

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1185

STATE OF LOUISIANA

VERSUS

TONY J. GIBSON

Judgment Rendered: MAY 11 2012

JEW

*J.P.P.
IMH*

Appealed from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary, Louisiana
Trial Court Number 122,770

Honorable James R. McClelland, Judge

Camille A. Morvant, II, District Attorney
Thibodaux, LA

Attorney for
State – Appellee

Nelson Dan Taylor, Sr.
Thibodaux, LA

Attorney for
Defendant – Appellant
Tony J. Gibson

BEFORE: KUHN, PETTIGREW, McCLENDON, WELCH, AND HIGGINBOTHAM, JJ.

*McClelland, J. dissents and assigns reasons.
Kuhn, J. dissents with reasons. by JEW*

WELCH, J.

Defendant, Tony J. Gibson, appeals a judgment decreeing that he is ineligible to serve as an alderman for the Town of Baldwin, ordering his removal from the office, and declaring his seat on the town council vacant. We reverse.

BACKGROUND

The facts forming the basis for this appeal are not in dispute. On December 16, 1997, Mr. Gibson pled guilty to carnal knowledge of a juvenile, a felony, in the 16th Judicial District Court for the Parish of St. Mary. In accordance with the terms of a plea bargain, Mr. Gibson was sentenced to serve a term of imprisonment of five years, the execution of which was suspended, and Mr. Gibson was placed on supervised probation for a period of three years. After having discharged his sentence, on October 22, 2002, Mr. Gibson received an automatic first offender pardon.

On July 8, 2010, Mr. Gibson filled out a qualifying form for election to the Office of Alderman for the Town of Baldwin in St. Mary Parish. Therein, Mr. Gibson certified that he was not prohibited from qualifying as a candidate for conviction of a felony pursuant to Article I, § 10 of the Louisiana Constitution. Article I, § 10 of the Constitution prohibits a convicted felon from holding public office unless he has been granted a governor's pardon or fifteen years have elapsed since the completion of his sentence.¹

¹ Louisiana Constitution article I, § 10 provides, in pertinent part:

(B) **Disqualification.** The following persons shall not be permitted to qualify as a candidate for elective public office or to 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 ... and has not afterwards been pardoned ... by the governor of this state

....
(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 such 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.

On November 2, 2010, Mr. Gibson was elected as an alderman for the Town of Baldwin. Thereafter, J. Phil Haney, the district attorney for St. Mary Parish, filed an *ex parte* motion and order in the 16th Judicial Court seeking to be recused from handling any action, civil or criminal, arising out of any potential violation of the Louisiana Election Code or the Louisiana Constitution occurring in connection with Mr. Gibson's election. The motion alleged that Mr. Gibson, a convicted felon, was ineligible to hold public office pursuant to Article I, § 10 of the Louisiana Constitution. The motion further alleged that a civil action pursuant to La. C.C.P. arts. 3901 and 3902, which provides for a writ of *quo warranto* directing an individual to show by what authority he claims or holds public office, existed to prevent Mr. Gibson from taking office and/or remove him from office. DA Haney claimed that a conflict existed which could reasonably prevent his office from taking part in the *quo warranto* proceeding as at least one assistant district attorney would likely be a witness in that litigation. Moreover, the motion alleged that there was a pending criminal action against Mr. Gibson in the 16th Judicial District Court, and a possible conflict of interest existed in DA Haney's office prosecuting both actions. The motion requested that Camille Morvant, the district attorney for the 17th Judicial District Court, be appointed as substitute district attorney to handle any and all criminal matters related to the claimed election code violations, and that the Office of the Attorney General be appointed to take over the pending criminal action against Mr. Gibson.

On December 9, 2010, the trial court issued an order recusing DA Haney from handling any criminal or civil actions arising in connection with Mr. Gibson's election, appointing DA Morvant to serve as district attorney with respect to any civil or criminal matters relating to an alleged election violation, and appointing the Office of the Attorney General to handle the existing criminal case against Mr. Gibson.

On January 11, 2011, DA Morvant, on behalf of the Parish of St. Mary, filed this petition seeking to prevent Mr. Gibson from taking office on January 13, 2011. The petition alleged that fifteen years had not elapsed since Mr. Gibson pled guilty to the felony crime in 1997 and his election to office in 2010, and because Mr. Gibson did not receive a governor's pardon, Mr. Gibson is prohibited by Article I, § 10 of the Constitution from being sworn in for public office and is therefore ineligible to serve as alderman for the Town of Baldwin. Injunctive relief to prevent Mr. Gibson from being sworn in or taking his seat on the council was not sought. The record does not reveal whether Mr. Gibson in fact was sworn in and served on the council thereafter.

At a hearing held on February 14, 2011, Mr. Gibson filed a motion to dismiss the petition and to disqualify DA Morvant as the attorney for the State of Louisiana. Therein, he asserted that the appointment of DA Morvant to initiate the civil proceeding against him was made without lawful authority because there was no pending civil proceeding when the appointment was made and that the *ex parte* motion filed by DA Haney deprived him of notice and an opportunity to be heard. On the merits, Mr. Gibson argued that pursuant to the Louisiana Election Code, the State was required to challenge his qualification within nine days following the election, and by not doing so, a challenge to his qualification to run for office no longer existed.² Mr. Gibson argued that there were well-established procedures to remove an elected official from office, none of these procedures had been utilized by the State in this case, and the attempt to remove him from office by the use of summary proceedings was improper. The State argued that the instant proceeding is not a *quo warranto* proceeding because the State is not challenging Mr. Gibson's

² The Louisiana Election Code sets forth procedures for contesting a candidate's qualifications and contesting an election. Louisiana Revised Statutes 18:1405 provides that an action objecting to candidacy shall be instituted within seven days after the close of qualifications for candidates in the primary election, while an action contesting an election involving election to office shall be instituted on or before the ninth day after the date of the election.

authority to hold public office, but whether Mr. Gibson is prohibited by the Louisiana Constitution from holding public office.

On February 24, 2011, the trial court issued judgment dismissing Mr. Gibson's motion seeking to disqualify DA Morvant from prosecuting the action. The court decreed that Mr. Gibson was not qualified to run for public office, ordered that Mr. Gibson be removed from his seat on Baldwin's town council, and declared the seat of Alderman previously held by Mr. Gibson to be vacant.

Mr. Gibson filed a motion for a new trial. At the hearing thereon, Mr. Gibson argued that the judgment was contrary to the law, particularly this court's decision in **State v. Banta**, 2003-0200 (La. App. 1st Cir. 2/23/04), 872 So.2d 1110, where the State sought to remove a seated public official from office through a writ of *quo warranto*. This court held that once the election had been certified and the elected official had been sworn in, the *quo warranto* action was no longer viable and should have been dismissed. **Banta**, 872 So.2d at 1113. In **Banta**, the State further argued that the elected official, a convicted felon who did not have a governor's pardon, was disqualified from holding office pursuant to the Louisiana Constitution. This court noted that there are well-established methods for testing a person's qualifications to run for office, controlled by the Louisiana Election Code, La. R.S. 18.1 *et seq.*; however, no action had been filed objecting to the official's candidacy, and the time for bringing such an action had long expired. Moreover, this court stated, there are numerous provisions in the law providing procedures for removing elected officials from public office found in the constitution, namely, Article X, § 24, providing for removal by impeachment for the commission of a felony or felony conviction while in office, Article X, § 25, providing for removal by suit for a felony conviction while in office, and recall of an elected official, set forth in Article X, § 26 and La. R.S. 18:1300.1 through 18:1300.17. However, none of these procedures had been followed. In **Banta**, this court held that because

the official had been duly elected, no one had timely filed an opposition to his qualifying for or taking public office, and no one filed the appropriate proceeding to remove him from public office such as a recall, the trial court's judgment removing the official from office for violating Article I, § 10 of the Constitution was improper. **Banta**, 872 So.2d at 1114.

In response, the State again insisted it was not seeking removal of Mr. Gibson from office through a writ of *quo warranto* or through the Louisiana Election Code, but for violating the Louisiana Constitution. The trial court denied Mr. Gibson's motion for a new trial, finding that **Banta** did not apply for three reasons. First, the court noted that the elected official therein had received an automatic first offender pardon. Secondly, the trial court noted that this court stressed that there was no evidence in the record to suggest that the official fraudulently misrepresented himself when qualifying for office; however, in this case, Mr. Gibson certified that he was not ineligible under Article I, § 10 of the Constitution after the Supreme Court, in **Touchet v. Broussard**, 2010-0380 (La. 3/3/10), 31 So.3d 986, held that a first offender's pardon is not the equivalent of a governor's pardon required by Article I, § 10 to make a convicted felon eligible to run for public office. The trial court further distinguished **Banta** on the basis that the lawsuit was not filed until almost three years after the elected official had been in office. In this case, the trial court stated, the evidence showed that the State notified Mr. Gibson before the election that he was not eligible to hold public office. The trial court also stated that the lawsuit was filed and Mr. Gibson was served with the lawsuit before Mr. Gibson was sworn in.

In this appeal contesting his removal from public office, Mr. Gibson asserts the following assignments of error: (1) the trial court lacked authority to appoint a substitute attorney for the recused district attorney where there was no pending proceeding; (2) the court erred in entering an *ex parte* order in a civil proceeding

without mandating service of the order or notice to the defendant who was the subject of the pleading; (3) the court erred in failing to apply the Louisiana Election Law to the civil challenge to his qualification for public office and further erred in failing to find the action untimely and inappropriate to contest the qualifications of a public official; and (4) the court erred in failing to enforce the plea bargain agreement between the State of Louisiana and himself by imposing the disqualifying conditions of amendments to the Louisiana Constitution which had not been enacted at the time of the plea bargain and which vacated the reasonable expectations arising from the plea agreement when made. Because we find merit in Mr. Gibson's third assignment of error, we pretermitt discussion of all remaining assignments of error.

As stated earlier, in **Banta**, this court has previously held that the State may not seek removal of an official from public office through a writ of *quo warranto* once the election had been certified and the elected official took his oath of office. **Banta**, 872 So.2d at 1113. While the State in this case insists it is not seeking to use the *quo warranto* procedure, it is doing precisely what was attempted in **Banta**: seeking the removal of an elected public official on the basis that the elected public official is ineligible to hold public office by virtue of Article I, § 10 of the Constitution. Like **Banta**, no action was filed pursuant to the Louisiana Election Code to contest Mr. Gibson's qualification to hold public office before the election or within the delays set forth therein for contesting an elected official's qualifications after being elected, even though the evidence showed that the District Attorney's office knew about Mr. Gibson's impediment and notified Mr. Gibson that he was not eligible before the election was held. And while the State did file a proceeding contesting Mr. Gibson's qualification to hold public office prior to the date Mr. Gibson was scheduled to take his oath of office, it did not seek injunctive relief to prevent Mr. Gibson from taking his seat. Once duly elected,

Mr. Gibson could only be removed from office by one of the well-established procedures for removing elected officials from office. Because none of them were instituted in this case, we hold that the trial court lacked authority to remove Mr. Gibson from his seat and declare the seat vacant.

CONCLUSION

For the above reasons, the judgment appealed from is reversed. All costs of this appeal, in the amount of \$1,147.31 are assessed to the State of Louisiana.

REVERSED.

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STATE OF LOUISIANA

VERSUS

TONY J. GIBSON

McCLENDON, J., dissents and assigns reasons.

Pursuant to Louisiana Constitution Article I, § 10, 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. Because Mr. Gibson, a convicted felon, is constitutionally prohibited from taking or holding public elective office unless the foregoing circumstances are met, it is error to conclude that he cannot be removed merely because he was not challenged pursuant to the procedures in the Election Code. See my dissenting opinion in **State v. Banta**, 03-0200 (La.App. 1 Cir. 2/23/04), 872 So.2d 1110, 1114-16. Accordingly, I conclude that the trial court correctly held that Mr. Gibson, 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, is ineligible to serve as alderman for the Town of Baldwin.

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KUHN, J., dissenting.

JE Kuhn
JEW

Article I, section 10 of the Louisiana Constitution provides that a person who has been convicted of a felony in this state “shall not be permitted to ... take public elective office.” Therefore, defendant cannot constitutionally be qualified to hold office. Hence, the procedures for removal of elected officials from office are not the correct touchstone for the issues in this case. Accordingly, I dissent.