

IN THE SUPREME COURT OF OHIO

STATE ex rel. William D. Mason,
Cuyahoga County Prosecuting Attorney,

* Case No. 2012-1128

Relator,

*
*
*

-vs-

Original Action in Prohibition

NANCY MARGARET RUSSO,
Judge, Cuyahoga County Common Pleas Court*

*
*

Respondent.

MEMORANDUM IN SUPPORT OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION

WILLIAM D. MASON, CUYAHOGA COUNTY PROSECUTING ATTORNEY
The Justice Center, Courts Tower
1200 Ontario St., Ninth Floor
Cleveland, Ohio 44113
Relator

MIKE DeWINE, Ohio Attorney General
MICHAEL J. SCHULER, #0082390
Assistant Attorney General
Ohio's Attorney General's Office
Constitutional Offices Section
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
Phone No.: (614) 728-7592
Fax No.: (614) 728-7592
michael.schuler@ohioattorneygeneral.gov

NANCY MARGARET RUSSO, JUDGE,
CUYAHOGA COUNTY COURT OF COMMON PLEAS
The Justice Center, Courts Tower
1200 Ontario St., Courtroom 18C
Cleveland, Ohio 44113
Respondent

BRIAN MOONEY, #0066018
CHRISTOPHER A. WAGNER, #00072524
SUSAN A. CHOE, #0067032
Assistant Attorneys General

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO
Lucas County Courthouse
Toledo, Ohio 43604
Phone No: (419) 213-2001
Fax No: (419) 213-2011
ejarrett@co.lucas.oh.us
By: EVY M. JARRETT, #0062485
Assistant Prosecuting Attorney
COUNSEL FOR AMICUS CURIAE
OHIO PROSECUTING ATTORNEYS ASSOCIATION

Charitable Law Section, Gambling Unit
150 E. Gay St., 23rd Floor
Columbus, Ohio 43215
Phone: (614) 466-3181
Fax: (614) 466-9788
COUNSEL FOR AMICUS CURIAE
OHIO ATTORNEY GENERAL MIKE DeWINE

RECEIVED

JUL 24 2012

CLERK OF COURT

SUPREME COURT OF OHIO

FILED

JUL 24 2012

CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	1
I. Issuance of a temporary restraining order is an exercise of judicial power.	2
II. A judicial order precluding prosecution of a group of individuals or entities under a criminal statute is an unauthorized usurpation of executive power. ...	2
A. The investigation and prosecution of crimes are executive functions.	2
B. Respondent's issuance of a restraining order was a judicial encroachment on the exercise of executive authority.	3
C. There is no allegation that relator abused his discretion in this case.	5
D. There is no suggestion that relator was attempting to enforce a void or unconstitutional criminal statute, causing an irreparable injury to vested property rights for which there is no adequate remedy at law.	6
E. Issuance of the restraining order permitted the trial court to accomplish by means of a civil, equitable remedy that which cannot be accomplished in criminal cases: entry of summary judgment against a prosecution.	8
III. A writ of prohibition may appropriately issue to prevent or correct a violation of the separation of powers doctrine, without regard to the availability of a remedy on appeal.	9
CONCLUSION	10
CERTIFICATION	11

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Prosecuting Attorneys Association is a private non-profit organization founded in 1937 for the benefit of the 88 elected county prosecutors in Ohio. The OPAA's mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice.

The OPAA has an interest in maintaining the integrity of the boundaries between the judiciary and executive branches, and the OPAA is concerned with judicial restraints on the exercise of prosecutorial discretion. The OPAA therefore supports issuance of a writ of prohibition in this matter.

STATEMENT OF THE CASE AND FACTS

The OPAA relies on the statement of facts and case submitted in relator's petition and complaint for writ of prohibition, filed on July 3, 2012.

ARGUMENT

Under Ohio law, issuance of a writ of prohibition is appropriate when (1) a court is about to exercise judicial power; (2) the exercise of that power is unauthorized by law; and (3) a denial of the writ would cause injury for which there is no remedy in the ordinary course of the law. *State ex rel. Steffen v. Court of Appeals*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, ¶16. However, if the court patently and unambiguously lacks jurisdiction to exercise the power in question, the relator need not demonstrate a lack of an adequate remedy in the ordinary course of the law. *State ex*

rel. Sapp v. Franklin Cty. Court of Appeals, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, at ¶15; *Steffen*, at ¶16.

A temporary restraining order prohibiting the prosecution of certain individuals or entities is undeniably an exercise of judicial power. Moreover, under Ohio law, trial courts patently and unambiguously lack jurisdiction to impose such restraints on the executive branch.

I. Issuance of a temporary restraining order is an exercise of judicial power.

It is clear that issuance of a temporary restraining order is an exercise of judicial power. *See, e.g., State ex rel. Columbus Southern Power Co. v. Sheward*, 63 Ohio St.3d 78, 79-80, 585 N.E.2d 380 (1992); and *State ex rel. Northern Ohio Tel. Co. v. Winter*, 23 Ohio St.2d 6, 260 N.E.2d 827 (1970).

II. A judicial order precluding prosecution of a group of individuals or entities under a criminal statute is an unauthorized usurpation of executive power.

A. The investigation and prosecution of crimes are executive functions.

Ohio's Constitution vests legislative power in the General Assembly (Section 1, Article II, Ohio Constitution), executive power in the Governor (Section 5, Article III, Ohio Constitution), and judicial power in the courts (Section 1, Article IV, Ohio Constitution). *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 462, 1999-Ohio-123, 715 N.E.2d 1062. Although Ohio's Constitution does not explicitly address the principle of separation of powers, this court has recognized the need to "protect the borders separating the three branches" and to maintain " 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' " *State v. Bodyke*, 126 Ohio St.3d 266, 278, 2010-Ohio-2424, 933 N.E.2d

753, ¶47, 51.

The prosecution of crimes is a function entrusted to the executive branch of government:

The several counties of Ohio, as political subdivisions of the state, may be called upon by the general assembly of Ohio to aid any of the executive officers of the state, in any manner that the general assembly shall deem best, in the exercise of the police powers of the state, particularly in the investigation and prosecution of crimes and offenses.

State ex rel. Doerfler v. Price, 101 Ohio St. 50, 128 N.E. 173 (1920), paragraph six of the syllabus. *Accord In re Metzenbaum*, 26 Ohio Misc. 47, 265 N.E.2d 345 (Cuyahoga C.P.1970) (holding that executive power includes "the power and duty of Ohio's county prosecutors to enforce the penal laws of the state by investigating and prosecuting persons accused of crime"); and *State v. Curry*, 134 Ohio App. 3d 113, 118, 730 N.E.2d 435 (9th Dist.1999) (noting that the decision to prosecute is an "administrative and executive decision").

B. Respondent's issuance of a restraining order was a judicial encroachment on the exercise of executive authority.

This court has recognized the need for vigilance against the danger "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches.'" *Bodyke*, quoting *Morrison v. Olson*, 487 U.S. 654, 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), ¶53. By issuing a restraining order prohibiting the prosecution of certain parties, respondent has performed an act "more properly accomplished by" the executive branch. In essence, respondent's restraining order stripped relator's ability to make the decision to prosecute. Such pre-trial restraints on the decision to prosecute violate the principles of separation of powers.

Curry, supra; and *Village of Ontario v. Shoenfelt*, 5th Dist. No. 2302, 1985 Ohio App. LEXIS 6795.

Prohibiting judicial restraints on prosecutorial discretion is a sensible policy. A "decision to prosecute is particularly ill-suited to judicial review" because courts cannot evaluate factors including "the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). See also *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) ("[j]udicial deference to the decisions of [prosecutors] rests in part on an assessment of the relative competence of prosecutors and courts"). The judiciary's authority is best exercised on a case-by-case basis. Courts' "perspectives are limited to those cases over which they preside," and "judges cannot feasibly determine how best to allocate prosecutorial resources, let alone weigh the strength of the prosecution's evidence against such consideration." *United States v. Jenkins*, 518 F.3d 722 (9th Cir.2008).

The principle of separation of powers embodied in the Ohio Constitution is consistent with the "general rule that a court of equity will not interfere by injunction to prevent the enforcement of criminal statutes at the instance of an alleged law violator." *Troy Amusement Co. v. Attenweiler*, 137 Ohio St. 460, 465, 30 N.E. 2d 799 (1940). Similarly, the United States Supreme Court has noted that a court of equity "has no jurisdiction over the prosecution, the punishment or the pardon of crimes." *In re Sawyer*, 124 U.S. 200, 210, 8 S.Ct. 482; 31 L.Ed. 402 (1988) The threat of a criminal

action was traditionally considered an insufficient injury to warrant the extraordinary remedy of an equitable restraint on a criminal prosecution. *Norcisa v. Provincetown, Board of Selectmen*, 368 Mass. 161, 330 N.E.2d 830 (1975). Further, prosecutors represent the public interest, "and it would not be proper for a court of equity to undertake to restrain an officer acting in his official capacity and under the responsibilities of his office, from discharging what to him may appear to be a plain duty pertaining to his office." *Moses v. Mayor*, 52 Ala. 198 (1875).

C. There is no allegation that relator abused his discretion in this case.

This court's prior precedents consistently hold that "the decision whether to prosecute is discretionary and not normally subject to judicial review." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197, citing *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 27, 1996-Ohio-228, 661 N.E.2d 18; *Ohio Assn. of Pub. School Emp. v. Dayton City School Dist. Bd. of Edn.*, 59 Ohio St. 3d 159, 160, 572 N.E.2d 80, 82 (1991). Ohio law is clear that the judiciary "cannot interpose and direct in regard to the performance of an official act which rests in the discretion of any officer, whether executive, legislative or judicial." *State ex rel. Whiteman v. Chase*, 5 Ohio St. 528 (1856).

Ohio law does not sanction either requiring prosecution or forbidding prosecution in the absence of an abuse of discretion. *Mootispaw*, for example, involved a complaint for a writ of mandamus to compel a prosecutor to investigate and prosecute a claim of collusion. The writ of mandamus was denied, because "a prosecuting attorney will not be compelled to prosecute a complaint except when the failure to prosecute constitutes

an abuse of discretion." *Id. Accord State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 27, 661 N.E.2d 180, 184 (1996) (denying a writ of mandamus to compel investigation of alleged police misconduct).

In this case, there is no suggestion that relator abused his discretion. The issuance of the temporary restraining order - at least initially - was based on the trial court's conclusion that that (1) the plaintiffs were not utilizing the same software that was the subject of a pending criminal case; (2) that none of the plaintiffs were subjects of criminal proceedings; (3) that the plaintiffs were operating sweepstakes establishments, as opposed to gambling activities; (4) that the businesses were operating as lawful enterprises subject to proper permits and licenses; and (5) that the plaintiffs were operating their establishments before the enactment of H.B. 386. In short, the grounds for issuance of the restraining order were based on respondent's application of the criminal statutes to the plaintiffs' activities, as opposed to an assessment of whether the relator abused his discretion.

D. There is no suggestion that relator was attempting to enforce a void or unconstitutional criminal statute, causing an irreparable injury to vested property rights for which there is no adequate remedy at law.

Just as this court has denied efforts to compel prosecution of particular cases, it has similarly been reluctant to permit judicial restraints on the exercise of prosecutorial discretion. Lower courts are instructed to "exercise great caution" when considering injunctive relief that might "interfere with another branch of government and especially with the ability of the executive branch to enforce the law." *Garono v. State*, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988), citing *Country Club Hills Homeowners Assn. v.*

Jefferson Metro. Housing Auth., 5 Ohio App. 3d 77, 449 N.E.2d 460 (1981); *Lyons v. Cincinnati*, 55 Ohio App. 458, 9 N.E.2d 988 (1936); and *Snyder v. Alliance*, 41 Ohio App. 48, 179 N.E. 426 (1931).

Garono held that "[u]nless the police seek to enforce an unconstitutional or void law, we will not inhibit their efforts to enforce the law." *Id.*, citing *Troy Amusement Co. v. Attenweiler*, 137 Ohio St. 460, 30 N.E. 2d 799 (1940); and *VFW v. Sweeney*, 64 Ohio Law Abs. 277, 111 N.E. 2d 699 (C.P.1952). In this case, there is no claim that the criminal statutes are void or unconstitutional. Respondent's decision to issue the restraining order was based on her assessment of the plaintiffs' activities, not the validity of the criminal statutes in question.

Attenweiler, supra, phrased the exception even more restrictively, stating that the only exception is when "public authorities or private persons seek to enforce unconstitutional and invalid legislation whereby vested property rights will be interfered with to the extent of causing irreparable injury for which there is no adequate remedy at law." *Id.*, 137 Ohio St. at 466, citing *Olds v. Klotz*, 131 Ohio St. 447, 3 N. E.2d 371. *Attenweiler* rejected the application of the exception to protect a business holding "bank nights" at a theater. The exception was inapplicable because avenues for the protection of rights existed "in the guaranties surrounding the defense of an accused person and in his action at law for damages for wrongful prosecution, arrest or imprisonment." *Attenweiler* therefore concluded that an action for an injunction may not be used to determine "the guilt or innocence of the plaintiff, its officers and agents," and that "the plaintiff and those acting in its behalf must await a test in the criminal

courts since the facts alleged in the petition do not warrant chancery in stepping in to prevent the administration of criminal justice in the ordinary and usual way." *Id.*

This case involves neither an abuse of discretion, nor an allegedly void criminal statute, nor an irreparable injury to property rights without an adequate remedy at law. The general rule prohibiting judicial restraints on the exercise of prosecutorial discretion applies, without any applicable exception. But issuance of the restraining order was also inconsistent with Ohio courts' general reluctance to determine the merits of criminal cases before trial.

E. Issuance of the restraining order permitted the trial court to accomplish by means of a civil, equitable remedy that which cannot be accomplished in criminal cases: entry of summary judgment against a prosecution.

Consistent with the limitations on judicial restraints of the executive branch, Ohio courts evaluate criminal cases after indictment and, at the earliest, after the prosecution's presentation of its case at trial. Ohio courts generally prohibit the dismissal of an indictment which is "valid on its face," the test for which is "whether the allegations contained in the indictment or complaint make out offenses under Ohio criminal law." *State v. Killis*, 6th Dist. No. OT-11-007, 2011-Ohio-4739, ¶6, quoting *State v. Eppinger*, 162 Ohio App.3d 795, 2005-Ohio-4155, 835 N.E.2d 746 (8th Dist.), ¶37. Summary judgments against facially valid indictments are not permitted under Ohio's Criminal Rules, because " 'premature declarations' . . . are strictly advisory and an improper exercise of judicial authority." *State v. Varner*, 81 Ohio App.3d 85, 86, 610 N.E.2d 476 (9th Dist.1991), quoting *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 35, 257 N.E.2d 371, 372. (1970). See also *State v. Brady*, 119 Ohio St.3d

375, 378, 2008- Ohio-4493, 894 N.E.2d 671, ¶18-19.

In effect, respondent's restraining order acted as a summary judgment against any potential prosecution of certain individuals and entities. By finding that these parties are not engaged in gambling activities as described in the Revised Code, respondent precludes any meaningful prosecution of these parties, who may assert that the issue has been decided, that prosecution is barred by the principles of res judicata, and that any attempt to prosecute is actually a form of malicious prosecution. Such a result is inconsistent with the general expectation that the merits of criminal cases are determined by trial, not by a summary disposition.

III. A writ of prohibition may appropriately issue to prevent or correct a violation of the separation of powers doctrine, without regard to the availability of a remedy on appeal.

Ohio law recognizes that writs of prohibition may be issued to prevent or correct a violation of the doctrine of separation of powers. For example, this court issued writs of prohibition and mandamus to preclude implementation of legislation that intrudes upon judicial power. *Sheward, supra*, 86 Ohio St. 3d at 492. Similarly, a writ of prohibition was an appropriate remedy when a trial court issued a restraining order and preliminary injunction in order to circumvent the governor's executive order closing certain park facilities. *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St. 2d 127, 304 N.E.2d 382 (1973). Likewise, the Fifth District granted a writ of prohibition to preclude operation of a trial court's written procedures that "usurped the administrative function of decision making about what charges shall be prosecuted, when, and against whom" in violation of the constitutional principle of separation of powers. *State ex rel. Collins v.*

Hillyer, 5th Dist. No. 1751, 1983 Ohio App. LEXIS 13648.

Gilligan issued the writ of prohibition without regard for the availability of any other legal remedy. The trial court's issuance of a restraining order and an injunction were acts outside its jurisdiction, so that the availability of another legal remedy was irrelevant. *Gilligan's* reasoning likewise dictates that in this case, where respondent issued a restraining order in violation of the separation of powers, the requested writ should be granted without regard to the availability of any other remedy.

CONCLUSION

Because respondent patently and unambiguously lacked jurisdiction to issue the restraining order in this case, amicus curiae the OPAA supports relator's request for a writ of prohibition in this case.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing motion for leave and the attached order was sent via ordinary U.S. Mail this 23^d day of July, 2012, to William D. Mason, Cuyahoga County Prosecuting Attorney, The Justice Center, Courts Tower, 1200 Ontario St., Ninth Floor, Cleveland, Ohio 44113, Relator; The Honorable Nancy Margaret Russo, Judge, Cuyahoga County Court of Common Pleas, The Justice Center, Courts Tower, 1200 Ontario St., Courtroom 18C, Cleveland, Ohio 44113, Respondent; Michael J. Schuler, Assistant Attorney General, Ohio Attorney General's Office, Constitutional Offices Section, 30 E. Broad St., 16th Floor, Columbus, Ohio 43215; Brian Mooney, Christopher A. Wagner, Susan A. Choe, Assistant Attorneys General, Charitable Law Section, Gambling Unit, 150 E. Gay St., 23rd Floor, Columbus, Ohio 43215.

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney