

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BROWN COUNTY

State of Ohio, ex rel.

:

Case No. CA2009-02-10

Dennis J. Varnau

Relator/Petitioner

FILED  
COURT OF APPEALS

Vs

AUG 24 2010

RESPONDENT'S REPLY TO RELATOR'S  
MOTION TO CERTIFY A CONFLICT

Dwayne Wenninger

:

Respondent

TINA M. MERANDA  
BROWN COUNTY CLERK OF COURTS

Respondent Dwayne Wenninger (Wenninger) now replies to the motion to certify a conflict as filed herein by Relator Varnau (Varnau).

At the outset, as the Court is very well familiar, Varnau's complaint in this case was in quo warranto alleging that Wenninger illegally holds the office of Brown County Sheriff. Wenninger now reviews the cases cited by Varnau as creating a conflict with this Court's Decision in this quo warranto case.

*State ex rel. Wolfe v. Lorain Cty. Bd. Of Elections* (1978), 59 Ohio App.2d 257  
(Wolfe)

*Wolfe* is a mandamus action where Wolfe, by mandamus, sought to void or cancel the certificate of election of one Wearsch as a councilperson at large in the City of Avon, Ohio. Setting aside that the remedy that Wolfe should have sought was, in probability, prohibition, the second syllabus of Wolfe states as follows:

R.C. Title 35 and R.C. 705.12 impose no duty on a county board of elections to recall the certificate of election of a municipal councilman-at-large, who prior to his election, was employed by the United States Postal Service.

It is readily apparent that the issues in *Wolfe* are wholly different than the title to office issue that was present in this case. Essentially, the *Wolfe* court went on to say that Wearsch's election should be certified and the question of whether he qualified for office would be resolved when it was time for him to take office. *Wolfe*, p. 259, 260. *State ex rel. Varnau v. Wenninger* is not a certification of election results case and, as such, *Wolfe* is not in conflict with this Court's determination that Wenninger is entitled to retain his office, a matter recently resolved by this Court but long ago resolved by the Brown County Board of Elections.

*Foster v. Cuyahoga Cty. Bd. Of Elections* (1977), 53 Ohio App.2d 213 (*Foster*)

In November of 1976, Foster, a write-in candidate for the position of Cuyahoga County sheriff, sought a temporary restraining order and injunction against Basil Russo who was also a write-in candidate for the same position. The basis for Foster's complaint was that Russo had been an unsuccessful Democratic Party candidate for the U.S. Congress in the June of 1976 primary. The Foster court was called upon to interpret whether R.C. 3513.04 (person who seeks party nomination in a primary is prohibited from write-in candidacy in the following general election) conflicts with rights under the First or Fourteenth Amendments to the United States Constitution. The Foster court upheld the constitutionality of R.C. 3513.04 and Russo was barred from being a write-in candidate for the office of Cuyahoga County sheriff. Foster was not a quo warranto action and nothing in the Foster case creates a conflict with this Court's Decision in quo warranto. In fact, the qualification of Russo under whatever version of the sheriff qualification statute that was in effect in 1976, was never an issue in the case.

In summary, neither *Wolfe* nor *Foster* is an action in quo warranto that is specifically dealing with the sheriff qualification statute, R.C. 311.01 (B) or (C), the specific inquiry of this Court. As such,

no conflict exists with this Court's Decision as entered herein on August 16, 2010. Varnau's motion to certify must be ignored, overruled or summarily dismissed.

  
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Counsel for Respondent Wenninger

CERTIFICATE OF SERVICE

I certify that on August 24<sup>th</sup>, 2010, a copy of this pleading was served by ordinary mail, postage prepaid on Thomas G. Eagle, 3386 N. State Rt. 123, Lebanon, Ohio 45036.

  
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Gary A. Rosewhoffer