

[Cite as *Adams v. Vivo*, 2014-Ohio-4166.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DuJUAN L. ADAMS,

PLAINTIFF-APPELLANT,

- VS -

ANTHONY P. VIVO,

CLERK OF COURT, et al.,

DEFENDANTS-APPELLEES.

CASE NO. 13 MA 163

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas
Court, Case No. 13 CV 1398.

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

DuJuan Adams, Pro-se

#395-935

Marion Correctional Institution

P.O. Box 57

Marion, OH 43302

For Defendants-Appellees:

Attorney Paul J. Gains

Prosecuting Attorney

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Assistant Prosecuting Attorney

21 W. Boardman St., 6th Floor

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JUDGES:

Hon. Mary DeGenaro

Hon. Gene Donofrio

Hon. Joseph J. Vukovich

Dated: September 18, 2014

[Cite as *Adams v. Vivo*, 2014-Ohio-4166.]
DeGenaro, P.J.

{¶1} This matter is a pro-se appeal by DuJuan Adams, Appellant, from the Mahoning County Common Pleas Court's decision dismissing his complaint for damages against Anthony Vivo, Clerk of Court and Deputy Clerk "D. Zupko," Appellees herein. Adams contends that the Appellees failed to comply with statutory and common law requirements regarding the journalization of a sentencing entry filed within his case, and thus the entry is void entitling him to a new criminal trial and to compensatory damages. For the reasoning provided below, his assignments of error are meritless, and the judgment of the trial court is affirmed.

Relevant Facts and Procedural History

{¶2} In a 2000 jury trial, Adams was convicted of two counts of attempted murder with firearm specifications. In Adams' direct appeal his convictions were affirmed, but his sentence was vacated and remanded for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *State v. Adams*, 7th Dist. No. 00 CA 211, 2006-Ohio-1761. Adams was resentenced in October, 2006, which was affirmed in *State v. Adams*, 7th Dist. No. 06 MA 179, 2007-Ohio-5352.

{¶3} In 2011, Adams filed a pro-se motion in the trial court seeking a de novo sentencing hearing, arguing that his sentence was void because the October 2006 sentencing entry did not comply with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, and did not include his applicable term of post-release control. The trial court overruled this motion. On appeal, the matter was remanded for a resentencing hearing regarding the limited issue of post-release control pursuant to R.C. 2929.191(C), and for the trial court to enter a corrected sentencing entry with Adams' post-release control requirements and the manner of his conviction pursuant to *Baker*. *State v. Adams*, 7th Dist. No. 11 MA 65, 2011-Ohio-6428.

{¶4} On remand, during resentencing, the trial court advised Adams that upon his release from prison, he would be subject to a mandatory term of five years of post-release control, and the consequences of violating post-release control. Adams raised several issues at the hearing, including that his sentencing entries were not time-stamped. The trial court declined to address any issues other than as directed by this

court. On January 27, 2012, the trial court issued a nunc pro tunc judgment entry of sentence that specified the manner of Adams' conviction pursuant to *Baker* and included the proper post-release control notification. Adams filed an appeal from that judgment challenging the constitutionality of R.C. 2929.191 and the validity of the sentencing entry renewing his argument that the pleadings were not properly filed due to the lack of a time-stamp on the filings. Finding no error in his resentencing or the manner in which the pleadings were filed, the judgment of the trial court was affirmed. *State v. Adams*, 7th Dist. No. 12 MA 26, 2013-Ohio-1433.

{¶5} Ever persistent, Adams again challenged the 2012 nunc pro tunc entry, arguing the entry did not have a time-stamp, and therefore not a final appealable order resulting in him being held unlawfully. Finding no merit to his argument this court stated:

Appellant's appeal from the trial court's decision denying his motion for the issuance of a final appealable order is without merit. The validity of Appellant's 2006 sentencing and 2012 nunc pro tunc entry was resolved by us in *State v. Adams*, 7th Dist. No. 12 MA 26, 2013–Ohio–1433. Appellant does not raise any new issues that were not or could not have been addressed in a prior appeal. For this reason Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

State v. Adams, 7th Dist. No. 13 MA 111, 2014-Ohio-649, ¶15.

{¶6} This court stated, "Res judicata applies to bar further appeal on the issues surrounding the validity of Appellant's sentencing entry and the jurisdiction of the trial court." *Id.* at ¶14. It is noteworthy this most recent opinion was not released until February 21, 2014. The complaint giving rise to the appeal in the present case was filed on May 24, 2013.

{¶7} In his complaint which is the subject of the instant appeal, Adams claimed that Appellees failed to comply with statutory requirements regarding the filing of his sentencing entry and consequently he was entitled to damages. Instead of filing an answer, Appellees filed a motion to dismiss which the trial court granted.

Civ.R. 12(B)(6)

{¶8} In his first of three assignments of error, Adams asserts:

{¶9} "Whether a defense of res judicata could be properly raised in a motion to dismiss pursuant to: Civ. R. 12(B)(6); and whether such motion to dismiss (which contains materials and evidence outside of the pleadings) should have been converted to and ruled on as motion for summary judgment pursuant to: Civ. R. 56."

{¶10} A motion to dismiss for failure to state a claim can be granted only when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 524, 1996-Ohio-298, 668 N.E.2d 889 citing *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 71 O.O.2d 223, 224-225, 327 N.E.2d 753, 754-755. Further, the factual allegations of the complaint as well as all reasonable inferences derived therefrom must be taken as true when addressing a motion to dismiss pursuant to Civ.R. 12(B)(6). *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 1995-Ohio-187, 649 N.E.2d 182.

{¶11} A review of Appellees' motion to dismiss and the judgment entry of September 26, 2013, reveals that res judicata was never argued, nor was it relied upon by the trial court in dismissing Adams' Complaint. This in and of itself is a basis to find Adams first assignment of error meritless.

{¶12} At the trial court level Appellees argued that the complaint should be dismissed because there was no allegation that the clerk did anything wrong, and further, that the sentencing order attached to Adams's complaint was time-stamped and complied with all of the statutory requirements. Adams argues that it was improper for the trial court to consider anything outside of the complaint. His argument fails for two reasons.

{¶13} First, Adams attached the sentencing entry to his complaint. He cannot now challenge the trial court's review of a document he attached and referenced in his complaint. Under the invited error doctrine, "a party is not entitled to take advantage of an error that he himself invited or induced." *State ex rel. Kline v. Carroll*, 96 Ohio St.3d

404, 2002-Ohio-4849, 775 N.E.2d 517, ¶27. Secondly, as stated in the trial court's entry, an attachment to a pleading can be considered a part of the pleading pursuant to Civ.R. 10(D) if it is a written instrument which defines the rights and responsibilities of the parties. A review of the complaint and attachments demonstrates that Appellees are correct in their assertion that they fully complied with all requirements imposed upon them by law. Accordingly, granting the motion to dismiss was proper and Adams' first assignment of error is meritless.

Disqualification of Judge

{¶14} In his second assignment of error, Adams asserts:

{¶15} "Whether the presiding judge was disqualified from presiding over the proceedings where [he] was intended to be called as a witness in the proceedings, and a foundational aspect of the action was predicated solely on a specific order by the judge (to the defendantsa) [sic] which order was flatly ignored by defendants."

{¶16} An appellate court lacks jurisdiction to consider matters of judicial disqualification. "Appellate courts do not have jurisdiction to disqualify a common pleas judge on grounds of bias. R.C. 2701.03 grants to the Chief Justice of the Ohio Supreme Court the exclusive authority to disqualify and replace a common pleas court judge because of personal bias." *Bundschu v. Naffah*, 147 Ohio App.3d 105, 2002-Ohio-607, 768 N.E.2d 1215, ¶51 (7th Dist.). See also, Ohio Constitution, Article IV, Section 5(C). (The chief justice considers the disqualification of a common pleas court judge). Accordingly, Adams' second assignment of error is meritless.

Filing Requirements

{¶17} In his third and final assignment of error, Adams asserts:

{¶18} "Whether the 'filing requirements' of: O.R.C. § 2303.08; and, O.R.C. Sect. 2303.10, are 'discretionary' subject to defendants' discretion."

{¶19} This is essentially the same argument raised in his most recent appeal. This court stated:

The principle of "[r]es judicata may be applied to bar further litigation of

issues that were raised previously or could have been raised previously in an appeal." *State v. Houston*, 73 Ohio St.3d 346, 347, 652 N.E.2d 1018 (1995), citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). We have already determined in an earlier appeal filed by Appellant that there is no jurisdictional defect in the underlying sentencing entry, the entry is not void and is not voidable due to some alleged defect arising from the possible omission of a time-stamp on the nunc pro tunc entry. Res judicata applies to bar further appeal on the issues surrounding the validity of Appellant's sentencing entry and the jurisdiction of the trial court.

State v. Adams, 7th Dist. No. 13 MA 111, 2014-Ohio-649, ¶14.

{¶20} The entry in question has been reviewed multiple times at the trial and appellate levels. Consistent with our most recent holding, Adams is precluded from attacking the validity of the sentencing entry in this appeal. Accordingly this assignment of error is meritless.

{¶21} In sum, all of Adams' assignments of error are meritless and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.