

IN THE COURT OF COMMON PLEAS
CIVIL DIVISION
ADAMS COUNTY, OHIO

C. DAVID KELLEY,
Adams County Prosecuting Attorney,

Case No. 20120521CVH

Plaintiff

Judgment Entry

v.

Willard Lowe aka Willie Lowe

Defendant

[Handwritten signature]

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CLERK OF COURTS

* * * * *

This cause comes on for decision upon the Plaintiff's April 29, 2013 Motion For Summary Judgment, and upon the Defendant's May 10, 2013 Motion For Summary Judgment and his May 13, 2013 Motion to Amend Summary Judgment. Upon the Defendant's request, the Court heard oral arguments by Plaintiff's Counsel Dana N. Whalen and by the Defendant Willard Lowe upon May 28, 2013. The Court has considered the Defendant's May 16, 2013 Motion to Dismiss Plaintiff's -Attorney Summary Judgment, the Plaintiff's May 24, 2013 Reply, and all other responses, replies, and Memoranda in support of and opposing the respective summary judgment motions. The Court has additionally considered the pleadings and all other evidence as permitted and authorized by Civil Rule 56 (C).

This case arises out of the Plaintiff's Complaint alleging that the Defendant is a vexatious litigator as defined in R.C. 2323.52, and seeking a permanent injunction against the Defendant in accordance with R.C. 2323.52 (D). The Plaintiff's Motion For

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Summary Judgment requests that the Court find the Defendant to be a vexatious litigator as a matter of law, and to grant injunctive relief pursuant to R.C. 2323.52 (D).

The Defendant's Motion For Summary Judgment essentially asks this Court to set aside or vacate the criminal conviction against him in Case No. 2010 0046 in the Adams County Court of Common Pleas. The Defendant's Motion To Amend Summary Judgment sets forth various reasons why the Defendant believes his court filings were not frivolous or baseless, and why the Court should not find him to be a vexatious litigator.

In determining the respective Motions for Summary Judgment and Defendant's Motion to amend, the Court has followed the mandates of Civil Rule 56 (C) which require the Court to find, before it can grant summary judgment, that

- (1) there is no genuine issue as to any material fact,
- (2) the moving party is entitled to judgment as a matter of law,
- (3) it appears from the evidence that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, and
- (4) the party against whom the motion for summary judgment is made is entitled to have the evidence construed most strongly in that non-moving party's favor.

The Court has given due consideration to the various definitions in R.C. 2323.52 (and R.C. 2323.51 as applicable), including but not limited to "conduct", "vexatious conduct", and "vexatious litigator". The Court further finds that the Defendant's underlying conduct herein involves his various requests and motions for post-conviction relief from his conviction in Case No. 2010 0046 in the Adams County Common Pleas

Court. The Plaintiff's Complaint alleges as well that he has pursued this request for relief in three cases in the Fourth District Court of Appeals. Motions for post-conviction relief are held by Ohio Courts to be civil actions, characterized as "quasi-civil" in State v. Nichols, 11 Ohio St. 3d 40, 41-42 (1984). Courts have consistently held post-conviction pleadings to be collateral civil attacks on a judgment, with the trial court having the same discretion to deny relief as in any other civil postjudgment motion. State v. Apanovitch, 107 Ohio App. 3d 82, 87 (1995); State v. Steffen, 70 Ohio St. 3d 399, 410 (1994); State v. Calhoun, 86 Ohio St. 3d 279, 281 (1999). The Court accordingly finds the Defendant's filings at issue in this case to be civil in nature, although arising out of his criminal conviction.

The Court notes that the various filings of the Defendant set forth at pages 4-11 inclusive of the Plaintiff's Memorandum in Support of his Motion For Summary Judgment accurately state the Defendant's filings in those four cases, of which a certified copy of each of those cases were filed in the within case contemporaneous with and as referenced in the Plaintiff's Motion For Summary Judgment. [The cases so certified by the Adams County Clerk of Courts on April 25, 2013 were Case No. CR 20100046 in the Adams County Court of Common Pleas, and Case Nos. 2011 CA 915, 2011CA 923 and 2012 CA 939 in the Ohio Fourth District Court of Appeals.]

As to Post-conviction relief, the Court refers to R.C. 2953.21 which states in subsection (J) as follows: "...the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case ...". The Court further notes that case law has universally found that post-conviction review is a narrow remedy, since res judicata bars any claim

that was or could have been raised at trial or on direct appeal. No trial was involved in our situation due to the Defendant having entered pleas of guilty to four counts of Aggravated Trafficking in Drugs in Case No. CR 20100046.

Additionally, R.C. 2953.23 (A) provides that "... a Court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section [section 2953.21] or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A) (1) or (2) applies...". Neither division (A) (1) nor (A) (2) are applicable to the Defendant, since (A) (1) (b) requires a showing by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted. In our situation, the Defendant entered pleas of guilty. Therefore, there could be no constitutional errors at trial (emphasis added). Division (A) (2) deals with DNA testing, which is clearly inapplicable. As to the R.C. 2953.21 (A) expiration period prescribed therein, the time prescribed in division (A) (2) is no later than one hundred eighty (180) days after the date on which the trial transcript is filed in the Court of Appeals in the direct appeal of the judgment of conviction, or, if no appeal is taken, no later than one hundred eighty (180) days after the expiration of the time for filing the appeal.

Since the trial judge in Case No. CR 2010 0046 by his July 25, 2012 Judgment Entry and Decision Denying Defendant's Motions specifically denied (at pages 14-19) the Defendant's January 12, 2012 Motion for Post-Conviction Relief; and by the trial judge's August 7, 2012 Judgment Entry and Decision Denying Defendant's Motions specifically denied (at pages 10-14 and referenced as Motion no. 36) the Defendant's June 25, 2012

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Motion to Amend Post-Conviction Relief, the R.C. 2953.21 (A) filing expiration period is rendered moot, since the trial judge dealt with the Defendant's Post-Conviction Relief Motions on their merits. Consequently, only the second or successive petition provisions of R.C. 2953.23 would remain available to the Defendant, and the Court has heretofore found those provisions to be unavailable.

As to direct appeals, Case No. 2012 CA 939 in the Fourth District court of Appeals dealt with the Defendant's February 16, 2012 Notice of Appeal and his February 27, 2012 Motion For Leave To File A Delayed Appeal. On February 27, 2012 the Defendant filed another Notice of Appeal From Judgment of Conviction, with the September 27, 2011 Revised/Amended Judgment Entry of Sentence being attached and/or filed therewith. The Court of Appeals, by Decision and Judgment Entry filed April 4, 2012 denied the Defendant's/Appellant's Motion For Leave To File Delayed Appeal. The Defendant (Appellant) on April 12, 2012 filed a Motion For Reconsideration with the Fourth District Court of Appeals, which by Entry filed April 17, 2012 denied the Defendant's/Appellant's Motion For Reconsideration. The Court of Appeals specifically rejected the Defendant's contention that the most recent September 27, 2011 Sentencing Entry was not a final appealable order. The Court of Appeals cited State v. Lester, 130 Ohio St. 3d 303 (2011) in support of its decision.

The Court notes that the Defendant, in Case No. CR 20100046 was sentenced by a Judgment Entry of Sentence on October 7, 2010 to one year in prison on each count, consecutive. Then, on October 18, 2010, a corrected Judgment Entry of Sentence was filed, sentencing the Defendant to one year on each count consecutive, for a total of four years. This Entry stated "This Is A Final Appealable Order". Thereafter, on September

27, 2011, the Revised/Amended Judgment Entry on Sentence was filed, in accordance with the September 19, 2011 Opinion of the Fourth District Court of Appeals, citing R.C. 2505.02. This Revised/Amended Judgment Entry on Sentencing added that the Defendant was convicted "Pursuant to Voluntary Pleas of Guilty", and again imposed one year on each count, consecutive to one another for a total term of incarceration of four years. Again, the Revised/Amended Entry included the language in bold print: "THIS IS A FINAL APPEALABLE ORDER." The Defendant's time for filing any notice of appeal began to run, at the very latest, from this September 27, 2011 date.

As a result of the foregoing, there is no doubt but that the Defendant had no reason, basis, or recourse to continue filing post-conviction documents in Case No. CR 20100046. His post-conviction relief options under R.C. 2953.21 and 2953.23 were foreclosed, and his appeal and delayed appeal motions had been denied by the Fourth District Court of Appeals. The Adams County Court of Common Pleas had no legitimate jurisdiction to afford any relief to the Defendant. The Defendant habitually, persistently, and without reasonable grounds engaged in vexatious conduct as defined in R.C. 2323.52 (A) (2) in both the Adams County Court of Common Pleas and in the Fourth District Court of Appeals. The Defendant is found to be a vexatious litigator as defined in R.C. 2323.52 (A) (3), as a matter of law. The Court finds that there is no genuine issue as to any material fact; that the Plaintiff is entitled to judgment as a matter of law; that reasonable minds can come to but one conclusion from the evidence, and that conclusion is adverse to the Defendant; and the Court finds that it has construed the evidence most strongly in favor of the Defendant. The Court accordingly grants judgment in favor of the Plaintiff on his Complaint, and finds the Defendant to be a vexatious litigator.

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As to the Defendant's Motion For Summary Judgment and his Motion to Amend Summary Judgment, the Court finds and orders that the Defendant is not entitled to judgment as a matter of law. The Defendant's Motion For Summary Judgment and Motion to Amend Summary Judgment are both denied, for all of the reasons heretofore set forth and stated.

Having granted the Plaintiff's Motion For Summary Judgment, and upon the Court's finding and order that the Defendant is a vexatious litigator, it is hereby ordered as follows:

1. The Defendant Willard Lowe is prohibited from instituting any legal proceeding in the court of claims, any court of common pleas, any municipal court, or any county court, without having first obtained leave of this Court to proceed;
2. The Defendant is also prohibited from continuing any legal proceeding in the Adams County Court of Common Pleas in Case No. CR 2010 0046, and specifically including but not limited to any post-conviction motions, without first obtaining leave from this Court to so proceed;
3. The Defendant is further prohibited from making any application, other than an application to this Court for leave to proceed, in any proceeding instituted by the Defendant or by any other person in any of the courts listed in No. 1 above, to-wit: court of claims, common pleas, municipal, or county court.

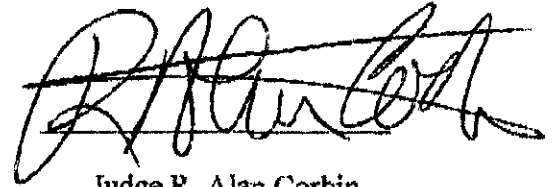
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4. The Defendant shall not institute nor continue any proceedings in any court of appeals, including but not limited to the Fourth District Court of Appeals, nor file any application, other than an application for leave to proceed, without having first filed an application for leave to proceed in the court of appeals in which the legal proceedings would be instituted or are pending, pursuant to the provisions of R.C. 2323.52 (F) (2).

It is further ordered that the Clerk of the Adams County Court of Common Pleas send a certified copy of the within Judgment Entry to the Supreme Court of Ohio for publication, pursuant to R.C. 2323.52 (H).

It is so ordered. There is no just reason for delay. Costs are waived.

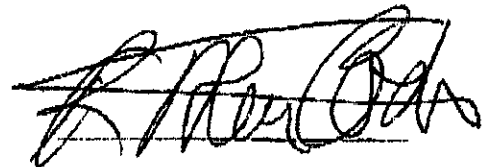
It is further ordered that the Trial to the Court scheduled for June 12 and 13, 2013 is hereby vacated.




Judge R. Alan Corbin

To the Clerk:

Please forward a copy of the within Judgment Entry to Dana N. Whalen, Attorney for the Plaintiff; to Willard Lowe, Defendant, #638009, Belmont Correction Camp, P.O. Box 540, St. Clairsville, OH 43950; and to the Supreme Court of Ohio as directed herein, and pursuant to Civ. R. 58 (B).



Judge R. Alan Corbin

CLERK'S CERTIFICATE	
The State of Ohio, Adams County, ss:	
I certify that this is a true and correct copy of the original filed in my office on	
6/17/13	
LARRY HELLER, CLERK OF COURTS	
BY:	
	Deputy Clerk
DATE:	6/11/13

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