IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

United Auto Workers,
Local Union 1112, et al.,

Plaintiffs,

v.

Jennifer L. Brunner,
Ohio Secretary of State,

Defendant.

Case No. 05CVH-03-2553

Judge John F. Bender

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
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CLERK OF COURTS

United Auto Workers,
Local Union 1112, et al.,

Plaintiffs,

v.

Jennifer L. Brunner,
Ohio Secretary of State,

Defendant.

Case No. 07CVH-03-3412

CONSOLIDATED

Franklin County
Board of Commissioners,

Plaintiff,

v.

State of Ohio, et al.,

Defendants.

Case No. 07CVH-05-7008

CONSOLIDATED

DECISION AND ENTRY
ON MOTION FOR STAY PENDING APPEAL
Filed June 12, 2007

RENDERED THIS 17th DAY OF JULY 2008

BENDER, J.

The State of Ohio and the Attorney General (collectively, the Attorney General) filed a motion asking the court to stay enforcement of its June 18, 2008 order. The Union Plaintiffs and the Secretary of State oppose the motion. A reply brief has been filed. Because all parties have had notice of the motion and an opportunity to be heard, it is properly before the court for a decision.[1]

Application for Stay Pending Appeal

Two rules allow a court to stay the enforcement of a final order pending appeal: App.R. 7 and Civ.R. 62. App.R. 7(A) says that a motion in the court of appeals for stay pending appeal "must ordinarily be made in the first instance in the trial court. A motion for such relief * * * shall show that the application to the trial court for the relief sought is not practicable, or that the trial court has, by journal entry, denied an application, or failed to afforded the relief which the applicant requested." Thus, App.R. 7(A) allows the court of appeals to grant a stay pending appeal and contemplates the possibility that a trial court might deny such a motion.

Civ.R. 62(B) states, "When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond." Civ.R. 62(C) states that when an appeal taken by the state "and the operation or enforcement of the judgment is stayed, no bond * * * shall be required from the appellant." While the phrase "and the operation or enforcement of the judgment is stayed" appears to contemplate the possibility that it might *not* be stayed by the trial court, the rule is not applied that way. In *State ex rel. Ocasek v. Riley*, the Supreme Court unequivocally held that when Civ.R. 62(B) and (C) are read together, the only

[1] The Commissioner Plaintiffs have chosen to not take a position on the motion for stay.

requirement to obtain a stay pending appeal is posting an adequate bond, and when the appeal is brought by the state the trial court 'has no discretion to deny the stay." [2]

Ocasek remains as vibrant today as it was thirty years ago, having been reaffirmed by the Supreme Court in 2000[3] and again in 2003.[4] Yet this case is unprecedented. *Ocasek* and its progeny deal with laws that were enacted according to the procedures set forth in the Ohio Constitution and were entitled to a strong presumption of constitutionality while subjective arguments for and against their validity were carefully considered.[5]

By contrast, whether a law was passed according to the procedures set forth in the Ohio Constitution is measured objectively. The provisions that no law shall be passed without the approval of a majority of both houses of the General Assembly; that the presiding officer of each chamber shall sign each bill to attest it was enacted properly; and that each bill shall be presented to the governor for his approval, are mandatory.[6] The evidence is what it is. The Ohio Constitution was either followed, or it was not.

The "'failure to observe [a mandatory provision] will render a statute void.'"[7] A void judgment is a nullity and is treated as if in never existed, leaving the parties "in the same position as if there had been no judgment." [8] A court's authority to grant relief

[2] *State ex rel. Ocasek v, Riley* (1978), 54 Ohio St.2d 488.
[3] *State ex rel. State Fire Marshal v. Curl* (2000), 87 Ohio St. 3d 568.
[4] *State ex rel. Geauga Cty. Commrs. v. Milligan* , 100 Ohio St.3d 366, 2003-Ohio-6608.
[5] *State ex rel. Dickman v. Defenbacker* (1955), 164 Ohio St.142, 149.
[6] *Ritzman v. Campbell* (1915), 93 Ohio St. 246, 252.
[7] Id., quoting *Ex Parte Falk* (1885), 42 Ohio St. 638, 639.
[8] *State v. Broadnax*, Franklin App. No. 07AP-785, 2008-Ohio-1799, ¶11.

from a void judgment does not derive from procedural rules; it is an inherent power grounded in principles of fundamental justice.[9]

To "declare a legislative act unconstitutional and void, * * * on the ground that it violates the constitution of this state, the case must be free from doubt, the violation must be palpable. So long as doubt remains the legislative act should be enforced."[10] The evidence in this case is undisputed. S.B. 694 was enrolled, but it was not passed by both houses of the General Assembly. It is therefore void. Am.Sub. H.B. 694 was passed by both houses of the General Assembly, but it was not enrolled.[11] It is therefore void. [12]

It is just as clear that Am.Sub. H.B. 119 did not reenact the provisions of H.B. 694. After Am. Sub. H.B. 350 was declared unconstitutional in 1999, the Supreme Court addressed this precise set of facts in *Stevens v. Ackman* (2000), 91 Ohio St.3d 182, 193-197. Am.Sub. H.B. 350 was enacted in 1996; some of its provisions were amended in 1997. In Stevens, the Supreme Court rejected the very argument that the Attorney General makes here: that the 1997 amendments effectively reenacted the 1996 law later found unconstitutional. The *Stevens* decision has not been modified. No authority has been presented to suggest the Supreme Court would rule any differently today.

As the Supreme Court of Ohio explained some 22 years ago:

> The passage of time and subsequent performance of the contract cannot "cure" this constitutional defect, for an unconstitutional law must be treated as having no effect

[9] *Patton v. Diemer* (1988), 35 Ohio St.3d 88, paragraph four of the syllabus; *Kingsborough v. Tousley* (1897), 56 Ohio St. 450, 461-462. The same principle applies to criminal statutes. *State v. Wilson* (1995) 73 Ohio St.3d 40, 45; *State v. Perry* (1967), 10 Ohio St.2d 175.
[10] *Armstrong v. Treasurer of Athens Cty.* (1840), 10 Ohio 235, 237.
[11] The language of the enrolled act prevails over anything that conflicts with it. R.C. 1.53. S.B. 694 was enrolled; Am.Sub. H.B. 694 was not. Yet for some reason, notwithstanding the Revised Code's plain language, Am. Sub. H.B. 694 is treated as the law even though it was never enrolled.
[12] Section 15, Article II, Ohio Constitution; *Ritzman v. Campbell* (1915), 93 Ohio St. 246; *Maloney v. Rhodes* (1976), 45 Ohio St.2d 319.

> whatsoever from the date of its enactment. This fundamental proposition has been expressed as follows:
>
> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County* (1886), 118 U.S. 425, 442. Accord *Ex Parte Siebold* (1879), 100 U.S. 371, 376; *Chicago, I. & L. Ry. Co.* v.. *Hackett* (1913), 228 U.S. 559, 566. [13]

On one hand, it is counterintuitive to stay this judgment because doing so requires the people of Ohio to follow a law that was not passed according to the rules they set in their Constitution for their government to follow. The Attorney General has not identified a single case where an Ohio law that was not passed as the Ohio Constitution requires was allowed to stand. Nor has the Attorney General identified a single instance where the pages with the signatures of the Speaker of the House, the President Pro Tempore of the Senate, and the Governor were removed from the bill they did sign and placed with a bill "they meant to sign."

On the other hand, while *Ocasek* and its progeny are clearly distinguishable, the clarity of the Supreme Court's controlling pronouncements in *Ocasek* and *Curl* is unmistakable; only they can decide if this distinction makes a difference. After careful consideration of controlling Supreme Court precedent, the court finds that it does not have the discretion to take any step other than to grant the state's motion and stay the enforcement of the June 18, 2008 order pending the outcome of the appeal.

SO ORDERED.

John F. Bender, Judge

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[13] *Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 80.

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