

81271-3

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CASE NOS. 253163 ; 253171

CITY OF SPOKANE,
Respondent,

v.

LAWRENCE JOHN ROTHWELL,
Petitioner.

No. 253163

CITY OF SPOKANE,
Respondent,

v.

HENRY E. SMITH,
Petitioner.

No. 25317

REPLY BRIEF OF PETITIONERS

BREEAN L. BEGGS
WSBA #20795
Attorney for Petitioners
Center for Justice
35 W. Main Street, Suite 300
Spokane, Washington 99201
(509) 835-5211

TABLE OF CONTENTS

STATEMENT OF THE CASE.....4

INTRODUCTION.....4

ARGUMENT.....4

 A. De Facto Authority Cannot Exist When a Judicial Department is Invalid.....5

 B. Whether Department Four and Judge Walker had Jurisdiction Over the Petitioners Must be Determined in Light of the Municipal Court Structure At the Time of Their Convictions...7

 C. The City Failed to Offer Any Evidence That Its Noncompliance Did Not Thwart the Will of the Voters.....8

 D. Quo Warranto Proceedings are Inappropriate Because the Petitioners are Not Former Judicial Officers or Judicial Candidates.....9

CONCLUSION.....11

CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES

Washington Constitution
WA Const., art. IV, § 10.....8

Cases
Boyer v. Fowler, 1 Wn.Terr. 101 (1860).....6
City of Spokane v. County of Spokane, 158 Wn.2d 661, 146 P.3d 893
(2006).....7
In re Eng, 113 Wn.2d 178, 776 P.2d 1336 (1992).....5
Mun. Ct. of Seattle ex rel. Tulberg v. Beighle, 28 Wn. App. 141, 622
P.2d 405 (1981).....10
Norton v. Shelby County, 118 U.S. 425 (1886).....5, 6
Reid v. Dalton, 124 Wn. App. 113, 100 P.3d 349 (2004).....10
State v. Canady, 116 Wn.2d 853, 809 P.2d 203 (1991).....5, 6
State v. Moore, 73 Wn. App. 805, 871 P.2d 1086 (1994).....8, 9
State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 969 P.2d 64
(1998).....10

Rules and Statutes
RCW 3.46.070.....8
RCW 4.16.005.....10
RCW 7.56.020.....9

Other Authorities
3 E. McQuillin, *The Law of Municipal Corporations* § 12.104 (3d ed.
rev.1973).....6
De Jure Office As Condition of a De Facto Officer, Annot., 99 A.L.R.
294 (1935).....6

STATEMENT OF THE FACTS

Petitioners' statement of the facts is set forth in the Brief of
Petitioners (11/07/06).

INTRODUCTION

COMES NOW the Petitioners, Lawrence J. Rothwell and Henry E.
Smith, by and through their attorney, Breean L. Beggs of the Center for
Justice, and submits the following reply to the Brief of Respondent.

ARGUMENT

The Respondent's Brief misconstrues the issues before this Court
and misstates the law. First, both Department Four of the Spokane County
District Court (Department) and Judge Walker lacked jurisdiction over the
Petitioners because the Department was not created in compliance with the
applicable governing statutes. As such, any judge elected to such an
invalid department does not have *de jure* or *de facto* authority. Second,
any subsequent remedial measures taken by the City cannot retroactively
create jurisdiction over the Petitioners in April of 2005. Third, statutory
noncompliance should not be disregarded based upon the mere speculation
that a proper election would have led to the same results. Finally, *quo*
warranto proceedings are irrelevant in this case. As such, the City fails to
demonstrate that it strictly complied with chapters 3.38 and 3.46 of the

Revised Code of Washington and, as such, the Petitioners convictions should be reversed based on a lack of jurisdiction.

A. De Facto Authority Cannot Exist When a Judicial Department is Invalid.

Department Four was an illegally created department and, therefore, Judge Patti Walker did not have *de facto* authority over the Petitioners. As a preliminary matter, *In re Eng* is inapplicable in this case as to the issue of *de facto* authority. (*Cf.* Resp't Br. 6-7.) In that case, the question of whether a judge had *de facto* authority was not before the court because the appellant conceded that the judge had such authority. *See In re Eng*, 113 Wn.2d 178, 181, 776 P.2d 1336 (1989); *State v. Canady*, 116 Wn.2d 853, 856, 809 P.2d 203 (1991) (noting that the issue of *de facto* authority was not decided in *In re Eng*).

A judge serving in an invalid judicial department cannot have *de facto* authority. The Petitioners challenge the jurisdiction of both Department Four of the District Court and Judge Walker in her capacity as a municipal court judge. Department Four was not created in compliance with the relevant laws governing municipal departments of district court and, as such, is invalid. A *de facto* department is an absolute legal nullity and lacks any *de jure* authority. *See Norton v. Shelby County*, 118 U.S. 425, 443 (1886). Furthermore, a department itself must be valid in order to

imbue an incumbent officer with *de facto* authority. *Id.* at 444. If a person is elected to an invalid department, then no validity can attach to the acts of such an officer. *Id.* at 449.

The general principles set forth in *Norton* were applied to judicial departments in *State v. Canady*. 116 Wn.2d 853, 809 P.2d 203 (1991). In *Canady*, a defendant challenged the legal authority of a judge to issue a search warrant from the outset of his legal proceedings. *Id.* The warrant was issued by a judge pro tempore sitting in Department 4N of the Seattle Municipal Court. *Id.* at 854, 809 P.2d 203. Even though the department was held out by the city as a legitimate judicial department, the court determined that it was improperly created. *Id.* at 855, 809 P.2d 203. As such, the department lacked *de jure* authority and its actions were invalid. *Id.* at 856, 809 P.2d 203. Furthermore, the judge serving in that department lacked *de facto* authority and the warrant issued was invalid. *Id.* at 857, 809 P.2d 203. “[T]here can be no such thing as an *office de facto*, as distinguish from an *officer de facto*. Hence, the general rule that the acts of an officer de facto are valid has no application where the office itself does not exist.” *Id.* (citing *Boyer v. Fowler*, 1 Wn.Terr. 101 (1860); 3 E. McQuillin, *The Law of Municipal Corporations* § 12.104 (3d ed. rev. 1973); *De Jure Office As Condition of a De Facto Officer*, Annot., 99 A.L.R. 294 (1935)).

Department Four is an invalid department and, as such, any person elected to serve as a judicial officer in that department lacks *de facto* authority. The actions of such an officer are invalid and, in this case, Department Four and Judge Walker did not have jurisdiction over the Petitioners.

B. Whether Department Four and Judge Walker had Jurisdiction Over the Petitioners Must be Determined in Light of the Municipal Court Structure at the Time of Their Convictions.

Jurisdictional infirmities at the time of the Petitioners' convictions should not be dismissed based upon the City's subsequent remedial measures. The Respondent asserts that the City of Spokane no longer operates a Municipal Department under chapter 3.46. (Resp't Br. at 2.) However, the City merely cites to a judicial opinion stating that the City has the ability to create an independent municipal court. *See generally City of Spokane v. County of Spokane*, 158 Wn.2d 661, 146 P.3d 893 (2006). The City presents no evidence, nor does such evidence exist in the Record, that the structure of the municipal court has been altered. In any event, this appeal deals with the structure of the court in April of 2005 and any subsequent remedial measures are irrelevant.

//

//

//

C. The City Failed to Offer Any Evidence That Its Noncompliance Did Not Thwart the Will of the Voters.

Statutory noncompliance should not be dismissed based upon mere speculation. While the statute clearly states that “[o]nly voters of the city shall vote for municipal judges,” RCW 3.46.070, the City argues that it substantially complied with this statute by allowing city voters to participate in municipal court elections. (Resp’t Br. at 2, 4.) However, the City fails to point to any evidence in the Record to support its assertion.¹ (See *id.* at 2.) Instead, it surmises that the result would have been the same regardless of whether county residents were allowed to participate in the election for municipal court judges. (*Id.*) The City offers no evidence to support this assertion and there are a number of aspects involved in an election outside of the label on a ballot. For example, a person running for a municipal court position is required to expend funds campaigning throughout the county, rather than focusing on city voters.

The need for flexibility and a presiding judge’s administrative powers are not a firm foundation for approbating an illegally created judicial department. Judicial departments are legislative creations. Wn. Const. art. 4, § 10; see *State v. Moore*, 73 Wn. App. 805, 810, 871 P.2d 1086 (1994). The procedures for establishing municipal departments are

¹ It should be noted that the City’s entire brief is devoid of any references to the record.

set forth in chapters 3.38 and 3.46 of the Revised Code of Washington and the City must strictly comply with the required procedures. *Moore*, 73 Wn. App. at 813, 871 P.2d 1086. While this case is slightly different than *Moore*, where there was no voter participation, substantially altering the voter basis from the statutorily required basis of only city voters minimizes the accountability of the municipal court judges to the people that they serve. *See id.* It is essential that courts be properly and publicly created and authorized. *Id.* at 814, 871 P.2d 1086.

In light of the lack of evidence available on this issue, the City's statutory noncompliance cannot be justified based upon the mere assertion that election results would have been the same regardless of who voted.

D. Quo Warranto Proceedings are Inappropriate Because the Petitioners are Not Former Judicial Officers or Judicial Candidates.

Petitioners do not have standing to bring a petition for a writ of *quo warranto*, yet the City asserts that the only way the Petitioners can challenge the jurisdiction of Department Four and Judge Walker is through a successful *quo warranto* proceeding. (Resp't Br. 5, 8, 11.) A private person may file a *quo warranto* petition if such a person "claims an interest in the office." RCW 7.56.020. In construing this statute, this Court determined that to establish individual standing in a private *quo warranto* action challenging the holder of a public office, a person must

plead and prove his or her own rightful title to the unexpired term of the disputed office. *Reid v. Dalton*, 124 Wn. App. 113, 121, 100 P.3d 349 (Div. 3 2004); see *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 895-96, 969 P.2d 64 (1998) (interest must be a special, individualized interest). Thus, even a losing candidate does not have standing to bring a claim. *Reid*, 124 Wn. App. at 121, 100 P.3d 349. The statute of limitations for such challenges expires ten days after an election. *Id.*; RCW 4.16.005.

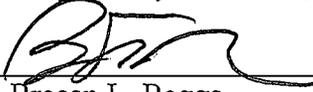
Furthermore, a *quo warranto* proceeding is inappropriate in this case. A *quo warranto* proceeding is the proper method for determining a person's *right* to a public office. *Verharen*, 136 Wn.2d at 893, 969 P.2d 64. As such, *quo warranto* proceedings may be used by judicial officers who were removed from office or by people who lost judicial elections. See *Mun. Ct. of Seattle ex rel. Tulberg v. Beighle*, 28 Wn. App. 141, 622 P.2d 405 (1981) (*quo warranto* action by magistrate challenging his summary removal from office). Such proceedings are not used to challenge the jurisdiction of a court or a judge over a person's trial. If this Court determines that the only possible remedy for the Petitioners was to file a claim for *quo warranto*, then, effectively, there is no possible recourse for a defendant who is subjected to the jurisdiction of an illegal court or invalid judge.

CONCLUSION

The City failed to strictly comply with the statutes governing the establishment of municipal departments for three reasons. First, only residents of the City of Spokane can elect full-time municipal court judges. Second, the districting plan in place at the time of the Petitioners' convictions failed to designate which departments actually served as a municipal court or to allocate the amount of time that each district court judge would serve in a municipal capacity. Third, statutory noncompliance cannot be dismissed based on administrative concerns. For the reasons mentioned above in this brief, no *de facto* authority existed because the Department was not properly created and *quo warranto* proceedings are inapplicable. As such, the City failed to strictly comply with the law and the Department and Judge Walker lacked jurisdiction over the Petitioners.

DATED this 2nd day of March, 2007.

Respectfully submitted,



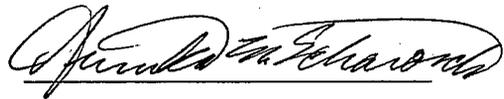
Breean L. Beggs
WSBA #20795
Attorney for Petitioners
Center For Justice
35 W. Main, Suite 300
Spokane, WA 99201
(509) 835-5211

CERTIFICATE OF SERVICE

Pursuant to RAP 18.5 and CR 5(b)(1), I certify I am not a party to this action, I am competent to testify therein, and I caused to be delivered a true and correct copy of the foregoing Reply Brief of Petitioners to Michelle Szambelan, Acting Spokane City Prosecutor, 909 W. Mallon, Spokane, WA 99201, at or before the time of filing.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 2nd day of March, 2007.

A handwritten signature in cursive script, reading "Donald M. Edwards", written over a horizontal line.