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IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 55 MAP 2020

IN RE: NOMINATION PAPER OF ELIZABETH FAYE SCROGGIN ET AL.

APPELLANTS' REPLY BRIEF IN SUPPORT OF APPEAL

Appeal from September 9, 2020 Order of the Pennsylvania Commonwealth Court at No. 460 MD 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes

I. INTRODUCTION

With its September 9, 2020 decision, the Commonwealth Court held that a candidate for the office of President of the United States can run without a candidate for Vice President and that compliance with the Pennsylvania Election Code's requirements for ballot access is optional. The lower court reached its decision by ignoring the Election Code's mandatory filing provisions; by disregarding stipulations of fact; and by creating atextual excuses for the Candidates' failure to comply with the Code. The Green Party of Pennsylvania ("GPPA") stipulated that it failed to adhere to the Election Code, but would have this Court take a "no harm, no foul" approach to the lower court's errors, without addressing the profound consequences of effectively making the Election Code's ballot access provisions optional, waivable or superfluous.

The GPPA stipulated that the candidate's affidavit was not appended to the GPPA Nomination Paper that listed her as the GPPA candidate for President of the United States, effectively conceding that her nomination had not been perfected. The candidate's affidavit, as faxed to the Department without any direction as to how it was to be used or to what it was to be attached, languished in an unprinted, unreceived and unacknowledged limbo for three weeks before the GPPA asked the Department to look for it. The GPPA would have this Court accept the lower court's conclusion that, although the affidavit was not actually "appended" in the

"traditional sense," the affidavit should be treated as if it had been so because it was somehow "impractical" for this one Candidate to comply with the Code. The GPPA does not and cannot offer any explanation how any "impracticalities" of compliance, which a federal court previously rejected just a few weeks ago (in a case brought by the GPPA that sought to excuse noncompliance with the Code), might have affected this Candidate any differently than all the other candidates who managed to comply with the Election Code.

The GPPA also would have this Court accept the Department's action of accepting nomination papers as a *de facto* final determination, precluding any challenge. This position defies both the Election Code and this Court's treatment of the challenge process. Allowed to stand, the lower court's decision would render the Election Code's challenge framework meaningless. If the Election Code's ballot access requirements are to have any meaning, the efforts of the lower court and the GPPA to treat them as merely waivable and unenforceable guidelines must be rejected.

For these reasons and for the reasons set forth in its main brief, the Appellants ask this Court to reverse the lower court's decision and to rule that the name of Howie Hawkins, as the GPPA candidate for President, should be stricken from the ballot and to confirm that no GPPA candidate for Vice President shall be placed on the ballot for the General Election of 2020.

II. LEGAL ARGUMENT

A. Candidates' Arguments Demonstrate the Insupportable Nature of Their Position and Presence on the Ballot

Candidates essentially make these arguments to this Court:

- A facsimile transmission of a copy of a candidate's affidavit, which was not discovered or even converted to paper form until three weeks after the filing deadline, should be treated as if it had been "filed" under Section 951 (25 P.S. § 2911) of the Election Code. (Appellees' Br. at 7);

- Although the Candidates stipulated that ***neither*** of their candidates' affidavits of the Presidential and Vice-Presidential candidates listed on the Nomination Paper were actually appended to the Nomination Paper, the facsimile transmission is sufficiently "appended," apparently in a metaphysical sense, as Section 951 (25 P.S. § 2911) of the Election Code requires. (Appellees' Br. at 6-8);

- Although Candidates filed their original Nomination Paper in person on August 3 at the Department's filing room, and included attached original candidates' affidavits of ***other*** candidates appended to the Nomination Paper, Covid-19 somehow made it impractical for the placeholder candidates to present their original candidate's affidavits to the Department in their August 3 filing. (Appellees' Br. at 7); and

- Although Section 977 (25 P.S. § 2937) of the Election Code sets forth the process for objectors seeking to set aside nomination papers that the Department accepts, the Department's acceptance of a deficient and non-compliant nomination paper somehow creates a safe harbor for any challenge that asserts noncompliance with the Election Code. (Appellees' Br. at 1, 16).

As set forth in Appellants' Main Brief, and as set forth below, none of these arguments are supported by law, or even the facts of this case. The Nomination Paper must be set aside.

B. Ms. Scroggin's Affidavit was Not Filed.

The Election Code expressly requires that a "[n]omination paper. . . shall be **filed** with the Secretary of the Commonwealth." 25 P.S. § 2913 (emphasis added). To be presumed valid, the Code requires that a Nomination Paper must be "received **and filed**" with the appropriate authority.[1] *See* 25 P.S. § 2937 (emphasis added). Ms. Mathis confirmed that the Department requires original candidate's affidavits for filing. (tr. 41:15-19).

Ms. Scroggin's faxed copy of her affidavit was not filed with the Department and her affidavit was not "received and filed" as the Election Code specifically requires. Ms. Scroggin faxed a copy of her affidavit to a general number, failed to alert the Department of a fax submission, and did not transmit with the fax any cover sheet or instructions to indicate that this stray affidavit was to be appended to the Nomination Paper. (tr. 60:3-17). The Department had no reason to expect a facsimile from Ms. Scroggin, because Mr. Runkle had appended

[1] The lower court noted at several points that Ms. Scroggin's affidavit was *received* by the Department on August 3, 2020. (Op. 5, 7). This is insufficient. If the Department's mere *receipt* of Nomination Papers and attendant affidavits was sufficient to satisfy the Election Code, then the use of the words "and filed" in 25 P.S. § 2937 would be superfluous. "It is well settled that we 'are not permitted to ignore the language of a statute, nor may we deem any language to be superfluous.'" *Landay v. Rite Aid of Pennsylvania, Inc*., 629 Pa. 287, 303, 104 A.3d 1272, 1282 (2014) (*quoting Wayne M. Chiurazzi Law Inc. v. MRO Corp*., 626 Pa. 303, 332, 97 A.3d 275, 292 (2014)). Thus, Section 977 (25 P.S. § 2937) clearly requires that the papers not only be received, but also filed.

to the Nomination Paper the original candidate's affidavit for Howie Hawkins for President of the United States. (Pet. Ex. P-1 ¶ 3; tr. 47:4-8).

As a result, *for more than three weeks*, the stray Scroggin facsimile sat in an unmonitored email account—unprinted, undiscovered, and unacknowledged by Department staff, with no direction as to what staff was to do with the affidavit, if discovered. It was not discovered until GPPA counsel asked Department personnel to search for it. (*Id.*). To this day, the Department has *still* not received the original Scroggin affidavit. (*Id.*). Under these undisputed facts, it stretches the imagination to conclude that the Department *received* the facsimile in a timely manner. It is impossible to conclude that the affidavit was also *filed* as 25 P.S. § 2937 requires.[2] (tr. 41:6-19, 44:17-25).

The Election Code requires election paperwork to be "received *and filed*" with the Department for myriad reasons. 25 P.S. § 2937. Chief among these is the public's right to view complete, "as-filed" Nomination Papers so that potential objectors can review the completed paperwork and make objections if the papers are insufficient or defective. 25 P.S. § 2937. Objectors have only a narrow seven-day period in which to review nomination papers. *Id.* Here, no member of the

[2] The lower court acknowledged that the absence of an original affidavit for purported Vice-Presidential candidate Neal Taylor Gale was fatal to his nomination, but did not come to the same conclusion for Ms. Scroggin, despite the fact that the Department has yet to receive Ms. Scroggin's original affidavit. (tr. 60:8-10).

public had an opportunity to view Ms. Scroggin's affidavit during the seven-day review window *because even the Department did not know of its existence*. Members of the public and would-be electors are entitled to examine complete election paperwork and to rely on a complete submission when evaluating whether to challenge nomination papers and petitions. Ms. Scroggin's decision to fax a copy of her affidavit to an unmonitored Department email account eliminated the ability of any objector to assess the submission and was completely improper under the Election Code. Because Ms. Scroggin never perfected her nomination, the GPPA failed to nominate a Presidential candidate. In attempting to transform the Scroggin facsimile into a "filed" candidate's affidavit, Candidates distort the record and amplify the trial court's errors. Candidates incorrectly claim (and the trial court impermissibly found) that the Department was accepting "electronic filings until midnight on August 3, 2020." (Appellees' Br. at 6). This is simply unsupported by the record: Ms. Mathis testified that Presidential electors were permitted to email their unsworn statements until midnight, but that for candidates for office, the Department required original candidate's affidavits. (Compare tr. 41:15-19 with 44:17-25). Because Candidates' arguments (and the trial court's position) are unsupported by both fact and law, they must be rejected.

C. Appellees' Recitation of Facts is Unsupported by the Record.

At several points in their Brief, Appellees assert various "facts" that are either unsupported by the record or contradicted by the stipulations of the parties. Preliminarily, Appellees assert that "the DOS was accepting electronic filings until midnight on August 3, 2020." (Appellees' Br. at 6). This contention grossly misstates the record. Ms. Mathis did not testify that the Department was accepting any and all filings electronically on August 3, 2020—instead, she only testified that she had allowed Green Party Presidential Electors to submit affidavits via email. (tr. 67:4-13). This testimony falls far short of a blanket statement that *all* nomination paperwork could be filed electronically.[3]

Next, Appellees attempt to walk back the fact that the Scroggin Affidavit was not appended to the GPPA's Nomination Paper—a fact that Appellees have *repeatedly* agreed to and stipulated. (Appellees' Br. at 6; *see* Sept. 3, 2020 Joint Stipulation at ¶ 3; Petitioner's Exhibit P-1 at ¶ 3). It is undisputed that the

[3] Moreover, Appellees' repeated contention that the Department was "short staffed" is misplaced. (Appellees' Br. at 7, 13, 16). To the contrary, Ms. Mathis testified that there were "several members of [her] staff there." (tr. 20:3-7).

Scroggin Affidavit was not attached to the Nomination Paper, and Appellees cannot now "undo" their previous stipulations to that effect.

D. Ms. Scroggin's Affidavit was Not "Appended."

The Election Code requires that "[t]here shall be ***appended*** to each nomination paper offered for filing an affidavit of each candidate nominated therein." 25 P.S. § 2911(e) (emphasis added). Here, the parties stipulated that Ms. Scroggin's candidate's affidavit was not appended to the GPPA Nomination Paper that listed her as the GPPA's candidate for President of the United States. (*See* September 3, 2020 Stipulation at ¶ 3; Petitioners' Exhibit P-1, ¶ 3). The Department testified that Ms. Scroggin's affidavit was not part of the packet of candidate's affidavits presented on August 3, 2020. (tr. 28:5-17; Petitioners Exhibit P-3). Despite its unsupportable qualification, the lower court acknowledged that "Scroggin's Affidavit was not 'appended' by the candidate in the traditional sense." (Op. at 8).[4]

[4] Under the Pennsylvania Statutory Construction Act, undefined terms are to be construed "according to their common and approved usage." 1 Pa. C.S. § 1903. This statutory mandate applies to undefined terms in the Election Code. *In re Beyer*, 115 A.3d 835, 838-39 (Pa. 2015). The Election Code does not define the term "append." 25 P.S. § 2602. The common definition of "append" is to "1) attach, affix ('appended a diagram to the instructions'); or 2) to add as a supplement or appendix (as in a book) ('notes appended to each chapter')." *Append*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/append (last visited Sept. 14, 2020). Accordingly, this Court has consistently interpreted "append" to require physical adhesion. *See In re Steel*, 377 Pa. 260, 263-64, 105 A.2d 139, 140-41 (1954), and *Petition of Stout*, 421 Pa. 305, 219 A.2d 351, 351 (1966) (Musmanno, J., dissenting) (*citing Palmer v. Helm*, 421 Pa. 305, 219 A.2d 349 (1966); *Stout v. Helm*, 421 Pa. 305, 219 A.2d 349 (1966)).

The lower court identified no authority for its contorted conclusion that, despite the plain language of the Election Code requirement, Ms. Scroggin was not required to *actually* append her affidavit to the Nomination Paper. The lower court pointed to the "impracticality of appending Scroggin's Affidavit under current circumstances, including Covid-19." (Op. at 9). Yet, the court could not explain why it might have been "impractical" for Ms. Scroggin to actually append her affidavit, while, at the same time, the GPPA had managed to overcome that "impracticality" when it actually appended five original (albeit defective) affidavits to its Nomination Paper. In-person filing was also not "impractical" for GPPA representative Timothy Runkle, who filed the Nomination Paper (with its affidavits appended) in person at the Department on August 3, 2020. (Petitioner's Exhibit P-1, ¶ 3). Neither case law nor circumstances support the lower court's decision to disregard express statutory requirements. In their brief, Candidates characterize any issue with the appending of Scroggin's affidavit as a "bureaucratic snafu," and rely upon a manipulation of a statement Ms. Mathis made about Presidential elector requirements during the Covid-19 pandemic. (Appellees' Br. at 8). Yet, the above demonstrates that Candidates themselves were the source of any confusion, when they appended the candidate's "affidavits" of Hawkins and Walker to the Nomination Paper.

Further, Candidates ignore the fact that Candidates and GPPA had express, actual notice about its requirements for its Nomination Paper. During the signature gathering period, GPPA participated in a lawsuit in federal court demanding that its candidates achieve ballot access without compliance with certain aspects of the Election Code because of the ongoing Covid-19 pandemic. *See Libertarian Party of Pa. et al. v. Wolf et al.*, Case No. 5:20-cv-2299 (E.D. Pa.). In the Complaint, GPPA sought ***no*** relief regarding the presentation of original candidate's affidavits with its Nomination Paper. *Id.* at Compl. [ECF 1], generally.

Notably, Timothy Runkle, who presented GPPA's Nomination Paper to the Department on August 3, was a party in that federal litigation. Compare *Id.* at [ECF 1, ¶ 14] *with* Petitioners' Exhibit P-1, ¶ 3 here. Mr. Runkle was GPPA's sole witness at the hearing in that matter. *Id.* at [ECF 57, F/F 65-66]. At that hearing, the Department made clear that original nomination papers were required for filing. *Id.* at [ECF 57, F/F 24]. On July 14, 2020 the District Court rejected all of GPPA's demands (which again, included nothing about relaxing requirements for candidate's affidavits). *Id.* at [ECF 57-58]. On July 28, 2020, less than a week before the August 3 filing deadline, the Third Circuit affirmed the District Court's decision. *Libertarian Party of Pa. et al. v. Wolf et al.,* Case No. 20-2481 (3d Cir. Jul. 28, 2020) at [ECF 36-1]. Department staff were similarly aware of that litigation. (tr. 45:1-22). The lower court made a fundamental error when it waived

away any deficiencies due to Covid-19.[5] Candidates completely fail to reconcile any errors with appending that the lower court excused here, and for that reason the Nomination Paper must be set aside.

E. The Department's Acceptance is Immaterial in the Face of the Clear Defects of the Nomination Paper.

The Department's acceptance of a Nomination Paper is not the end of the inquiry into that Paper's validity—it is the beginning of the process. The Election Code expressly contemplates that the Department may accept papers that contain defects and, therefore, establishes a process by which the public may examine and object to those papers. 25 P.S. §§ 2936, 2937. As this Court has explained, these two sections "are *in pari materia* and are to be construed coextensively" and their legislative intent is "to provide a remedy against alleged erroneous action of a county board of elections (or the Secretary of the Commonwealth) is plain." *In re Philadelphia County Bd. of Elections*, 364 Pa. 525, 528, 73 A.2d 34, 36 (1950) (emphasis in the original). Those actions do not receive any sort of deference when the legislative requirement is clear. *In re Nader,* 865 A.2d 8, 262 (Pa. Commw. Ct. 2004) (holding that once the Secretary of the Commonwealth accepts nomination papers for filing "our review of any objections to the papers is de

[5] Objectors addressed *Libertarian Party et al. v. Wolf* before the lower court. (*See* tr. 45:1-22, 87:20-88:10). The lower court, however, did not acknowledge the case in reaching its conclusions about Covid-19. (*See* Op. generally).

novo"), *see also In re Stack*, 184 A.3d 591 (Pa. Commw. Ct. 2018) (noting, in *dicta*, that candidate had followed the Department's instructions, but then reviewing propriety of candidate's affidavit *de novo*).

The Department accepted the candidates of Hawkins and Walker in the place of Scroggin and Gale because it believed that having an affidavit for each office was sufficient, regardless of whether the candidate's affidavit is from the person listed on the Nomination Paper. The trial court recognized the error of this decision and set aside GPPA's Nomination Paper with respect to the office of Vice President. (Op. at 6-7). On appeal, Candidates do not challenge the Department's error on this clear requirement of the Election Code. Nonetheless, Candidates complain that the Department's instructions with regard to filing did not include the word "append" and that the Department did not inform them of any requirements for a facsimile that the Department did not even know was coming. (Appellees' Br. at 12). In support of this bizarre argument, Candidates rely on case law that generally states that the Election Code is to be construed liberally. (Appellees' Br. at 16, citing *In re Nader*, 580 Pa. 22, 38, 858 A.2d 1167, 1177 (2004) and *In re Nomination Petition of Flaherty*, 564 Pa. 671, 678, 770 A.2d 327, 331 (2001)). Notably, in both of those cases, despite the liberal construction of the Election Code, this Court set aside the relevant papers and removed the candidates from the ballot. *Id.*

If the effect of the Department's acceptance of defective Nomination Papers was to put a final validity stamp on defective Papers, the entire objection process that the Election Code carefully established would be superfluous. Accordingly, the Department's "acceptance" of the Nomination Paper is immaterial. It is also irrelevant that the Department failed to advise the GPPA of the defects in its Nomination Papers. The Department is not charged with the responsibility of identifying and warning each and every candidate of each and every potential defect in their nomination papers. The fact that it did not do so here at the time of filing is immaterial. This Court has, for decades, voided and invalidated nomination petitions and papers that the Department accepted, notwithstanding their defects. *See, e.g.*, *Petition of Cianfrani*, 467 Pa. 491, 494, 359 A.2d 383, 384 (1976) (invalidating nomination petition with defective affidavit).

III. CONCLUSION

For the foregoing reasons and for the reasons set forth in their main Brief, Appellants ask this Court to reverse the Commonwealth Court's decision as to the treatment of the Presidential candidate and set aside the Nomination Paper for the Green Party of Pennsylvania with respect to candidates for President and Vice President of the United States.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a)(1), I hereby certify that this BRIEF has a word count of 3,778 words, as counted by Microsoft Word's word count tool.

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief in Support of Appeal was served as indicated September 14, 2020 on the following persons:

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