IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: City of Lebanon Home Rule Charter	:	
	:	No. 364 C.D. 2010
Appeal of: Carl and Abigail Jarboe	:	SUBMITTED: July 16, 2010
	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** September 1, 2010

Carl and Abigail Jarboe, husband and wife, appeal, *pro se*, from the *en banc* decision of the Court of Common Pleas of Lebanon County, which granted a declaratory judgment for the City of Lebanon (City) holding that a provision of the City's Home Rule Charter (Charter) was void. The Jarboes assert numerous objections to the decision below, including violations of the state and federal constitutions, and that the common pleas judges violated their oaths of office. We affirm.

The City filed an Action for Declaratory Judgment in 2009, seeking to invalidate Article XIII of the Charter, which reads:

> Subject and rates of taxation in the City shall be those allowable under the Third (3rd) Class City Code of the Commonwealth of Pennsylvania on the effective date of this Charter . . . except as follows:

> 1. Real Estate – the rate of taxation on real estate . . . shall not increase by more than two (2) mills unless approved though action of Public Referendum. The rates for those taxes specified shall not exceed:
>
> | Tax | Tax Limitations |
> |---|---|
> | Earned Income | 1.4% |
> | Occupational millage Tax | 0% |
> | Per Capita Tax | 0% |
> | Emergency and Municipal Services Tax (formerly known as Occupational Privilege Tax) | $52/person /annually |
> | Occupational Privilege Tax | 0% |

The Jarboes, City residents, filed an Answer, arguing that the tax provision should not be invalidated.[1] Common pleas, sitting *en banc*, held that the provision was invalid, citing *Musewicz v. Cordaro*, 925 A.2d 172 (Pa. Cmwlth. 2006). In that case, this court invalidated a similar Home Rule Charter provision requiring a referendum before certain tax increases could be put into effect as a violation of 53 Pa. C.S. § 2962(b). Section 2962(b) states that in home rule municipalities, the "governing body shall not be subject to any limitation on the rates of taxation imposed upon residents." 53 Pa. C.S. § 2962(b). The Jarboes raise seven objections to the decision of common pleas to invalidate the Charter provision, which will be addressed in turn.

In the first section of the Jarboes' brief, they assert that common pleas was incorrect because *Musewicz* has no precedential value, misquotes the Pennsylvania Constitution, and violates the Pennsylvania Constitution. These

[1] Although there is no indication that the Jarboes formally intervened in this action, common pleas appeared to hold that all property owners in the City had standing to participate in this suit. Regardless, no objection has been raised to the Jarboes' participation or their standing as appellants.

arguments have no merit. *Musewicz*, as a published decision of this court, is, as common pleas correctly found, binding precedent. It contains no misquotations of the Pennsylvania Constitution. The Jarboes assert that *Musewicz*, and the statute it relies on, violates Article I, Section 2 of the Pennsylvania Constitution, which states:

> All power is inherent in the people . . . they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

The Jarboes maintain that the citizens of Lebanon were using their right to alter their form of government when they adopted the Charter, and therefore, to void a section of the Charter violates that right. However, the Constitutional provision the Jarboes cite has never been applied to Home Rule Charters, or municipal government generally. Article I, Section 2 has been applied only in the context of statewide governmental questions, such as the procedure for amending the Pennsylvania Constitution. *See, e.g., Com. v. Tharp*, 562 Pa. 231, 754 A.2d 1251 (2000). Even more fundamentally, a constitutional provision granting rights to "the people" does not eviscerate the laws setting forth the procedures by which the citizens may exercise those rights. The people act through the laws passed by their representatives in the General Assembly as well as through local enactments, and under our existing structure of government, a local municipality simply may not override affirmative State law.

The Jarboes next argue that common pleas misapplied Article 9, Section 2 of the Pennsylvania Constitution when it held that the statute invalidated the Charter. However, in its decision on this issue, common pleas was correctly following this court's decision in *Musewicz*, in which this court held that Article 9,

Section 2 requires that Home Rule Charter provisions in violation of statute be found invalid. For all the reasons explained at length by common pleas in this case and by this court in *Musewicz*, there was no misapplication of Article 9, Section 2 of the Pennsylvania Constitution.

The Jarboes also assert that common pleas erred in denying their request for a jury trial. In cases for declaratory judgment, "[w]hen a proceeding under this subchapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." 42 Pa. C.S. § 7539. However, in this case, there were no disputed material facts. The Jarboes assert that a jury could have found facts including the motivation of the citizens who voted for the Charter, and if it was necessary for the City to raise taxes. However, none of these issues are relevant to the outcome of the case. This case, as common pleas noted, revolves around a single question of law: whether the Charter provision at issue is superseded by 53 Pa. C.S. § 2962(b). Common pleas correctly ruled that it was, and there was no need for factual findings by a jury to reach that conclusion.

The Jarboes next argue that common pleas violated their constitutional right to Equal Protection when it accelerated the briefing schedule in this case. Specifically, the Jarboes take issue with the fact that the court ordered briefs for both sides to be submitted on the same day, rather than making the City's brief due earlier, giving the Jarboes the opportunity to respond to arguments therein. In its opinion, common pleas acknowledged that it accelerated its customary briefing schedule in the case so that it could be resolved before City real estate tax bills were mailed out for the year. Common pleas also noted that the

Jarboes were able to submit a brief by the deadline, and appeared prepared at the hearing. Before this court, the Jarboes do not point to any actual rule that was broken in this departure from convention, nor any actual prejudice they suffered and have not established a violation of their constitutional rights or an abuse of discretion on the part of common pleas.

The Jarboes also assert that the judges below violated their oaths of office by not accepting their arguments, including their arguments based on the Pennsylvania Constitution. Because we find that the opinion below is correct in all respects, it is entirely clear that the common pleas judges in no way violated their oaths of office.

The Jarboes argue that all of the judges below should have recused themselves from this case because they all at one point presided over other cases in the Jarboes' long and often unsuccessful history of *pro se* litigation in Lebanon County.[2] The Jarboes cite Section C of Canon 3 of the Code of Judicial Conduct[3] as authorizing this court to reverse on those grounds. However, Canon 3 "creates no right of recusal on behalf of litigants, but merely prescribes standards by which judges should exercise their discretion in ruling upon questions of recusal." *Com. v. Williams*, 557 Pa. 207, 221, 732 A.2d 1167, 1174 (1999). For this reason, the Jarboes cannot prevail on this argument.[4]

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[2] Of the four judges on the Lebanon County Court of Common Pleas, one, Judge Jones, did recuse, because, as a property owner in the City, his taxes would be directly affected by the outcome of the case. President Judge Tylwalk and Judges Kline and Charles did not recuse.

[3] Section C (1) states that "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned," including when "they have a personal bias or prejudice concerning a party."

[4] Although the issue has no bearing on the resolution of this case, we note that there is nothing in the record which suggests that any of the common pleas judges improperly declined to recuse themselves.

Finally, the Jarboes argue that common pleas erred in granting relief not requested by the City. In their Action for Declaratory Judgment, the City requested that the court strike Article XIII of the Charter, as a violation of the statutory prohibition on limitations on municipal governing bodies' power to tax. *See* 53 Pa. C.S. § 2962(b). The court invalidated only Section (1) of Article XIII, as it found that this was the only section which violated the statute, and that invalidating only that section was required by the Charter's severability clause. *See* Charter Article X, Section 3, Reproduced Record at 30a. The Jarboes argue that this variation from the City's requested relief was improper. This is incorrect. In fact, the Statutory Construction Act of 1972 requires that courts treat all statutes as severable. 1 Pa. C.S. § 1925. Our Supreme Court has held that the principles of the Statutory Construction Act are to be followed when construing local laws. *Patricca v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 527 Pa. 267, 590 A.2d 744 (1991). Therefore, common pleas' ruling with regard to severability was correct.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 1st day of September, 2010, the order of the Court of Common Pleas of Lebanon County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge