

SUPREME COURT OF OHIO

State ex rel. White v. Koch

96 Ohio St. 3d 395 (Ohio 2002) · Decided October 2, 2002

SUMMARY

The Ohio Supreme Court dismissed as moot an appeal concerning extraordinary writs sought to prevent enforcement of a temporary restraining order involving taxpayer-funded mayoral mailings about Cleveland City Council salary increases. The court rejected exceptions for matters capable of repetition yet evading review and matters of great public or general interest.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Per curiam; Moyer, C.J.; Resnick, J.; F.E. Sweeney, J.; Pfeifer, J.; Cook, J.; Lundberg Stratton, J.; Douglas, J.
JURISDICTION	Ohio
DECIDED	October 2, 2002
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appellants appealed the Cuyahoga County Court of Appeals' dismissal of their action seeking writs of mandamus and prohibition to prevent a common pleas judge from issuing or enforcing a temporary restraining order concerning the use of public funds for mayoral mailings.
STANDARD OF REVIEW	The court reviewed whether the extraordinary-writ appeal remained justiciable and whether an exception to mootness applied.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Ohio
PARTIES	Michael White, Cara Watts, Jason Woods v. Judith Kilbane Koch

TOPICS

- mootness
- appellate procedure
- free speech
- first amendment
- election law

PRACTICE AREAS

- Appellate procedure
- Constitutional law
- Election law
- Remedies
- Municipal law

QUESTIONS PRESENTED

1. Whether the appeal from dismissal of the mandamus and prohibition action became moot after the election passed, the mayor left office, and the challenged ordinance was repealed.
2. Whether the appeal qualified for the capable-of-repetition-yet-evading-review exception to mootness.
3. Whether the appeal qualified for the great-public-or-general-interest exception to mootness.
4. Whether mandamus was a cognizable remedy to prevent enforcement of the temporary restraining order.

HOLDINGS

1. The appeal was moot because the election that the mailings sought to influence had passed, Mayor White was no longer in office and therefore could no longer use the mayor's office budget for comparable mailings, and the challenged ordinance had been repealed.
2. The capable-of-repetition-yet-evading-review exception did not apply because the challenged injunction was not necessarily too short-lived for appellate review and there was no reasonable expectation that White would again be subjected to a comparable restraining order.
3. The appeal did not present a sufficiently debatable constitutional question or matter of great public or general interest to warrant an exception to mootness.
4. To the extent appellants sought extraordinary relief in mandamus to prevent enforcement of the temporary restraining order, that claim was not cognizable in mandamus.

KEY QUOTATIONS

“When the election has passed, as it has here, the action for extraordinary relief or an appeal from a judgment in the extraordinary-writ action is moot.” (398)

“Accordingly, we dismiss this appeal as moot.” (399)

FACTUAL BACKGROUND

Cleveland's ordinances provided an automatic annual six-percent pay increase for city council members. Mayor Michael White opposed the increases and supported proposed legislation changing the compensation formula; shortly before the November 2001 election, his office prepared and mailed letters to Cleveland voters at taxpayer expense criticizing the raises and supporting the proposed ordinance. After council members sued, the common pleas court temporarily restrained the mayor and his staff from using taxpayer funds to communicate with the public about the council raises; by the time of the Supreme Court appeal, the election had passed, White had left office, and the challenged salary-increase ordinance had been repealed.

PROCEDURAL HISTORY

Fourteen Cleveland City Council members sued Mayor White and members of his staff in the Cuyahoga County Court of Common Pleas, seeking injunctive and monetary relief concerning taxpayer-funded mailings opposing the council's automatic pay raises. Judge Judith Kilbane Koch issued a temporary restraining order. Appellants then sought mandamus and prohibition in the court of appeals, which dismissed the action. The Supreme Court of Ohio stayed the temporary restraining order pending appeal and ultimately dismissed the appeal as moot.

DISPOSITION

dismissed

CASES CITED

- State ex rel. White v. Kilbane Koch, 94 Ohio St. 3d 1409, 759 N.E.2d 786 (2001)
- State ex rel. Hills Communities, Inc. v. Clermont Cty. Bd. of Elections, 91 Ohio St. 3d 465, 468, 746 N.E.2d 1115 (2001)
- State ex rel. Dispatch Printing Co. v. Louden, 91 Ohio St. 3d 61, 64, 741 N.E.2d 517 (2001)
- State ex rel. Calvary v. Upper Arlington, 89 Ohio St. 3d 229, 231, 729 N.E.2d 1182 (2000)
- State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger, 28 Ohio St. 3d 418, 28 OBR 472, 504 N.E.2d 37 (1986)
- Franchise Developers, Inc. v. Cincinnati, 30 Ohio St. 3d 28, 30 OBR 33, 505 N.E.2d 966 (1987)
- Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist., 73 Ohio St. 3d 590, 598, 653 N.E.2d 646 (1995)
- Carter v. Las Cruces, 121 N.M. 580, 583, 915 P.2d 336 (1996)
- State ex rel. Cunningham v. Amer Cunningham Co., L.P.A., 94 Ohio St. 3d 323, 324, 762 N.E.2d 1012 (2002)
- State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections, 90 Ohio St. 3d 238, 242, 736 N.E.2d 893 (2000)
- Egan v. Natl. Distillers & Chem. Corp., 25 Ohio St. 3d 176, 25 OBR 243, 495 N.E.2d 904 (1986)

OPINION

PER CURIAM.

Per Curiam. {¶ 1} On December 20, 1984, the Cleveland City Council passed an ordinance codified at Section 173.07 of the Codified Ordinances of Cleveland, which provided an automatic six-percent annual pay increase for city council members. Section 173.06(b) of the Codified Ordinances provides that the annual salary of the Mayor of Cleveland shall be increased in 1995 and each year thereafter “by an amount which shall be computed by applying the percentage of the immediately preceding year’s salary that is equal to the percentage increases in salaries and wages established for that year in a majority of the collective bargaining agreements between the City and the various unions recognized by the City.” *396{¶ 2} On February 14, 2000, the council president introduced proposed Ordinance 218-2000, which, if enacted, would have revoked the automatic six-percent annual salary increases for council members and set annual salary increases for council members based on the same formula used for the mayor.

Appellant Michael White, the Cleveland mayor at that time, supported Ordinance No. 218-2000. {¶ 3} By letters dated October 3, 2001, Mayor White advised registered voters of Cleveland that he opposed the council’s automatic six-percent annual salary increases and supported Ordinance 218-2000 to revoke those increases.

In his October 3, 2001 letters, Mayor White stated, “Now that the voters of the City of Cleveland have defined a slate of candidates for the November Council and Mayoral elections, I believe it is time for everyone in our City who is concerned with good government to examine an extremely important issue.” Appellants, Mayor White, his secretary, Cara Watts, and his assistant, Jason Woods, caused the letters to be prepared and mailed.

The cost to prepare and mail the letters and accompanying documents was covered by the mayor’s office budget. {¶ 4} On October 22, 2001,¹⁴ Cleveland Council members filed a complaint in the Cuyahoga County Court of Common Pleas against White, Watts, Woods, and other members of the mayor’s office staff involved in the compilation and mailing of the October 3, 2001 letters to Cleveland voters.

The council members requested injunctive relief preventing appellants and Mayor White’s staff from distributing the October 3, 2001 letters at taxpayer expense. The council members also requested an order commanding appellants to retrieve each mailing and to compensate the city treasurer for the over \$1,500,000 in taxpayer money used to prepare and mail the October 3, 2001 letters and accompanying documents. {¶ 5} At an October 26, 2001 hearing held on the complaint, three council members testified that the letters were “political submissions” that defamed them and that the letters were prepared and mailed at taxpayer expense in contravention of the city charter.

Appellee, Judge Judith Kilbane Koch of the common pleas court, granted a temporary restraining order that same day enjoining Mayor White, Watts, and Woods, as well as the mayor’s other staff, “from using taxpayer funds to communicate w/ the public regarding the issue of City Council’s raises.” {¶ 6} On October 30, 2001, Mayor White, Watts, and Woods filed a complaint in the Court of Appeals for Cuyahoga County for writs of mandamus and prohibition to prevent Judge Kilbane Koch from issuing, enforcing, or taking any further action concerning the temporary restraining order.

Appellants alleged that the temporary restraining order prevented Mayor White “from effectively *397addressing the public, fiscal and governmental issues raised by City Council’s automatic 6% pay raise.” Appellants claimed that the temporary restraining order constituted an unconstitutional prior restraint on Mayor White’s right to free speech. Judge Kilbane Koch moved to dismiss appellants’ complaint. {¶ 7} On November 5, 2001, the court of appeals granted Judge Kilbane Koch’s motion and dismissed the mandamus and prohibition action.

On November 26, 2001, appellants appealed the judgment of the court of appeals. On December 19, 2001, this court granted appellants’ motion for a stay of the temporary restraining order and the scheduled hearing on preliminary injunction pending appeal. *State ex rel. White v. Kilbane Koch* (2001), 94 Ohio St.3d 1409, 759 N.E.2d 786. {¶ 8} According to the parties’ briefs, the city council subsequently passed Ordinance 85-02, effective January 1, 2006, which repeals the

automatic six-percent annual salary increase for council members that had prompted Mayor White's October 3, 2001 mailings.

On January 7, 2002, White's term of office as Cleveland mayor expired. On January 8, 2002, the Chief Justice denied affidavits of disqualification filed by appellants against Judge Kilbane Koch in the common pleas court case. Appellants, however, do not dispute Judge Kilbane Koch's assertion that on January 15, 2002, she voluntarily recused herself from further proceedings in the common pleas court actions in order to avoid any appearance of impropriety.

The common pleas court case has now been assigned to a different judge. {¶ 9} This cause is now before the court on appellants' appeal from the November 5, 2001 court of appeals judgment dismissing their action for writs of mandamus and prohibition. {¶ 10} Appellants assert that the court of appeals erred in dismissing their mandamus and prohibition action.

But, as Judge Kilbane Koch persuasively argues, we need not reach the merits of these claims because this appeal is moot. {¶ 11} As Judge Kilbane Koch notes, "this appeal from the appellate court's refusal to intervene ultimately involves the former mayor's challenge to the recused judge's order that temporarily restrained spending more public money on mailings concerning a now-repealed city ordinance for the purpose of influencing an election that has already passed." The opening paragraph of the October 3, 2001 mailings evinces a manifest intent on the part of Mayor White to influence the November 2001 city council election, but that election has now passed. "When the election has passed, as it has here, the action for extraordinary relief or an appeal from a judgment in the extraordinary-writ action is moot." State ex rel.

Hills Communities, Inc. v. Clermont Cty. Bd. of Elections (2001), 91 Ohio St.3d 465, 468, 746 N.E.2d 1115. And because White is no longer mayor, he can no longer use public funds appropriated for the mayor's office to pay for these or comparable mailings. {¶ 12} Appellants nevertheless contend that although Judge Kilbane Koch's mootness claim might "have some colorable appeal," this case falls within two exceptions to the mootness doctrine. {¶ 13} Appellants initially assert that this appeal is not moot because it is capable of repetition yet evading review. "This exception applies when the challenged action is too short in duration to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again." State ex rel.

Dispatch Printing Co. v. Loudon (2001), 91 Ohio St.3d 61, 64, 741 N.E.2d 517. {¶ 14} Neither of these factors is present here. Injunctions preventing the expenditure of public funds to finance mailings by a mayor are not always so ephemeral that they cannot be fully litigated before cessation. Cf. State ex rel. Calvary v. Upper Arlington (2000), 89 Ohio St.3d 229, 231, 729 N.E.2d 1182.

And the mayor challenging such an order would not always leave office before an appellate resolution concerning the legality of the order is completed. Because White has now left office, there is no reasonable expectation that he will be subjected to a comparable restraining order again. {¶ 15} The cases appellants cite in support of their argument that this appeal is capable of repetition, yet evading review, do not require a contrary conclusion.

Unlike those cases, this appeal does not involve the exclusion of a nonparty to a judicial proceeding. See *Louden*, 91 Ohio St.3d at 64, 741 N.E.2d 517; *State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger* (1986), 28 Ohio St.3d 418, 28 OBR 472, 504 N.E.2d 37. {¶ 16} Appellants next assert that this appeal is not moot because it is of great public or general interest, raising substantial constitutional questions. “Although a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest.” *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 30 OBR 33, 505 N.E.2d 966, paragraph one of the syllabus; *Danis Clarkco Landfill Co. v. Clark Cty.*

Solid Waste Mgt. Dist. (1995), 73 Ohio St.3d 590, 598, 653 N.E.2d 646. {¶ 17} This case does not raise a matter of sufficient public or general interest to warrant invoking this exception to the mootness doctrine. Restricting public funding of governmental mailings is not a blanket restriction on any speech by the governmental official involved, e.g, the mayor.

See *Carter v. Las Cruces* (1996), 121 N.M. 580, 583, 915 P.2d 336, and cases cited therein (“a number of judicial authorities, although resting their holdings on other grounds, such as state law, find support in the constitution for the general proposition that, at *399some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign”).

And at least one treatise has noted that the issue of the propriety of the government’s reliance on the First Amendment to advance messages favorable to the government is a “more rare problem.” 4 *Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure* (3d Ed.1999) 278, Section 20.11. Furthermore, to the extent that appellants seek extraordinary relief in mandamus to prevent enforcement of the temporary restraining order, their claim is not cognizable in mandamus.

See *State ex rel. Cunningham v. Amer Cunningham Co., L.P.A.* (2002), 94 Ohio St.3d 323, 324, 762 N.E.2d 1012. {¶ 18} Accordingly, we dismiss this appeal as moot. Our conclusion comports with our well-settled precedent that we will not indulge in advisory opinions. *State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections* (2000), 90 Ohio St.3d 238, 242, 736 N.E.2d 893; *Egan v. Natl.*

Distillers & Chem. Corp. (1986), 25 Ohio St.3d 176, 25 OBR 243, 495 N.E.2d 904, syllabus. Appeal dismissed. Moyer, C.J., Resnick, F.E. Sweeney, Pfeifer, Cook and Lundberg Stratton, JJ., concur. Douglas, J., dissents.

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