SUPREME COURT OF ARIZONA

LEGACY FOUNDATION ACTION FUND,

Plaintiff/Appellant,

v.

CITIZENS CLEAN ELECTIONS COMMISSION,

Defendant/Appellee.

Arizona Supreme Court
No. CV-16-0306-PR

Court of Appeals
Division One
No. 1 CA-CV 15-0455

Maricopa County
Superior Court
No. LC2015-000172-001

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION*

This case does not raise any issues meriting the Court's review. Petitioner Legacy Foundation Action Fund ("LFAF") filed a late appeal of an administrative decision of the Citizens Clean Elections Commission. Clearly established law states that "[a]ny person who fails to seek review [of a final administrative order] 'within the time and in the manner provided . . . *shall be barred* from obtaining judicial review.'" *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 415 ¶ 40 (2006) (quoting A.R.S. § 12-902(B) (emphasis in original)). In a unanimous and unpublished decision, the Court of Appeals applied this existing law to undisputed facts to conclude that LFAF's late appeal is barred. (The "Decision" or "Dec." ¶¶ 7-12.)[1]

LFAF argues against this straightforward application of existing law by pointing to other contexts where courts have allowed challenges to a court's jurisdiction. But the cases LFAF cites do not conflict with the decision below and do not raise issues of statewide importance needing

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* APP VOL X ##### refers to pages from the Appendix submitted with LFAF's petition.

[1] APP VOL 1 00003. This brief will refer to the memorandum decision by paragraph number.

this Court's attention. The Decision correctly resolved this case and broke no new ground in doing so. LFAF's petition should be denied.

RELEVANT FACTS

LFAF's Petition includes a lengthy recitation of facts related to the merits of its untimely appeal. The facts relevant to this Petition, however, are far more limited.

I. The Commission receives a complaint alleging that LFAF violated the Act and commences an enforcement proceeding that leads to the issuance of the March 27 Order.

The Citizens Clean Elections Act, A.R.S. §§ 16-940 to -961 (the "Act"), authorizes the Commission to enforce the Act, to "adopt rules to carry out the purposes of [the Act] and to govern the procedures of the commission." A.R.S. § 16-956(A)(7), (C).

In 2014, the Commission received a complaint alleging that LFAF failed to comply with the Act's requirement that "any person who makes independent expenditures" shall file certain reports of those expenditures. A.R.S. §§ 16-941(D) and 16-958(A)-(B).[2] Following its rules, the Commission initiated an enforcement proceeding, after which the Commission issued an order assessing civil penalties on November 28,

[2] IR-42.

2014.[3] The November 28 order provided that LFAF could request a hearing before an administrative law judge ("ALJ") within 30 days, which it did.[4]

Following the ALJ hearing, the Commission issued a final administrative order on March 27, 2015, accepting part and rejecting part of the ALJ's decision (the "March 27 Order").[5] The March 27 Order affirmed the November 28 order and assessed a civil penalty.[6]

II. LFAF seeks judicial review of the March 27 Order and its untimely complaint is dismissed for lack of jurisdiction.

LFAF sought review under the Judicial Review of Administrative Decisions Act ("JRADA"), A.R.S. §§ 12-901 to -914, which provides for judicial review of final administrative decisions. LFAF filed its complaint for judicial review in the superior court on April 14, eighteen days after issuance of the March 27 Order.[7] The superior court dismissed the action, however, because the Act states that a party "has fourteen days from the

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[3] IR-62.

[4] *Id.*; IR-63; 69.

[5] APP VOL 2 00008.

[6] *Id.*

[7] IR-1.

date of issuance of the order assessing the penalty to appeal to the superior court as provided in" JRADA. A.R.S. § 16-957(B).[8]

III. The Court of Appeals affirms the superior court, holding that LFAF's untimely appeal is barred.

LFAF appealed the dismissal of its complaint and the Court of Appeals affirmed. The court held that LFAF's argument that its complaint was timely filed was "foreclosed by *Smith*," and affirmed that the 14-day deadline in § 16-957(B) applies to appeals from Commission orders (Dec. ¶ 8). The Decision also rejected LFAF's argument that § 12-902(B) allows a party to challenge an agency's jurisdiction at any time, holding that the "language of § 12-902(B) does not allow an appeal of an administrative decision to be heard after the allotted time for appeal has passed." (Dec. ¶ 12.) In so holding, the Decision considered and rejected LFAF's alternative arguments to save its untimely appeal (Dec. ¶¶ 11-12). LFAF then filed its Petition.

REASONS THE COURT SHOULD DENY REVIEW

This case presents none of the hallmarks of a case warranting review. The Court of Appeals correctly applied the plain language of § 12-902(B)

[8] APP VOL 2 00030.

and this Court's holding in *Smith* to affirm the superior court's dismissal of LFAF's untimely complaint. LFAF's efforts to create a reviewable issue fail.

LFAF plucks language from other cases to manufacture a "conflict with other appellate decisions" where none exists. The cases LFAF cites arise in different procedural contexts and do not conflict with the Decision. LFAF cannot avoid that it had an unfettered right to appeal to the superior court (on jurisdiction and the merits) and it failed to timely avail itself of that right. The Decision applied existing law to these undisputed facts and correctly affirmed the dismissal of LFAF's complaint. This Court should deny the Petition.

I. The Petition poses no review-worthy questions of statewide importance.

Setting aside that the Decision is correct under a straightforward application of existing law (*see* § II), the Petition amounts to a plea for error correction that would impact only this case. Nothing about the Decision curtails the appeal rights of future litigants seeking review of Commission orders.

Moreover, the Petition seeks a remarkable and far-reaching rule (that a party should be able to appeal the issue of jurisdiction at any time, even months or years late) yet fails to identify what jurisdictional claims would survive here were LFAF to prevail. LFAF explains (at 7) that it argued on appeal that the "Commission lacked jurisdiction because LFAF's speech did not constitute express advocacy," and thus LFAF did not make any unreported expenditures. In other words, the contention is not that the Commission lacks authority over entities making independent expenditures but that the Commission reached the wrong conclusion about the character of LFAF's expenditures. This is a challenge to the merits of the Commission's order, not its jurisdiction to decide the issue. Indeed, that is the holding of the case on which LFAF puts so much faith, *State ex rel. Dandoy v. City of Phoenix*, 133 Ariz. 334, 338-39 (App. 1992) (explaining that "[a]n erroneous interpretation and application of a statutory provision . . . will normally constitute mere legal error and not operate to deprive an administrative agency of jurisdiction," and holding that an order may have "involved legal error" but "did not lack subject matter jurisdiction"); *see also Cockerham v. Zikratch*, 127 Ariz. 230, 234-35 (1980) ("void" judgment is not the same as "wrong" or "erroneous").

Accordingly, this Court's intervention is further unmerited because, even if revived, the Petition does not raise any actual jurisdictional claim. The Court should not entertain issuing what would amount to an advisory opinion.

II. Using a straightforward application of statutory text and this Court's decision in *Smith*, the Court of Appeals correctly held that LFAF's administrative appeal is barred.

Despite LFAF's attempts to make more of this case, the resolution is simple. This is a case about the straightforward application of a jurisdictional appeal deadline.

LFAF seeks judicial review of the March 27 Order and its imposition of penalties against LFAF. JRADA permits an aggrieved party to obtain judicial review of a "final administrative decision," such as the March 27 Order, by filing a timely complaint for judicial review in the superior court. A.R.S. §§ 12-904(A); 12-905(A) ("Jurisdiction to review final administrative decisions is vested in the superior court."). In general, a party has "thirty-five days from" service of an administrative decision to commence an appeal. A.R.S. § 12-904(A). "The provisions of JRADA do not apply, however, if a more definite procedure is set forth in 'the act creating or conferring power on an agency or a separate act.'" *Smith*, 212 Ariz. at 413

¶ 29 (quoting A.R.S. § 12-902(A)(1)). Here, the Act itself provides its own deadline for appeals: once the Commission "issue[s] an order assessing a civil penalty . . . [t]he violator has fourteen days from the date of issuance of the order assessing the penalty to appeal to the superior court as provided in" JRADA. A.R.S. § 16-957(B).

The Act's 14-day deadline (not JRADA's general deadline) applies to judicial appeals of Commission orders, and the deadline "is jurisdictional; any appeal not filed within the stated period is barred." *Smith*, 212 Ariz. at 413 ¶ 29 (citing A.R.S. § 12-902(B)). Section 12-902(B) of JRADA compels this result. It provides: "Unless review is sought of an administrative decision within the time and in the manner provided in this article, the parties to the proceeding before the administrative agency ***shall be barred*** from obtaining judicial review of the decision." A.R.S. § 12-902(B) (emphasis added).

Given these clear authorities, the courts below easily concluded that, although LFAF had a full right of appeal under § 16-957(B), LFAF failed to timely avail itself of that right, and its appeal was properly dismissed as a result. (Dec. ¶¶ 8-13.)

III. The Court of Appeals correctly applied § 12-902(B) as written, and the Decision does not create a "split in authority" with *Arkules* and *Dandoy*.

To muddy the clear law controlling this case, LFAF raises various arguments that it should be able to challenge the Commission's jurisdiction at any time, no matter how long after the appeal deadline it seeks review. None of LFAF's arguments call the Court of Appeals' holding into doubt or merit this Court's consideration.

As the Court of Appeals correctly held, § 12-902(B) "provides that a party is barred from seeking judicial review of an administrative decision if the party fails to file a timely appeal." *See* A.R.S. § 12-902(B); (Dec. ¶ 10). LFAF argues (at 8, 12-16) that the Decision conflicts with previous decisions holding that § 12-902(B) "permit[s] aggrieved persons to challenge a tribunal's jurisdiction at any time," pointing to language used in two Court of Appeals opinions, *Arkules v. Board of Adjustment*, 151 Ariz. 438 (App. 1986) and *Dandoy*, 133 Ariz. 334. LFAF's argument fails.

LFAF's argument turns on a misreading of the second sentence of § 12-902(B). That sentence restricts a party's right to appeal to "questioning the jurisdiction" of the agency if an administrative decision becomes final (and thus appealable) because of the party's failure to "file any document

in the nature of an objection, petition for hearing or application for administrative review within the time allowed by the law." A.R.S. § 12-902(B); (Dec. ¶ 10). In other words, as the Decision explains, the second sentence of § 12-902(B) "does not allow an appeal . . . after the allotted time for appeal has passed. Instead, it restricts a party who has suffered an administrative default or who has not exhausted administrative remedies from challenging the merits of the agency's decision." (Dec. ¶ 12.)

Neither *Arkules* nor *Dandoy* conflict with the Decision; at most they use broad, unnecessary language in dicta to describe the effect of § 12-902(B) in totally different procedural contexts.

Arkules involved a special action complaint brought by a non-party to challenge the decision of a municipal board of adjustment, not a party's appeal under JRADA. 151 Ariz. at 439. The court held that the non-party's complaint was "brought within a reasonable time," even though it was filed after a 30-day time limit. *Id*. at 440.

Before reaching that conclusion, the court cited § 12-902(B), characterizing it as providing that "an appeal from an administrative agency may be heard even though untimely to question the agency's" jurisdiction. *Id*. But, by its terms, § 12-902(B) applies only to "***the parties to***

the proceeding before the administrative agency," not non-parties who may have some separate grounds to seek review. A.R.S. § 12-902(B) (emphasis added). Whatever rule should apply to non-parties is not found in § 12-902(B), and it is simply irrelevant to the holding in *Arkules*.

Section 12-902(B) was also cited in a different context in *Dandoy*. There, the City of Phoenix and a state agency entered into an agreed-upon consent order after the agency sent a cease-and-desist order. 133 Ariz. at 335-36. "Some seven months later," the agency—not the City—filed suit to enjoin violations of the consent order. *Id.* On appeal, the City argued that the underlying cease-and-desist order was void and could not provide a basis for an injunction. *Id.* Before reaching the City's argument, the court explained that § 12-902(B) provides "an exception to [the] statutorily declared finality . . . for the purpose of questioning the jurisdiction of the administrative agency." The court went on to hold that "the City's attempt to circumvent finality . . . by an attack on . . . jurisdiction" was not "sound." *Id.* at 337. Like *Arkules*, *Dandoy's* citation of § 12-902(B) does not arise in a party's appeal of a final administrative decision under JRADA. Rather, *Dandoy* involved a separate lawsuit attempting to enforce a consent order, not an appeal from an agency's final administrative order.

Moreover, the broad gloss these cases give to § 12-902(B) is clearly incorrect if applied to a party's appeal under JRADA. Section 12-902(B), by its terms, applies to "the parties to the proceeding before the administrative agency" and bars appeals of administrative decisions "[u]nless review is sought of an administrative decision within the time and in the manner provided in this article." § 12-902(B). And to the extent *Arkules* and *Dandoy* create confusion, this Court's holding in *Smith* controls over these older court of appeals cases: the fourteen-day deadline in § 16-957 is "jurisdictional" and "any appeal not filed within the stated period is barred." 212 Ariz. at 413 ¶ 29 (citing A.R.S. § 12-902(B)).

IV. LFAF's Rule 60-based arguments are irrelevant to the statutory right of appeal and should be disregarded.

LFAF's remaining arguments (at 9-11) are variations of the same argument: LFAF should be allowed to appeal the issue of jurisdiction at any time because of the right under Rule 60 to attack a judgment as "void" without regard to a party's delay. The Court of Appeals easily rejected this line of argument, explaining that "the right to appeal from any ruling including an administrative decision exists only by force of statute and is limited by the terms of the statute." (Dec. ¶ 9 (citation omitted).) That

proposition is beyond dispute and longstanding. *See Ariz. Comm'n of Agriculture & Horticulture v. Jones*, 91 Ariz. 183, 187 (1962) ("right of appeal" under Administrative Review Act "exists only by force of statute, and this right is limited by the terms of the statute" (citation omitted)); *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 595 ¶ 13 (App. 2009) (same).

Whatever authority exists to ask a tribunal to set aside its own judgment does not create additional appellate jurisdiction to excuse an untimely appeal. The cases relied upon by LFAF do not say anything different. *See Martin v. Martin*, 182 Ariz. 11, 15 (App. 1994) (holding that trial court did not err in refusing to vacate erroneous but not void judgment); *Nat'l Inv. Co. v. Estate of Bronner*, 146 Ariz. 138, 140 (App. 1985) (holding that trial court did not abuse discretion in setting aside its own default judgment); *In re Milliman's Estate*, 101 Ariz. 54, 58 (1966) (holding that "court which makes a void order may" set aside its own order).

Consequently, the Rule 60 procedures to set aside a void judgment do not relieve LFAF of its obligation to appeal "within the time and in the manner provided," A.R.S. § 12-902(B).

CONCLUSION

The Petition should be denied.

RESPECTFULLY SUBMITTED this 17th day of February, 2017.

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