

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

JEFFREY C. KEITH,	:	PER CURIAM OPINION
Petitioner,	:	CASE NO. 2009-T-0056
- vs -	:	
BENNIE KELLEY, WARDEN,	:	
Respondent.	:	

Original Action for Writ of Habeas Corpus.

Judgment: Petition dismissed.

Jeffrey C. Keith, pro se, PID: 334-054, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430 (Petitioner).

Richard Cordray, Attorney General, State Office Tower, 30 East Broad Street, Columbus, OH 43215-3428, and *M. Scott Criss*, Assistant Attorney General, Criminal Justice Section, 150 East Gay Street, 16th Floor, Columbus, OH 43215 (For Respondent).

PER CURIAM.

{¶1} The instant proceeding in habeas corpus is presently before this court for final consideration of the motion to dismiss of respondent, Warden Bennie Kelley of the Trumbull Correctional Institution. As the primary basis for his motion, respondent states that the factual allegations of petitioner, Jeffrey C. Keith, are not sufficient to set forth a viable claim for the writ because they demonstrate that he had an adequate remedy at law. For the following reasons, we hold that the dismissal of the habeas corpus petition

is justified.

{¶2} Our review of petitioner's allegations shows that his present incarceration in the state prison is predicated upon three separate convictions which were rendered in the Cuyahoga County Court of Common Pleas over a four-year span. In April 1995, the first of the convictions was entered in Cuyahoga C.P. No. CR-316724. Following a jury trial, petitioner was found guilty of five counts of arson and one count of grand theft of a motor vehicle. He was then sentenced to an aggregate prison term of fifteen to twenty-five years on the six counts.

{¶3} Judge Daniel Gaul, a duly-elected member of the Cuyahoga County Court of Common Pleas, presided over the entire proceedings in the initial action. However, when the second case against petitioner, Cuyahoga C.P. No. CR-333972, went forward in early 1997, the jury trial was conducted by Joseph E. Cirigliano, a visiting judge from Lorain County, Ohio. At the close of that second trial, the jury found petitioner guilty of various counts of theft, Medicaid fraud, securing writings by deception, uttering a forged instrument, and forgery. Judge Cirigliano then imposed an aggregate term of ten and one-half years for these specific crimes, and also ordered that the term would be served consecutively to the sentence from the first criminal case.

{¶4} The third action against petitioner, Cuyahoga C.P. No. CR-350831, went to trial in April 1999, and was again heard by Judge Cirigliano. In this instance, the jury returned a guilty verdict on various charges of uttering a forged instrument, grand theft, attempted aggravated theft, tampering with evidence, and forgery. As the sentence for these separate offenses, Judge Cirigliano ordered petitioner to serve an aggregate term of five years, to run concurrently with the sentence imposed under his second case.

{¶5} Although petitioner appealed each of the foregoing convictions, all three were ultimately upheld by the Eighth District Court of Appeals. See, respectively, *State v. Keith* (Mar. 13, 1997), 8th Dist. No. 69267, 1997 Ohio App. LEXIS 914; *State v. Keith* (Oct, 22, 1998), 8th Dist. No. 72275, 1998 Ohio App. LEXIS 4990; *State v. Keith* (Aug. 17, 2000), 8th Dist. Nos. 76469, 76479, and 76610, 2000 Ohio App. LEXIS 3757.

{¶6} Even before petitioner had completed the appellate process, he began to file at the trial level a series of post-judgment motions under each of the three cases. In addition, he also instituted a number of original actions regarding his three convictions. In many of these submissions, petitioner raised the contention that each conviction must be declared void because neither Judge Gaul nor Judge Cirigliano had been properly appointed to hear the respective three cases.

{¶7} In January 2002, petitioner submitted a separate motion under his initial case, Cuyahoga C.P. No. CR-316724. In that motion, he requested leave from the trial court for the purpose of filing a motion for a new trial. Approximately two months later, a judgment entry was issued in which the motion for leave was overruled. This entry was signed by Judge Cirigliano, despite the fact that Judge Gaul had presided over the trial in the first case and had executed the original sentencing judgment.

{¶8} Petitioner immediately appealed the denial of his request for leave to the Eighth Appellate District. In *State v. Keith*, 8th Dist. No. 81125, 2002-Ohio-7250, the appellate court never addressed the merits of the “leave” issue; instead, the court held that, since Judge Cirigliano had never been appointed to hear any particular aspect of Cuyahoga C.P. No. CR-316724, he had lacked the requisite authority to render any type of ruling on petitioner’s motion. Based upon this, the appellate court concluded that

Judge Cirigliano's entry must be declared void, and that the appeal must be dismissed on the basis that a void judgment was not appealable.

{¶9} Approximately four years after the release of the foregoing opinion of the Eighth Appellate District, petitioner brought his first action in habeas corpus before this court. As the primary grounds for that action, petitioner maintained that his continuing incarceration in the state prison was illegal because each of his three convictions had subsequently been declared void. As to his first conviction under Cuyahoga C.P. No. CR-316724, he predicated his entire argument upon the appellate court's holding in 8th Dist. No. 81125, 2002-Ohio-7250. That is, it was petitioner's position that the decision of the Eighth Appellate District had the effect of vacating his entire conviction under the first case.

{¶10} In *Keith v. Bobby*, 11th Dist. No. 2007-P-0027, 2007-Ohio-5210, this court dismissed petitioner's first habeas corpus petition on the basis that his allegations had been legally insufficient to establish that he was entitled to be released from prison. At the outset of our analysis, we held that petitioner had misinterpreted the extent of the Eighth Appellate District's decision in the prior appeal from the denial of the motion for leave. Specifically, we noted that the Eighth Appellate District had not addressed the issue of whether Judge Gaul had acted within the scope of his authority in rendering the basic conviction; instead, the decision in the prior appeal had been limited to the issue of Judge Cirigliano's authority to proceed on the motion for leave. In light of this, our opinion ultimately concluded that petitioner had failed to demonstrate that his initial criminal conviction had been vacated. *Id.* at ¶12-14.

{¶11} In the second part of our analysis in petitioner's first habeas corpus case,

this court further noted that, as of April 2007, he had not completed the sentence that had been imposed for his first conviction. Accordingly, our opinion indicated that any question as to the continuing validity of petitioner's second and third convictions was not properly before us in that action because, even if the latter two convictions had been declared void, he still could be legally held solely upon the sentence under his original conviction. *Id.* at ¶15.

{¶12} Petitioner appealed our decision to dismiss his first habeas corpus case to the Supreme Court of Ohio. In *Keith v. Bobby*, 117 Ohio St.3d 470, 2008-Ohio-1443, the Supreme Court upheld our decision in all respects. In addition to concluding that the Eighth Appellate District had not vacated petitioner's sentence in his first criminal case, the court emphasized that an action in habeas corpus was not an appropriate means of challenging whether Judge Gaul or Judge Cirigliano had been properly appointed to hear the underlying criminal cases. *Id.* at ¶14.

{¶13} While the foregoing habeas corpus litigation was going forward, petitioner continued to submit motions before the three trial courts in Cuyahoga County. In some of the submissions, he would move for the appointment of a new trial judge so that new judgments could be issued vacating all three convictions. When the motions in question were overruled at the trial level, petitioner would then appeal the rulings to the Eighth Appellate District. However, before his new appeals could proceed on the actual merits, he would move to dismiss his own appeals on the basis that the underlying convictions had already been declared void. Without commenting on the substance of petitioner's "void" argument, the Eighth Appellate District would dismiss the appeals as if petitioner had submitted a voluntary dismissal.

{¶14} After dismissing his latest set of appeals in April 2009, petitioner initiated the instant action, his second habeas corpus case before this court. In again asserting that his present incarceration is illegal, petitioner has raised two arguments in support of his sole claim for relief. First, he submits that none of his three convictions were valid because the trial judges never had subject matter jurisdiction over the criminal actions. Specifically, petitioner contends that Judges Gaul and Cirigliano never had the authority to proceed with the three trials because they were not duly appointed to hear the cases. Second, he argues that none of his convictions are presently enforceable because the Eighth Appellate District has expressly vacated each of the three sentences.

{¶15} In further support of his habeas corpus claim, petitioner has attached to his petition copies of the various judgment entries which have been rendered by the Cuyahoga County Court of Common Pleas, the Eighth Appellate District, this court, and the Supreme Court of Ohio. Moreover, he also attached copies of various motions he had filed over the preceding twelve years, including those motions before the Eighth Appellate District in which he requested the dismissal of his own appeals.

{¶16} In now moving to dismiss this particular action pursuant to Civ.R. 12(B)(6), respondent maintains that the nature of petitioner's arguments is such that they cannot form the grounds of a viable habeas corpus claim. Essentially, respondent asserts that, since the propriety of the judicial acts of Judges Gaul and Cirigliano could have been reviewed in the direct appeals of the three convictions, petitioner had an adequate legal remedy which precludes a collateral attack upon the validity of those convictions.

{¶17} In regard to the elements of a habeas corpus claim, this court has stated on numerous occasions that such a writ will lie only when the prisoner can establish: (1)

an unlawful restraint of his liberty; and (2) the absence of any alternative remedy at law. *State ex rel. Waites v. Gansheimer*, 11th Dist. No. 2006-A-0003, 2006-Ohio-1702, at ¶4. As to the second of these elements, the courts of this state have consistently held that an alleged procedural error in a criminal proceeding cannot be contested in the context of a habeas corpus case when the substance of the point can be fully litigated in a direct appeal from the conviction. In fact, in reviewing this court's previous decision to dismiss petitioner's first habeas corpus action, the Supreme Court of Ohio followed this basic principle in relation to petitioner's contention that Judges Gaul and Cirigliano lacked the requisite authority to impose a conviction in the three underlying cases (for the sake of clarity, it should be noted that the Supreme Court referred to petitioner as "Keith" in its opinion):

{¶18} "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 ***; see also *State ex rel. Key v. Spicer* (2001), 91 Ohio St.3d 469, *** ('a claim of improper assignment of a judge can generally be adequately raised by way of appeal'; *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 30, *** (mandamus and prohibition are not substitutes for appeal to contest alleged improper assignment of judge)." *Keith*, 2008-Ohio-1443, at ¶14.

{¶19} Under the first argument in his present habeas corpus claim, petitioner has raised the identical issue which the Supreme Court addressed in the foregoing quote; i.e., he submits that all three of his convictions must be declared invalid because

Judges Gaul and Cirigliano were never properly appointed to the underlying cases. As a result, the Supreme Court's prior holding would clearly be controlling in this instance. To this extent, the first basis for petitioner's present claim is legally insufficient to state a viable cause of action because any dispute concerning the authority of the trial judges should have been litigated as part of his direct appeals from the convictions.

{¶20} As was noted previously, under the second argument in his present claim for the writ, petitioner contends that he is entitled to be released immediately because each of his three convictions has already been declared void. In essence, petitioner is requesting this court to enforce the Eighth Appellate District's prior determinations as to the validity of the convictions. In relation to his first conviction under Cuyahoga C.P. No. CR-316724, he cites one opinion and two judgment entries which, according to him, show that his original conviction is no longer valid.

{¶21} Since petitioner has attached copies of the opinion and judgment entries to his instant petition, this court has had an opportunity to review the determinations of the Eighth Appellate District. Our review of the three documents readily indicates that petitioner has misinterpreted the holdings of our sister appellate district.

{¶22} The opinion at issue was rendered in *State v. Keith*, 8th Dist. No. 81125, 2002-Ohio-7250. As was discussed above, the question of the proper interpretation of the Eighth Appellate District's decision was fully addressed by this court as part of our separate opinion in petitioner's first habeas corpus case. In *Keith*, 2007-Ohio-5210, we expressly concluded that, although the Eighth Appellate District had voided a judgment of Judge Cirigliano overruling a motion for leave, no such determination had been made in regard to the basic conviction imposed by Judge Gaul. Moreover, our decision on

this point was specifically upheld by the Supreme Court of Ohio on appeal. *Keith*, 2008-Ohio-1443, at ¶11. Thus, petitioner's continuing reliance upon the opinion in 8th Dist. No. 81125 is misplaced, and simply does not support his contention that his original criminal conviction has been vacated.

{¶23} The second document referenced by petitioner is a judgment entry which was issued in 8th Dist. No. 92021. In that proceeding, petitioner had brought an appeal from a trial court entry in which his motion for a new trial under Cuyahoga C.P. No. CR-316724 had been denied. Before the appeal could proceed, appellant moved to dismiss the matter for the reason that the trial court entry was void because the new judge who signed the entry had never been properly assigned to the case. In subsequently issuing its own judgment entry, the Eighth Appellate District did dismiss the appeal; however, it did so sua sponte on the basis of res judicata. Furthermore, the appellate court stated that it was denying petitioner's motion to dismiss as moot. Hence, despite dismissing the appeal, the Eighth Appellate District did not accepted petitioner's "void" argument as to either the appealed entry or the original conviction.

{¶24} A similar analysis can be applied to the second judgment entry referenced by petitioner in his habeas corpus petition. After the presiding judge of the Cuyahoga County Court of Common Pleas had denied petitioner's motion for the appointment of a new judge for his case, he sought to appeal that decision in 8th Dist. No. 93019. While the appeal was pending, petitioner moved the Eighth Appellate District to dismiss the matter because the presiding judge's determination was void. In its own judgment entry dismissing the appeal, the appellate court did indicate that it was granting petitioner's motion, but only after stating that the motion to dismiss would be treated as a motion to

voluntarily dismiss the appeal. Accordingly, there is again nothing to indicate that the appellate court intended to vacate petitioner's original conviction in Cuyahoga C.P. No. CR-316724.

{¶25} Without commenting upon the merits of the foregoing three decisions of the Eighth Appellate District, this court would simply restate that our review of the sole opinion and two judgment entries readily demonstrates that the authority of Judge Gaul to impose the conviction in petitioner's first criminal case has never been questioned. In other words, the evidentiary materials attached to the instant petition in habeas corpus actually support the conclusion that petitioner's original sentence has not been declared void, but is still valid and enforceable.

{¶26} In conjunction with the second argument in his present claim, petitioner also attached to his petition copies of certain judgment entries which, according to him, establish that the Eighth Appellate District has vacated his second and third convictions. As to this point, this court would again emphasize that, for his sentence under his first conviction in Cuyahoga C.P. No. CR-316724, petitioner was ordered to serve a term of fifteen to twenty-five years; thus, since the first conviction was imposed in April 1995, he has not completed the maximum possible term under that particular case. Under such circumstances, it is unnecessary for this court to determine if the latter two convictions are still valid, since a writ of habeas corpus will only be issued if the prisoner is entitled to be released immediately. *Keith*, 2008-Ohio-1443, at ¶12.

{¶27} Given that it is considered civil in nature, a claim in habeas corpus can be dismissed under Civ.R. 12(B)(6) for failing to state a viable cause of action. *Waites*, 2006-Ohio-1702, at ¶10. "Pursuant to this rule, a civil complaint can be dismissed when

the nature of the factual allegations are such that, even when the allegations are construed in a manner most favorable to the plaintiff-petitioner, they will still be insufficient to establish that he will be able to prove a set of facts under which he would be entitled to the requested relief.” Id.

{¶28} Applying the foregoing standard to the instant habeas corpus claim, this court concludes that neither of the arguments raised by petitioner is legally sufficient to satisfy the elements for the writ. First, petitioner cannot contest the authority of Judges Gaul or Cirigliano in the context of a habeas corpus action because he had an adequate legal remedy through direct appeals of his convictions. Second, petitioner’s present incarceration is not illegal because his own factual allegations, including the materials attached to his petition, show that his original conviction under Cuyahoga C.P. No. CR-316724 has never been declared void.

{¶29} Consistent with the foregoing discussion, respondent’s motion to dismiss is granted. It is the order of this court that petitioner’s entire habeas corpus claim is hereby dismissed.

MARY JANE TRAPP, P.J., COLLEEN MARY O’TOOLE, J., TIMOTHY P. CANNON, J.,
concur.