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.	)	BRIEF IN SUPPORT OF MOTION to DISMISS and RESISTANCE TO MOTION FOR TEMPORARY ORDER
Thomas J. Vilsack, Governor of the State of Iowa, 99AG10350	)	
Defendant.	)	

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INTRODUCTION

In this action the county attorney tries to stuff his foot into the Cinderella slipper of a mandamus action in order to challenge Executive Order No. 42 that issued on July 4, 2005 -- four days after the County Attorney filed the Petition for Order of Mandamus. Only in a mandamus action does the County Attorney have standing to sue in the name of the "State of Iowa" in the "public interest." Iowa Code § 661.8 (2005). See State v. Allen, 569 N.W.2d 143, 145 (Iowa 1997). Mandamus is an improper remedy to challenge Executive Order No. 42 after it has issued or to test its legal validity. Because mandamus has been invoked improperly, the County Attorney loses his narrow statutory footing to sue in the name of the "State of Iowa" in the "public interest." Without a proper mandamus action, the County Attorney must demonstrate some other means to establish standing as a proper plaintiff -- a requirement he cannot meet.

Even if the Petition for Order of Mandamus were not dismissed, the County Attorney is not entitled to a temporary order on the merits. The Iowa Constitution allows

the General Assembly authority to regulate the clemency process. Iowa Const. art. IV, § 16. Exercising this authority, the General Assembly has chosen to enact statutes that confer a "right" on persons convicted of a criminal offense to make application for restoration of citizenship rights, but that also expressly state the Governor's authority to restore citizenship rights "shall not be impaired." Iowa Code § 914.1-2 (2005). Because the statutory application process is neither mandatory nor exclusive and the statutes preserve the Governor's constitutional power, the Governor retains authority to restore citizenship rights when no application has been made. Executive Order No. 42, in fact, restores rights of citizenship *only* to those who have *not* made application under the statutes. The statutory procedure chosen by the General Assembly, therefore, is not contravened.

ARGUMENT

I. MANDAMUS IS NOT AN APPROPRIATE REMEDY TO CHALLENGE EXECUTIVE ORDER NO. 42; DISMISSAL LEAVES THE COUNTY ATTORNEY WITHOUT AUTHORITY TO PROCEED.

Generally, mandamus provides a vehicle for litigation that allows the county attorney to sue in the name of the "State of Iowa" to protect the "public interest." Iowa Code §§ 661.8 (2005). See State v. Allen, 569 N.W.2d 143, 145 (Iowa 1997). Because the remedy of mandamus has been invoked improperly, the litigation should be dismissed. Without statutory authority to proceed in mandamus, the county attorney

must establish standing alternatively -- and the elements of standing are lacking in this case.

A. The County Attorney Cannot Use Mandamus to Challenge the Legality of an Executive Order that Has Been Issued.

For nearly a hundred years the Iowa Supreme Court has held that mandamus cannot be used to review the legality of an act that has already occurred. In Woodbury County v. Talley, 147 Iowa 498, 123 N.W. 746 (1909), the Court flatly rejected the use of mandamus to challenge a decision by a county treasurer who declined to tax certain property that previously assessed by the county assessor as nontaxable. Noting that the decision "may be wrong," the Court, nevertheless, explained that "the wrong is not to be righted by a writ of mandamus." Explaining the limited nature of mandamus, the Court stated: "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." Id. at 505, 123 N.W. at 749.

The holding in Talley is consistent with more recent authorities confirming the limited nature of the mandamus remedy. By statute, mandamus is "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). It is "a drastic remedy to be applied only in exceptional circumstances. It is not used to establish rights but to enforce rights that have already been established." Nor can

it be used to control the discretion of a person. Hewitt v. Ryan, 356 N.W.2d 230, 233 (Iowa 1984).

Applying these principles, the Iowa Supreme Court has held that mandamus could not be used to require a civil service commission to reinstate and award compensation to an employee who had been terminated when he reached mandatory retirement age. Stith v. Civil Service Comm'n, 159 N.W.2d 806 (Iowa 1968). The Court reasoned that the question posed in the case was "strictly one of law," i.e., whether a statute imposing a mandatory retirement age of 70 under the Public Employees' Retirement System prevails over a statute providing for termination only for cause under the civil service system. Accordingly, mandamus was improper to determine the rights of the plaintiff and the case was remanded for further proceedings in certiorari.[1] Stith v. Civil Service Comm'n, 159 N.W.2d at 808-09.

These authorities demonstrate that mandamus is improper to challenge Executive Order No. 42. Under Talley, the remedy cannot be used to challenge the legality of an

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[1] Ordinarily, an action filed erroneously in mandamus can be recast in the proper form. See I.R.Civ.P. Rule 1.458 ("In any case of mandamus, certiorari, appeal to the district court, or for specific equitable relief, where the facts pleaded and proved do not entitle the petitioner to the specific remedy asked, but do show the petitioner entitled to another remedy, the court shall permit the petitioner on such terms, if any, as it may prescribe, to amend by asking for such latter remedy, which may be awarded."). But, because mandamus provides the *only* vehicle that allows the county attorney standing to to sue on behalf of the State of Iowa in the public interest, the county attorney cannot recast the petition without losing standing. See Division I. B.

act that has already occurred. Because Executive Order No. 42 has already issued, the county attorney cannot now use mandamus to litigate whether the Executive Order is legally valid. Similarly, under Hewitt and Stith, mandamus cannot be used to determine whether the Executive Order is legally sound. Mandamus can only be used to command a person "to do or not to do an act the performance or omission of which the law enjoins as a duty resulting from office. . . ." Iowa Code § 661.1 (2005). The remedy cannot be invoked to determine the legality of the Executive Order. Because the remedy cannot be used to control discretion, it cannot be used to command the Governor to revise or draft another executive order in its place.[2]

B. The Statutory Authority of the County Attorney to sue in the Name of the "State of Iowa" is Limited to Mandamus.

The statutes authorizing mandamus carve out a specific form of action in which the county attorney has limited authority to sue civilly in the name of the "State of Iowa" in the "public interest." The Attorney General is vested with broad statutory authority to prosecute and defend civil actions in which the "State of Iowa" may be a party or

[2] Executive Order No. 42 actually directs two actions only one of which is challenged in the petition. Paragraph I. restores rights of citizenship to certain offenders effective July 4, 2005. Paragraph III. establishes a prospective process effective August 1, 2005, for review on a monthly basis of offenders who meet criteria in the Executive Order for restoration of rights. This monthly review will include recommendations from the court on those persons discharged from probation. Because mandamus cannot be used to test the legal validity of this process or to control the discretion to restore rights of citizenship to persons on each monthly list, a Petition for Order of Mandamus would be an improper remedy to challenge Executive Order No. 42 on this ground as well. See Hewitt v. Ryan, 356 N.W.2d at 233.

interested and to prosecute and defend actions against any state officer in his official capacity. Iowa Code §§ 13.2(2), 13.2(3) (2005). By contrast, a county attorney has only narrow statutory authority under mandamus statutes to file a civil petition in the name of the "State of Iowa" in the "public interest." Iowa Code § 661.8 (2005). Because this authority is confined to the statutory mandamus remedy, the county attorney is without authority to continue the suit in another form should mandamus fail. See fn. 1, *supra*.

C. The Standing of the County Attorney to Sue in the "Public Interest" is Limited to Mandamus.

Absent statutory authority to proceed in mandamus, the county attorney must establish standing as a plaintiff who can demonstrate a sufficient interest and injury that is different from that of the public generally. The Petition for Order of Mandamus relies solely on the statutory authority to file a mandamus in the "public interest" and, therefore, fails to allege any injury to the Plaintiff that could confer standing.

"'Standing to sue' has been defined to mean that a party must have 'sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" Birkhofer ex rel. Johannsen v. Brammeier, 610 N.W.2d 844, 847 (Iowa 2000) (quoting Black's Law Dictionary 1405 (6th ed.1990)). The Iowa Supreme Court has explained that "a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." Id. at 847; In re Marriage of Mitchell, 531 N.W.2d 132, 134 (Iowa 1995); Hawkeye Bancorporation v. Iowa College Aid Comm'n, 360 N.W.2d 798, 801 (Iowa 1985).

Having a legal interest in the litigation and being injuriously affected are separate requirements for standing, both of which must be satisfied. Hawkeye Bancorporation v. Iowa College Aid Comm'n, 360 N.W.2d at 801. Accordingly, "whether litigants have standing does not depend on the legal merit of their claims, but rather whether, if the wrong alleged produces a legally cognizable injury, they are among those who have sustained it." Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564, 567 (Iowa 1976).

Injury that stems from simple disagreement with the action taken by a state official is too "abstract" to confer standing. Recently in Alons v. Iowa Dist. Court for Woodbury County, No. 03-1982, 2005 WL 1413164, at 13 (Iowa Sup. Ct. June 17, 2005), the Iowa Supreme Court rebuffed standing by legislators to challenge a district court decision with which they simply disagreed. Addressing standing principles, the Court explained:

> [T]hese plaintiffs have not shown that they have a legally recognized or personal stake in the underlying case. Nor have they shown that they have been injured in fact as distinguished from having been injured in an abstract manner. As mentioned, when the only claim is nonobservance of the law, such claim affects only the generalized interest of all citizens. Any injury resulting from such nonobservance is abstract in nature and not sufficient for standing. . . *Simply having an opinion does not suffice for standing*. [Citations omitted and emphasis added.]

Applied to the pending petition, standing principles make clear that the county attorney cannot obtain standing simply by having an opinion on the legal merits of the Executive Order. Because the mandamus action is fatally flawed and must be dismissed as the wrong remedy, the County Attorney cannot proceed in the name of the "State of Iowa" in the "public interest" under Iowa Code section 661.8 and lacks an alternative

ground on which to establish standing.

II. EXECUTIVE ORDER NO. 42 IS CONSISTENT WITH REGULATION OF THE CLEMENCY PROCESS BY THE GENERAL ASSEMBLY.

The County Attorney filed this action before Executive Order No. 42 issued and, therefore, did not have the opportunity to review the Executive Order before the petition was drafted. Nevertheless, the county attorney asserts in the petition that the Governor is acting "contrary to the duly enacted limitations on his constitutional authority contained within Iowa Code chapter 914 and 915." (Petition ¶ 13) A close reading of Executive Order No. 42 demonstrates that nothing in its terms is contrary to statute.

A. The General Assembly Failed to Limit Restoration of Rights of Citizenship Exclusively to a Statutory Application Process.

The Iowa Constitution allocates power to grant restoration of citizenship rights between the Governor and the General Assembly. See Dean v. Haubrich, 248 Iowa 978, 83 N.W.2d 451 (1957) ("qualifications of voters and office holders within the states were reserved to the states and are exclusively under state control"). The Governor is vested with executive "power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, *subject to such regulations as may be provided by law*." Iowa Const. art. IV, § 16 (emphasis added). By subjecting the Governor's authority to "such regulations as may be provided by law," the Iowa Constitution, like the constitutions of many other states, leaves room for reasonable legislative enactments. See, e.g., Ark. Const. art. VI, § 18 (governor has full clemency

authority, except in cases of treason and impeachment, "under such rules and regulations as shall be prescribed by law."); Ark. Code Ann. § 16-93-204(a) (all applications for clemency "shall be referred to the [Parole Board]."); and Mo. Const. Art. IV, § 7 (power to pardon vests in the governor, except in cases of treason or impeachment, under rules and regulations prescribed for the manner of applying); Mo. Rev. Stat. § 217.800(2) (all pardon applications referred to the Board of Probation and Parole for investigation and recommendation.).

Responding to this constitutional invitation, the General Assembly, in turn, has provided a person convicted of a criminal offense with "the right to make application to the board of parole for recommendation or to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or *restoration of rights of citizenship* at any time following conviction."[3] Iowa Code § 914.2 (emphasis added).

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[3] Chapter 914 further delineates this application process. The Board of Parole reviews applications "periodically" and recommends to the governor, *inter alia*, "restoration of the rights of citizenship for persons who have by their conduct given satisfactory evidence that they will become or continue to be law-abiding citizens." Iowa Code § 914.3(1) (2005). The governor must respond to a recommendation "within ninety days." Iowa Code § 914.4 (2005). Additionally, the governor may, in his discretion, obtain a copy of "the minutes of evidence taken on the trial, and any other facts having reference to the propriety of the governor's exercise of the governor's powers in the premises." Iowa Code § 914.5(1) (2005). The Governor also may "take testimony"or request a statement from the warden or superintendent concerning the applicant's "deportment during the period of imprisonment and a recommendation as to the propriety of restoration." Iowa Code § 914.5(2)-(3) (2005). Finally, the process for issuance of restorations and disposition of copies is detailed. Iowa Code § 914.6(1)-(4) (2005).

But this application process is qualified by a legislative fiat: "The power of the governor under the constitution to grant a reprieve, pardon, commutation of sentence, remission of fines and forfeitures, or restoration of the rights of citizenship *shall not be impaired*." Iowa Code § 914.1 (2005) (emphasis added).

Despite this legislative preservation of the Governor's constitutional power, the County Attorney challenges the Governor's authority to grant restoration of citizenship rights *sua sponte*. This same argument was rejected by the Illinois Supreme Court which recognized that a Governor's constitutional power to grant clemency cannot be restricted to a statutory application process. In Madigan v. Snyder, 208 Ill.2d 457, 467, 804 N.E.2d 546, 588 (2004), the Illinois Court reviewed state statutes that authorized an application process requiring consent by an inmate to an application for executive clemency and upheld the Governor's authority to act without any application pending.

Noting that the Governor had the constitutional "power to grant reprieves, commutations and pardons, after conviction, for all offenses, *subject to such regulations as may be provided by law relative to the manner of applying therefor*," the Court declined to restrict the Governor's authority to act based solely on an application. The Court reasoned: "If petitioners' position were correct, it would mean that the legislature could nullify the Governor's clemency power through legislation, simply by enacting regulations sufficiently strict to prevent any clemency petition from ever reaching the Governor." Significantly, in Illinois "the legislature went out of its way to ensure that no

one would read its regulation of the application process as limiting the Governor's power to act" by enacting a statute that expressly states: "Nothing in this Section shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence, or pardon." People ex rel. Madigan v. Snyder, 208 Ill.2d at 466 -67, 804 N.E.2d at 552-53. This statutory preservation of the Governor's authority to act without a formal application is remarkably similar to Iowa Code section 914.1.

Reviewing the Iowa statutes in light of the Iowa Constitution, it is evident that the General Assembly has chosen to enact statutes that provide for an application process, but that leave the Governor with the unimpaired authority to grant restoration of rights to those who do not make any application at all. Accordingly, Executive Order No. 42 properly restores rights of citizenship to those persons who do not elect to follow the statutory application process.

B. Executive Order No. 42 Complies with the Statutory Application Process Enacted by the General Assembly.

Certainly nothing in Executive Order No. 42 purports to override the application process provided in state statutes.[4] By its terms the Executive Order expressly leaves the application process in place:

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[4] The Petition for Order of Mandamus refers to both Chapter 914 and Chapter 915, but with respect to Chapter 915 cites only to section 915.19. (Petition ¶ 7) This statute requires notification to registered victims prior to granting a "reprieve, pardon, or commutation" on application of an offender. Iowa Code § 915.19(1) (2005). It does not concern restoration of rights of citizenship -- either on application by the offender or by Executive Order.

> The rights of citizenship, including that of voting and qualification to hold public office, which were forfeited by reason of conviction shall be restored for all offenders that are completely discharged from criminal sentence, including any accompanying term of probation, parole, or supervised release, as of July 4, 2005, *but not have not made an application pursuant to Iowa Code Chapter 914*."

Executive Order No. 42, ¶ I (emphasis added).

Any doubt remaining from the express exemption of those who have made an application under Chapter 914 is resolved by further explanation:

> Notwithstanding this executive order, offenders still may make application for a restoration of citizenship rights pursuant to Iowa Code Chapter 914. *All applications, unless withdrawn, will be processed according to the procedures set forth in Chapter 914 of the Code of Iowa*.

Executive Order No. 42, ¶ III. (emphasis added).

In light of the clear language of Executive Order No. 42, there is no ground for a temporary order to direct compliance with the Iowa statutes.

CONCLUSION

For all of the foregoing reasons, the Petition for Order of Mandamus should be dismissed and the Motion for Temporary Order should be denied.

Respectfully submitted,

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