State of New Hampshire Supreme Court

NO. 98-586

2001 TERM

MAY SESSION

STATE OF NEW HAMPSHIRE

v.

STEVEN DIAMOND

RULE 7 APPEAL FROM FINAL DECISION

REPLY BRIEF OF DEFENDANT/APPELLANT, STEVEN DIAMOND

By: Joshua L. Gordon, Esq.
(On behalf of the N.H. Civil Liberties Union)
Law Office of Joshua Gordon
26 S. Main St., #175
Concord, N.H. 03301
(603) 226-4225

Barbara A. Bradshaw
(On behalf of the N.H. Civil Liberties Union)
Law Office of Barbara Bradshaw
53 Silver St.
Dover, NH 03820

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW HAMPSHIRE CASES

OTHER STATE'S CASES

SECONDARY AUTHORITY

ARGUMENT

I. *De Facto* Officer Doctrine Does Not Apply Because There Is No *De Jure* Office of UNH Police

A. State's Brief Neglects Crucial Limitations of the *De Facto* Officer Doctrine

In its brief the State raises the *de facto* officer doctrine. It argues that the UNH police are *de facto* officers, and that their actions are therefore valid.

The recital of the doctrine, *State's Brief* at 12, is correct, and its argument is persuasive. But the State misrepresents the defendant's contentions, and has neglected crucial limitations of the doctrine.

The generally recognized conditions and elements necessary for the status as a *de facto* officer are: existence of a *de jure* office; the color of authority, title, law, or right; possession of the office; and recognition or reputation as, and reliance on, the officer. *See e.g., United States v. Royer*, 268 U.S. 394, 397 (1925); *Grooms v. La Vale Zoning Bd.*, 340 A.2d 385 (Md.App. 1975).

B. Existence of a *De Jure* Office Is a Necessary Condition of a *De Facto* Officer

The existence of a *de jure* office is a necessary condition of a *de facto* officer. One cannot hold an office, regardless of how it was attained, when the office itself does not exist. There is nothing such as a *de facto* office.

The United States Supreme Court explained this fully in *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). The board of county commissioners of Shelby County, Tennessee, issued bonds, and the holders later sued to collect. The Court held, however, that there was no such office in Tennessee as that of county commissioner. The acts of anyone claiming to hold that position, regardless of the method of their appointment, were therefore void. The Court's comments are worth quoting at length:

But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county. This contention is met by the fact that there can be no officer, either de jure or de facto, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions . . . . The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential.

. . .

Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel. But, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a de facto office under a constitutional government, and that the acts of the incumbents are entitled to consideration as valid acts of a de facto officer. Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. [But w]here there is no office there can be no officer de facto, for the reason that there can be none de jure.

. . .

None of the cases cited militates against the doctrine that, for the existence of a de facto officer, there must be an office de jure, although there may be loose expressions in some of the opinions, not called for by the facts, seemingly against this view. Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached; and such, in our judgment, was the position of the commissioners of Shelby county.

Norton v. Shelby County, 118 U.S. 425, 441-449 (quotations, citations omitted).

Norton v. Shelby County has been followed in every instance the issue has arisen. In *Carson v. Wood*, 175 S.E.2d 482 (W.Va. 1970), for instance, Ray George took numerous actions as "Director of Office Services" of the State Road Commission of West Virginia. He was indicted under West Virginia's bribery statute, which specifies that it applies to "any executive, legislative, judicial or ministerial officer." The court found "there did not exist by law any such office as 'director of office services of the State Road Commission of West Virginia.'" It thus held that he was not a *de jure* officer of the State, and further that because there was no such office, he also was not a *de facto* officer. "To constitute an officer *de facto* the office must have a *de jure* existence." *Carson v. Wood*, 175 S.E.2d at 491. The court thus quashed the indictment as charging no crime.

Likewise in *Higgins v. Salewsky*, 562 P.2d 655 (Wash. App. 1977). There, the state authorized municipalities to create a civil service commission by local ordinance. One city established such a commission, but without the required local legislation, leading the Court to hold that its actions were null and void: "Under a constitutional government such as ours, there can be no such thing as an *office de facto*, as distinguished 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." *Higgins v. Salewsky*, 562 P.2d at 658. *See also, Tobler v. Beckett*, 297 So.2d 59, 61 (Fla.App. 1974) ("In order for an individual to qualify as a *de facto* officer or judge there must be a *de jure* office."); *Lile v. Powderly*, 612 S.W.2d 762, 764 (Ky. App. 1981) ("the existence of a *de jure* office is a necessary condition of a *de facto* officer"); *State ex rel. Tamminen v. City of Eveleth*, 249 N.W. 184, 186 (Minn. 1933) ("The rule generally adhered to is that there can be no *de facto* officer unless there is a *de jure* office for him to fill. . . . Where, however, there is no

law or ordinance even attempting to create an office, or where the law or ordinance creating such an office has been held unconstitutional or has been repealed, no one can become an officer *de facto* by assuming to act in a wholly non-existing office."); *Kovalycsik v. Garfield*, 156 A.2d 31 (N.J. Super. 1959); *Holcombe v. Grota*, 102 S.W.2d 1041, 1042 (Tex. 1937) ("It is of course fundamental that in the absence of an office *de jure* there can be no officer *de facto*."); *Jones v. State Bd. of Trustees of Emp. Retire. Sys.*, 505 S.W.2d 361 (Tex. Civ. App. 1974); *State ex rel. Farmer v. Edmonds Municipal Court*, 621 P.2d 171, 175 (Wash. App. 1980) ("Generally, there must be a *de jure* office before there can be a *de facto* officer.").

The *Norton v. Shelby* requirement that there must be a *de jure* office in order for there to be a *de facto* officer makes perfect sense. First, without a *de jure* office there could be no *de jure* officer, never mind a *de facto* officer. Second, as noted, the elements for a *de facto* officer are: existence of a *de jure* office; the color of authority, title, law, or right; possession of the office; and recognition or reputation as, and reliance on, the officer. These are factual matters, and declaring that a person is a *de facto* officer is nothing more than a reasonable inference that the purported officer held the position in question. But no amount of facts regarding the conduct of the officer can create an inference of the existence of the office. *Higgins v. Salewsky*, 562 P.2d at 658.

C. Cases Cited by the State Are Concerned Merely With Defective Attainment of Office

The circumstances generally giving rise to the status as a *de facto* officer are an irregular or illegal election; an informal, defective, or invalid appointment; failure to meet qualifications of office; holding over in office; an ineligibility arising during the term of office; or acceptance

of an incompatible office. *See e.g.*, 63c AM. JUR. 2D, *Public Officers and Employees* § 30 *et. seq.*

Every case cited by the State in its brief is in that sphere. *State v. Boiselle*, 83 N.H. 339, 341 (1928) (exercising incompatible office); *State v. Barnard*, 67 N.H. 222 (1892) (appointment had technical defect); *State v. Jewell*, 64 N.H. 13 (1885) (appointment of officer not under seal); *Waite v. Santa Cruz*, 184 U.S. 302 (1902) (whether act of Mayor was during his term); *Ex parte Ward*, 173 U.S. 452 (1899) (appointment process improper); *McDowell v. United States*, 159 U.S. 596 (1895) (appointment process); *Ball v. United States*, 140 U.S. 118 (1891) appointment process); *Hussey v. Smith*, 99 U.S. 20 (1878) (federal marshal's authority to serve process); *Malone v. State*, 406 So.2d 1060 (Ala. Crim. App. 1981) (deputy sheriff not complied with requirements of appointment); *State ex rel. James v. Deakyne*, 58 A.2d 129 (Del. Super. Ct. 1948) (member of city council moved outside city limits); *Carty v. State*, 421 N.E.2d 1151 (Ind. App. Ct. 1981) (irregular appointment); *Grooms v. La Vale Zoning Bd.*, 340 A.2d 385 (Md. App. 1975) (hold-over officer); *People v. Davis*, 272 N.W.2d 707 (Mich. App. Ct. 1978) (special prosecutor improperly appointed); *Pleasant Hills Borough v. Jefferson Township*, 59 A.2d 697 (Pa. 1948) (irregular election); *Commonwealth v. Pontious*, 578 A.2d 1 (Pa. Super. Ct. 1990) (defective hiring); *State v. Smejkal*, 395 N.W.2d 588 (S.D. 1986) (untimely appointment of magistrate); *State v. Oren*, 627 A.2d 337 (Vt. 1993) (expired term).

D. This Case Challenges the Existence of the UNH Police Department, Not the Appointment of the Arresting Officer

Steven Diamond is not challenging merely an irregular appointment of the officer who arrested him; this case challenges the existence of the UNH police department. It does not raise merely the issue of an officer *de facto*; it alleges that the position itself of "UNH police officer"

does not exist. There is no *de jure* office in this case. Because there must be a *de jure* office for there to be a *de facto* officer, the *de facto* officer doctrine does not help the State.

E. The UNH Officer Was a Usurper Whose Actions Are Void

When a person pretends to fill an office that does not exist, such as the arresting police in this case, he is not a *de facto* officer, but a "usurper" or "intruder." *Norton v. Shelby County*, 118 U.S. 425, 441 (1886); *Grooms v. La Vale Zoning Bd.*, 340 A.2d 385 (Md. App. 1975); *People ex rel. Duncan v. Beach*, 242 S.E.2d 796 (N.C. 1978). The purported official acts of a usurper are void. *Id.*

II. *De Facto* Doctrine Applies to One-Time Occurrences

The New Hampshire cases cited by the State which apply the *de facto* officer doctrine involve a one-time use of official power. In *State v. Barnard*, 67 N.H. 222, 223 (1892), this Court wrote: "A person called in on a single occasion to exercise a power which the void statute purports to confer upon him may be an officer de facto whose title cannot be assailed collaterally." Likewise, in *State v. Jewell*, 64 N.H. 13, 20 (1885), this Court wrote: "Graham's official claim having begun and ended with the service of this writ, there is now no need of an opportunity to contest his claim in a quo warranto." In both cases, the Court excused the otherwise unauthorized conduct in part because of its rare and non-repeating nature.

In the case of the UNH police department, however, as noted in the defendant's initial brief, the defect concerning its existence has been doubted by UNH and the Town of Durham for many years. *Defendant's Brief* at 41. In this case, UNH's conduct should not be so easily excused.

III. *De facto* Officer Doctrine Does Not Apply to Basic Constitutional Protections

Ryder v. United States, 515 U.S. 177 (1995), involved a judge appointed in violation of the federal constitution's appointments clause. The United States Supreme Court held that while the *de facto* officer doctrine might apply when the issue is merely one of "etiquette or protocol," *Ryder*, 515 U.S. at 182 (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)), it does not apply when the matter impinges upon "basic constitutional protections designed in part for the benefit of litigants." *Ryder*, 515 U.S. at 182 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).

Steven Diamond's case does not involve a defective appointment or a missing seal. It addresses basic constitutional protections against unauthorized exercise of the state's awesome power of arrest. The *de facto* doctrine therefore does not apply.

IV. No Bar To Collateral Attack When the Case Challenges the Existence of the Office

The State cites the well-worn rule that the authority of a police officer cannot be attacked collaterally. All the cases upon which the State relies, however, involve a *de facto* officer. When there is no *de jure* office, the no-collateral-attack rule does not apply.

The distinction is not a technicality – it makes sense. As the State notes, the rule against collateral attack of an officer's authority is based on sound policy: "Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions." *State v. Boiselle,* 83 N.H. 339, 342 (quoting *Norton v. Shelby County*, 118 U.S. at 442).

But this policy does not address the situation here. As noted, Steven Diamond is not challenging the arresting officer's appointment to office; he is challenging the existence of the

UNH police force. The prohibition on collateral attack is set forth in the *de facto* officer cases. But the State cites no case in which a challenge to the office itself is barred because it is brought collaterally. In fact, there is no bar to a collateral challenge to the existence of the office.

But even when the issue is merely the appointment process of a public officer, the no-collateral-attack rule is not woodenly applied. In *Ryder v. United States*, 515 U.S. 177 (1995), the defendant challenged the judge sitting in his case based on the process by which the judge was appointed to office. The United States Supreme Court gave short-shrift to the government's attempt to bar the litigation because it was brought collaterally, noting that the defendant had raised the issue before trial. The Court there not only reached the issue, but held in favor of the defendant.

V. Even If the *De Facto* Officer Doctrine Applies, This Court Should Address the Existence of the UNH Police

Even if this Court applies the *de facto* doctrine as the State has requested, the Court should nonetheless address the merits of the Steven Diamond's challenge to the authority of the UNH police. There are several reasons.

First, the issue is recurring. Although it has been rarely raised, it is a potential issue in every case commenced by an arrest of the UNH police. It may also be implicated in cases arising on the campus in Plymouth.

Second, there are significant barriers to a direct challenge to the contract between UNH and the Town of Durham. There is little interest, incentive, and funding to bring a declaratory or injunctive action. This is evidenced by the fact that even though the defect in the authority of the UNH police is an issue of constitutional dimension and has been known for many years, it has not yet been addressed. There are few besides a criminal defendant charged by the UNH police

who have any incentive to raise the matter. But the issue has been fully litigated in this case and there is no need to await another.

Third, there is little danger of a flood of habeas corpus petitions from already-convicted defendants seeking to take advantage a decision favorable to Mr. Diamond. As noted in his initial brief, an illegal arrest is a matter that is waived if not raised at trial. There are, at most, only a few defendants who have raised the issue. *See e.g., Ryder*, 515 U.S. at 185 (in granting retrospective relief, Court noted it would "affect only between 7 to 10 cases pending on direct review").

VI. Durham Police Chief David Kurz's Inability to Discover, or Do Anything About, Alleged Sexual Harassment in the UNH Police Department

During Steven Diamond's district court litigation, testimony established Durham Police Chief David Kurz's institutional inability to oversee the operations of the UNH police department. During the pendency of this appeal, the chief of the UNH police department, Roger Beaudoin, was charged and acquitted of criminal sexual assault. While none of the facts concerning that case are in this record, it is instructive to note that Mr. Beaudoin's UNH employers conducted an investigation without the aid or knowledge of the Durham Police, the Durham Police were apprized of the matter only after the commencement of a criminal investigation by the Strafford County Attorney, the Durham Police had no part in Mr. Beaudoin's exit from his job due to the allegations, and the Durham Police were never in a position to learn of the allegations or to take any effective action. The Beaudoin matter, newspaper accounts of which are contained in the appendix to this reply brief, reinforces evidence which is on the record showing that the Durham Police have no remedy for even egregious conduct by UNH police officers.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of the defendant.

Respectfully submitted,
Steven Diamond,
By his Attorney,

Law Office of Joshua L. Gordon

Dated: May 25, 2001

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

CERTIFICATION

I hereby certify that on May 25, 2001, copies of the foregoing will be forwarded to Ann Rice, Assistant Attorney General, and to Barbara Bradshaw, Esq.

Dated: May 25, 2001

Joshua L. Gordon, Esq.

APPENDIX