

8/2/05

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

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

No. EQCV016165

vs.

RESISTANCE TO MOTION
TO DISMISS

Thomas J. Vilsack,
Governor of the State of Iowa,
Defendant.

COMES NOW the State of Iowa, by Muscatine County Attorney Gary R. Allison

and resists defendant's motion to dismiss:

Dismissal of a petition is an extraordinary remedy. Such a motion is properly sustained only when there exists no conceivable set of facts entitling the non-moving party to relief. Orud v. Groth, 652 N.W.2d 447, 450 (Iowa 2002). This Court's review must be based only on the facts and circumstances contained in the petition. Tate v. Derifield, 510 N.W.2d 885, 887 (Iowa 1994). The allegations in the petition must be viewed in their most favorable light, resolving all doubts in the plaintiff's favor. Magers-Fionof v. State, 555 N.W.2d 672, 674 (Iowa 1996).

Thus, for purposes of the motion to dismiss, the Court must assume that the issue presented is in the "public interest" as that term is used by Iowa Code § 661.8: "The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the county attorney, when the public interest is concerned, and is in the name of such private party or of the state, as the case may be in fact brought." The Court must also assume that the Governor's restoration of rights scheme is a violation of the applicable provisions of

Iowa Code Chapters 914 and 915 as described in the previously filed memoranda in support of the motion for temporary order.

Defendant claims that mandamus, "is not a proper remedy to challenge the legality of an act that has already occurred." In support of this statement, defendant cites Woodbury County v. Talley, 147 Iowa 498, 123 N.W. 746 (1909). In Talley a county treasurer ruled as to the taxable nature of certain corporate property. The persons aggrieved by that decision did not seek any form of judicial review. They instead sought an action in mandamus to require the treasurer to reach the opposite conclusion. Rather than rejecting the mandamus action because the act had already occurred, the Court rejected it because of the method by which the action had been challenged:

[I]t appears to us very clear that the conceded facts exclude the remedy by mandamus. While demanding that the treasurer act upon the facts and evidence produced before him and determine the question submitted to his decision, the petition shows that he has already acted and already made his decision. 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. If the treasurer has any discretion in such cases, if his decision is either judicial or quasi judicial, the order made by him may be erroneous, but it is not void, and his errors must be corrected by appeal where a right of appeal is given or by certiorari or other appropriate method of review. Mandamus does not contemplate the review of judicial acts or orders.

Id. at 749 (emphasis added).

Talley merely stands for the proposition that mandamus cannot be used to control the ultimate discretion exercised by the official – a use not sought by the State of Iowa in this petition. To describe Talley as holding that mandamus does not apply to acts which have already occurred is misleading.


Equally misleading is defendant's claim that "mandamus is not a proper remedy to challenge the legal validity of an action" under Sith v. Civil Service Commission of


City of Des Moines, 159 N.W.2d 806 (Iowa 1968). Upon review of the Sith decision it is clear that the Court merely held that mandamus was an improper vehicle to compel a civil service commission to make a determination as to which statute regulating public employees applied to the plaintiff. The plaintiff in Sith had sought an order in mandamus to compel the commission to determine that the provisions of law which said that he could only be discharged for cause superseded other provisions of law which mandated his retirement at age seventy. The Court found that there was no clearly established right with respect to the application of the conflicting statutes. That is, the requested mandamus order really sought to control the ultimate discretion of the commission - which statute applied to the plaintiff. The Court found that mandamus was not the correct means to resolve the statutory conflict and converted the action to one for a writ of certiorari. Id. at 808-09.

Here, the duties applicable to the Governor are clearly established by statutes enacted in accordance with an unambiguous constitutional provision. Indeed, defendant has failed to cite a single provision of Iowa law which would except the Governor from compliance with the procedures which predicate the grant of executive clemency (as opposed to his clear authority, after compliance, to make any decision with regard to clemency he finds proper).

Defendant's entire motion is premised on his claim that mandamus is not the appropriate remedy. Under the established principles for review of a motion to dismiss, however, the Court must determine at this stage that the Governor's action is illegal and contrary to the public interest. Upon such a determination, the motion to dismiss is clearly without merit.

WHEREFORE, the State of Iowa respectfully requests defendant's motion to dismiss be denied.


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Original filed.
Copy to: Julie Pottorff

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record, or the parties if unrepresented, at their respective addresses disclosed on the pleadings.

By: U.S. Mail Fax
 Courthouse Mail Hand delivered
 Certified Mail Other

Signature: 
Date: 8/2/15