

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL. OHIO	:	
COALITION AGAINST GUN	:	
VIOLENCE, et al.,	:	
	:	
Relators,	:	
	:	
v.	:	CASE NO: 04-0601
	:	
DREW ALEXANDER, SHERIFF, et al.,	:	ACTION IN MANDAMUS
	:	
Respondents.	:	

MOTION TO DISMISS OF PROPOSED INTERVENOR
OHIO ATTORNEY GENERAL JIM PETRO

Now comes Ohio Attorney General Jim Petro, proposed intervenor in this cause of action, by and through counsel, to file this motion to dismiss pursuant to Civ. R. 12(B)(6), for the reasons that Relators lack proper standing and the complaint fails to state a claim upon which relief can be granted by this Court. A memorandum in support of this motion is attached hereto and incorporated by reference.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION.

In the instant case, Relators seeks a writ of mandamus ordering Respondents to “cease and desist” from enforcing provisions of the Ohio Revised Code that were enacted or amended in Amended Substitute House Bill No. 12 (H.B 12) of the 125th General Assembly. Relators assert the “public interest standing” created by this Court in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. However, the very fact that they seek a writ of mandamus ordering public officials to cease and desist from specific activities belies any claim to the extraordinary writ of mandamus. Rather, Relators’ claims are clearly grounded in declaratory and injunctive relief, and this Court has repeatedly held that it does not have jurisdiction to grant such relief.

Indeed, Relators’ reliance upon this Court’s decision in *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, is an irony. In *Klein*, the Attorney General appeared to defend prior statutes regulating the carrying of concealed weapons on the basis that Appellees were asking the court to overturn a legislative regulatory scheme because they did not like the policy choices made by the Ohio General Assembly. Here, in a fashion similar to the Plaintiffs in *Klein*, Relators appear before this Court attempting to strike down a legislative choice with which they disagree.

As set forth below, however, Relators’ claims should be addressed in a common pleas court action seeking a declaratory judgment and prohibitory injunction. This Court should reject Relators’ claims to the standing established by *Sheward* and their complaint should be dismissed.¹

¹ The Attorney General contests the Relators’ standing to bring this claim and whether this Court is the proper forum at this stage of the proceedings but, if necessary, is fully prepared to defend this constitutional statutory scheme.

II. FACTS.

In their complaint, Relators allege that the provisions of H.B. 12 are unconstitutional on a number of bases. In the section titled “Jurisdiction,” Relators discuss the legal obligations imposed upon sheriffs in the State of Ohio in administering licenses to carry concealed weapons. Relators further discuss their interest in “assuring their own safety, the safety of their members, as well as the public generally.” See, ¶¶16 and 18, complaint.

In the first count of the complaint, Relators allege that sheriffs in the State of Ohio have insufficient information regarding the mental health of certain applicants to process those applications with a reasonable and reliable determination of mental competency. In the second count of the complaint, Relators state that the sheriffs are without sufficient funds to perform the obligations imposed by H.B. 12 and that this “unfunded mandate” is inconsistent with the separation of powers under the Ohio Constitution. In the third count, Relators allege that allowing courses, classes and programs to be offered to meet the certification requirement of private groups creates an imminent danger to the citizens of Ohio. In the fourth count, Relators argue that provisions providing immunity from civil liability deny equal protection of the law to some citizens and are therefore unconstitutional. In the fifth count of the complaint, Relators state that the provisions of H.B. 12 are unconstitutionally inconsistent and void for vagueness. In their sixth count, Relators argue that H.B. 12 usurps judicial authority. In their seventh and final count, Relators allege that the provisions of H.B. 12 violate the equal protection and due process clauses of both the federal and state constitutions.

In their prayer for relief, Relators request that a writ of mandamus issue ordering all Respondents to cease and desist from enforcing any provisions of H.B. 12 and that Respondents also be ordered to continue to enforce and abide by previous provisions of the Ohio Revised

Code. Relators also seek an alternative writ to prohibit all further acts performed by Respondents pursuant to H.B. 12 and ordering them to show cause why the writ should not be made permanent.

What the complaint and accompanying affidavit in support are devoid of, however, is any factual information to support the allegations set forth in the complaint. Therefore, it is clear from the face of the complaint that this case requires significant factual discovery and development prior to the Court being able to make any determination. As noted below, the very fact that this case requires significant factual development undercuts Relators' claims to *Sheward* standing and to any writ of mandamus.

III. LEGAL ARGUMENT.

A. This Court Lacks Original Jurisdiction Over Actions For Declaratory and Injunctive Relief.

In this action, Relators seek extraordinary relief in the form of a writ of mandamus. Relators are not entitled to a writ unless they demonstrate that: (1) they have a clear legal right to the requested acts; (2) Respondents have a clear legal duty to perform; and (3) Relators have no adequate remedy in the ordinary course of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565; *State ex rel. Scripts Howard Broadcasting Co. v. Cuyahoga Cty. Court of Common Pleas* (1995), 73 Ohio St.3d 19. Although Relators have styled this action as one for relief in mandamus, “the function of mandamus is to compel the performance of a pre-existing duty as to which there is a default. It is not granted to take affect prospectively, and it contemplates the performance of an act which is incumbent on the respondent when the application of the writ is made.” *State ex rel. Willis v. Sheboy* (1983), 6 Ohio St.3d 167, syllabus

¶2.

Under Ohio law, “[i]f the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus, and must be dismissed for want of jurisdiction.” *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 634. (The Court dismissed mandamus action where the real objects of the complaint were a declaration that H.B. 283 was unconstitutional and an injunction prohibiting public officials from appropriating money in accordance with the bill.) *See also, State ex rel. Purdy v. Clermont Cty. Bd. of Elections* (1997), 77 Ohio St.3d 378; *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections* (1995), 72 Ohio St.3d 69, 70; *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 2-3; *State ex rel. Walker v. Bowling Green* (1994), 69 Ohio St.3d 391, 392.

This Court recently reaffirmed the principle that when “the essence of [Relators’] claims involved declaratory and prohibitory injunction,” mandamus is not proper, even if “the allegations are partially couched in terms of compelling affirmative duties.” *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, ¶14. In *Satow*, the relators sought: (1) a declaration that H.B. 329 was inapplicable to the apportionment of certain governmental funds; (2) a declaration that H.B. 329 was unconstitutional; (3) a declaration that the alternate mode of apportionment adopted in Columbiana County pursuant to H.B. 329 was null and void; and (4) to compel respondents to apportion and distribute to relevant governmental funds in accordance with the 1990 alternate method of distribution. *Id.* at ¶19.

This Court dismissed the complaint because “constitutional challenges to legislation are generally resolved in an action in common pleas court rather than in an extraordinary writ action filed here.” *Id.* at ¶18, citing *Rammage v. Saros*, 97 Ohio St.3d 430, 2002-Ohio-6669, ¶11; *see also State ex rel. Linndale v. Teske* (1995), 74 Ohio St.3d 1415 (1995) (a mandamus action

challenging the constitutionality of a newly enacted statute prohibiting certain municipalities from issuing speeding citations sua sponte dismissed by holding that an action for declaratory is an adequate remedy at law).

Here, as in *Grendell*, and *Satow*, Relators specifically request relief in the form of a writ of mandamus ordering Respondents to “cease and desist from performing any of the acts set forth in the CCW statute and/or from enforcing any of its provisions;” and “ordering Respondents to cease and desist from performing any of the acts set forth in the CCW statute and further ordering them to continue to enforce and abide by the previous provisions of the Ohio Revised Code...;” and finally that Respondents be ordered to cease all further acts performed in accordance with or pursuant to the “CCW statute....” *See, Relators complaint*, page 19. Further, Relators clearly seek a declaratory judgment that H.B. 12 is unconstitutional since Respondents could not be ordered to “cease and desist” from enforcing the law unless this Court first reached the determination that it had to declare that legislation unconstitutional.

Because Relators’ complaint is so clearly couched in terms of seeking a prohibitory injunction and declaratory judgment, this Court should dismiss the complaint.

B. Relators Do Not Satisfy The Mandamus Exception Set Forth By This Court in *Sheward*.

In their complaint, Relators justify filing this mandamus action on the basis that it satisfies the standards created by this Court in *Sheward, supra*, 86 Ohio St.3d 451. However, this case is distinguishable from the “extraordinary” cases in which this Court has chosen to proceed in mandamus even though the complaint seeks a declaratory judgment regarding the constitutionality of a statute. In *Sheward*, this Court acted to “protect or enforce the people’s right to maintain the constitutional system of justice they created,” 86 Ohio St.3d at 503, and found that the statute in question would affect **every** Ohioan who was the victim of a tort.

Similarly, in *Ohio AFL-CIO v. Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, the bill in question “affects every injured worker who seeks to participate in the workers’ compensation system. It affects virtually everyone who works in Ohio.” *Id.* at ¶12. By way of contrast, here the Relators’ claims of every Ohioan being affected are clearly stretched to the limits of credibility, and in many cases, the expressed harm is hypothetical.

For example, in the first count of the complaint, Relators argue that there is no ready source of information or consultation by sheriffs to determine whether some applicants fail to meet certain mental health criteria. Yet, this claim is clearly premised upon the hypothetical attempt of a mentally incompetent person first attempting to apply for a license to carry a concealed weapon. Additionally, even if a mentally incompetent person were issued a license, that person would then have to take some overt action to harm another individual. Such a string of occurrences does not present the same type of certainty present in *Sheward* and *Ohio AFL-CIO*.

Relators also claim that a fee paid by an applicant does not cover the actual cost incurred in performing duties and obligations imposed upon sheriffs by this legislation. However, Relators’ complaint and supporting affidavit are devoid of any factual support for this assertion. The speculation necessary to reach the conclusion that there is harm to all Ohioans is a slender reed upon which to grant an extraordinary writ striking down a comprehensive legislative enactment.

Likewise, in count three of Relators’ complaint, the means provided for obtaining certification is allegedly unconstitutional based upon vague statement that “the present courses, classes and programs being offered...are inadequate....” Again, Relators offer no proof except an affidavit that merely mimics the vague allegations of the complaint.

These few examples suffice to demonstrate the fact that the Relators' claim to *Sheward* standing is too vague and hypothetical. Such a broad standard would allow any individual to make a claim of entitlement to a writ by making vague and hypothetical assertions that a statute is "unconstitutional." Yet, this Court specifically rejected that type of claim when it issued its decision in *Sheward*.

Based on the foregoing, it is clear that Relators cannot satisfy the standards set by this Court for establishing *Sheward* standing to seek a writ of mandamus and their claims should be dismissed.

C. The Relators Cannot Maintain an Action for Prohibition.

Further, in *Sheward*, the Relator sought both writs of mandamus and prohibition against judges with cases pending that would be affected by the statutory changes in tort reform. Therefore, the judges could be prohibited from proceeding in the pending cases if this Court issued a writ of prohibition. Here, the Relators would not, and could not, properly seek a writ of prohibition in any other Ohio court. By its very definition, a writ of prohibition could not lie against these Respondents because the sheriffs are not prepared to exercise judicial power, nor are the sheriffs similar to an inferior court about to exceed its jurisdiction. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 73. Thus, there is no basis to prohibit the sheriffs and police chief Respondents from fulfilling their statutory obligations.

Realizing the sweeping potential of its decision in *Sheward*, the *Sheward* majority limited the granting of writs of mandamus and prohibition to determined the constitutionality of statutes to "exceptional circumstances that demand early resolution." *AFL-CIO, supra*, 97 Ohio St.3d at 506, ¶12, citing *Sheward*, 86 Ohio St.3d at 515 (J. Pfeifer, concurring). The majority in *AFL-CIO* found that the circumstances of that case qualified it as "one of those rare cases." *Id.*

The instant case is not one that directly affects each and every tort claim filed in Ohio, nor does it involve warrantless searches or workers through drug and alcohol testing. Rather, it involves the statutory scheme directing Ohio's sheriffs in the processing of applications filed by a limited number of individuals seeking to carry concealed weapons. Further, neither *Sheward* nor *AFL-CIO* required extensive discovery. Yet, in the instant case, Relators have made a number of factual averments that must be subjected to discovery.

Based on the foregoing, it is clear that Relators fail to satisfy the standards established by this Court to exercise its jurisdiction to review this statutory scheme. This case is neither rare nor extraordinary.

D. This Case Requires Significant Discovery And Therefore Fails To Meet The Tests Set Forth In *Sheward*.

As noted above, several of Relators' claims are susceptible to significant factual discovery. For example, as to the claim of the requirements being an unfunded mandate, contained in count two of Relators' complaint, it is clear that significant discovery must be done to either verify or rebut this claim. Likewise, the factual assertions regarding the quality and acceptability of training requires factual development before any court could make a knowledgeable determination as to whether any violations of the Ohio Constitution have occurred. Indeed, Relators support this count of their complaint by alleging a new constitutional cause of action known as "Unfunded Mandate." Such a claim to a heretofore-unknown constitutional right is best explored and tested first at the common pleas court by way of a declaratory judgment action with significant briefing by the parties.

Finally, the Attorney General's Office recently promulgated rules directly involving Relators' claims in the first count of their complaint. O.A.C. 109:5-3-01, effective April 8, 2004, creates by emergency rule a procedure for reporting incompetency records.²

IV. CONCLUSION.

Only recently, the Attorney General appeared before this Court in *Klein, supra*, 99 Ohio St.3d 537, 2003-Ohio-4779, arguing that the Plaintiffs in that case simply disagreed with policy choices that the General Assembly was constitutionally authorized to make. A little over a year later, the Attorney General again appears before this Court contesting the legal claims of yet another group of individuals who are seeking to strike down a policy choice made by the General Assembly that it is constitutionally authorized to make, by claiming violations of the Ohio Constitution.

It should not be doubted that Relators have the right to bring such a challenge. However, the proper forum to raise such claims is in a common pleas court, and the appropriate vehicles for seeking such a determination are to be found in declaratory action and prohibitory injunction. Rather than travel this route, Relators appear before this Court requesting an extraordinary writ of mandamus, not to compel public officials, but rather to make them "cease and desist" in enforcing a comprehensive legislative scheme passed by the General Assembly. The extraordinary nature of this request is heightened by the fact that Relators ask this Court to act with little factual information being asserted in support of their claims.

² Two other emergency rules became effective at the same time. Both rules involve licensing fees. Permanent versions of these two rules will soon be set for hearing before the Joint Committee on Agency Rule Review. See, O.A.C. 109:2-17-01 and 109:2-17-02.

This Court has wisely limited its holding in *Sheward* to only the most egregious circumstances. This Court should maintain that wise and prudent policy by granting the Attorney General's Motion to Dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Motion to Dismiss of Proposed Intervenor Ohio Attorney General Jim Petro* has been served by regular U.S. mail, postage prepaid, this 5th day of May, 2004 upon the following:

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