Supreme Court of Ohio Clerk of Court - Filed September 15, 2016 - Case No. 2016-1277

IN THE SUPREME COURT OF OHIO

STATE EX REL. SENSIBLE NORWOOD , ET AL.	*	Case No. 2016-1277
Relators,	*	Original Action in Mandamus
	*	Expedited Election Case
vs.	*	
HAMILTON COUNTY BOARD OF ELECTIONS	*	
Respondent	*	

AMICUS CURIAE BRIEF OF CITY OF NORWOOD IN OPPOSITION TO RELATORS' MANDAMUS ACTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....iii

I. STATEMENT OF INTEREST OF AMICUS CURIAE....1

II. STATEMENT OF FACTS....1

III. ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW....2

First Proposition of Law....2

Although the initiative powers are reserved to the people of each municipality on questions which the municipality is authorized by law to control by legislative action, where the municipality is not authorized by law to control by legislative action, the people do not have initiative powers.

Second Proposition of Law....2

A county Board of Elections in Ohio has a duty to act as a gatekeeper to keep matters off a municipal ballot which the municipality would not be authorized to control by legislative action.

Third Proposition of Law....3

An Ohio municipality is not authorized to control the enforcement of existing state and federal criminal law within the municipality by legislative action, and a county Board of Elections is authorized to exclude an initiative petition containing such a provision.

Fourth Proposition of Law....5

An Ohio municipality is not authorized to ordain felony offenses in Ohio, and a county Board of Elections is authorized to exclude an initiative petition containing such a provision.

Fifth Proposition of Law....6

The gatekeeping function of a county Board of Elections in Ohio must include the duty to exclude irretrievably confusing language in an initiative petition from the ballot.

Sixth Proposition of Law.....7

Where the Ohio Revised Code and the United States Code specifically permit criminal and civil asset forfeiture due to violation of various sections of Ohio and United States statutes prohibiting marihuana and hashish trafficking, Relators' petition prohibiting the enforcement of criminal and civil asset forfeitures is beyond the municipality's legislative authority, and a county Board of Elections is authorized to exclude an initiative petition containing such a provision.

IV. CONCLUSION.....8

V. CERTIFICATE OF SERVICE.....9

TABLE OF AUTHORITIES

Page

CASES:

Donnelly v. Fairview Park, 13 Ohio St.2d 1, 233 N.E.2d 500 (1968).....4

State ex rel. The City of Youngstown v. Mahoning County Board of Elections, 144 Ohio St.3d 239, ___ N.E. 2d ___, 2015-Ohio-3761 (2015).....1-2

State v. O'Mara, 105 Ohio St.94, 136 N.E. 855 (1922).....6

CONSTITUTIONAL PROVISIONS; STATUTES:

OHIO CONSTITUTION, Article II,.....2, 8

OHIO REVISED CODE SECTION 715.67.....6

OHIO REVISED CODE SECTION 733.49.....5

OHIO REVISED CODE SECTION 733.51.....5

OHIO REVISED CODE SECTIONS 733.53-733.56.....5

OHIO REVISED CODE SECTION 2921.44(A)(2).....4

OHIO REVISED CODE SECTION 2925.03.....4

OHIO REVISED CODE SECTION 2925.11.....4

OHIO REVISED CODE SECTIONS 2981.01-2981.14.....8

OHIO REVISED CODE SECTION 3701.11(K).....2

I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae City of Norwood is a municipal corporation duly organized and validly existing under the constitution and laws of the State of Ohio. Norwood is a statutory city; Norwood has no Charter. Relator Sensible Norwood seeks to "decriminalize" marihuana within the City of Norwood via ballot initiative. The initiative presented to the City and the Board of Elections, however, purports to do far more than merely eliminate marihuana offenses from the existing Norwood Code. The initiative language includes provisions that far exceed the legislative authority of an Ohio municipal corporation; provisions that exceed the authority of a municipal legislature are administrative rather than legislative; and provisions that are incomplete and contradictory. Relators are asking this Court to place an initiative in front of the voters of Norwood that is extremely confusing, contains patently invalid provisions, and which will almost immediately be the subject of legal challenge if passed. While amicus understands that Relators' good-faith intent to seek a change in the law, this initiative is simply too flawed to be a proper means for that pursuit.

II. STATEMENT OF FACTS

On July 20, 2016, Relators presented petitions to the City of Norwood Auditor. Pursuant to Ohio Revised Code §731.28, the City of Norwood Auditor, after ten days, transmitted a certified copy of the text of the proposed ordinance to the Hamilton County Board of Elections. The Board of Elections verified sufficient signatures of electors to place the proposed ordinance on the ballot.

On August 16, 2016, the Board of Elections held a special meeting to consider, among other things, Relators' initiative. On August 22, 2016 the Board of Elections held a special meeting for the sole purpose of considering Relators' initiative. Having considered the matter at the special meeting, the Board of Elections chose not to place Relators' initiative on the ballot for

the reasons stated in their draft August 22, 2016 minutes (Exhibit 8) and the transcript of the special meeting (Exhibit 9). Relators filed their original action in mandamus with the Supreme Court on August 29, 2016, which was timely answered by Respondent. Relators filed their merit brief with the court on September 12, 2016.

III. ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition of Law

Although the initiative powers are reserved to the people of each municipality on questions which the municipality is authorized by law to control by legislative action, where the municipality is not authorized by law to control by legislative action, the people do not have initiative powers.

Article II, §1f, of the Ohio Constitution, governing the powers of municipalities states:

"The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

The corollary to this constitutional reservation to the people of each municipality is also true: where a municipality is not authorized by law to control matters by legislative action, the people do not have initiative powers.

Second Proposition of Law

A county Board of Elections in Ohio has a duty to act as a gatekeeper to keep matters off a municipal ballot which the municipality would not be authorized to control by legislative action.

As this Court has noted:

"R.C. 3501.11(K) empowers a board of elections to determine whether a ballot measure falls within the scope of the constitutional power of referendum or initiative. For example, the right of referendum does not exist with resphttps://www.facebook.com/saintjosephs/?fref=tsect to a measure approved by a city council acting in an administrative, rather than legislative capacity. *Buckeye Commm. Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998), paragraph 2 of the syllabus. Because a referendum on an administrative matter is a legal nullity, boards of elections have not only discretion but an affirmative duty to keep such items off the ballot. *State ex rel Eversole [v. Delaware Cty. Bd. of Elections*, 140 Ohio St.3d 487,

2014-Ohio-4077, 20 N.E.3d 678], ¶30. It necessarily follows that the boards of elections have discretion to determine which actions are administrative and which are legislative."

State ex rel. The City of Youngstown v. Mahoning County Board of Elections, 144 Ohio St.3d 239, 41 N.E. 2d 1229, 2015-Ohio-3761 (2015).

Respondent Hamilton County Board of Elections exercised its discretion to determine that much of the Relators' initiative is administrative. Specifically, the Board of Elections determined that the Relators' initiative not be certified to the November ballot because, among other things, "it includes administrative directives instructing the Norwood police and city attorney how to enforce existing Ohio law." (Exhibit 8, page 2, Draft Minutes of Hamilton County Board of Elections Meeting Held August 22, 2016.) [Amicus presumes the term "city attorney" in the initiative refers to the Norwood Director of Law, *see* Ohio Revised Code §733.49.]

Third Proposition of Law

An Ohio municipality is not authorized to control the enforcement of existing state and federal criminal law within the municipality by legislative action, and a county Board of Elections is authorized to exclude an initiative petition containing such a provision.

Section 513.15(m) of Relators' proposed initiative petition states, in full:

"(m) No Norwood police officer, or his or her agent, shall report the possession, sale, distribution, trafficking, control, use or giving away of marihuana or hashish to any other authority except the Norwood City Attorney; and the City Attorney shall not refer any report to any other authority for prosecution or for any other reason."

Exhibit 1, page 12 of 16.

Relators' merits brief claims: "Section 513.15(m) is part and parcel of the proposed newly enacted law that would decriminalize marihuana in Norwood." (page 10). Relators' brief correctly states that "Whether the action of a legislative body is legislative or administrative depends on:

whether the action taken is one enacting a law, ordinance or regulation, or executing or

administering a law, ordinance or regulation already in existence."

Relators' Brief, page 8, citing *Donnelly v. Fairview Park,* 13 Ohio St.2d 1, 233 N.E.2d 500 (1968), paragraph two of the syllabus.

What Relators hope this Court ignores is that the City of Norwood is not authorized to control the enforcement of existing state and federal criminal law within the municipality by the City's legislative action. Specifically, Norwood police officers have statutory duties to enforce state and federal laws which are already in existence, regardless of whether Relators' initiative repeals the City of Norwood's ordinance prohibiting the possession and trafficking of marihuana. Police officers' duties include the enforcement of the existing federal Controlled Substances Act, and the enforcement of the existing Ohio Revised Code §§ 2925.11 and 2925.03, which respectively prohibit the possession and trafficking of marihuana and hashish.

Just as the Norwood City Council cannot prohibit the enforcement of existing state and federal criminal law within the municipality by legislative action, neither should these Relators be able to prohibit Norwood Police officers from enforcing existing the state and federal laws prohibiting marihuana and hashish possession and trafficking which they are charged to enforce.

Among the duties of the Norwood Police officers include the following:

"No law enforcement officer shall negligently do any of the following...Fail or prevent the commission of an offense or to apprehend an offender, when it is in the law enforcement officer's power to do so alone, or with available assistance."

Ohio Revised Code §2921.44(A)(2)

In addition to prohibiting the Norwood Police from reporting possession or distribution to anyone but the "City Attorney," Relators' initiative purports to prohibit the Norwood City Attorney from referring any report of the possession, sale, distribution, trafficking, control, use or giving away of marihuana or hashish to any other authority for prosecution or for any other reason. What Relators' initiative ignores is that the

City of Norwood, as a statutory Ohio city, as distinguished from a charter City, has an independently elected director of law under Ohio Revised Code §733.49. The director of law is not intended to be controlled by the City's legislative authority, and has defined duties under Ohio Revised Code §733.51, §733.53-733.56, among other statutes. Ohio Revised Code §733.53 gives city law directors in Ohio broad discretion as to which actions are prosecuted in Mayor's Court and which are prosecuted elsewhere. Beyond prosecutorial authority, the initiative purports to forbid the "City Attorney" from referring the listed information to "any other authority," which could include the Mayor, a Health Department, housing authorities, Ohio Department of Jobs and Family Services, the Ohio Adult Parole Authority, or the Fire Department. Amicus is unaware of any other information the Department of Law is forbidden from revealing to *any* authority under *any* circumstances. The Ohio Revised Code does not give the legislative authority of statutory municipalities, like Norwood, any authority over how the director of law discharges his or her statutory and ethical duties as Director of Law and public prosecutor. Therefore any effort to control the statutorily-elected director of law, by either the City Council or by initiative, is administrative, too, because it would purport to execute or administer laws already in existence, which do govern the conduct of the director of law. Therefore, these should neither be the subject of municipal ordinances or initiatives.

In addition, as discussed in detail below, the initiative also purports to create felony offenses and to preclude criminal and civil asset forfeiture "by any authority," both of which far exceed the authority of an Ohio municipal corporation.

Fourth Proposition of Law

An Ohio municipality is not authorized to ordain felony offenses in Ohio, and a county Board of Elections is authorized to exclude an initiative petition containing such a provision.

Ohio Revised Code §715.67 authorizes any Ohio municipal corporation to make the

violation of any of its ordinances a misdemeanor. However, Ohio law does not authorize an Ohio municipality to ordain felony offenses. The power to define and classify and prescribe punishment for felonies committed within the state is lodged in the General Assembly of the State of Ohio. When so defined, classified and prescribed, such laws must have uniform operation throughout the state. *State v. O'Mara*, 105 Ohio St.94, 136 N.E. 855 (1922). Despite an Ohio municipality's lack of authority to ordain felony offenses, Relators' initiative:

- Section 513.15(d)(3) purports to make possession or use of over ten grams of solid hashish or over two grams of liquid hashish a fifth degree felony (Exhibit 1, page 11 of 16).

- Section 513.15(f)(3) purports to make the illegal cultivation of marihuana equal to, or in excess of, two hundred grams a fifth degree felony (Exhibit 1, page 11 of 16).

- Section 513.15(j) says: "Trafficking in marihuana shall be a fifth degree felony." (Exhibit 1, page 12 of 16).

As discussed above, Section 515.15(m) also prohibits the police and "City Attorney" from reporting any marihuana or hashish possession or distribution. So the initiative purports to create felony offenses, and then forbids the policy or "City Attorney" from revealing information about those purported felonies.

These three sections of Relators' initiative, unequivocally purport to ordain felonies, which are obviously beyond the authority of the Norwood City Council to control by ordinance or resolution, so they cannot be properly considered by the people of Norwood by initiative.

Fifth Proposition of Law

The gatekeeping function of a county board of elections in Ohio reasonably includes the sound discretion to exclude nonsensical language in an initiative petition from the ballot.

At least two of the "penalty" sections of Relators' initiative do not even use complete sentences:

- Relators' petition Section 513.15(e) states, in full: "No person shall knowingly cultivate or manufacture marihuana. The penalty for the offense shall be as follows:"

(Exhibit 1, page 11 of 16).

- Relators' petition has two paragraphs marked "Section 513.15(f)", the second of which states in full: "No person shall knowingly give or offer to make a gift of twenty grams or less of marihuana. The penalty shall be determined as follows:" (Exhibit 1, page 11 of 16).

The language in those provisions "as follows:" is actually followed by nothing. These two "penalty" provisions of Relators' initiative are, grammatically and substantively, nonsense. These "penalty" provisions convey no meaning to the voter. It is within the sound discretion of a county board of elections to exclude literally nonsense from the ballot.

Sixth Proposition of Law

Where the Ohio Revised Code and the United States Code specifically permit criminal and civil asset forfeiture due to violation of various sections of Ohio and United States statutes prohibiting marihuana and hashish trafficking, Relators' petition prohibiting the enforcement of criminal and civil asset forfeitures is beyond the municipality's legislative authority, and a county Board of Elections is authorized to exclude an initiative petition containing such a provision.

Relators' petition, Section 513.15 (o) states, in full:

> "Criminal or Civil Asset Forfeiture due to any violation of these sections herein is not authorized and is strictly prohibited by any authority."

Exhibit 1, page 12 of 16.

Relators' petition Section 513.15(o) purports to prohibit what is specifically authorized throughout Ohio under Ohio Revised Code Chapter 2981, including the fourteen sections of Ohio's Forfeiture Law, §2981.01 through §2981.14. The initiative's use of the phrase "is strictly prohibited by *any authority*" (emphasis added) would prohibit not just the City of Norwood's Police Department, and independently-elected Law Director, but also the Hamilton County Sheriff, the Hamilton County Prosecutor, the Ohio State Patrol, the Ohio Attorney General, the United States Drug Enforcement Administration, the United States Federal Bureau of Investigation and the United States Attorney General from implementing the full range of both

Ohio and federal forfeiture statutes addressing marihuana and hashish trafficking which have been in place, and been used, for years. Analyzing the amazing breadth of Relators' petition Section 513.15(o), through the lens of Article II, §1f of the Ohio Constitution, the only just conclusion to be reached is that it cannot possibly be among the "questions which such municipalities may now or hereafter be authorized by law to control by legislative action." Therefore, Section 513.15(o) cannot been the proper subject of a municipal initiative. This is another example of the overreach which could occur if this initiative, well beyond that authority allotted to the Norwood City Council, is presented to the people of Norwood.

IV. CONCLUSION

The people of the City of Norwood should not be burdened with having to consider a 13-page initiative, some of which is grammatically nonsensical, and more of which far exceeds what Norwood's legislative authority, its City Council, would be authorized to control by ordinance. The Hamilton County Board of Elections recognized this truth, and acted on it. This Court should acknowledge this same truth and deny Relators' writ of mandamus.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Amicus Curiae Brief has been served upon the following by e-mail transmission this 15th day of September, 2016:

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