

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOSEPH GUARRASI,

Appellant

v.

HONORABLE DIANE E. GIBBONS,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2769 EDA 2013

Appeal from the Order Entered September 12, 2013
In the Court of Common Pleas of Bucks County
Civil Division at No(s): 2007-07270

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.**

MEMORANDUM BY JENKINS, J.

FILED JULY 17, 2014

On August 21, 2007, Joseph Guarrasi commenced this action against the District Attorney of Bucks County, the Honorable Diane Gibbons, seeking criminal prosecution against her under 16 P.S. §§ 1405 and 4405 due to alleged misconduct in office. In an amended complaint filed on April 13, 2011, Guarrasi no longer demanded criminal prosecution but simply requested that Gibbons be “censored, suspended and expelled from office.”

On September 5, 2013, the trial court entered summary judgment in favor of Gibbons and against Guarrasi. Guarrasi filed a timely appeal and timely statement of matters complained of on appeal. The trial court did not file a Pa.R.A.P. 1925(a) opinion.

** Former Justice specially assigned to the Superior Court.

We affirm the dismissal of Guarrasi's action against Gibbons under section 1405, since this statute does not apply to district attorneys of second class A counties such as Gibbons. We affirm the dismissal of Guarrasi's action under section 4405 as moot. Gibbons resigned as district attorney at the end of 2007, so there is no longer any live case or controversy under section 4405. Even if Guarrasi's action is not moot, we affirm on the basis that Gibbons is entitled to judgment as a matter of law.

The record¹ provides the following facts. In 2003 or early 2004, Guarrasi attempted to purchase Michael Samios' residence in Doylestown, Pennsylvania, in exchange for cash and a mobile home that Guarrasi claimed he owned². Guarrasi, it turned out, did not own the mobile home, so Samios and his girlfriend, Lisa Fryling, were evicted after they moved into the mobile home³. Guarrasi also allegedly solicited Fryling to commit insurance fraud. He encouraged Fryling to hit one of his limousines with her SUV, report to

¹ In addition to this record, we take judicial notice that Guarrasi has filed multiple other lawsuits in state and federal court against Gibbons and other individuals. **See *Guarrasi v. Gambardella, et al.***, 604 MD 2009 (Commonwealth Ct.), ***aff'd per curiam***, 66 A.3d 250 (Pa.2013); ***Guarrasi v. Scott***, 25 A.3d 394 (Pa.Cmwlt.2009); ***Guarrasi v. Carroll***, 979 A.2d 383 (Pa.Super.2009); ***Guarrasi v. Gibbons***, 2008 WL 4601903 (E.D.Pa., 10/15/08). Unless otherwise noted, all citations below are to documents filed in the present case.

² Amended Complaint, exhibit 25 (newspaper articles attached to Guarrasi's amended complaint concerning charges against him).

³ ***Id.***

her insurer that a “phantom vehicle” ran her off the road, and split the insurance settlement with Guarrasi⁴.

Samios contacted police to complain that Guarrasi had committed real estate fraud. The police encouraged Samios to keep working with Guarrasi to gather additional information⁵.

On February 23, 2004, pursuant to Gibbons’ directive, Chief Deputy District Attorney Gary Gambardella applied for a Wiretap Act order authorizing interception of oral communications in Guarrasi’s residence between Guarrasi and Samios involving criminal solicitation to commit insurance fraud and possibly theft by deception and promoting prostitution⁶. Chief Deputy Gambardella sought a “one person consensual interception” of oral communications pursuant to 18 Pa.C.S. 5704(2)⁷ and identified Samios

⁴ ***Id.***

⁵ ***Id.***

⁶ Amended Complaint, exhibit 15 (February 23, 2004 wiretap application).

⁷ Section 5704 provides in relevant part:

It shall not be unlawful and no prior court approval shall be required under this chapter for:

(2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities, including, but not limited to, the crimes enumerated in section 5708 (relating to order authorizing interception of wire, electronic or oral communications), where:

(Footnote Continued Next Page)

(Footnote Continued) _____

(i) Deleted.

(ii) *one of the parties to the communication has given prior consent to such interception.* However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be initiated, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however, such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom;

(iii) the investigative or law enforcement officer meets in person with a suspected felon and wears a concealed electronic or mechanical device capable of intercepting or recording oral communications. However, no interception under this subparagraph may be used in any criminal prosecution except for a prosecution involving harm done to the investigative or law enforcement officer. This subparagraph shall not be construed to limit the interception and disclosure authority provided for in this subchapter; or

(iv) the requirements of this subparagraph are met. If an oral interception otherwise authorized under this paragraph will take place in the home of a nonconsenting party, then, in addition to the requirements of subparagraph (ii), the interception shall not be conducted until an order is first obtained from the president judge, or his designee who shall

(Footnote Continued Next Page)

as the consenting party to the interceptions⁸. The trial court signed an order authorizing the wiretap⁹. Several days later, Samios informed police that Guarrasi offered him \$2,000 to kidnap and kill or maim Guarrasi's business partner, Thomas Wittenhauer, for refusing to move out of an investment property that Guarrasi wanted to turn into a house of prostitution¹⁰. Since these crimes were more serious than the crimes referenced in the original wiretap application, Gambardella again obtained Samios' consent to a one

(Footnote Continued) _____

also be a judge, of a court of common pleas, authorizing such in-home interception, based upon an affidavit by an investigative or law enforcement officer that establishes probable cause for the issuance of such an order. No such order or affidavit shall be required where probable cause and exigent circumstances exist. For the purposes of this paragraph, an oral interception shall be deemed to take place in the home of a nonconsenting party only if both the consenting and nonconsenting parties are physically present in the home at the time of the interception.

[Emphasis added].

⁸ Amended Complaint, exhibit 15 (February 23, 2004 wiretap application).

⁹ Amended Complaint, ¶ 36; Gibbons' Motion For Summary Judgment, exhibit 3, p. 14 (stipulation during trial in **Guarrasi v. Gambardella**).

¹⁰ Amended Complaint, exhibit 25 (newspaper articles attached to Guarrasi's amended complaint).

person consensual interception and obtained a second wiretap order from the trial court pursuant to section 5704(2)¹¹.

On March 2, 2004, based on the interceptions and other investigation, Guarrasi was arrested and charged with attempted murder, solicitation to commit murder and numerous related offenses¹². Subsequently, he entered a plea of nolo contendere to attempted murder and a guilty plea to multiple counts of attempted aggravated assault, attempted kidnapping, attempted unlawful restraint, attempted false imprisonment, attempted burglary and solicitation to commit insurance fraud¹³. The court sentenced him to 6 ½ – 15 years' imprisonment¹⁴.

In 2007, Guarrasi filed the action against Gibbons that is the subject of the present appeal. Guarrasi's original complaint alleged that Gibbons, *inter alia*, violated multiple provisions within the Wiretap Act and misrepresented the nature of Guarrasi's acts to the media¹⁵. Based on these accusations,

¹¹ Gibbons' Motion For Summary Judgment, exhibit 3, pp. 41-46 (trial transcript in ***Guarrasi v. Gambardella***).

¹² Amended Complaint, exhibit 33 (criminal information against Guarrasi).

¹³ ***Guarrasi v. Scott***, 25 A.3d 394, 397-98 (Pa.Cmwlth.2009).

¹⁴ ***Guarrasi v. Gibbons***, 2008 WL 4601903, *3 (E.D.Pa., 10/15/08).

¹⁵ Complaint, ¶ 135.

Guarrasi demanded criminal prosecution against Gibbons for willful and gross negligence under 16 P.S. §§ 1405 and 4405¹⁶.

In 2009, Guarrasi filed an action in the Commonwealth Court, ***Guarrasi v. Gambardella, supra***, demanding that Chief Deputy District Attorney Gambardella and two detectives be removed from office for violations of the Wiretap Act.

On April 13, 2011, Guarrasi filed an amended complaint in the present case. He no longer demanded criminal prosecution against Gibbons but only requested that she be “censored, suspended and expelled from office¹⁷” under sections 4405 and 1405 for (1) violating the Wiretap Act, (2) disclosing intercepted information to the public even though this information was sealed under the court’s wiretap order, (3) misleading the public about information obtained from the wiretap, and (4) permitting Samios and Fryling to live for eight months in a residence that he owned.

On October 20, 2011, following a bench trial in ***Guarrasi v. Gambardella***, the Commonwealth Court, per the Honorable Keith B.

¹⁶ To be clear, Guarrasi did not demand criminal prosecution under the Wiretap Act *itself*. Instead, he asserted that Gibbons’ alleged violations of the Wiretap Act formed the basis for criminal prosecution under sections 1405 and 4405.

¹⁷ Amended Complaint, ¶ 134.

Quigley, entered a verdict in favor of the county detectives¹⁸. On February 19, 2013, the Supreme Court affirmed¹⁹.

In July 2013, Gibbons moved for summary judgment on the ground that the final disposition in ***Guarrasi v. Gambardella*** defeated Guarrasi's action against Gibbons under the doctrine of collateral estoppel²⁰. On September 5, 2013, the trial court entered summary judgment in favor of Gibbons. The court's order did not explain its reasons for granting summary judgment. Nor, as noted above, did the court file a Rule 1925(a) opinion.

Our discussion begins with an overview of 16 P.S. §§ 4405 and 1405. 16 P.S. § 4405, a statute within the Second Class County Code²¹, prescribes penalties for district attorneys in second class and second class A counties who commit misconduct in office. 16 P.S. § 1405, a statute within the County Code²², prescribes penalties for district attorneys in third through

¹⁸ Gibbons' Motion For Summary Judgment, exhibit 5 (Commonwealth Court's memorandum opinion in ***Guarrasi v. Gambardella***). Prior to trial, Chief Deputy District Attorney Gambardella was dismissed as a party to this case.

¹⁹ ***Guarrasi v. Gambardella, et al.***, 66 A.3d 250 (Pa.2013) (per curiam).

²⁰ Memorandum Of Law In Support Of Gibbons' Motion For Summary Judgment, pp. 6-8.

²¹ 16 P.S. § 3101 *et seq.*

²² 16 P.S. § 101 *et seq.*

eighth class counties who commit misconduct in office. Sections 4405 and 1405 are identical in content. They both provide:

(a) If any district attorney shall wilfully and corruptly demand, take or receive any other fee or reward than such as is prescribed by law for any official duties required by law to be executed by him in any criminal proceeding, or if such district attorney shall be guilty of wilful and gross negligence in the execution of the duties of his office, he shall be guilty of a misdemeanor in office, and, on conviction thereof, be sentenced to pay a fine not exceeding one thousand dollars and to undergo imprisonment not exceeding one year, and his office shall be declared vacant.

(b) Upon complaint in writing, verified by oath or affirmation of the party aggrieved, made to the court in which any district attorney shall prosecute the pleas of the Commonwealth, charging such district attorney with wilful and gross negligence in the execution of the duties of his office, the court shall cause notice of such complaint to be given to the district attorney and of the time fixed by the court for the hearing of the same. If upon such hearing the court shall be of opinion that there is probable cause for the complaint, they shall hand over or commit the district attorney to answer the same in due course of law. If the court shall be of opinion that there is no probable cause for such complaint, they shall dismiss the same, with reasonable costs to be assessed by the court.

Id.

Both sections 4405 and 1405 “set forth the procedure by which a private individual can seek to have a district attorney convicted of a misdemeanor in office and remove him or her from office based on willful and gross negligence in the execution of the duties of his or her office.”

Leventry ex rel. Com. v. Tulowitzki, 804 A.2d 1281, 1283 (Pa.Cmwltth.2002)²³. Both sections provide that

upon the filing of a complaint by an aggrieved person, the court shall hold an evidentiary hearing to determine if probable cause exists for the complaint. If the court finds that there is not probable cause for the complaint, it shall dismiss the complaint with reasonable costs to be assessed. However, if the court finds that probable cause exists for the complaint, it shall commit the district attorney to answer the complaint, and subsequently appoint a competent attorney, i.e., an 'independent prosecutor' to prepare an indictment and prosecute the offense on behalf of the Commonwealth as required by . . .16 P.S. § 1406 [and § 4406, respectively].

Id. "While the penalties enumerated in sections 1405(a) [and 4405(a)] are criminal in nature, the procedure by which a district attorney may be removed from office set forth in section 1405(b) [and 4405(b)] is civil in nature." **Id.** at 1284 n. 3. "Because the provisions of section 1405(b) [and 4405(b)] place the burden of establishing probable cause on a private individual rather than an individual acting at the behest of the public interest, and the only thing at issue is whether an 'independent prosecutor' should be appointed, that determination [is] not criminal in nature." **Id.**

²³ **Leventry** involves an appeal from an order refusing to dismiss a District Attorney under section 1405, but its analysis applies with equal force to section 4405 due to the identical nature of these statutes.

Since Bucks County is a second class A county,²⁴ 16 P.S. § 4405 applied to Gibbons while she was district attorney. 16 P.S. § 1405 never applied to Gibbons.

In an appeal under sections 4405 and/or 1405, an interesting question exists as to whether we should exercise jurisdiction instead of the Commonwealth Court. The Commonwealth Court's jurisdiction over appeals from final orders of common pleas courts is limited to certain defined classes of subject matter. 42 Pa.C.S. § 762. An appeal from the dismissal of an action under sections 4405 and/or 1405 lies within the exclusive jurisdiction of the Commonwealth Court²⁵. But even when an appeal falls within the Commonwealth Court's jurisdiction, the Superior Court may exercise

²⁴ ***See Wings Field Preservation Associates, L.P. v. Com., Dept. of Transp.***, 776 A.2d 311, 318 (Pa.Cmwlth.2001) (identifying Bucks County as second class A county).

²⁵ 42 Pa.C.S. § 762(a)(4)(i)(A) provides that the Commonwealth Court has exclusive jurisdiction over

all actions or proceedings arising under any municipality, institution district, public school, planning or zoning code or under which a municipality or other political subdivision or municipality authority may be formed or incorporated or where is drawn in question the application, interpretation or enforcement of any. . .

statute regulating the affairs of political subdivisions, municipality and other local authorities or other public corporations or of the officers, employees or agents thereof, acting in their official capacity.

jurisdiction over the appeal when the parties do not object. Pa.R.A.P. 741(a). **Wilkins v. Marsico**, 903 A.2d 1281, 1284 (Pa.Super.2006) (accepting jurisdiction over appeal from dismissal of action against Dauphin County District Attorney under section 1405, where district attorney did not object to this Court's exercise of jurisdiction). As in **Wilkins**, Gibbons does not object to this Court's exercise of jurisdiction over Guarrasi's appeal. And since section 4405 is identical in nature to section 1405, we should treat the appeals under both statutes the same way. Therefore, we accept jurisdiction over Guarrasi's appeal.

Guarrasi has no right to relief under section 1405, since this statute does not apply to district attorneys in second class A counties such as Gibbons.

Guarrasi's appeal under section 4405 fails for multiple reasons. First, it is moot. Under the mootness doctrine, "an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed." **Pub. Defender's Office of Venango County v. Venango County Court of Common Pleas**, 893 A.2d 1275, 1279 (Pa.2006) (quoting **Pap's A.M. v. City of Erie**, 812 A.2d 591, 599-600 (Pa.2002)). The existence of a case or controversy requires "a real and not a hypothetical legal controversy and one that affects another in a concrete manner so as to provide a factual predicate for reasoned adjudication...." **City of**

Philadelphia v. SEPTA, 937 A.2d 1176, 1179 (Pa.Cmwlth.2007). As our Supreme Court has explained:

The cases presenting mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way—changes in the facts or in the law—which allegedly deprive the litigant of the necessary stake in the outcome.

Pap's A.M., 812 A.2d at 599–600. It is well settled that the courts “do not render decisions in the abstract or offer purely advisory opinions.”

Pittsburgh Palisades Park, LLC v. Commonwealth, 888 A.2d 655, 659 (Pa.2005). Judicial intervention “is appropriate only where the underlying controversy is real and concrete, rather than abstract.” **City of Philadelphia v. Commonwealth**, 838 A.2d 566, 577 (Pa.2003).

There is no longer any live dispute in this case. In August 2007, when Guarrasi commenced this case, a live controversy existed under section 4405, because Gibbons was still the District Attorney of Bucks County. But at the end of 2007, Gibbons resigned as District Attorney. Thus, the remedy sought in Guarrasi’s amended complaint -- Gibbons’ removal as district attorney²⁶ -- became moot due to “events occurring after the lawsuit has

²⁶ The Amended Complaint seems to request a declaration that Gibbons is ineligible to hold the office of District Attorney as well as any other office in Pennsylvania. **Id.**, ¶ 133. Nothing in section 4405 indicates that this sweeping remedy is available as a result of a District Attorney’s alleged
(Footnote Continued Next Page)

gotten under way.” **Pap’s A.M.**, 812 A.2d at 599. Moreover, while Guarrasi demanded Gibbons’ criminal prosecution in his original complaint, he abandoned this demand in his amended complaint. The amended complaint merely requests that Gibbons be “censored, suspended and expelled from office”, a remedy rendered moot by her resignation as District Attorney.

Even if Guarrasi’s action under section 4405 is not moot, the trial court properly entered summary judgment against him. Summary judgment is proper

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2. In an appeal from the grant of summary judgment, we view the record in the light most favorable to the appellant (Guarrasi), the non-moving party below. **Liss & Marion, P.C. v. Recordex Acquisition Corp.**, 983 A.2d 652, 657 (Pa.2009). Our standard of review is *de novo* and our scope of review is plenary. **Id.** We may reverse only if the lower court committed an error of law. **Id.**

(Footnote Continued) _____

misconduct. Section 4405 permits removal of an individual from the office of District Attorney for misconduct, but not from any other office.

In Guarrasi's lawsuit against Chief Deputy Gambardella and the two detectives, the Commonwealth Court held after a one-day trial that there were no Wiretap Act violations committed in connection with Guarrasi's criminal case²⁷. The Supreme Court affirmed this decision²⁸. Consequently, under collateral estoppel principles, Guarrasi is precluded from arguing in the present case that there were any Wiretap Act violations. **Office of Disciplinary Counsel v. Duffield**, 644 A.2d 1186, 1189 Pa.(1994) (doctrine of collateral estoppel precludes relitigation of issue determined in previous action if: (1) issue decided in prior case is identical to the one presented in later action; (2) there was final adjudication on the merits; (3) party against whom the plea is asserted was party or in privity with party in prior case; (4) party or person privy to the party against whom doctrine is asserted had full and fair opportunity to litigate issue in prior proceeding; and (5) determination in prior proceeding was essential to judgment).

Nor is there any merit to Guarrasi's claim that Gibbons misinformed the public about the nature of the case against Guarrasi. Guarrasi's response to Gibbons' motion for summary judgment²⁹ fails to identify a

²⁷ Gibbons' Motion For Summary Judgment, exhibit 5 (Commonwealth Court's memorandum opinion in **Guarrasi v. Gambardella**).

²⁸ **Guarrasi v. Gambardella, et al.**, 66 A.3d 250 (Pa.2013) (per curiam).

²⁹ Guarrasi's Answer and New Matter Memorandum to Defendant's Third Summary Judgment Motion, Dkt. No. 72 (7/22/13).

single detail that Gibbons misrepresented. Thus, there is no genuine issue of material fact precluding entry of summary judgment.

As for Guarrasi's argument that Gibbons released information under seal, this does not subject Gibbons to penalty under section 4405. Very little caselaw touches upon the meaning of "willful and gross negligence" under sections 1405 and 4405. **See Wilkins, Leventry, supra.** We are confident, however, that isolated technical violations such as one premature disclosure of sealed information does not create grounds for removing a District Attorney from office – especially when, as here, there is no evidence that the disclosure was in any way misleading.

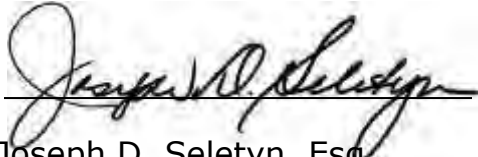
Finally, Guarrasi has waived several other claims of misconduct (Gibbons' alleged misuse of public funds and alleged permission for Samios and Fryling to live in Guarrasi's residence) by failing to develop any argument on these subjects in his appellate brief. **Commonwealth v. Briggs**, 12 A.3d 291, 326 n. 34 (Pa.2011) (a claim undeveloped in appellate brief is waived).

For these reasons, the trial court's entry of summary judgment in favor of Gibbons and against Guarrasi was proper.

Order affirmed.

J-S36018-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/17/2014