Fulton County Superior Court
EFILEDAC
Date: 9/4/2018 5:11 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES BURNS, Plaintiff	*	CIVIL ACTION 2018CV309891
vs.	*	
PAUL HOWARD, Defendant	*	

FINAL ORDER ON EMERGENCY PETITION FOR WRIT OF MANDAMUS

James Burns was formerly an Officer with the Atlanta Police Department. On 22 June 2016, he was allegedly involved in an on-duty shooting incident that left a civilian dead. Burns was indicted for felony murder on 31 August 2016 in case 16SC146204. That criminal case was dismissed by way of order of *nolle prosequi* on 25 July 2018. The State has since notified Burns that it intends to reindict him tomorrow, 5 September 2018.

Pursuant to O.C.G.A. § 17-7-52, peace officers enjoy certain rights when a grand jury is considering a proposed indictment of the officer. Specifically, before O.C.G.A. § 17-7-52 was amended effective 1 July 2016, an officer had a right to be present for the grand jury proceedings and to make an unexamined statement to the grand jury. Now, under the amended law, officers are not afforded those rights.

Burns' grand jury presentment in 16SC146204 was on 31 August 2016, only weeks after the amendments went into effect. The State, represented by District Attorney Paul Howard – Defendant in this civil action – permitted Burns to be present and make a statement, as was required under the former version of O.C.G.A. § 17-7-52. The State elected to do so because questions were raised as to whether the new 1 July 2016 legislation was retroactive in its effect or if instead the previous version of O.C.G.A. § 17-7-

52 should apply because the alleged criminal acts occurred at the time the former law was in effect.

The State has recently notified Burns that it believes the 1 July 2016 version of O.C.G.A. § 17-7-52 governs, and thus Burns and his counsel will not be permitted to attend tomorrow's grand jury proceedings. In response, Burns filed this emergency motion for a writ of mandamus, asking the Court to mandate District Attorney Paul Howard to permit Burns and counsel to be present at the grand jury proceedings (and make a statement if he chooses) as was permitted under the former provisions of O.C.G.A. § 17-7-52.

As an initial matter, the Court notes that, although cast as a petition for a writ of mandamus, Burns' motion has a distinct flavor of declaratory judgment to it, in that Burns asks this Court to declare which version of the law applies (pre- or post-1 July 2016) and to then order the State to act accordingly. This poses a problem for Burns, given the restrictions sovereign immunity places on this Court's jurisdiction to consider a declaratory judgment action on a constitutional question.[1] However, the Court finds that this issue can be resolved on other grounds.

The State argues that it is now settled law that the amended version of O.C.G.A. § 17-7-52 applies, even when the alleged conduct at issue predates the amendments. *See State v. Peabody*, 343 Ga. App. 362, 367 and n.2 (2017). Citing to *State v. Lindsay*, 255 Ga. App. 464, 468–69 (2002), Burns argues he accrued substantive rights under O.C.G.A. § 17-7-52 as it existed on 22 June 2016 which the Court should mandate the State through Paul Howard to observe.[2]

---

[1] "We hold today that the doctrine of sovereign immunity extends generally to suits against the State, its departments and agencies, and its officers in their official capacities for injunctive and declaratory relief from official acts that are alleged to be unconstitutional." *Lathrop v. Deal*, 301 Ga. 408, 409 (2017).

[2] "Georgia has a constitutional ban on the retrospective application of laws. In that regard, although legislation which involves mere procedural or evidentiary changes may operate retrospectively, legislation

This tension between *Peabody* and *Lindsay* provides the answer for the Court. Two panels of the Court of Appeals have reached (ostensibly) differing conclusions as to which version of O.C.G.A. § 17-7-52 should be applied: the version in force at the time of the incident or the version in force at the time of the indictment.[3] Put differently, there is no clear legal right to the relief that Burns seeks.

> The writ of mandamus is properly issued only if (1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief.
>
> With respect to this second requirement, a clear legal right to the relief sought may be found only where the claimant seeks to compel the performance of a public duty that an official or agency is required by law to perform.

Consol. Gov't of Columbus, Georgia v. P&J Beverage Corp., 344 Ga. App. 482, 484-485 (2018). While *Peabody* seems clear enough to the undersigned (and would require the Court to deny relief to Burns), if the Court takes *Lindsay* to stand for the proposition Burns urges, then it is quite *unclear* whether Burns has a legal right to the relief requested. The emergency motion for writ of mandamus is accordingly **DENIED.** There being no issues remaining for adjudication, the Clerk shall close the file.

SO ORDERED this 4th day of September 2018.

Judge Robert C. I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

Filed and served electronically via eFileGA

---

which affects substantive rights may operate prospectively only. Substantive law is that law which creates rights, duties, and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations." *State v. Lindsay*, 255 Ga.App. 464, 468-69 (2002) (punctuation omitted).

[3] *Lindsay* also concerned the applicability of that statute.