

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

BRANDON GIVENS,

Plaintiff,

v.

**DELAWARE HARNESS
RACING COMMISSION,**

Defendant.

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C.A. No.: N10M-10-100

Submitted: September 1, 2011

Decided: November 17, 2011

Upon Defendant's Motion to Dismiss.

Defendant's Motion is **DENIED**.

Plaintiff's Request for a Writ of Prohibition is **DENIED**.

OPINION AND ORDER

Stephani J. Ballard, Esq., Law Offices of Stephani J. Ballard, LLC,
Wilmington, Delaware. Attorney for Petitioner.

Andrew M. Kerber, Esq., Deputy Attorney General, Wilmington, Delaware.
Attorney for Defendant.

BRADY, J.

INTRODUCTION

This litigation arises from the Defendant Delaware Harness Racing Commission's ("Commission") suspension of Plaintiff Brandon Givens's harness racing license in April 2010. Givens filed this action on October 22, 2010, seeking a prohibition enjoining the Commission from suspending and continuing to suspend Givens's license and enjoining the Commission from providing a hearing on the merits of the offense. The Court granted Givens's Motion to Stay Administrative Proceedings before the Commission on December 29, 2010.

On December 6, 2010, the Commission filed a Motion to Transfer Venue to Kent County Superior Court, or in the alternative to Dismiss. On January 14, 2011, Givens submitted answers to the Commission's motions. The Court reserved a decision on the two motions. The Commission asserts three main bases upon which it seeks to transfer venue to Kent County: (1) the Commission conducts its affairs in Kent County; (2) the Commission and witnesses reside in, and relevant records exist in, Kent County, and (3) 3 *Del. C.* § 10026 mandates that appeals from Commission decisions to suspend licenses are subject to review, upon questions of law only, by the Superior Court in the county in which the license was granted. Givens contends the bases upon which the Commission seeks to transfer venue are insufficient. The Commission bases the Motion to Dismiss on the grounds that Givens failed to exhaust administrative remedies available to him. Givens contends that a licensee need not exhaust administrative remedies before challenging the adequacy of an administrative remedy.

On December 29, 2010, the Court granted Givens's Motion to Stay Administrative Proceedings before the Commission. On February 16, 2011, the Court

ordered that Givens could secure DNA testing of the sample, which was being held by the Commission, and was not restricted to solely a second, identical test. The Court then ordered all matters related to this case to be held in abeyance until DNA testing was complete. On June 30, 2011, the Court heard Givens's Motion for Clarification of the DNA Testing Order and Authority of the Parties and Testing Laboratory and ordered the Commission to provide all information or reports from the lab to Givens and to direct the lab to speak with Givens's counsel if it has questions.

On August 25, 2011, the Commission filed a Motion to Dismiss on the basis that this Court lacks subject matter jurisdiction over this matter and cannot issue Givens's requested relief. On August 29, 2011, Givens submitted his answer to the Commission's motion, reiterating his request that the Court issue a writ of prohibition to enjoin the Commission from enforcing and maintaining the suspension of Givens's license.

The issues before the Court are: (1) whether a valid basis exists for the Commission to transfer venue to Kent County; (2) whether Givens must exhaust administrative remedies available to him before challenging the Commission's remedy; and, if so, (3) whether the Court can grant Givens's requested relief of a writ of prohibition, and whether the Court should grant Givens's requested relief of a writ of prohibition.

The Court finds New Castle County is an appropriate venue for this action. Therefore the Commission's Motion to Transfer Venue is **DENIED**.

The Court finds that it is authorized by law to grant a writ of prohibition to an administrative agency, such as the Delaware Harness Racing Commission. Therefore, the Commission's Motion to Dismiss is **DENIED**. The Court further finds that a writ of

prohibition is not an appropriate remedy in this case. Therefore, Givens's request that this Court issue Givens a writ of prohibition to compel the Commission to restore his harness racing license is **DENIED**.

FACTUAL BACKGROUND

Givens is a licensed driver and trainer of harness racing horses. The Commission administered a human drug (urine) test to Givens on April 7, 2010. The Commission informed Givens on April 13, 2010 that his sample tested positive for several controlled substances, and that Givens was, as a result, suspended from all racing activity under a DHRC ruling. Givens requested a hearing within three racing days, pursuant to DHRC Rule 10.2.3. A hearing was held before all three DHRC Judges ("Board of Judges") on April 18, 2010. The judges informed Givens his license would be suspended until a final hearing on the matter. On October 1, 2010, Givens demanded by letter that the Commission reinstate his license without a hearing.

The DHRC Rule 5.1.8.7 provides for harness racing licensees to request confirmatory drug testing through secondary urine sample analysis. The Board of Judges advised Givens by letter on October 8, 2010 that he could request confirmatory drug testing, and that the Board of Judges could schedule Givens a hearing if his sample tested positive for controlled substances upon confirmatory testing. Givens did not request confirmatory testing. Givens inquired to the Commission about DNA testing. The Commission responded that DNA testing is not provided for in the DHRC rules. The Commission has not taken further action, including scheduling Givens a second hearing, since Givens made no request for confirmatory drug testing. In the six months that have passed since then, Givens has not sought a ruling on the merits or taken an appeal of the

Commission's decision not to administer a DNA test. Instead, Givens filed a complaint with this Court, seeking a writ of prohibition, which will be denied for the reasons stated herein.

While the matters were before the Court, after hearing argument from both sides, the Court ruled that Givens could request a DNA test as he stood ready to bear the expense of same. While the practice has been that a second test is of the same nature as the initial test, the Court found that the Commission rules did not prohibit differing, additional testing at no expense to the Commission, if requested by Givens. The DNA testing, after some delay, was finally conducted at Givens's expense on July 27, 2011. The Commission stated it is prepared to hold a hearing if Givens would request one, and with the DNA test results, the Commission and Givens now have information upon which to base a finding at a hearing.

DISCUSSION

I. The Commission's Motion to Transfer Venue is DENIED, as the Commission has not set forth circumstances that strongly militate against Givens's choice of venue, and 3 Del. C. § 10026 does not prevent this Court from hearing the matter.

In Delaware, an action filed in one county may be tried in another county, by judicial discretion, so long as a consideration of equities yields that the change is desirable.¹ "A plaintiff's choice of forum is entitled to great weight and will not be disturbed unless there are factors that strongly militate against it."²

In *Connell v. Ammons*, the Superior Court in Sussex County determined a defendant who sought to change venue to New Castle County did not persuasively show

¹ *Connell v. Ammons*, 2011 WL 4827581, at *1 (Del. Super. Sept. 6, 2011) (citing *Krueger v. Cedars Academy*, 1996 WL 422334 (Del. Ch. Apr. 26, 1996)).

² *Id.* (citing *Goldberg v. Hersman et. al.*, 2000 WL 33275020 (Del. Com. Pl. Jan. 28, 2000)).

that many witnesses would be inconvenienced by traveling, that compelling witnesses to attend trial would be problematic, that the trial would be lengthy, or that the defendants would be inconvenienced by trying the action in Sussex County.³ The Court denied the defendant's motion for change of venue.

The Commission contends that venue in Kent County is proper because the Commission maintains its offices and conducts its business, including the operation of two harness racing tracks, in Kent County only, and the Commission issues harness racing licenses in Kent County only. Additionally, Givens resides in Sussex County, not New Castle County, all witnesses and Commission employees likely to be called to testify reside in Kent County, and the Commission's records, which may be introduced as evidence, are kept in Kent County. The Commission cites 3 *Del. C.* § 10026, which states:

Any license issued by the Commission shall be subject to suspension or revocation by the Commission for any cause whatsoever which the Commission deems sufficient. If any license is suspended or revoked, the Commission shall state publicly its reasons for so doing and cause an entry of the reasons to be made on the minute book of the Commission and its action shall be final. The propriety of such action shall be subject to review, upon questions of law only, by the Superior Court of the county within which the license was granted. The action of the Commission shall stand unless and until reversed by the Court.

The Commission argues that, were Givens to first exhaust administrative remedies provided for by the Commission rules, an appeal of the Commission's decision would be filed with the Superior Court in Kent County, because Givens's license was provided in Kent County.

³ *Id.*

Givens contends the Commission lacks a legally viable basis to transfer venue. Givens points out that the Commission is a unit of the Delaware Department of Agriculture, a statewide agency, and has members in each county of the state. Givens argues that 3 *Del. C.* § 10026 is inapplicable here, because this action is not an appeal, no adjudicated suspension has occurred,⁴ and the statute does not apply to drivers and trainers, but rather to persons or entities who wish to hold horse racing meets. Givens also points out that § 10026 has not prevented Courts in New Castle and Sussex County from adjudication DHRC matters.⁵ Givens also denies the grounds of convenience the Commission sets forth. Givens argues the attorneys for the matter practice in New Castle County, documentation and witnesses can be sent electronically, and moving the case 50 miles south would cause delay and expense, in addition to depriving Givens of his choice of forum.

Similar to the circumstances of *Connell*, the Commission here has not demonstrated that hearing the specific matters before the Court in New Castle County presents a significant hardship to the parties involved. The Commission points to no witnesses in particular who would be materially inconvenienced by traveling from Kent County to New Castle County, does not specify how transporting records to New Castle County would be difficult, and does not satisfactorily explain how the location of the racetracks the Commission operates affects the convenience of litigating this matter. Overall, the grounds the Commission presents for transferring venue do not surpass or outweigh the deference the Court must give to Givens's choice of venue.

⁴ Givens's license is summarily suspended.

⁵ See e.g. *Marsh v. Delaware Racing Comm'n*, 1992 WL 301722 (Del. Super. 1992) (Kent County); *Finnegan v. Delaware Harness Racing Comm'n*, 1986 WL 9912 (Del. Super. 1986) (Sussex County).

The Commission's argument that an appeal from a Commission decision of suspension or revocation must be filed in the Superior Court of the county where the license was issued, pursuant to 3 *Del. C.* § 10026, fails for two main reasons. First, this action is not an appeal; it is a petition for a writ before a final determination that Givens's license is suspended or revoked. Second, as Givens points out, § 10026 has not prevented the Superior Court in New Castle County (as well as Sussex County) from adjudicating issues relating to action by the Commission.

For the foregoing reasons, Defendant's Motion to Transfer Venue is **DENIED**.

II. While a writ of prohibition is not an appropriate remedy, this Court has lawful jurisdiction over the matter. Therefore, the Commission's Motions to Dismiss of December 6, 2010 and August 25, 2011 are DENIED, and Givens's requested relief of a writ of prohibition is DENIED.

This Court has exclusive, original jurisdiction to direct a writ of prohibition to administrative bodies and other nonjudicial entities.⁶ Therefore, contrary to the Commission's assertion that this Court cannot grant Givens's requested relief, this Court is authorized to grant writs of prohibition to administrative bodies, such as the Commission.

A writ of prohibition is an extraordinary remedy of last resort that is only available where there is no other adequate legal remedy. "The sole purpose of the writ is to prevent an inferior tribunal from exercising jurisdiction over matters not legally within its cognizance or from exceeding its jurisdiction in matters properly before it."⁷ A writ of prohibition "should issue only in clear cases of great necessity, i.e., in cases where the

⁶ *Petition of Barbee*, 693 A.2d 317, 319 (Del. 1997) (citing *Family Court v. Department of Labor*, 320 A.2d 777, 779-80 (Del. Ch. 1974)).

⁷ *Cont'l Coach Crafters Co. v. Fitzwater*, 415 A.2d 785, 789 (Del. Super. 1980) (citing *Canaday v. Superior Court*, 116 A.2d 678 (Del. 1955)).

inferior tribunal's lack of jurisdiction is clear rather than cases where the jurisdictional question is doubtful.”⁸ A writ of prohibition may be issued where an inferior tribunal has “acted to violate an individual’s fundamental constitutional rights, thus stripping itself of jurisdiction.”⁹ In *Worrell v. Industrial Accident Board*, the Superior Court determined that the threshold questions for an assessment of whether to issue a writ of prohibition are: “(1) Does the petitioner have any other legal remedy? And (2) Was the Commission acting in excess of its jurisdictional power?”¹⁰

An analysis of the facts under the test set forth in *Worrell* shows that a writ of prohibition is not an appropriate remedy here. First, Givens has alternative available legal remedies in the form of a second hearing and an appeal of the Commission’s decision, if Givens is not satisfied with the results. Second, the Commission did not act in excess of its jurisdiction power, nor did it strip itself of jurisdiction over this matter by violating Givens’s constitutional right to due process.

A. Alternative Legal Remedies are Available to Givens

Whether there is another available adequate remedy must be determined by the facts of each case. There is no general rule or test to be applied. However, when an infringement of property rights is incidental to the action of the court and no adequate remedy by appeal, or otherwise, is available, the writ of prohibition may issue.¹¹

A harness racing license is a property interest that invokes the protection of the Due Process Clause.¹² In *Barry*, the U.S. Supreme Court found that the New York State

⁸ *Id.* (citing *Knight v. Haley*, 176 A. 461, 464-65 (Del. Super. 1934)).

⁹ *Steigler v. Superior Court*, 252 A.2d 300, 303 (Del. 1969); *Worrell v. Indus. Accident Bd.*, 1997 WL 913500, at *1 (Del. Super. Nov. 7, 1997).

¹⁰ *Worrell*, 1997 WL 913500, at *1.

¹¹ *Knight v. Haley*, 36 Del. 366, 176 A. 461, 465 (Del. Super. Ct. 1934) (wherein writ was granted because the inferior court lacked subject matter jurisdiction).

¹² See *Barry v. Barchi*, 443 U.S. 55, 63 (1979).

Racing and Wagering Board deprived a horse trainer's constitutional right to due process when the Board failed to promptly provide the trainer a hearing following suspension of his license on the grounds that his horse tested positive for drugs.¹³ Clearly, Givens is constitutionally entitled a prompt post-suspension hearing. Givens exercised his right to a hearing before the Commission on April 18, 2010. The Commission can hold a final hearing on the matter if and when Givens requests one.

The Commission contends this matter should be dismissed because Givens failed to avail himself of the administrative remedies available before the Board and the Commission; specifically, that he failed to advise the Board concerning confirmatory drug testing of his secondary urine sample before filing this Superior Court proceeding. The Commission suggests that Givens's failure to advise the Board and Commission concerning confirmatory testing, along with his Complaint, constitutes a decision to forgo confirmatory drug testing.¹⁴ Givens responds that the Commission disregarded its established rules and regulations for handling infractions by its licensees, leading Givens to file for a writ with this Court. Givens additionally argues that he need not exhaust administrative remedies before filing for relief with this Court.

The Commission is prepared to hold a second hearing, allowed by regulation, following the suspension of Givens's racing license due to a finding of drug contamination.¹⁵ However, the Commission has not held a second hearing because Givens has not requested one under the procedures set forth in the DHRC Rules. Givens instead asked for DNA testing, which is not provided for in the DHRC Rules.

¹³ *Id.* at 68.

¹⁴ Def.'s Mot. to Dismiss ¶ 12.

¹⁵ *Id.* ¶7.

B. The Commission had Jurisdiction to Act and Did Not Divest Itself of Jurisdiction

A writ of prohibition is meant to assure the orderly administration of justice and prevent “unwarranted assumption of power over persons or matters not within the legitimate cognizance of the inferior tribunal.”¹⁶ A writ of prohibition has been granted where an inferior court lacked subject matter jurisdiction over the matter.¹⁷

The Commission had jurisdiction over this matter, *ab initio*, and the Commission did not divest itself of jurisdiction. It acted within its statutory jurisdiction, and it did not violate Givens’s constitutional rights during proceedings.

1. The Commission Did Not Exceed Its Jurisdiction, *per se*.

Plaintiff cites to *Mitchell v. Alcoholic Beverage Control Commission*, as authority for the assertion that constitutional violations on the part of administrative bodies constitute *per se* excesses of jurisdiction.¹⁸ In *Mitchell*, an African American appealed from a denial of a license for the sale of alcohol by the Alcoholic Beverage Control Commission, contending the basis of the denial was race.¹⁹ There, the Court held that the Commission acted outside of its jurisdiction by denying Mitchell equal protection of law and denying a license without a reasonable statutory basis.²⁰ The Court held that Mitchell was denied due process of law because the Commission’s decision was arbitrary and capricious.²¹ While the case does not state that constitutional violations are excesses

¹⁶ *Matushefske v. Herlihy*, 59 Del. 117, 120, 214 A.2d 883, 885 (Del. 1965); see *Cont'l Coach Crafters*, *supra*.

¹⁷ *Knight*, *supra*, 176 A. at 465.

¹⁸ 193 A.2d 294 (Del. Super. 1963).

¹⁹ *Id.* at 294.

²⁰ *Id.* at 317.

²¹ *Id.* at 312.

of jurisdiction, *per se*, *Mitchell* states that administrative agencies must act within their statutory authority, and decisions made without that authority cannot be upheld.²²

Here, the Commission had statutory authority to revoke plaintiff's license under 3 *Del. C.* § 10026, whereas in *Mitchell*, the Alcoholic Beverage Commission was bound by statute and case law to examine all applications for licenses and consider the existing conditions in the locality to determine whether granting a license would serve the public interest and convenience.²³ Therefore, *Mitchell* is inapplicable here, and the Commission acted within its jurisdictional bounds.

2. The Commission Did Not Strip Itself of Jurisdiction

A writ of prohibition may be issued where the inferior tribunal has “acted to violate an individual’s fundamental constitutional rights, thus stripping itself of jurisdiction.”²⁴ The case *Steigler v. Superior Court* states: “An order may be void for want of jurisdiction by reason of extreme irregularities in the proceedings, other than lack of jurisdiction over the offense and the person, as where fundamental constitutional rights have been violated during the course of the proceedings leading to the order.”²⁵

Here, the Commission has not violated and does not violate Givens's constitutional right to due process. The DHRC Rules provide for Givens to have a hearing following confirmatory drug testing. The Board additionally advised Givens that the Board would schedule a hearing if Givens would consent to confirmatory testing. While there was some delay, resolved by the Court's finding that Givens could request DNA testing, since receiving those results, Givens has not exercised his right under the

²² *Id.* at 311.

²³ *Id.* at 318.

²⁴ *Steigler v. Superior Court*, 252 A.2d 300, 303 (Del. 1969); *Worrell v. Indus. Accident Bd.*, 1997 WL 913500, at *1 (Del. Super. Nov. 7, 1997).

²⁵ *Steigler*, 252 A.2d at 303.

DHRC Rules to request a second hearing. Therefore, the Commission has not denied Givens due process by its inaction. Rather, Givens has opted to forego the process available to him and seeks instead to attain relief outside the channels provided by the agency's rules and regulations. Without a violation of fundamental constitutional rights, a tribunal cannot strip itself of jurisdiction.²⁶

CONCLUSION

For all the foregoing reasons, the Commission's Motion to Transfer Venue is **DENIED**, the Commission's Motions to Dismiss of December 6, 2010 and August 25, 2011 are **DENIED**, and Givens's request for a writ of prohibition is **DENIED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

²⁶ See *Steigler, supra*, 252 A.2d at 303.