeal was pending, Ali filed another appeal in our court, one from the trial court’s denial of a “motion to vacate void judgment entry.” *State v. Ali*, 8th Dist. Cuyahoga No. 112728. That appeal is pending and will not be affected by our declaration that Ali is a vexatious litigator.

{¶ 29} Ali also filed a petition for habeas corpus in the Fifth District Court of Appeals; that court dismissed the petition, finding (among other deficiencies) that Ali's claims were not cognizable in habeas corpus. *See State ex rel. Ali v. Smith*, 5th Dist. Richland No. 09 CA 151, 2010-Ohio-386, ¶ 4.

{¶ 30} Ali next filed in our court a petition for a writ of mandamus compelling his trial court judge to issue findings of fact and conclusions of law with respect to the denial of a "motion to vacate void judgement." *See State ex rel. Ali v. McMonagle*, 8th Dist. Cuyahoga No. 95059, 2010-Ohio-3514, ¶ 1. Our court granted summary judgment against Ali because his motion in the trial court was untimely, among other reasons. *See id.* at ¶ 4–6.

{¶ 31} In 2011, Ali filed a motion with our court for leave to file a delayed appeal from another order of the trial court; our court denied the motion. *State v. Ali*, 8th Dist. Cuyahoga No. 96465, Motion No. 442375 (Mar. 31, 2011).

{¶ 32} In 2012, after the trial court conducted a resentencing hearing to correct a deficiency regarding postrelease control notifications, Ali challenged the new sentencing journal entry in a "motion to correct void sentence." When the motion was denied, Ali appealed and we affirmed. *State v. Ali*, 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510.

{¶ 33} That same year, Ali filed in the trial court a petition to vacate or set aside his sentence, alleging ineffective assistance of counsel. Ali's petition was dismissed and we affirmed that dismissal on appeal because the motion was

untimely and because Ali's arguments were barred by res judicata. *State v. Ali*, 8th Dist. Cuyahoga No. 99062, 2013-Ohio-2696, ¶ 6, 11.

{¶ 34} In 2013, our court dismissed another untimely appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 100593, Motion No. 469648 (Nov. 15, 2013). Ali then filed a motion for reconsideration, which our court denied. *Id.*, Motion No. 470156 (Nov. 26, 2013).

{¶ 35} Ali then filed a motion “for leave to appeal for lack of jurisdiction”; our court denied the motion and dismissed the appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 100730, Motion No. 470576 (Dec. 19, 2013).

{¶ 36} In 2014 our court dismissed another untimely appeal and motion “for leave to appeal for lack of jurisdiction.” *State v. Ali*, 8th Dist. Cuyahoga No. 100809, Motion Nos. 470970 and 471545 (Jan. 17, 2014). Ali then filed a motion “for review of judgment pursuant to R.C. 2953.02 and/or R.C. 2505.03,” which our court denied. *Id.*, Motion No. 471888 (Feb. 4, 2014).

{¶ 37} Our court next affirmed the denial of a motion for a final, appealable order and/or resentencing, based in part on res judicata. *State v. Ali*, 8th Dist. Cuyahoga No. 101129, 2014-Ohio-4478, ¶ 8.

{¶ 38} That same year, our court denied another motion for leave to file a delayed appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 102235, Motion No. 480987 (Dec. 11, 2014).

{¶ 39} In 2015, Ali filed an appeal from a “motion to render the sentence * * * void and to dismiss this case * * *”; our court dismissed the appeal as barred by

res judicata and because it was a duplicate appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 102757, Motion No. 484486 (Apr. 10, 2015). Ali filed a motion for reconsideration, which was also denied. *Id.*, Motion No. 484703 (Apr. 21, 2015).

{¶ 40} That same year, our court dismissed another untimely appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 103049, Motion No. 486683 (June 23, 2015). Our court then denied a motion to file a delayed appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 103214, Motion No. 487066 (July 15, 2015).

{¶ 41} Our court next dismissed a petition for a writ of mandamus to vacate the convictions and sentence. *State ex rel. Ali v. Clancy*, 8th Dist. Cuyahoga No. 103328, 2015-Ohio-4594. At that time, our court found that Ali’s litigation conduct had “border[ed] on being frivolous” and warned him that he was in danger of being declared a vexatious litigator. *Id.* at ¶ 5.

{¶ 42} In 2016, our court denied two motions to file delayed appeals. *State v. Ali*, 8th Dist. Cuyahoga No. 104364, Motion No. 495535 (Apr. 25, 2016); *State v. Ali*, 8th Dist. Cuyahoga No. 104730, Motion No. 498188 (Aug. 16, 2016).

{¶ 43} In 2017, our court affirmed the denial of a motion to vacate a void sentence on the grounds of prosecutorial misconduct, based in part on res judicata. *State v. Ali*, 8th Dist. Cuyahoga No. 105534, 2017-Ohio-6894, ¶ 9. Our court also found the appeal to be based on “self-serving statements” and “mere speculation.” *Id.* at ¶ 7.

{¶ 44} That same year, our court denied another motion to file a delayed appeal. *State v. Ali*, 8th Dist. Cuyahoga No. 106439, Motion No. 511680 (Nov. 15, 2017).

{¶ 45} In 2020, our court denied two more motions to file delayed appeals. *State v. Ali*, 8th Dist. Cuyahoga No. 109681, Motion No. 537833 (Apr. 27, 2020); *State v. Ali*, 8th Dist. Cuyahoga No. 109703, Motion No. 538211 (May 8, 2020).

{¶ 46} In 2021, our court affirmed the denial of a “motion to vacate an unlawful void sentence,” finding it a successive and untimely petition for postconviction relief. *State v. Ali*, 8th Dist. Cuyahoga No. 109580, 2021-Ohio-1085, ¶ 17.

{¶ 47} In 2021, our court affirmed the denial of another successive and untimely petition for postconviction relief. *State v. Ali*, 8th Dist. Cuyahoga No. 110624, 2021-Ohio-4303, ¶ 13.

{¶ 48} In July 2022, Ali filed a motion for leave to file a delayed application for reconsideration of his direct appeal, which our court denied. *State v. Ali*, 8th Dist. Cuyahoga No. 88147, Motion No. 556255 (July 8, 2022).

{¶ 49} After reviewing this litigation history — which includes multiple filings that present arguments that are 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 — and noting that our court has previously warned Ali about frivolous conduct, we now find that Ali has habitually, persistently

and without reasonable cause engaged in frivolous conduct in our court. Thus, we find Ali to be a vexatious litigator and impose the sanctions set forth below.

III. Conclusion

{¶ 50} Having disregarded Ali's first assignment of error and overruled Ali's second assignment of error for the reasons stated above, we affirm.

{¶ 51} Having found that Ali has habitually, persistently and without reasonable cause engaged in frivolous conduct in matters before our court, we declare him to be a vexatious litigator under Loc.App.R. 23. Accordingly, Ali is prohibited from instituting any future legal proceedings in the Eighth District Court of Appeals of Ohio without first obtaining leave and he is further prohibited from filing any proceedings in the Eighth District Court of Appeals of Ohio without the filing fee and security for costs required by Loc.App.R. 3(A). Any request to file an appeal or original action shall be submitted to the clerk of this court for the court's review.

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

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P. J., and
MARY EILEEN KILBANE, J., CONCUR