

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2003 CA 0200

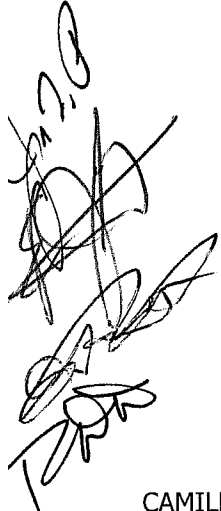
STATE OF LOUISIANA
VERSUS
CHARLES BANTA, III

Judgment rendered February 23, 2004.

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Appealed from the
17th Judicial District Court
in and for the Parish of Lafourche, Louisiana
Trial Court No. 95114
Honorable Ashly Bruce Simpson, Judge

* * * * *



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STATE OF LOUISIANA

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CHARLES BANTA, III

* * * * *

BEFORE: FOIL, PETTIGREW, DOWNING, GAIDRY, AND McCLENDON, JJ.

McCleendon, J. Dissents and Assigns Reasons.

PETTIGREW, J.

In this action for writ of quo warranto, an elected official contests a judgment decreeing that he holds his office without authority in violation of Article I, Section 10 of the Louisiana Constitution and prohibiting him from holding that office. For the following reasons, we reverse the trial court's judgment and dismiss the petition for writ of quo warranto.

FACTS AND PROCEDURAL HISTORY

On May 17, 1990, Charles Banta, III was convicted of six counts of felony theft. On June 18, 1990, he was sentenced to two years of imprisonment and a period of five years of supervised probation to commence upon his release from the custody of the Department of Public Safety and Corrections. Subsequently, he exhausted all legal remedies of appeal. On July 25, 1997, having fully served his sentence, Mr. Banta received a first offender pardon in accordance with Article IV, Section 5(E)(1) of the Louisiana Constitution.

Subsequently, on October 23, 1999, Mr. Banta was duly elected to the office of Councilman, Lafourche Parish Council, District No. 2. On January 12, 2000, he took his oath of office and received a commission from the governor. In November 2002, District Attorney Walter Naquin, Jr., on behalf of the Parish of Lafourche, filed a petition for writ of quo warranto, asserting Mr. Banta illegally held the office in violation of Article I, Section 10 of the Louisiana Constitution and seeking his removal. Following a hearing on the matter, the trial court rendered judgment on December 5, 2002, finding that Mr. Banta held the office of Councilman, Lafourche Parish Council, District No. 2, without authority and in violation of Louisiana Constitution Article I, Section 10 and prohibiting Mr. Banta from holding said office.

It is from this judgment that Mr. Banta has appealed. The main thrust of Mr. Banta's argument on appeal is that the trial court erred in utilizing the quo warranto summary proceeding to effectively remove him from office. Mr. Banta also asserts that the trial court erred in its interpretation and application of Article I, Section 10 of the Louisiana Constitution, noting that the first offender pardon he received on July 25,

1997, has the same effect as a governor's pardon. However, because we agree with Mr. Banta that the appropriate procedure to remove him from public office was not utilized, we need not reach the issue concerning the first offender pardon and pretermite same.

DISCUSSION

There are several different procedures that may be employed to remove individuals from public office. In the instant case, the State chose to file a petition for writ of quo warranto pursuant to La. Code Civ. P. art. 3901, which provides as follows:

Quo warranto is a writ directing an individual to show by what authority he claims or holds public office, or office in a corporation, or directing a corporation to show by what authority it exercises certain powers. Its purpose is to prevent usurpation of office or of powers.

The writ of quo warranto is narrow in scope and is to be given only a limited use. **City of Plaquemine v. Medlen**, 393 So.2d 301, 303 (La. App. 1 Cir. 1980). If the court finds that a person is holding an office without authority, the judgment shall forbid him to do so and may declare who is entitled to the office or may direct an election when necessary. La. Code Civ. P. art. 3902. If it is determined that a person holds office by virtue of a valid election, the inquiry ceases, and the writ should be dismissed. **Morris v. Thomason**, 28, 238, p. 2 (La. App. 2 Cir. 4/8/96), 672 So.2d 433, 434, writ denied, 96-1383 (La. 9/13/96), 679 So.2d 105.

Official Revision Comment b to Article 3901 provides as follows: "The provision referring to public office was incorporated on the theory that the Intrusion into Office Act, R.S. 42:76 *et seq.*, does not give an individual the right to file suit except when he is claiming the office." Pursuant to La. R.S. 42:76, an action to try the right to office is authorized as follows:

An action shall be brought in the name of the state in any of the following cases:

(1) When any person usurps, intrudes into, or unlawfully holds or exercises or attempts to remain in possession of any public office or franchise within this state.

Apparently, the use of the term "usurpation" under both statutes is interrelated. "Usurp" is defined by The New Oxford American Dictionary (2001) as to take a position

of power or importance illegally or by force. In a legal sense, a usurper is defined by La. R.S. 42:71 (the Intrusion into Office Act) as follows:

Any person who assumes or pretends to be a public officer without the authority of an election, or without the authority of a commission from the governor when a commission is required; or who has been duly addressed out of an office that he held ... or who has been removed from such an office by impeachment or recall, is a usurper.

According to the record below, Mr. Banta proved that he was duly elected by the citizens of Lafourche Parish, that he received a commission from the governor certifying same, and that he took his oath of office on January 12, 2000. Applying the above cited statutes concerning quo warranto proceedings and usurpation of office, it is clear that once Mr. Banta proved these elements, the quo warranto action was no longer viable against him and should have been dismissed. Mr. Banta was not a usurper as defined by La. R.S. 42:71.

The State further argued that pursuant to Article I, Section 10 of the Louisiana Constitution, Mr. Banta was disqualified from holding the position of Councilman, District No. 2. Article I, Section 10 of the Louisiana Constitution, as amended by 1997 La. Acts No. 1492, §1,¹ provides, in part:

(B) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or take public elective office or appointment of honor, trust, or profit in this state:

(1) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government or country having such authority to pardon in the place where the person was convicted and sentenced.

Article I, Section 10 operates to prevent certain persons from either qualifying as a candidate for elective office or taking public office. It should be noted that at the time Mr. Banta qualified to run for Councilman, District No. 2, no individual or representative of the State filed any type of action to prevent him from qualifying.

¹ The amendments to Article I, Section 10 were approved October 3, 1998, and became effective on November 5, 1998, which was prior to Mr. Banta's qualifying.

Thereafter, Mr. Banta was duly elected as Councilman, District No. 2. On January 12, 2000, he received a commission from the governor certifying his election and took the oath of office. It was not until November 19, 2002, that the State, through the District Attorney's Office, filed the instant action to remove Mr. Banta from office. Thus, prior to any action being taken against him, Mr. Banta had qualified for the election and taken office as Councilman, District No. 2. Moreover, there is no evidence in the record to suggest that Mr. Banta fraudulently misrepresented himself when qualifying to run for office. His prior conviction was public record. According to the record, verification of his first offender pardon was provided to the Clerk of Court in August 1997. Accordingly, Article I, Section 10 is not applicable herein.

In filing the petition for writ of quo warranto, the State went beyond the initial question of by what authority Mr. Banta was holding his office. Rather, the State raised questions regarding his qualifications to run for office. Such issues are controlled by the statutes we commonly refer to as the "Louisiana Election Code," in general designated as La. R.S. 18:1 *et seq.*, and in particular, La. R.S. 18:1401 through 18:1413.

There are several other provisions that afford procedures for removing people from public office. Pursuant to La. R.S. 18:492, the grounds for an objection to the candidacy of a person qualifying for public office are set forth as follows:

A. An action objecting to the candidacy of a person who qualified as a candidate in a primary election shall be based on one or more of the following grounds:

(1) The defendant failed to qualify for the primary election in the manner prescribed by law.

(2) The defendant failed to qualify for the primary election within the time prescribed by law.

(3) The defendant does not meet the qualifications for the office he seeks in the primary election.

(4) The defendant is prohibited by law from becoming a candidate for one or more of the offices for which he qualified.

There has been no such action filed objecting to Mr. Banta's candidacy. Moreover, pursuant to La. R.S. 18:1405(A), the time to do so has long since expired.²

The Louisiana Constitution provides other methods by which individuals may be removed from public office. Article X, Section 24 provides for impeachment of a state or district official, whether elected or appointed, where during his term of office, the official either commits or is convicted of a felony or commits an act of malfeasance or gross misconduct while in such office. This particular provision does not apply to Mr. Banta as there is no such evidence in this case. Article X, Section 25 provides for removal by suit. However, this section refers to impeachment as grounds for removal by suit, which, as previously indicated, cannot be applied in the instant case. Another provision is set forth in Article X, Section 26, i.e., recall of a public official. The guidelines for recalling an elected official are provided in La. R.S. 18:1300.1 through 18:1300.17. There was no evidence introduced in this proceeding that a recall petition was filed. Therefore, this particular constitutional provision does not apply to Mr. Banta.

Based on our review of the record herein, it is clear that Mr. Banta was duly elected as Councilman, District No. 2. No one timely filed an opposition to Mr. Banta's qualifying for or taking public office. Nor has anyone filed the appropriate proceeding such as a recall petition to remove him from public office.

DECREE

For the above and foregoing reasons, the judgment of the trial court is reversed. Further, judgment is hereby rendered dismissing the State's petition for writ of quo warranto. Appeal costs in the amount of \$1,053.45 are assessed against the State.

REVERSED AND RENDERED.

² Louisiana Revised Statutes 18:1405(A) provides as follows:

A. An action objecting to candidacy shall be instituted within seven days after the close of qualifications for candidates in the primary election. After the expiration of the time period set forth in this Section, no further action shall be commenced objecting to candidacy based on the grounds for objections to candidacy contained in R.S. 18:492.

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CHARLES BANTA, III

STATE OF LOUISIANA

McCLENDON, J., dissents.

For the following reasons, I respectfully dissent. On appeal, Mr. Banta asserts that, pursuant to Article 1, section 20 of the Louisiana Constitution, he has the right to hold office of Councilman. The District Attorney, on the other hand, asserts that Article 1, section 10 governs herein.

Article 1, section 20 is entitled "Right to Humane Treatment" and provides, in pertinent part, that "[f]ull rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense."

Article 1, section 10 provides as follows:

Section 10. **(A) Right to Vote.** Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for a felony.

(B) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or take public elective office or appointment of honor, trust, or profit in this state:

(1) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either **by the governor of this state** or by the officer of the state, nation, government or country having such authority to pardon in the place where the person was convicted and sentenced.

(2) A person actually under an order of imprisonment for the conviction of a felony.

(C) Exception. Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony and who has served his sentence, but has not been pardoned for such felony, shall be permitted to qualify as a candidate for or hold office if the date of his qualifying for such office is more than fifteen years after the date of the completion of his original sentence. (Emphasis added.)

While Article 1, section 20 provides that full rights of citizenship shall be restored, Article 1, section 10 provides a limitation on the restoration of rights. Article 1, section 20 is a general provision allowing for restoration of rights of citizenship. **State v. Adams**, 355 So.2d 917, 922 (La. 1978). Article 1, section 10 is a specific provision dealing with the right to vote and hold office. If one constitutional provision addresses a subject in general terms and another addresses the same subject in a more detailed way, and there is a conflict in the two provisions, the more specific provision prevails. **Perschall v. State**, 96-0322, p. 22 (La. 7/1/97), 697 So.2d 240, 255. Therefore, Article 1, section 10 prevails over the more general provision and is applicable herein. **Cook v. Skipper**, 99-1448, p. 6 (La.App. 3 Cir. 9/27/99), 749 So.2d 6, 10, writ denied, 99-2827 (La. 9/30/99), 745 So.2d 601.

Alternatively, Mr. Banta asserts that he properly holds office under Article 1, section 10, by virtue of his first offender pardon. The District Attorney contends that the constitution specifically requires a pardon by the governor of this state, and a first offender pardon is insufficient as it is granted without any action by the governor.

Article 1, section 10 was amended during the 1998 legislative session; that amendment became effective on November 5, 1998.¹ The pertinent language of that constitutional provision is section 10(B), which provides that a person who has been convicted in this state of a felony, has exhausted all legal remedies, and “has not afterwards been pardoned by the governor of this state” shall not be permitted to take elective office. Article 4, section 5(E) provides that "a first offender . . . never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without a recommendation of the Board of Pardons and without action by the governor."

When a constitutional provision is clear and unambiguous, and its application does not lead to absurd consequences, it must be applied as written without further interpretation in search of its intent. **Succession of Lauga**, 624 So.2d 1156, 1165 (La. 1993). Article 1, Section 10 is clear and unambiguous; therefore, it must be applied as written. On its face, Section 10 requires a pardon by the governor, which Mr. Banta has not received as Article 4, section 5(E) grants certain felons a pardon "automatically" and "without action by the governor." However, Article 4 of the Louisiana Constitution governs the Executive Branch, as opposed to Article 1, which is entitled "Declaration of Rights" and sets forth the rights of individuals such as the rights to privacy, vote, bear arms, fair trial, and humane treatment. Therefore, Mr. Banta's first offender pardon did not restore his right to hold a public office under Article 1, section 10. **Malone v. Tubbs**, 36,816, 36-817, pp. 11-12 (La.App. 2 Cir. 9/6/02), 825 So.2d 585, 592, writs

¹ This constitutional amendment became effective before Mr. Banta qualified for and was elected to the office he holds; therefore, it applies herein. **Malone v. Tubbs**, 36,816, 36,817, p. 11 (La.App. 2 Cir. 9/6/02), 825 So.2d 585, 592, writs denied, 02-2322 (La.9/11/02), 824 So.2d 1164 and 02-2448 (La.10/1/02), 826 So.2d 1110; **Cook v. Skipper**, 99-1448, p. 8 (La.App. 3 Cir. 9/27/99), 749 So.2d 6, 11, writ denied, 99-2827 (La.9/30/99), 745 So.2d 601.

denied, 02-2322 (La. 9/11/02), 824 So.2d 1164 and 02-2448 (La. 10/1/02), 826 So.2d 1110. Cf. State v. Adams, 355 So.2d 917, 922 (La. 1978); **Gordon v. Louisiana State Board of Nursing**, 2000-0164, p. 7 (La.App. 1 Cir. 6/22/01), 804 So.2d 34, 38, writ denied, 01-2130 (La. 11/16/01), 802 So.2d 607; **Cook v. Skipper**, 99-1448, p. 6 (La.App. 3 Cir. 9/27/99), 749 So.2d 6, 10, writ denied, 99-2827 (La. 9/30/99), 745 So.2d 601.

The trial court did not err in concluding that Mr. Banta, whose date of qualifying for the office he holds was not more than fifteen years after the completion of his original sentence and who did not have a governor's pardon, holds the office of Councilman without authority.

Finally, Mr. Banta contends that a quo warranto proceeding is not the proper procedural vehicle to seek removal of an elected official. Quo warranto is a writ directing an individual to show by what authority he holds public office. LSA-C.C.P. art. 3901. When the court finds that a person is holding office without authority, the judgment shall forbid him to do so. LSA-C.C.P. art. 3902.

Under Article 1, section 10 of the Louisiana Constitution, a convicted felon is holding office without authority unless he can show that he received a pardon from the governor or fifteen years have elapsed since the completion of his sentence. Mr. Banta, a convicted felon, pled neither circumstance in his answer. The trial court, then, conducted a hearing at which the District Attorney attempted to show that Mr. Banta had no authority to hold the office of Councilman, and Mr. Banta argued his first offender pardon was the same as a governor's pardon. After considering the evidence and argument, the trial court rendered judgment finding that Mr. Banta held the office of Councilman without authority and in violation of

Louisiana Constitution Article 1, section 10, and rendered judgment prohibiting him from holding that office.

Admittedly, the writ of quo warranto has been used less frequently to try title to public office since the adoption of LSA-R.S. 42:76, which provides for actions to try the right to hold a public office. However, unlike the majority, I find no impediment to its use for that purpose. See Slater v. Blaize, 204 La. 21, 14 So.2d 872 (1943). Several Louisiana Attorney General Opinions, issued during the period of 1980 through 2002, confirm that the quo warranto procedure is an available procedural vehicle to remove from office an official whose qualifications do not comport with Article 1, Section 10 of the Louisiana Constitution. La. Atty. Gen. Op. Nos. 02-392 (11/6/02), 96-110 (4/8/96), and 80-257 (3/20/80). Furthermore, in the Attorney General's opinion there is a mandatory requirement on the part of the district attorney to bring a quo warranto proceeding to remove an elected official where his right to hold office is questionable. La. Atty. Gen. Op. Nos. 02-392 (11/6/02), and 96-110 (4/8/96). Therefore, I reject Mr. Banta's assertions that the trial court erred in deciding this issue on a petition for writ of quo warranto. For the foregoing reasons, I would affirm the judgment of the trial court.