IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY S. CHRISTOPHER Plaintiff-Below, Appellant, 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. DEAVER, Sussex County Council Councilwoman; GEORGE R. COLE, Sussex County Councilman; VANCE C. PHILLIPS, Sussex County Council Councilman; TODD F. LAWSON, Sussex County Administrator; and the STATE OF DELAWARE Defendants-Below, Appellees.	:	No. 201, 2013

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR SUSSEX COUNTY

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I. Clarification of the scope of this Appeal.

Prior to addressing the arguments advanced by the Appellees, Sussex County ("County") and the State of Delaware ("State"), the Appellant must clarify that this appeal only involves the constitutionality of HB325 as it applies to the sheriff. The sole issue on appeal is whether the Delaware Constitution vests the sheriff, as a part of the sheriff's duty to act as conservator of the peace, with the authority to investigate crimes and the power of arrest.

Appellant contends that HB325 is unconstitutional because, by prohibiting the sheriff from exercising powers of investigation and arrest, HB325 prevents the sheriff from performing his constitutional duty to act as a conservator of the peace. The focus of this appeal, and central point of Appellant's contention, is whether investigation and arrest are inherent to the sheriff's performance of the constitutionally-mandated duty to act as the "conservator of the peace."

Absent from this appeal, as evidenced by their absence from the Appellant's Opening Brief, are all the arguments peripheral to the constitutionality of HB325, including whether the sheriff is a chief law enforcement officer of the county.

It must be noted as well that the Appellant did not abandon the appeal against County, contrary to the County's assertion, because the County applied

HB325 to preclude the sheriff from making arrests and investigating crimes. Further, the record below shows that the County was a driving force behind HB325, and was heavily involved in the bill that stripped the sheriff of arrest authority.

II. Sheriff is not a name-only constitutional officer in Delaware, unlike the sheriff in New Hampshire, and is mandated by the Delaware Constitution to act as a conservator of the peace. Therefore, this Court must distinguish the New Hampshire Constitution and the *Linehan* opinion of the New Hampshire Supreme Court that was heavily relied upon by the Court Below and by the State in this appeal.

Turning to the arguments advanced by the Appellees, the State argues that because the Constitution does not specifically define the term "sheriff" or the term "conservator of the peace," the character and essence of those terms is at the infinite mercy of the General Assembly. The Constitution is an exercise in brevity. It is not a dictionary. This Honorable Court is called upon to determine the meaning of the term "conservator of the peace" as it applies to the sheriff, and whether it must necessarily include the sheriff's authority to arrest and investigate crimes so that the sheriff may act as a conservator of the peace.

Appellant contends that the phrase "sheriff shall act as conservator of the peace" contains a definition and imposes a duty. The sheriff is required to keep the "Kings Peace" by investigating crimes and arresting suspected criminals.

The State relies upon the case law from far-away jurisdictions in support for the proposition that the duties of the name-only constitutional officers are defined by the General Assembly. For instance, the State cites a Mississippi case, *Martin v. State,* for a proposition that the duties of undefined constitutional officers are contained only in the common and statutory law. (State's Answer Br. at 21-22.) However, Mississippi case law is irrelevant here because in Delaware the sheriff's duty is not undefined. In fact, the duty of the sheriff is spelled out in the Delaware Constitution: he must act as a conservator of the peace.

Likewise, the State's reliance on *Wheeler v. Shulman*, a 98 year old case from Kentucky, is wholly inapplicable to this matter because it dealt with the territorial jurisdiction of the Justice of the Peace and not the rights and duties of the Justice as a "conservator of the peace." In contrast, this appeal is not about the geographical boundaries of the sheriff's authority; this case is about the meaning of the term "conservator of the peace" as it applies to the sheriff and the powers necessary for him to perform this role.

The decision of the Court below, in both the result and the reasoning, heavily relied upon the New Hampshire Supreme Court's decision in *Linehan v. Rockingham County Commissioners*, 855 A.2d 1271, 1274-75 (N.H. 2004). The Court Below cited *Linehan* for the proposition that if the duty is not specifically defined in the Constitution, it is at the mercy of the General Assembly thusly:

> Where the sheriff is named in the Constitution his duties are the same as they were at the time the Constitution was adopted. His duties and authority, however, are not rendered unalterable by virtue of the sheriff being a constitutional officer. 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. The legislature is entirely at liberty to increase, decrease, or modify the powers and duties incident to this position.

(Appellant's Opening Br., Ex. A at 8)(internal citations omitted)

Not surprisingly, the State heavily relies on the *Linehan* opinion in its Answering Brief for the proposition that, unless expressly prescribed by the state constitution, the powers are at the mercy of the General Assembly.

Both the Court Below and the State missed a critical distinction between the New Hampshire and Delaware Constitutions. The New Hampshire Supreme Court interpreted the state's Constitution, holding that the sheriff is a name-only constitutional officer under the New Hampshire Constitution. The sheriff in the Delaware Constitution is not a name-only office.

The current New Hampshire Constitution uses the term "sheriff" four times. First, Article 38 of the New Hampshire Constitution requires the sheriff to serve process on the subject of impeachment. (AR-1). Second, Article 71 as amended in 1877 requires sheriffs to be elected (Article 46, requiring appointment of sheriff, was repealed by the same Amendment). (AR-2). Article 78 prohibits persons over 70 to serve as sheriffs. (AR-3). Article 94 prohibits the New Hampshire sheriff

from holding more than one position in the government. (AR-4). In short, the New Hampshire Constitution, in sharp contrast to the Delaware Constitution, holds the sheriff as a name-only office because it does not require the sheriff to act as a "conservator of the peace." Based on that finding, the *Linehan* Court held that sheriff's duties were subject to full legislative control.

The Delaware Constitution, however, is radically different from the New Hampshire Constitution as it relates to the sheriff because it mandates that the sheriff act as a "conservator of the peace." Thus, the *Linehan* logic and result are wholly inapplicable here because the Constitution of Delaware is radically different from the Constitution of New Hampshire in that it imposes a duty to act upon the sheriff and the Constitution of New Hampshire does not. Therefore, the finding that the Delaware sheriff is a name-only officer is impossible.

In Delaware, the sheriff is not a name-only office because the Constitution requires the sheriff to act as a "conservator of the peace." The Delaware General Assembly may not enact statutes infringing on the sheriff's ability to perform the function of conservator of the peace because that function is constitutionalized. The Appellant contends that the term conservator of the peace, as it applies to the Delaware sheriff, must include the authority to arrest and investigate.

III. Even if this Court finds that the sheriff's constitutional role is not defined by the term "conservator of the peace", it may not allow the General Assembly to eviscerate the office of the sheriff without a constitutional amendment.

The State proposes a rule that would permit the General Assembly to do whatever it pleases with any constitutional office whose duties are not distinctly spelled out. (State's Answer Br. at 3) It is the position of the Appellant that the duties of the sheriff are defined by the requirement of the sheriff to act as a "conservator of the peace," and this Court is called upon to determine the meaning of the term "conservator of the peace" as it applies to the sheriff in Article XV of the Delaware Constitution.

The State has admitted that the sheriff possessed investigation and arrest authority at the time of the ratification of the current constitution. (State's Answer Br. at 15) The General Assembly cannot, without amending the constitution, eviscerate and redefine the nature of a constitutionally created office.

The State argues that the General Assembly may add to and subtract from the duties of the constitutional officers. Naturally, the General Assembly may add, subtract, and otherwise regulate the offices created by the Constitution. It is absurd to argue otherwise. However, General Assembly may not enact legislation that subtracts *so much* from the power of the constitutional office as to effectively

abrogate it. Instead, the General Assembly must use its constitutional amendment power to abrogate the constitutional office.

Following is an illustration of the above principle: The General Assembly may add to and subtract from the jurisdiction of the Delaware Courts, but the General Assembly may not preclude the Delaware Courts from hearing and deciding cases and controversies because that would eviscerate the constitutional function of the Courts. Likewise, the General Assembly may change the scope of the jurisdiction of the Attorney General, as in *Darling*, but it may not prohibit the Attorney General from investigating and prosecuting crimes in the State, because that would drastically change the constitutional function of the Attorney General. The same logic applies to the sheriff. The General Assembly may change the contours of the office. However, the General Assembly may not take away a power that prevents the sheriff from acting as a conservator of the peace. It cannot strip a conservator of the peace of his ability to act without a constitutional amendment.

The Chancellor was a conservator of the peace under Article XV of the 1897 Constitution. As a conservator of the peace, the Chancellor was the head judicial officer in the State and presided over the pre-1953 Supreme Court of Delaware. This included the jurisdiction to hear criminal appeals. The Chancellor is no longer a conservator of the peace, as he was in the 1897 Constitution, because the

Constitution of Delaware was amended to create the Delaware Supreme Court in 1953.

Appellant contends that if the General Assembly wants to prevent him from acting as a conservator of the peace by prohibiting him from investigating crimes and arresting suspects—tools he possessed at the time of the Constitution to act as a conservator of the peace—the General Assembly must amend the Constitution.

In short, the General Assembly may define the contours of the constitutional office, but it cannot change its character and essence. The General Assembly simply does not have the constitutional authority, short of an amendment, to turn a sheriff into a paper-pusher, closing a blind eye to the fact that he is constitutionally required to act as a conservator of the peace.

The General Assembly frequently uses the amendment power it is provided under the Constitution. For example, most recently the General Assembly in 2000 and 2001 used its constitutional amendment power to eliminate the county-elected office of Register in Chancery. The first leg of a proposed constitutional amendment to eliminate the office was introduced and passed by the General Assembly on June 22, 2000. (72 Del. Laws 2000, ch. 357) The concurring second leg was passed on July 6, 2001. (73 Del. Laws 2001, ch. 98) Then, after the Constitution was amended, the General Assembly passed House Bill 226, which included the implementing language for the transition on January 1, 2002. The

implementing language phased out the duties of the county Register in Chancery for a Chief Register in Chancery.

Appellant's position is that HB325 eviscerates the Sheriff's constitutional role as to effectively abrogate his office. Basically, the process that the General Assembly used to strip the sheriff of his ability to act as a conservator of the peace *sub judici* is constitutionally flawed because it skipped right to implementing language and bypassed the first and second legs of the constitutional amendment process, specifically, proposal of an amendment in one term and concurrence with the proposal in the next term.

IV. The Conservators of the Peace are a group of constitutional officers empowered to keep the "Kings Peace," each officer using inherent tools to perform his function in keeping the peace.

The Appellant additionally argued in the Opening Brief that the Delaware Constitution, Article III §22 (sheriff election) and Article XV §1 (sheriff is conservator of the peace), when read in concert, give Delaware citizens the right to elect the sheriff as a conservator of the peace and not just as a paper pusher, service processor and auctioneer of foreclosed properties, as the General Assembly currently imagines the sheriff to be.

As was advanced in the Opening Brief, and accepted by the State in the Answering Brief, the term "conservator of the peace" means keeping the "King's Peace" by keeping our society free from crime. Appellant does not disagree with

the State's proposed definition of "Peace of the King" as providing security that the King (or the government) promised in Life and Goods. Security in life is a right to be free from crime.

The 1897 Constitution designates four officers responsible for making sure the "King's Peace" is kept, ensuring the normal state of society.[1] The Chancellor was the head judicial officer of the state and presided over the appellate court. The Attorney General prosecuted offenders, the Judges tried offenders and the Sheriff investigated and arrested the suspected lawbreakers. These roles covered the four phases of keeping the peace: arrest, prosecution, trial, appeal. (See full argument in Appellant's Opening Br. at 21)

Additionally, Appellant must focus this Court's attention on the fact that neither the State nor the County rebuts, challenges or even acknowledges this harmonization argument in their briefs.

It is critical to note that, in 1897, the Delaware State Police did not exist.[2] The State Police were created by statute, as opposed to the sheriff whose office is created by the Constitution. (34 Del. Laws 1925, ch. 84) Moreover, the General Assembly and the Attorney General now argue that "conservator of the peace" has no meaning. Yet, the 1925 enabling statute forming the Delaware Highway Patrol

[1] *See* Del.C.Ann. Const., Art. 15, § 1

[2] It was created in 1925 and the enabling statute explicitly states that the State Police shall be conservators of the peace in the state, like sheriffs, etc.

requires the State Police to act as "conservators of the peace" and likens their duties to the ones performed by the sheriff. *Id.*

Prior to the creation of the State Police, it was the role of the sheriff to arrest and commit lawbreakers as a "conservator of the peace." The State admits in their Answering Brief that the sheriff had the arrest powers at the time of ratification, but adds that the sheriff shared the investigation and arrest powers with the constables. Because the sheriff possessed the power at the time of ratification, the sheriff's arrest power is constitutionalized within the term "conservator of the peace." The power is a necessity incident to performing the job as a conservator of the peace. Sharing the power with the constables does not take away from the fact that sheriff possessed that power—the power to arrest.

Creation of the State Police did not and could not have taken away the investigation and arrest powers from the sheriff for two reasons: First, the State Police were not created by amendment, unlike the Delaware Supreme Court that repealed the jurisdiction of the Chancellor to hear criminal appeals (thus effectively preventing him from being a conservator of the peace). Second, the State Police are the conservators of the peace in the State, while the sheriff is the conservator of the peace in each county.

Additionally, Appellant disagrees with the state's interpretation of the doctrine of "*noscitur a sociis*." It does stand for a proposition that "terms grouped

together must be given a related meaning," but it does not imply that the terms must carry identical meanings as applied to the different constitutional officers.

First, *noscitur a sociis* does not apply here because this is not a case of statutory interpretation—this is a case of constitutional interpretation. Second, even if the rule applies in this case, the related meaning of the term "conservator of the peace" as it applies to each of the four officers listed in the Article XV does not mean that each must perform the same task in acting as a conservator of the peace. The result would be absurd, as it would require the Chancellor to go out and arrest suspects, and the sheriff to preside over appeals, etc.

Appellant disagrees with the State's absurd proposition that each conservator of the peace must have the exact same tools to perform the duty. If each conservator of the peace has identical tools to perform the duty, there would be no need for four conservators, as one would suffice. Instead, the duty of conserving the King's Peace comes in four different phases: arrest, prosecution, trial, and appeal. Each of the four conservators was empowered with tools necessary to carry out his respective phase of keeping the peace and preserving the order in society. The Sheriff arrested the offender, the Attorney General prosecuted the offender, the Judges tried the offender and the Chancellor presided over the appeals. Together this provides security in life and goods to the subjects.

The United States Supreme Court, in *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000), described the interpretive rule of *noscitur a sociis* to mean "words and people are known by their companions." The *Gutierrez* interpretation of the rule is more suitable here because it allows one rubric, conservator of the peace, to mean the entire process of keeping the King's Peace, with each respective conservator performing its inherent role, its part in ensuring the entirety of the King's Peace is kept.

In summary, the Appellant advanced an argument in the Opening Brief that was accepted by the State in the Answering Brief, that the term "conservator of the peace" means keeping the peace through keeping our society free from crime. Each of the four officers, as conservators of the peace, possesses inherent tools as evident in their respective positions, to ensure the peace is kept, as required by the Constitution.

V. This court need not pinpoint the origins of Sheriff's arrest authority, whether in common law or by English statute, because the Sheriff's arrest authority was constitutionalized as indispensible to his duty to act as conservator of the peace.

Next, the State and the County vehemently argue about the source of the sheriff's authority to investigate crimes and make arrests. A lot of ink was spilled in their respective briefs over whether the source was contained in the common law or in an English Statute. The State and the County expended a great deal of their energy to pinpoint the source of that authority as it existed prior to the current,

1897 Constitution. Additionally, the State and the County argue that the term "public peace officer" is not synonymous with the term "conservator of the peace." The above concerns will be addressed seriatim.

It does not matter whether the sheriff's arrest authority was based in common law, in an English statute before the enactment of the current, 1897 Constitution, or whether it was found in the term "public peace officer." Once the definitional requirement for the sheriff to act as a conservator of the peace was frozen into the Constitution, the sheriff's arrest power, as a necessary tool in performance of the duty of a "conservator of the peace," became constitutionalized. Thus, arrest authority is indispensible to the sheriff's ability to perform his duty to act as a conservator of the peace. The sheriff's arrest authority is parallel to the Judge's authority to try cases, the Attorney General's authority to prosecute offenders and the Chancellor's authority to hear appeals. They are all inherent powers in performing their respective roles as conservators of the "King's Peace."

Appellant fully set out his argument as to why the sheriff's arrest power was a necessary and indispensable tool of the sheriff being the "conservator of the peace." (supra, and in Appellant's Opening Br. passim) This Court should note that the State and the County do not even acknowledge this argument in their briefing. There is no reason to restate an unrebutted argument here, except to point the

Court's attention to the fact that the State admitted that the sheriff had investigation and arrest powers at the time of ratification of the Delaware Constitution. The fact that those powers were shared with the constables does not diminish their existence.

CONCLUSION

The constitutional amendment process was designed by the framers specifically for the purpose of changing the core rights and relationships set out by the Delaware Constitution, and distinguishes the Delaware Constitution from the British Constitution. Therefore, the General Assembly should be required to use the amendment process to prohibit the sheriff from acting as a conservator of the peace, analogously to the amendment that created the Supreme Court and prevented the Chancellor from being the Appellate Judge.

More importantly, though, the amendment process would force the General Assembly to face the voters who may or may not understand the effect of HB325 on the duties of the constitutionally-elected sheriff, but would undoubtedly understand the ramification of an amendment that overtly changed the office.