



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

JEFFREY S. CHRISTOPHER,

Plaintiff,

v.

SUSSEX COUNTY, a political subdivision of
the State of Delaware; MICHAEL H.
VINCENT, Sussex County Council President;
SAMUEL R. WILSON, Sussex County Council
Vice President; JOAN R. DEEVER, Sussex
County Council Councilwoman; GEORGE B.
COLE, Sussex County Council Councilman;
VANCE C. PHILLIPS, Sussex County Council
Councilman; TODD F. LAWSON, Sussex
County Administrator; and the STATE OF
DELAWARE,

Defendants.

C.A. No. S12C-05-018

Submitted: December 27, 2012
Oral Argument: March 8, 2013
Decided: March 19, 2013

On Plaintiff's Motion for Summary Judgment: **DENIED**
On Defendants' Motions for Summary Judgment: **GRANTED**

MEMORANDUM OPINION

Christos T. Adamopoulos, Esquire, Connolly Gallagher LLP, Wilmington, Delaware, Attorney for Plaintiff.

Jeffrey A. Wothers, Esquire; Leslie J. Williams, Esquire; Jason C. Reichlyn, Esquire, *admitted pro hac vice*, Niles, Barton & Wilmer, LLP, Baltimore, Maryland, Attorneys for Plaintiff.

David N. Rutt, Esquire, Moore & Rutt, P.A., Georgetown, Delaware, Attorney for Sussex County Defendants.

Edward K. Black, Esquire; Ian R. McConnel, Esquire; Lawrence W. Lewis, Esquire; Ryan P. Connell, Esquire, Department of Justice for the State of Delaware, Attorneys for Defendant State of Delaware.

GRAVES, J.

Pending before the Court is an action brought by the current Sheriff of Sussex County, Jeffrey S. Christopher (“the Sheriff”), seeking declaratory relief pursuant to 10 *Del. C.* § 6502.¹ The Defendants include the State of Delaware (“the State”), Sussex County (“the County”), the County Administrator and each member of the County Council (the County, the County Administrator, and the individual members of the County Council shall be referred to collectively as “the County Defendants”).

The Sheriff asks the Court to declare: (1) that, as Sheriff, he is the chief law enforcement officer of the County; (2) that, as the chief law enforcement officer of the County, he has full constitutional authority to exercise all powers necessary to conserve the peace such as the power of arrest, the power to enforce motor vehicle laws, the power to *posse comitatus*, the power to execute and process persons with outstanding warrants, and other similar powers of law enforcement; (3) that the Sheriff’s power arises from Delaware’s Constitution and, therefore, his law enforcement authority can be modified or limited only by a constitutional amendment; and (4) that the laws enacted in 2012 to prohibit the Sheriff from engaging in law enforcement activities are unconstitutional.² The State and the County Defendants oppose each of the Sheriff’s positions.

The Sheriff argues that he is the supreme law enforcement officer in the County such that his authority trumps even that of the Delaware State Police (“State Police”). He further asserts

¹ Section 6502 provides, in relevant part: “Any person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.”

² See 78 *Del. Laws*, c. 266 (2012).

that the County must properly fund the Sheriff's office so that he may fulfill his constitutional law enforcement mandate.

Having informed the Court that the declaratory relief issues are purely legal in nature and that there is no need for the Court to reach a finding of facts, each party seeks a decision by way of its respective motion for summary judgment. All parties have informed the Court the matter is ripe for decision. Nevertheless, the Sheriff makes a fact-based argument that Sussex County would be a safer place if only he and his deputies could arrest and incarcerate criminals and wanted persons. He argues his ability to exercise law enforcement authority would relieve and/or assist other law enforcement agencies, for instance, the State Police. These political public policy arguments are not and cannot be the basis of a decision on the legal issues. The Court only will consider the question of law presented: What, if any, law enforcement powers does the Sheriff currently have?

The Sheriff's arguments rely upon the current Delaware State Constitution and its predecessors. The Sheriff is a constitutional officer pursuant to our current constitution as well as the three previous versions thereof. He is a conservator of the peace in the current constitution as well as the prior two constitutions. The language concerning the office of sheriff and other officer holders also considered conservators of the peace is set forth below as to each version of the constitution.

The Constitution of the State of Delaware, adopted 1776: Article 12:

The Members of the Legislative and Privy Councils shall be Justices of the Peace for the whole state, during their continuance in trust; and the Justices of the Courts of Common Pleas shall be Conservators of the Peace in their respective counties.

The Constitution of the State of Delaware, adopted 1792: Article VIII, Section 1:

The members of the Senate and House of Representatives, the Chancellor, the Judges of the Supreme Court, and the Court of Common Pleas, and the Attorney General, shall by virtue of their offices, be conservators of the peace throughout the state; and the Treasurer, Secretary, Clerks of the Supreme Court, Prothonotaries, Registers, Recorders, Sheriffs, and Coroners, shall, by virtue of their offices, be conservators thereof, within the counties respectively in which they reside.

The Constitution of the State of Delaware, adopted 1831: Article VII, Section 1:

The members of the Senate and House of Representatives, the chancellor, the judges, and the attorney general shall by virtue of their offices, be conservators of the peace throughout the State; and the treasurer, secretary, prothonotaries, registers, recorders, sheriffs, and coroners, shall by virtue of their offices be conservators thereof within the counties respectively in which they reside.

And, finally, the Constitution of the State of Delaware, adopted 1897 and as amended:

Article XI, Section 1:

The Chancellor, Judges and Attorney-General shall be conservators of the peace throughout the State; and the Sheriffs shall be conservators of the peace within the counties respectively in which they reside.

The central question is: Does the office of the Sheriff inherently possess law enforcement authority because he is a “conservator of the peace”? The answer is no.

The Sheriff’s argument is premised on the constitutional language that identifies the sheriff office holder as a “conservator of the peace.” Being a “conservator of the peace,” the Sheriff contends, establishes his constitutionally-created right to engage in law enforcement activities. While our constitution and each of our prior constitutions do not set forth the responsibilities and duties of the Sheriff, he argues that the definition of a conservator of the peace requires no interpretation or construction because it is clear a conservator of the peace is

a protector of the peace. As a protector of the peace, the Sheriff argues he is charged with preserving and protecting law and order; ergo, his authority to engage in law enforcement activities is found in the constitution. The Sheriff further asserts that, because his law enforcement authority is derived from his role as a constitutional conservator of the peace, he has and shall continue to have law enforcement duties and responsibilities until such time as the constitution is amended.

There is no doubt that there is abundant authority in case law from other states for the proposition that a conservator of the peace is a peace officer entitled to make arrests. For example, in *Missouri v. Henderson*, the Missouri Court of Appeals held, “[A]t common law a conservator of the peace was a peace officer whose duties were to prevent and arrest for breaches of the peace in their presence, but not to arraign and try the offender. Thus, a conservator of the peace ... had a bona fide duty to make arrests and aid in conserving the peace.”³

The Sheriff’s attempt to rely on other state courts’ interpretation of the phrase “conservator of the peace” fails because it is not at all clear that the term “conservator of the peace” as used in the Delaware Constitution creates a right or recognizes a right to engage in law enforcement activities in the office of sheriff. Had the framers of the constitution chosen to limit who was a conservator of the peace to only the office of sheriff, the Sheriff would have been dealt a better hand of cards. But, the framers of all of our constitutions referenced many office holders in our government as being conservators of the peace. There is no authority to

³ 660 S.W.2d 373, 375 (Mo. Ct. App. 1983) (internal quotation marks and citations omitted).

suggest or infer that the framers intended, at various times in the history of our state, that chancellors, judges, senators, representatives, the Attorney General, as well as county treasurers, secretaries, clerks of the court, registers, recorders, coroners and sheriffs would all be law enforcement officers with the authority to investigate and make arrests.

The designation of so many different offices as being a conservator of the peace leads the Court to the obvious conclusion that being labeled a “conservator of the peace” in our constitution means nothing more than the office holder is a constitutional officer involved in governance tasked with keeping the peace or the “normal state of society.”⁴

The Court notes that in 1997, the Delaware State Bar Association published a book entitled *The Delaware Constitution of 1987 - The First One Hundred Years*. The Editor-in-Chief was Delaware Supreme Court Justice Randy J. Holland and the Chairman of the Editorial Board was Harvey Bernard Rubenstein, Esquire. The list of authors and editors of this project reads like a “Who’s Who” of the Bench and Bar of our State.

In regard to conservators of the peace appearing in our constitutions, the authors observed:

At common law, conservators of the peace appear to have had important powers, including the power to arraign and try offenders. But while the concept of conservator of the peace finds its earliest roots in medieval England, there is no history as to the reasons for inclusion of the concept in our constitution.

The “conservator of the peace” provision has received scant judicial attention in the more than two hundred years it has been, in one form or another, a part of the constitution. The list of offices it contains is clearly not exclusive. Article XV, Section 1 seems to have outlived its usefulness since the General Assembly has by statute favored persons performing a variety of functions with

⁴ *State v. Mitchell*, 212 A.2d 873, 878 (Del. Super. 1965).

the title “conservators of the peace,” and, whether or not they are called “conservators of the peace,” persons with law enforcement authority are now invested with that authority by statute.⁵

The Court holds that there is no law enforcement authority inherent in being listed among the cast of office holders identified as “conservators of the peace” in the Delaware Constitution.

Being a conservator of the peace does not confer any specific powers of law enforcement upon the Sheriff. The constitution is silent as to any enumerated powers. The Sheriff asserts he is therefore entitled to exercise whatever powers the constitutional office of sheriff enjoyed at the time our constitution was adopted. He argues that his common law responsibilities of being a peace office (*i.e.*, law enforcer) can be changed or modified only by constitutional amendment. The Court does not find this argument persuasive.

In the State’s first constitution, the following language was included:

The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, &c. agreed to by this convention.⁶

The common law of England became the law of Delaware but the framers of the constitution expressly reserved the authority to modify common law for the legislature.

⁵ The Delaware State Bar Association, *The Delaware Constitution of 1897 – The First One Hundred Years*, 187-88 (1997) (citations omitted).

⁶ Del. Const. art. 25 (1776).

The constitution of 1792 contained similar language incorporating and construing all laws existing at the time of its adoption.⁷ Likewise, the constitution adopted in 1831 included such language.⁸ Finally, the constitution adopted in 1897 and currently in force contains a similar clause.⁹

Therefore, when the common law became the law of the land, that common law continued to be in effect *unless modified by the legislature*.

It is unnecessary to review the historical powers and duties of a sheriff in this decision. The Court references an excellent review of the evolution of a sheriff's authorities found in *Pennsylvania v. Leet*.¹⁰ The analysis by the Supreme Court of Pennsylvania in *Leet* is particularly relevant because up until shortly before the Declaration of Independence was signed in 1776, Delaware's three counties were a part of Pennsylvania.

In *Leet*, the common law power of a sheriff or his deputy to arrest was recognized. The court found that certain statutes passed by the legislature did not remove the common law

⁷ Del. Const. art. VIII, § 10 (1792) (“All the laws of this state, existing at the time of making this constitution, and not inconsistent with it, shall remain in force, unless they shall be altered by future laws; and all actions and prosecutions now pending, shall proceed as if this constitution had not been made.”).

⁸ Del. Const. art. VII, § 9 (1831) (“All the laws of this State, existing at the time of making this Constitution and not inconsistent with it, shall remain in force unless they shall be altered by future laws; and all actions and prosecutions now pending shall proceed as if this Constitution had not been made.”).

⁹ Del. Const. sched. § 18 (“All the laws of this State existing at the time this Constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws.”).

¹⁰ 641 A.2d 299 (Pa. 1994).

authority of the sheriff to arrest. The sheriff's common law power to arrest co-existed with the motor vehicle laws concerning arrest because the legislature had not unequivocally abrogated the common law authority of a sheriff to make arrests. Therefore, the issue was not *whether* the legislature could abrogate the sheriff's common law authority – it could. The issue was *did* the legislature clearly remove the arrest authority from the sheriff – it did not.

In contrast, the laws passed by the Delaware legislature in 2012 unambiguously removed any common law arrest power the Sheriff may have had. In 78 *Del. Laws*, c. 266 (2012), the Sheriff's arrest powers were extinguished. Until recently, the question of whether the office of sheriff has any authority to arrest or investigate has laid dormant, if not dead, as far as the memory of all. The legislature merely formally recognized the reality that the sheriffs in all three counties were no longer in the law enforcement business.

Another case involving the common law duties of a sheriff and a legislature's authority to modify the same is *Linehan v. Rockingham County Commissioners*.¹¹ In that case, the Supreme Court of New Hampshire summarized:

“Where the sheriff is named in the Constitution his duties are the same as they were at the time the Constitution was adopted.” 1 W. Anderson, *Sheriffs, Coroners and Constables* § 43, at 37 (1941). His duties and authority, however, are not rendered unalterable by virtue of the sheriff being a constitutional officer. *See Daniels v. Hanson*, 115 N.H. 445, 448, 342 A.2d 644 (1975). The sheriff's duties and responsibilities, “unless expressly prescribed by the state constitution, are not immutable or exclusive, but are subject to legislative alteration and control.” 70 Am. Jur.2d *Sheriffs, Police, and Constables* § 56, at 270 (1987). “[T]he legislature is entirely at liberty to increase, decrease, or modify the powers and duties incident to this position.” *Id.* § 2; *see, e.g., Soper v. Montgomery County*, 294 Md. 331, 449 A.2d 1158, 1161 (1982); *In re Supervision and Assignment of Petit Jury Panels*, 60 N.J. 554, 292 A.2d 4, 6 (1972). Thus, the sheriff maintains his common law powers, duties

¹¹ 855 A.2d 1271 (N.H. 2004).

and responsibilities as they were at the time the constitution was adopted, except insofar as they have been modified by constitutional provisions or legislative enactments. *Daniels*, 115 N.H. at 448, 342 A.2d 644.¹²

Closer to home, our Supreme Court has recognized that Delaware's Attorney General, a constitutionally-created office, is an office vested with broad common law power and authority but that authority may be restricted or modified by statute.¹³ Therefore, it is within the power of the legislature and governor to enact and sign into law legislation that may add to or subtract from the common law authority of a constitutional office. Since the law of arrest is no longer based on common law but on statute,¹⁴ it is entirely appropriate for the qualifications and training of those who may arrest fellow citizens be determined by statute as opposed to common law.

To summarize, Delaware's constitution recognizes the office of sheriff but does not enumerate any specific power or authority held by the office. The Court concludes that the common law authority and responsibilities of the Sheriff are subject to modification and restriction by the legislature. The 2012 legislation extinguishing the Sheriff's law enforcement powers is valid.

¹² 855 A.2d at 1274-75.

¹³ *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941) (“[A]s the chief law officer of the State, the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority as the public interests may from time to time require. In short, the Attorney General's powers are as broad as the common law unless restricted or modified by statute.”).

¹⁴ *State v. Holland*, 189 A.2d 79, 82 (“Since the law of arrest is now regulated by statute whatever may have been the rule at common law ... is no longer material.”).

Conclusion

This Court declares and holds that a sheriff in Delaware shall not be involved in law enforcement and shall not act in any capacity as a police officer or peace officer.

This decision moots the Sheriff's complaints that the County has not properly funded his office and attempts to meddle in his business.

IT IS SO ORDERED.