

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

IN RELATION OF STATE OF OHIO,
KIMBERLY KENDALL CORRAL, :

Relator, :

No. 108880

v. :

DOMINIC VITANTONIO, :

Respondent. :

JOURNAL ENTRY AND OPINION

JUDGMENT: DENIED

DATED: January 8, 2020

Writ of Quo Warranto
Motion Nos. 532007 and 530875
Order No. 530875

Appearances:

Kimberly Kendall Corral, *pro se*.

Argie, D'Amico & Vitantonio, Dominic J. Vitantonio, *for respondent*.

PATRICIA ANN BLACKMON, J.:

{¶ 1} On August 6, 2019, the relator, Kimberly Kendall Corral, filed a motion for leave to file an action in quo warranto with a proposed complaint for quo warranto. The gravamen of the matter is that Corral is seeking to remove the

respondent, Dominic Vitantonio, from his position as Special Prosecutor in the underlying cases, *Euclid v. Amriott*, Euclid Municipal Court Nos. 19CRB00890 and 19CRB00921. Corral argues that Vitantonio was improperly appointed and that he has a conflict of interest that also prohibits him from holding the position. On September 4, 2019, the respondent filed a brief in opposition and included in the filing a request for \$2,750.00 in attorney fees because the relator has engaged in frivolous conduct. Relator filed her reply brief on September 17, 2019. For the following reasons, this court denies the motion for leave to file an action in quo warranto and denies the request for attorney fees.

{¶ 2} As gleaned from the filings in this case, on August 12, 2017, city of Euclid Police Officer Michael Amriott arrested Richard Hubbard. A video recording of the arrest appears to show Amriott using excessive force against Hubbard.¹ Subsequently, in December 2018, seven citizens of Euclid filed affidavits in Euclid Municipal Court, pursuant to R.C. 2935.09 asserting claims of misdemeanor and felonious assault against Amriott regarding his arrest of Hubbard. The Euclid Municipal Court referred the accusations to the county prosecutor and the city prosecutor for investigation. On June 13, 2019, Euclid's Law Director appointed and retained Vitantonio to investigate the misdemeanor accusations made in the complaining affidavits. On August 6, 2019, Hubbard signed Crim.R. 4 complaints against Amriott for assault and interfering with civil rights. Also on that date,

¹ It is alleged that Euclid fired Amriott, but a union grievance procedure reinstated him.

Vitantonio filed notice of appointment of special prosecutor and filed complaints against Amriott for two counts of assault and one count of interfering with civil rights. *Euclid v. Amriott*, Euclid M.C. No. 19CRB00890. A week later Vitantonio filed two counts of assault and one count of interfering with civil rights against Amriott in *Euclid v. Amriott*, Euclid M.C. No. 19CRB00921.

{¶ 3} Corral, who is alleged to be Amriott's defense counsel, claims that Vitantonio wrongfully holds the office of Special Prosecutor for the city of Euclid and should be removed through quo warranto. First, she alleges that he was improperly appointed to the office. Euclid Municipal Ordinance 139.01 provides in pertinent part as follows: "In the office of the Director of Law, there shall be such assistants and special counsel as shall be authorized by Council. * * * One of the assistants shall be the Police Prosecutor and the other an Assistant Law Director, both of whom shall perform such duties as shall be delegated to them by either the Mayor or the Director of Law." Corral concludes that because the director of law, and not council, appointed Vitantonio, he holds the position unlawfully.

{¶ 4} Corral further claims that conflicts of interest also disqualify Vitantonio as Special Prosecutor. Vitantonio is counsel for the Ohio Patrolmen's Benevolent Association. At some unspecified time in the past, Amriott was a member of the Ohio Patrolmen's Benevolent Association and "sought and was denied representation by the OPBA." Thus, "Vitantonio is not in a position to prosecute a person which his concurrent client refused to defend." (Pg. 2 of memorandum of law in support of motion for leave.)

{¶ 5} Corral also claims that Amriott is now a member of the Fraternal Order of Police, Ohio Labor Council, which competes directly with the Ohio Patrolmen's Benevolent Association. Thus, "with the appointment of Vitantonio, a labor and defense lawyer to one police union is not able to prosecute bargaining members of the competing police union." (Pg. 1 of memorandum of law in support of motion for leave.)

{¶ 6} Corral argues that Ohio Rules of Professional Conduct prohibit any conflict of interest that may arise out of private practice when a lawyer is working on behalf of the government. Prof.Cond.R.1.7(a)(2) provides in pertinent part that a "lawyer's acceptance * * * of representation of a client creates a conflict of interest if * * * there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client * * *." (Emphasis sic.) Corral also quotes Comment 4 to Prof.Cond.R.1.11: "a lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government." Corral concludes that Vitantonio's representation of the OPBA will create a substantial risk that he will consider the benefit to the OPBA when considering the prosecution of Amriott.²

² Corral also attached to the reply brief two "newspaper" or website articles claiming that Vitantonio represents police officers accused of improprieties, implying that his concerns for past and future such clients would create a conflict inhibiting his duties as Special Prosecutor. The court disregards these articles and this argument because newspaper articles are not admissible as evidence of the facts reported therein. *Cleveland*

{¶ 7} Ohio Revised Code Chapter 2733 governs quo warranto. R.C. 2733.01 provides in pertinent part as follows: “A civil action in quo warranto may be brought in the name of the state: (A) Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office * * * within this state, * * * (B) Against a public officer * * * who does or suffers an act which, by law, works a forfeiture of his office.” R.C. 2733.05 provides that the attorney general or a prosecuting attorney may bring an action in quo warranto. The Supreme Court of Ohio has stated “that the action is primarily a state action “to shield the sovereignty of the state from invasion and to prevent the abuse of corporate powers.” *State ex rel. Thomas v. Kane*, 43 Ohio St.3d 164, 165, 539 N.E.2d 1122 (1989), quoting *State ex rel. Cain v. Kay*, 38 Ohio St.2d 15, 17, 309 N.E.2d 860 (1974), and *State v. Dayton Traction Co.*, 64 Ohio St. 272, 280, 60 N.E. 291 (1901). Thus, the ordinary means of commencing a quo warranto action is for the state, through the attorney general or a prosecuting attorney, to institute the action.

{¶ 8} The exception is stated in R.C. 2733.07: “When the office of prosecuting attorney is vacant, or the prosecuting attorney is absent, interested in the action in quo warranto, or disabled, the court, of a judge thereof in vacation, may direct or permit any member of the bar to act in his place and bring and prosecute the action.” Corral is seeking to leave pursuant to R.C. 2733.07 to commence the quo warranto action. The appointment of private counsel to represent the state in a

v. Assn. of Emps., 84 Ohio App. 43, 81 N.E.2d 310 (8th Dist.1948); and *Heyman v. Bellevue*, 91 Ohio App. 321, 108 N.E.2d 161 (6th Dist.1951)

quo warranto proceeding is totally within the discretion of the court, and the court need not appoint any certain recommended counsel. *State ex rel. Thomas v. Kane*, 43 Ohio St.3d 164.

{¶ 9} Moreover, quo warranto, like the other extraordinary writs, will not lie if there exists an adequate remedy at law. *State ex rel. Johnson v. Talikka*, 71 Ohio St.3d 109, 1994-Ohio-260, 642 N.E.2d 353.

{¶ 10} Corral has not convinced this court that it should, in the exercise of its discretion, allow her or another private attorney to seek Vitantonio's ouster. First, the court is not convinced that the prerequisite of the prosecuting attorney being absent, disabled, or interested in the quo warranto action has been fulfilled. By its plain wording, the statute envisions that the county prosecuting attorney, as the representative of the state, would bring the action protecting state sovereignty. The statute does not extend this ability to municipal law directors. Corral seizes upon the language of "local prosecutor" in *State ex rel. Kohl v. Dunipace*, 56 Ohio St.2d 120, 382 N.E.2d 1358 (1978), as the Supreme Court of Ohio's acknowledgement that R.C. 2733.05 extends to such local prosecutors. However, an examination of *Kohl* reveals that the local prosecutor who had an interest in the case was the local prosecutor from Wood County. Thus, the court concludes that this essential prerequisite has not been fulfilled.

{¶ 11} Next, the court is not convinced that Vitantonio was improperly appointed. Euclid Municipal Ordinance 129.03 provides in pertinent part as follows: "When approved by the Mayor, the Director of Law shall be authorized to

employ, engage or retain the professional services of outside legal counsel, including labor negotiators, from time to time when such services are required and necessary in his or her opinion to assure adequate representation in specialized and technical litigation in which the City is involved.” This ordinance appears to vest the law director with sufficient authority to appoint a special prosecutor. Corral contests this interpretation, arguing that 139.01 language concerning special counsel and police prosecutor means that 139.01 controls the appointment of prosecuting attorneys, including special prosecutors. Corral continues that 139.03’s examples of labor negotiators and specialized and technical litigation limits that ordinance’s scope to civil attorneys. This court is not convinced because the ordinances do not directly state that and because such an interpretation would defeat the flexibility 139.03 intends.

{¶ 12} In any event, there are adequate remedies at law in the trial court to contest the appointment. In *Talikka*, 71 Ohio St.3d 109, the defendant in a criminal case sought to remove the special prosecutor through a writ of quo warranto. The Supreme Court of Ohio affirmed the denial of the writ, because the defendant had the adequate remedy at law of filing a motion to dismiss the indictment for lack of authority and then appealing if the motion was overruled and the defendant convicted. Similarly, in *State ex rel. Jackson v. Allen*, 65 Ohio St.3d 37, 1992-Ohio-27, 599 N.E.2d 696, the Supreme Court denied a writ of quo warranto to remove a special prosecutor, because the defendant had an adequate remedy at law by means

of a motion to dismiss the indictments on the grounds that the special prosecutor improperly held his position.

{¶ 13} The claims of conflict of interest may and should be reviewed by the trial court. In *State v. Gillard*, 64 Ohio St.3d 304, 595 N.E.2d 878 (1992), syllabus, the Supreme Court of Ohio ruled that when a trial court knows or reasonably should know of an attorney's conflict of interest, it has an affirmative duty to inquire whether the conflict of interest actually exists. Although *Gillard* concerned a defense attorney's conflict of interest, there is no reason why a prosecutor's conflict should not be examined first by the trial court and then the decision appealed if necessary. In the present case, defense counsel would be at liberty to file an appropriate motion raising the conflict of interest issue.

{¶ 14} Accordingly, this court denies the motion for leave to file a writ of quo warranto. The court also denies the respondent's motion for attorney fees. Relator to pay costs. This court directs the clerk of courts to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶ 15} Motion for leave denied.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR