

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel. Timothy A. Swanson, :
et al., :
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Relators, :
 :
v. :
 :
Stark County Democratic Central Committee, :
et al., :
 :
Respondents. :

Case No. 2013-1822

Original Action in Mandamus

RESPONDENTS' MOTION TO DISMISS

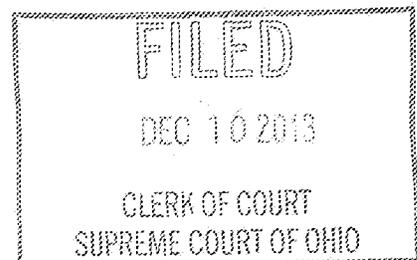
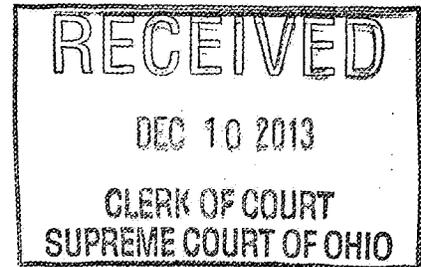
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RESPONDENTS' MOTION TO DISMISS

Pursuant to S.Ct.Prac.R. 12.04(A)(1), the respondents, Stark County Democratic Central Committee (DCC) and Randy Gonzalez, the committee's chairman, hereby move the Court to dismiss the relators' complaint styled as an "original action in mandamus." There are two independent grounds for this motion: lack of jurisdiction over the subject matter and failure to state a claim.

I. Lack of jurisdiction over the subject matter

Although labeled as "in mandamus," the relators' action is in substance an action for injunctive relief, over which this Court lacks original jurisdiction.

The Ohio Constitution does not grant this Court original jurisdiction for injunctive or declaratory relief. "That we have not original jurisdiction of suits for injunctions is entirely clear." *State ex rel. Ellis v. Bd. of Deputy State Supervisors*, 70 Ohio St. 341, 348, 71 N.E. 717 (1904). "Original jurisdiction is conferred upon the Supreme Court by the state Constitution only in *quo warranto*, mandamus, *habeas corpus*, prohibition and *procedendo*. The court is without authority to entertain an action in injunction instituted therein." *State ex rel. Smith v. Indus. Comm.*, 139 Ohio St. 303, 39 N.E.2d 838 (1942), paragraph one of the syllabus.

Thus, if the substance of the relators' action is injunctive in nature, then jurisdiction is absent and the action must be dismissed. "[I]f the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction." *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 1999-Ohio-130, 716 N.E.2d 704. *Accord State ex rel. Reese v. Cuyahoga Cty Bd. of Elections*, 115 Ohio St.3d 126, 2007-Ohio-4588, 873 N.E.2d 1251, ¶ 12; *State ex rel. Obojski v. Perciak*, 113 Ohio

St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, ¶ 13. As this Court has held: “Where a petition filed in the Supreme Court or in the Court of Appeals is in the form of a proceeding in mandamus but the substance of the allegations makes it manifest that the real object of the relator is for an injunction, such a petition does not state a cause of action in mandamus and since neither the Supreme Court nor the Court of Appeals has original jurisdiction in injunction the action must be dismissed for want of jurisdiction.” *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph four of the syllabus.

In determining the substance of the action, the Court is not controlled by how the relators have styled their complaint. “The nature of the writ sought is not to be determined by the label attached thereto by the relator.” *State ex rel. Smith*, 139 Ohio St. at 308. Instead, the Court looks to the substance of the complaint and “the real objects sought.” *State ex rel. Grendell*, 86 Ohio St.3d at 634. Indeed, the relators’ action is subjected to scrutiny to ensure that the Court’s jurisdiction is invoked in proper cases only: “[T]his court will scrutinize pleadings in order to assure that actions filed by parties requesting mandamus relief are consistent with our prior decisions as to the form and substance of the relief sought.” *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 132, 568 N.E.2d 1206.

The distinction between an action in mandamus and an action for injunction is clear. “A writ of mandamus compels action or commands the performance of a duty, while a decree of injunction ordinarily restrains or forbids the performance of a specified act.” *State ex rel. Smith*, paragraph two of the syllabus. The *Smith* court elaborated on this standard in the body of the opinion: “There is a substantial difference between commanding and forbidding action. It has been well stated that the important feature of the writ of mandamus which distinguishes it from any other remedial writ is that it is used merely to compel action and to coerce the performance

of a pre-existing duty. The functions of an injunction are ordinarily to restrain motion and enforce inaction, while those of mandamus are to set in motion and compel action.” *Id.* at 306.

The relators pray for relief that is injunctive in nature because they seek to restrain and forbid the respondents from performing certain acts. While the relators’ complaint is couched in terms of compelling acts, the complaint really seeks to restrain the respondents: “The Relators aver that unless the Respondents are ordered to follow clear Ohio law, and their duty imposed by such law, the Stark County Democratic Central Committee will convene, allow, review and permit consideration of other unqualified and untimely applicants * * *.” Complaint ¶ 17 (emphasis added). Clearly, the relators are trying to prevent an act from occurring.

The relators seek to forbid the DCC from “review[ing] and accept[ing] applications from individuals other than those who had applied” previously. Complaint ¶ 27. Further, the relators seek to prohibit and forbid the respondents from considering anyone other than Lou Darrow and Larry Dordea. Complaint ¶¶ 11, 26. Indeed, the relators expressly state that “George Maier . . . should not and cannot be considered as an applicant for Stark County Sheriff.” Complaint ¶ 21. And perhaps most insightful is that the relators are asking this Court to prohibit a current vote from taking place. Complaint p. 6, ¶ 2, Memorandum in support pp. 13-14, ¶ b.

Clearly, the relators are seeking to prohibit, forbid and restrain a number of acts by the respondents. The gravamen of the relators’ complaint is not to compel the DCC to perform a specific act. Rather, the relators seek to prohibit the DCC from considering any applicant other than those proposed by the relators, and to prohibit the DCC from even holding a current vote. Merely because the relators have phrased much of their complaint in the affirmative does not magically transform the inherently injunctive nature of the relief they seek. Regardless of how

the relators may label their action, the substance, core and real object of their complaint remains injunctive.

Even if there was some affirmative duty that the relators seek to enforce, “[w]here, as here, an action in mandamus does not provide effective relief unless accompanied by an ancillary injunction, it would appear that injunction rather than mandamus is the appropriate remedy.” *State ex rel. Corron v. Wisner*, 25 Ohio St.2d 160, 163, 267 N.E.2d 308 (1971); *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St. 3d 479, 482-83, 2003-Ohio-2074, 786 N.E.2d 1289, ¶ 15.

As if to prove the point, the relators initially claimed that “[n]either a declaratory judgment nor a prohibitory injunction would serve as alternative, adequate remedies * * *.” Memorandum in Support p. 12. Yet, the relators immediately thereafter filed a motion for ancillary injunctive relief, and complained that “*mandamus* would not afford complete relief.” Motion p. 9. This is the exact scenario described in *State ex rel. Corron*. The rule in that case is clear: where an action in mandamus does not provide effective relief unless accompanied by an ancillary injunction, then injunction rather than mandamus is the appropriate remedy.

The relators’ mandamus complaint simply cannot be viable without the motion for injunctive relief. The relators demand that no vote take place, certain votes must not be counted, and certain candidates must not be considered. This is not only injunctive in nature, but depends absolutely on the Court granting injunctive relief. Further, the relief sought by the relators’ motion for injunctive relief – prohibiting the respondents from considering any applicant other than Darrow and Dordea – is a mirror image of the relief sought by the complaint. This proves that the complaint is an injunctive action masquerading as a mandamus action. Injunctive relief is clearly necessary for the viability of the relators’ mandamus complaint.

For the above reasons, the Court should find that it lacks subject matter jurisdiction and should dismiss this action.

II. Failure to state a claim

Assuming arguendo that this Court has jurisdiction over the relators' action, the complaint fails to state a claim for the issuance of a writ of mandamus and should be dismissed.

In considering a motion to dismiss an original action, the Supreme Court has held: "Dismissal is appropriate if it appears beyond doubt, after presuming the truth of all material factual allegations and making all reasonable inferences in favor of the relators, that they are not entitled to the requested extraordinary relief." *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 632, 1999-Ohio-130, 716 N.E.2d 704. This is essentially the same standard as is applied to a motion to dismiss under Civ.R. 12(B)(6). *See O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus; *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶5.

The elements for a writ of mandamus are well established. "In order to be entitled to a writ of mandamus, the relator must establish that he has a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the requested act and that relator has no plain and adequate remedy at law." *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.

For purposes of this motion to dismiss, if it appears beyond doubt that the relators are unable to establish any of the three elements for a writ of mandamus, then the complaint should be dismissed.

A. The relators have no clear legal right to the requested relief and the respondents are not under a clear legal duty.

Because they are interrelated, the first two elements necessary for a writ of mandamus will be considered together.

The relators' entire case rests upon a sentence and a half found at ¶ 28 of this Court's decision in *State ex rel. Swanson v. Maier*, ___ Ohio St.3d ___, 2013-Ohio-4767 (*Swanson I*). At the end of that paragraph, the Court stated that "the vacancy occurred on January 7, the first day of McDonald's term. And 30 days after that date is the 'qualification date,' February 6, 2013." Indeed, the relators' complaint refers on eight occasions to the date of February 6, 2013. The relators describe this date as "inflexible" and argue that it is frozen in time as the qualification date as this matter moves forward prospectively. Memorandum p. 6.

The respondents certainly understand that February 6, 2013, served as the qualification date for the quo warranto action in *Swanson I*. The dispute before the Court *at that time* required a review of Maier's qualifications as of the date originally established as the qualification date.

However, the statutes and simple logic tell us that the original qualification date from ten months ago cannot be locked in or made permanent for purposes of effectuating and implementing the Court's remedy in *Swanson I*.

The statute that empowers the DCC to appoint the sheriff is R.C. 305.02(B), which states in pertinent part: "If a vacancy occurs from any cause in any of the offices named in division (A) of this section, * * * if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party with which such officer-elect was affiliated."

The next paragraph, R.C. 305.02(C), establishes the time limit in which the DCC has authority to make the appointment: “Not less than five nor more than forty-five days after a vacancy occurs, the county central committee shall meet for the purpose of making an appointment under this section.” Clearly, after a vacancy, there is a 45 day window in which the DCC has legal authority to make an appointment. After 45 days, the DCC’s legal authority lapses and it has no power to appoint. No interpretive gymnastics are necessary for this conclusion.

Obviously, the original 45 day window had long since lapsed as of November 6, 2013, the date on which *Swanson I* was announced. Yet, this Court expressly stated that Swanson would be reinstated “until the DCC, pursuant to R.C. 305.02(B), appoints a person qualified under R.C. 311.01 to assume the office of Stark County sheriff.” *Id.* at ¶ 40. Given the fact that the Court sent the appointment back to the DCC, it is beyond doubt that the vacancy and qualification dates are not forever frozen in time. If the relators’ argument was correct, then the 45 day time limit would have lapsed and the DCC would have no current authority whatsoever to make an appointment.

It is beyond doubt that the only way this case can be sent back to the DCC for appointment is if there is a new 45 day period following the vacancy created when Maier was removed from office. If the vacancy and qualification dates are frozen in time, then this Court’s only remedy after ousting Maier would have been to simply reinstate Swanson as acting sheriff. The lapsed 45 day period would have prohibited the matter from returning to the DCC. The very fact that this Court acknowledged the DCC’s current authority to appoint compels the conclusion that a new 45 day window was necessarily created.

It is telling that the relators point out “the passing of the qualification date” and admit that “[t]he ‘qualification date’ is long passed.” Memorandum pp. 3, 9. The relators can’t have it both ways – acknowledging the passing of the date, but denying the consequence. If the date has indeed passed, then the consequence is that the DCC’s original legal authority to appoint the sheriff has passed as well. Only a current vacancy and qualification date can give the DCC its current authority to appoint after *Swanson I*.

It is important to recognize that R.C. 305.02(C) does not grant any court the authority to extend the original 45 day period, this Court did not purport to assume such power in *Swanson I*, and the relators never asked the Court to do so. Indeed, to extend the original 45 day time period to 336 days (as of December 9, 2013) would violate the long established rule that this Court will not rewrite a statute. “Our role is to interpret existing statutes, not rewrite them.” *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 44. “It is our duty to apply the statute as the General Assembly has drafted it; it is not our duty to rewrite it.” *Doe v. Marlinton Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶ 29.

The relators’ claim for mandamus also violates the letter and spirit of the statutes that set forth the legal qualifications for a person to be appointed sheriff. “R.C. 311.01 expressly prohibits the appointment of a candidate for county sheriff who does not meet the specific statutory requirements set out in that section.” *Swanson I* at ¶ 27. Some of those statutory requirements include:

- “The person has been a resident of the county in which the person * * * is appointed to the office of sheriff for at least one year immediately prior to the qualification date.”

R.C. 311.01(B)(2).

- “The person has not been convicted of or pleaded guilty to a felony or any offense involving moral turpitude * * *, and has not been convicted of or pleaded guilty to an offense that is a misdemeanor of the first degree * * *.” R.C. 311.01(B)(5).
- The person has certain other credentials within three, four or five years immediately prior to the qualification date. R.C. 311.01(B)(8) and (9)(a).

The relators argue that the qualification date is frozen back on February 6, 2013, and only Darrow or Dordea can be appointed based on that date alone, with no current verification of qualifications. This relief sought by the relators would violate the above statutes, which strictly require current compliance, not merely compliance over 10 months ago. Are past applicants still residents of Stark County? Have they been convicted of or pleaded guilty to a crime? Are their credentials still within the valid windows of time set by statute? If the relators are correct, none of this matters. The relators have plainly stated their extreme position: “[A]ny such applicant considered and who may be eventually appointed, whose application was not processed before February 6, 2013, by law is unqualified.” Complaint ¶ 27. “There is nothing in Ohio law which requires that the relator qualify again.” Memorandum p. 5. The relators want to ignore everything that may have happened during the interim period while this case was pending – events that could make a previously qualified applicant, currently unqualified.

Under the relators’ scheme, the above statutes would be subject to sacrifice upon the altar of a stale qualification date. This could lead to the absurd and dangerous result that the only persons “qualified” to be sheriff could be persons who live in other counties or who have been convicted of crimes. Meanwhile, the relators’ relief would prohibit the DCC from finding out if applicants are currently qualified. Certainly, this absurd and unreasonable result does not comport with the statutory language or the statutory intent. “It is a cardinal rule of statutory

construction that a statute should not be interpreted to yield an absurd result.” *Mishr v. Bd. of Zoning Appeals*, 76 Ohio St.3d 238, 240, 1996-Ohio-400, 667 N.E.2d 365. Indeed, courts must presume that a “just and reasonable result is intended.” R.C. 147(C).

The relators’ relief would also violate the intent of the statutes that govern the filling of vacancies in the office of sheriff. A qualification date is set 30 days after a vacancy occurs. R.C. 311.01(H)(1). From between five and 45 days after a vacancy, the Central Committee has legal power to make an appointment. R.C. 305.02(C). From this statutory timetable, it is evident that the legislative intent is to hold a vote of appointment close in time to when the applicants have established their qualifications. The relators want to disregard this legislative intent and instead cling to a stale qualification date that is now remote in time to the vote of appointment.

The relators cite the case of *State ex rel. Williamson v. Cuyahoga Cty. Bd. of Elections* in support of their demand that Darrow simply be announced the winner, with no new vote taking place. The relators’ reliance on *Williamson* is completely misplaced.

In *Williamson*, Lambros and Williamson were the two candidates for the office of law director. It was determined that Lambros was not an eligible candidate for the election and his votes could not be counted. This left Williamson as the only eligible candidate on the ballot. Because Williamson was the only eligible candidate, the Court found that there was a clear legal duty to count only the votes cast for Williamson and declare him the winner of the election.

However, the *Williamson* Court took great care to point out that this second-place-wins rule does not apply when there is more than one eligible candidate, as here. When there is more than one eligible candidate, but the candidate receiving the highest number of votes is disqualified or unable to take office, the second place candidate is not elected. “Where the candidate receiving the highest number of votes is ineligible to election, the candidate receiving

the next highest number of votes for the same office is not elected. Only the *eligible candidate* who receives the highest number of votes for the office for which he stands is elected to such office.” (Underscore added. Italics sic.) *State ex rel. Williamson v. Cuyahoga Cty. Bd. of Elections*, 11 Ohio St.3d 90, 92, 464 N.E.2d 138 (1984), quoting *State ex rel. Halak v. Cebula*, 49 Ohio St.2d 291, 293, 361 N.E.2d 244 (1977). *Accord State ex rel. Haff v. Pask*, 126 Ohio St. 633, 186 N.E. 809 (1933), paragraph three of the syllabus. In these situations, a candidate must be both eligible and the highest vote recipient.

The situation in the case at bar falls squarely within the rule of *Williamson*. There were two or more eligible candidates (Darrow and Dordea) and the candidate receiving the highest number of votes (Maier) was ineligible. Contrary to the relators’ claim, the candidate receiving the next highest number of votes (Darrow) is not elected. It is beyond doubt that the relators have requested relief that is in direct violation of Ohio law. By itself, this is dispositive of the relators’ claim.

Thus, it is beyond doubt that the relators have no clear legal right to the requested relief. It is also beyond doubt that the respondents are not under a clear legal duty to not hold a vote, count only a minority of past votes, declare the second place vote recipient as the winner, and fail to ensure that applicants are currently qualified to serve as sheriff. Accordingly, the relators’ complaint should be dismissed.

B. The relators have a plain and adequate remedy at law, specifically, the appointment process set forth in R.C. 305.02(B).

The relators claim that they have no adequate alternative remedy at law. Complaint ¶ 20. Quite the contrary, this Court has already set forth the relators’ plain and adequate remedy at law: the appointment process set forth in R.C. 305.02(B). Indeed, this Court stated at ¶ 40 of

Swanson I that the DCC would proceed with the appointment process under that statute. The relator Darrow must pursue this remedy, not complain that he has none.

Assuming an appropriate application, the relator Darrow's statutory remedy is plain and adequate because he stands on a level playing field and enjoys as much an opportunity to win the vote as any other applicant. Any timely and currently qualified applicant could win the vote. How can the relators claim that they have no adequate remedy at law when Darrow could prevail in the vote of the DCC and be appointed sheriff? This is not the absence of an adequate remedy.

Because the relators have a plain and adequate remedy at law, they cannot establish that element of an action in mandamus. Therefore, it is beyond doubt that the relators are not entitled to the requested extraordinary relief, and the complaint should be dismissed.

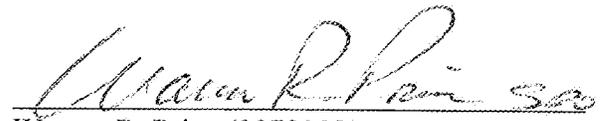
III. Conclusion

It is beyond doubt that the relators cannot establish each element necessary for a writ of mandamus. Therefore, the respondents respectfully move the Court to dismiss the relators' complaint.

Respectfully submitted,



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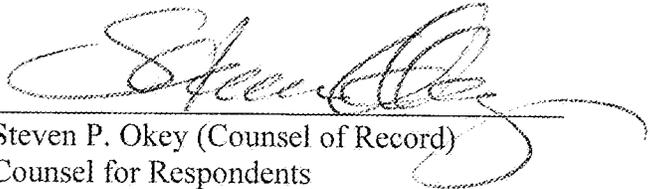
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