

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State ex rel. Roy Whitehead,
Michael Benton, Gregory S. Gerwin,
and Richard A. Harman

Court of Appeals No. S-12-022

Relators

v.

Sandusky County Board of Commissioners
and Sandusky County Board of Elections

DECISION AND JUDGMENT

Respondents

Decided: September 27, 2012

* * * * *

Andrew R. Mayle, Jeremiah S. Ray, and Ronald J. Mayle, for
relators.

Russell V. Leffler, Special Prosecuting Attorney, for respondents.

* * * * *

SINGER, P.J.

{¶ 1} Relators, Roy Whitehead, et al., filed a complaint in mandamus against respondents, Sandusky County Board of Commissioners, et al., requesting that this court issue a declaratory judgment determining 2012 Am.Sub.H.B. No. 509 (“H.B. 509”) to be

unconstitutional and to return to the status quo, as if the bill had never been enacted.

Relators also request this court to order respondents to hold an election of judges for the current county court. Respondents have filed an answer and relators filed a motion for summary judgment. As directed by this court in the expedited election schedule, both parties have filed merit briefs outlining the law and their arguments.

Declaratory Judgment Action – Constitutionality of Am.Sub.H.B. No. 509

{¶ 2} This action centers around the constitutionality of specific sections of H.B. 509 which abolish the current Sandusky County County Court, establish a new court titled the “Sandusky County Municipal Court,” and provide for the appointment of two part-time interim judges for the new court, until an election for the new judge for the new court is held in November 2013. The enacted legislation goes into effect on September 28, 2012 and amends R.C. 1901.01, 1901.02, and 1901.08. 2012 Am.Sub.H.B. No. 509. The sections relevant to this action provide as follows:

Sec. 1901.01. (A) There is hereby established a municipal court in each of the following municipal corporations:

* * *

(H) Effective January 1, 2013, there is hereby established a municipal court within Sandusky county in any municipal corporation or unincorporated territory within Sandusky county, except the municipal corporations of Bellevue and Fremont and Ballville, Sandusky, and York townships, that is selected by the legislative authority of that court.

* * *

Sec. 1901.02. (A) The municipal courts established by section 1901.01 of the Revised Code have jurisdiction within the corporate limits of their respective municipal corporations, or, for the Clermont county municipal court, the Columbiana county municipal court, and, effective January 1, 2008, the Erie county municipal court, within the municipal corporation or unincorporated territory in which they are established, and are courts of record. Each of the courts shall be styled “..... municipal court,” inserting the name of the municipal corporation, except the following courts, which shall be styled as set forth below:

* * *

(30) The municipal court established within Sandusky county in any municipal corporation or unincorporated territory within Sandusky county, except the municipal corporations of Bellevue and Fremont and Ballville, Sandusky, and York townships, that is selected by the legislative authority of that court and that, beginning January 1, 2013, shall be styled and known as the “Sandusky county municipal court.”

(B) In addition to the jurisdiction set forth in division (A) of this section, the municipal courts established by section 1901.01 of the Revised Code have jurisdiction as follows:

* * *

Beginning January 1, 2013, the Sandusky county municipal court has jurisdiction within all of Sandusky county except within the municipal corporations of Bellevue and Fremont and Ballville, Sandusky, and York townships.

* * *

Sec 1901.08 The number of, and the time for election of, judges of the following municipal courts and beginning of their terms shall be as follows:

* * *

In the Sandusky county municipal court, one full-time judge shall be elected in 2013. Beginning on January 1, 2013, the two part-time judges of the Sandusky county county court that existed prior to that date shall serve as part-time judges of the Sandusky county municipal court until December 31, 2013. If either judgeship becomes vacant before January 1, 2014, that judgeship is abolished on the date it becomes vacant, and the person who holds the other judgeship shall serve as the full-time judge of the Sandusky county municipal court until December 31, 2013.

* * *

Until December 31, 2006, in the Sandusky county county court, two part-time judges shall be elected in 1994, terms to commence on January 1, 1995, and January 2, 1995, respectively. The judges elected in 2006 shall

serve until December 31, 2012. The Sandusky county county court shall cease to exist on January 1, 2013.

Law

{¶ 3} We begin our analysis with the well-established proposition that all legislative enactments are presumed to be constitutional, and to prevail on a challenge to the constitutionality of a statute, the challenger must demonstrate that the statute is unconstitutional beyond a reasonable doubt. *State v. Lowe*, 112 Ohio St.3d 507, 861 N.E.2d 512, 2007-Ohio-606, ¶ 17, citing *Klein v. Leis*, 99 Ohio St.3d 537, 795 N.E.2d 633, 2003-Ohio-4779, ¶ 4. The presumption of the validity of a legislative enactment “cannot be overcome unless it appear[s] that there is clear conflict between the legislation in question and some particular provision or provisions of the Constitution.” *Xenia v. Schmidt*, 101 Ohio St. 437, 130 N.E. 24 (1920), paragraph two of the syllabus. With this standard in mind, we will now examine the issues before us.

{¶ 4} The General Assembly is vested with full power to determine what courts, inferior to the court of appeals, it will establish and to define their jurisdiction and power. Ohio Constitution, Article IV, Section 1; *Ex parte Hesse*, 93 Ohio St. 230, 233, 112 N.E. 511 (1915). The General Assembly may create and abolish judgeships, subject to certain conditions. Ohio Constitution, Article IV, Section 15. The General Assembly has no authority or power, however, to appoint judges. *Kovachy v. City of Cleveland*, 166 Ohio St. 388, 389, 143 N.E.2d 479 (1957), citing the Ohio Constitution, Article II, Section 27. All the judicial power of the state is vested in the courts designated in the Ohio

Constitution; upon the creation of any additional court by the legislature, the judicial officer must be elected by the electors of the district for which such court is created and it is not within the competency of the legislature to clothe with judicial power any officer or person not elected as a judge. *See Ex parte Logan Branch*, 1 Ohio St. 432, 434 (1853). Thus, the Ohio Constitution expressly empowers the General Assembly to establish a court; however, this authority does not extend to allow the legislature to select and qualify judges for that court. Consequently, judges must be elected or, under certain limited circumstances, such as to fill a vacancy in an already elected judge's office, may be appointed by the governor. Ohio Constitution, Article IV, Section 13.

{¶ 5} The Ohio Constitution also contains provisions regarding the time for holding elections and terms of office for elected officers. Ohio Constitution, Article XVII, Section 1. The term of office “of all elective county, township, municipal, and school officers shall be such even number of years not exceeding four as may be prescribed by law or such even number of years as may be provided in municipal or county charters. The term of office of all judges shall be as provided in Article IV of this constitution or, if not so provided, an even number of years not exceeding six as provided by law.” *Id.* The elections for elective officers other than state and county officers, “shall be held on the first Tuesday after the first Monday in November in the odd numbered years.” *Id.*

Analysis

{¶ 6} After reviewing the language of amended sections 1901.01 and 1901.02, which provide for the abolishment of one court and the creation of a new court, we conclude that those sections are well within the legislature’s powers conferred by the Ohio Constitution. Therefore, we determine H.B. 509’s amendments of those two sections to be constitutional. It is the procedure enacted in the amendment to section 1901.08, however, which is the primary subject of concern to this court.

{¶ 7} A plain reading of the section 1901.08 amendment indicates that the legislature has, in fact, provided for the appointment of two judges to the newly created Sandusky County Municipal Court. Any other interpretation simply is not credible. Furthermore, the enactment clearly states that the two part-time judges who served in the abolished court will automatically become the judges and share the single judge position created in the newly created court for one year.

{¶ 8} We are aware that Section 1, Article XVII of the Ohio Constitution provides that “[t]he general assembly may extend *existing terms of office* as to effect the purpose of this section.” (Emphasis added.) In this case, however, the existing terms of office, along with the existing court, will cease to exist as of January 1, 2013. The newly created judgeship does not yet exist nor has any judge ever been duly elected to that office. The legislature’s provision in H.B. 509 ignores the clear constitutional mandate that the judges for a court must be elected. Respondent’s argument that “two duly elected judges will serve an additional year in the capacity to which they were elected” likewise ignores

the fact that those two judges were not, in fact, elected for the newly created court, which actually provides for only one judge. Therefore, we conclude that the portion of the amendment which provides for the appointment of the former Sandusky County County Court judges to share the newly created judge position of the Sandusky County Municipal Court is unconstitutional beyond a reasonable doubt.

Remedy in Mandamus

{¶ 9} To be entitled to the issuance of a writ of mandamus, relator must demonstrate: (1) a clear legal right to the relief prayed for, (2) a clear legal duty on the respondent's part to perform the act, and (3) that there exists no plain and adequate remedy in the ordinary course of law. *State ex rel. Master v. Cleveland*, 75 Ohio St.3d 23, 26-27, 661 N.E.2d 180 (1996); *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 374 N.E.2d 641 (1978). In this case, having determined that some portions of H.B. 509 are unconstitutional, we conclude that relators have established a legal right, in part, to the relief requested, and respondents have a legal duty to have judges elected, either for the current county court or for the newly created county municipal court. Because the November 2012 election is less than two months away, we also conclude that there exists no plain and adequate remedy in the ordinary course of law. *See State ex rel. Smart v. McKinley*, 64 Ohio St.2d 5, 412 N.E.2d 393 (1980).

{¶ 10} We must now determine the appropriate remedy to the dilemma created by the legislature. Since we have determined that the appointment provision is unconstitutional, the question centers on which court will exist after December 31, 2012.

Relators urge us to find the amendments inextricably bound together, to find them all unconstitutional, and to return to the current status which would keep the Sandusky County County Court in effect. Respondents argue, among other options, that we may sever the offending sentences, allow the new court to be in existence, and that the Chief Justice of the Supreme Court could appoint temporary judges to operate it until the 2013 election. We find neither of these alternatives to be satisfactory.

{¶ 11} In enacting H.B. 509, the overriding intent of the General Assembly was to: (1) abolish the Sandusky County County Court and (2) replace it by creating the Sandusky County Municipal Court. Since it is this court's duty to carry out the intent of the legislature when it enacted these amendments, we conclude that the amendments to R.C. 1901.01 and 1901.02 are severable from the language in the amendment to R.C. 1901.08.

{¶ 12} Further, the language in the amended section R.C. 1901.08 which appoints the existing judges from the former county court to take the position for one year in the Sandusky County Municipal Court may be severed from the portion providing for an election.¹ Moreover, the judge for the newly created court must be elected prior to the

¹ The following is the portion deemed to be unconstitutional.

Beginning on January 1, 2013, the two part-time judges of the Sandusky county county court that existed prior to that date shall serve as part-time judges of the Sandusky county municipal court until December 31, 2013. If either judgeship becomes vacant before January 1, 2014, that judgeship is abolished on the date it becomes vacant, and the person who holds the other

date that the court's jurisdiction begins. Therefore, in order to give effect to the change in R.C. 1901.02, we conclude that a special election must be held prior to January 1, 2013, to elect the judge for the newly created court. In keeping with the original intent of the amendment, that term will be for one year. An election for a full six-year term will then be held in November 2013, as designated in the amendment, which will put the new court elections and judge's terms in sync with the Ohio Constitution requirements .

{¶ 13} The date for the special election should be determined as soon as possible, with the time for submitting petitions by the prospective candidates extended to an appropriate date prior to the election. This remedy not only carries out the legislative intent of the enacted amendments, but also provides the opportunity for all interested parties to participate in the election.

{¶ 14} Therefore, pursuant to R.C. 2731.06, this court issues a writ of mandamus and orders that respondents comply with the orders in this decision. Due to the nature of this proceeding, relators' request for attorney fees is not well-taken and is denied. Court costs of this proceeding are assessed to respondents.

{¶ 15} To the Clerk: Manner of Service

{¶ 16} The sheriff of Sandusky County shall immediately serve, **upon the respondents** by personal service, a copy of this writ pursuant to R.C. 2731.08.

judgeship shall serve as the full-time judge of the Sandusky county municipal court until December 31, 2013.

{¶ 17} The clerk is further directed to immediately serve **upon all other parties** a copy of this writ in a manner prescribed by Civ.R. 5(B).

{¶ 18} It is so ordered.

Petition granted.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.