

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Louis Joseph Malek,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20060244-CA
v.)	
)	
)	F I L E D
)	(June 22, 2006)
Lynn Jorgensen, Warden,)	
)	
Respondent and Appellee.)	2006 UT App 254

Third District, Salt Lake Department, 910902392
The Honorable Stephen L. Roth

Attorneys: Louis J. Malek, Draper, Appellant Pro Se
 Mark L. Shurtleff and Nancy L. Kemp, Salt Lake City,
 for Appellee

Before Judges Greenwood, Davis, and Thorne.

PER CURIAM:

Appellant Louis Joseph Malek appeals from the denial of his motion to vacate portions of a 1992 order on a petition for a writ of habeas corpus. This case is before the court on a sua sponte motion for summary disposition.

This court has twice affirmed decisions of both the Third District Court and the Fourth District Court determining the claims Malek raises in this appeal. See State v. Malek, 2005 UT App 429 (per curiam); Malek v. Friel, 2004 UT App 237 (per curiam). This court has twice rejected the claim that Malek is confined illegally because the original sentencing order was not signed, and twice affirmed district court rulings that any irregularity in the sentencing was corrected by a signed 1992 order entered in a habeas corpus action filed in Third District Court by Malek. The present appeal is taken from an order denying a belated rule 60(b) motion filed in the habeas corpus proceeding initiated in 1991.¹ See Utah R. Civ. P. 60(b). The

¹The 2004 appeal was taken from a petition for extraordinary relief principally challenging a probation revocation, but also
(continued...)

claims are barred by res judicata. See Hurst v. Cook, 777 P.2d 1029, 1036 (Utah 1989) ("A ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior habeas proceeding should not be readjudicated unless it can be shown that there are unusual circumstances.").

Malek seeks to nullify the 1992 decision granting him relief through removal of the multiple sentencing enhancements. By avoiding that decision, he believes he may reassert a claim that he is entitled to an unconditional release from incarceration due to an allegedly illegal sentence. However, the claims are barred by res judicata and are also meritless.

When Malek filed his petition for a writ of habeas corpus in April 1991, rule 65B(f) of the Utah Rules of Civil Procedure allowed a habeas petition to be filed "in the court most convenient to plaintiff." Utah R. Civ. P. 65B (1991). He elected to file a habeas petition in Third District Court, a venue allowed under the rule, to challenge the enhancements included in his sentence. After obtaining relief from the habeas court, he repeatedly sought to vacate the 1992 order on his habeas petition, most recently by claiming that the Third District Court lacked jurisdiction to consider the challenge to his sentence raised in the habeas petition. In Webb v. Van Der Veur, 853 P.2d 898 (Utah Ct. App. 1993), this court reviewed a claim that the habeas court lacked jurisdiction to consider the petition because it was not the district court that issued the commitment resulting in incarceration. Webb filed a habeas corpus petition directly in the Utah Supreme Court, and the supreme court referred the petition to the district court in the county where Webb was incarcerated. Webb pursued the petition in that district court. However, after the court denied relief, Webb appealed and claimed that the district court in the county where he was confined did not have subject matter jurisdiction to consider his habeas petition. Noting that all district courts have subject matter jurisdiction over habeas corpus petitions, this court held that "by voluntarily and intentionally pursuing habeas corpus relief" in the district court for the county in which he was confined, the petitioner was "estopped from objecting to [that court] assuming jurisdiction." Id. at 899.

¹(...continued)
raising issues regarding validity of the sentence. See Malek v. Friel, 2004 UT App 237 (Per curiam). The 2005 appeal was from the denial of a rule 60(b) motion filed in the original criminal proceedings in the Fourth District Court. See State v. Malek, 2005 UT App 429 (per curiam).

In 1992, the Third District Court considered Malek's petition for writ of habeas corpus challenging his sentence and issued an order removing multiple enhancements from his sentence. As we noted in his most recent appeal, Malek did not file an appeal from that 1992 order. See State v. Malek, 2005 UT App 429 (per curiam). Because Malek voluntarily and intentionally pursued habeas corpus relief in the Third District Court, he is estopped from objecting to that court exercising subject matter jurisdiction in that case.

We affirm the decision of the district court.

Pamela T. Greenwood,
Associate Presiding Judge

James Z. Davis, Judge

William A. Thorne Jr., Judge