

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

State of Iowa, ex rel. Gary R. Allison)
as County Attorney for Muscatine)
County, Iowa,)

Plaintiff,)

vs.)

Thomas J. Vilsack, Governor of)
the State of Iowa, 99AG10350)

Defendant.)

No. EQCV016165

REPLY TO RESISTANCE
TO MOTION TO DISMISS

In an effort to “fit” a cause of action into the only litigation vehicle that affords a county attorney standing as a plaintiff to challenge Executive Order No. 42, County Attorney Allison attempts to blur black letter law on mandamus. The statutory application process for restoration of rights is created as a “right” conferred on persons convicted of criminal offenses and is expressly drafted so as not to “impair” the “power of the governor under the constitution to grant . . . restoration of the rights of citizenship. . . .” Iowa Code §§ 914.1-2 (2005). Nothing in Executive Order No. 42 is inconsistent with the rights conferred on offenders.

The County Attorney’s effort to challenge the Executive Order No. 42 by mandamus is fatally misguided. The Petition for Order of Mandamus -- which expressly asks this court to “order the Governor that no executive order for restoration of rights

issue without full compliance with the limitations on his clemency powers” in Iowa Code Chapters 914 and 915 -- simply states no cause of action in mandamus. (Petition ¶ 13) The Executive Order has already issued, so the relief pled in the petition is no longer possible. More importantly, Executive Order No. 42 is not subject to review of its legal validity by mandamus and, in any event, does not contravene Iowa Code Chapters 914 and 915. The Petition for Order of Mandamus, therefore, should be dismissed.

Limitations on Mandamus

Chapter 661, under which the County Attorney proceeds, codifies the common law limitations on mandamus. Mandamus cannot be used to determine legal rights -- only to enforce legal rights that have already been established. Stith v. Civil Service Comm'n, 159 N.W.2d 806, 808-09 (Iowa 1968). In statutory terms, mandamus must be brought “to obtain an order . . . commanding . . . a person to do or not to do an act, the performance of which the law enjoins as a duty resulting from an office, trust, or station.” Iowa Code § 661.1 (2005). The duty must be sufficiently clear that the plaintiff has demanded performance, the refusal or neglect or which entitles the plaintiff to an order “commanding the defendant to fulfill such duty.”¹ Iowa Code § 661.9 (2005). If the duty sought to be compelled does not result directly from an “office, trust or station,”

¹ No demand was made that the Governor refrain from executing Executive Order No. 42. Plaintiff brushes off this statutory requirement by pleading that a demand would have been “an act of futility.” (Petition ¶ 12)

it must be a duty “for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance.” Iowa Code § 661.6 (2005). As the statutes delineate, a plaintiff comes into court with a cause of action in mandamus to enforce an established right. The plaintiff cannot come into court in mandamus in order to litigate whether the law has been violated.

The County Attorney’s attempt to factually distinguish cases on mandamus muddies the point. The crux of the dispute in Woodbury County v. Talley, 147 Iowa 498, 123 N.W. 746 (1909), was a decision by a county treasurer to decline to tax certain property that had been previously assessed by the county assessor as nontaxable. While the County Attorney tries to confine the holding of this case to the availability of alternative remedies, the Iowa Supreme Court plainly declined to allow mandamus to review the decision already made by the county official. Id. at 505, 123 N.W. at 749 (“What the appellants really ask the court to do is to command the treasurer to act again, to reverse and set aside the decision made by him, and to make another which shall accord with appellant's view of the law. Certainly this is not the office of mandamus.”). Similarly, the County Attorney is attempting in this case to use mandamus to review the legality of an Executive Order that has already issued.

Principles of law set forth in Stith v. Civil Service Comm’n cannot be disregarded based on minor factual distinctions. Stith states squarely that mandamus is not the

proper remedy to determine issues of law. Stith v. Civil Service Comm'n, 159 N.W.2d at 808-09. If government officials have acted illegally, a resolution of the legal issues and a remedy, if any, must be through alternative legal proceedings.² Similarly, any challenge to the legality of Executive Order No. 42 cannot be resolved in mandamus.

Harmony with Statutory Restoration Procedures

No statutes have been violated by Executive Order No. 42. The Executive Order, unseen by the County Attorney prior to drafting and filing his petition, expressly carves out the statutory process for restoration of rights. By its terms, the Executive Order does not apply to persons who have made an application for restoration of rights pursuant to Iowa Code Chapter 914. (Executive Order No. 42, ¶ I) A prayer for relief seeking an order directing the Governor to comply with Iowa Code Chapters 914 and 915, therefore, is improper.

Dismissal as Appropriate Remedy

Where mandamus has been brought improperly, dismissal is the appropriate remedy. See Moderate Income Housing, Inc. v. Board of Review of Pottawattamie County, 393 N.W.2d 324, 326 (Iowa 1986). Ordinarily a petitioner would be allowed the

² The County Attorney does not have another legal vehicle as plaintiff, because he lacks standing to pursue any other legal remedies. See Brief in Support of Motion to Dismiss and Resistance to Motion for Temporary Order, p. 5, fn 1. The County Attorney has not responded to the assertion that he lacks standing outside the scope of a mandamus proceeding. See Brief in Support of Motion to Dismiss and Resistance to Motion for Temporary Order, pp. 7-9.

opportunity to recast a petition for mandamus into proper form. See I.R.Civ.P. Rule 1.458. The lack of standing to pursue another form of remedy, however, forecloses the County Attorney from this possibility.

Respectfully submitted,

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