

IN THE SUPREME COURT OF PENNSYLVANIA

55 MAP 2020

**IN RE NOMINATION PAPER OF ELZABETH
SCROGGINS, ET AL**

BRIEF OF APPELLEE

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I. COUNTER STATEMENT OF SCOPE AND STANDARD OF REVIEW

In reviewing an order concerning the validity of a challenge to a nomination petition or paper, this Court may reverse only if the findings of fact are not supported by substantial evidence, there was an abuse of discretion, or there was an error of law. *In re Nomination Petition of Driscoll*, 577 Pa. 501, 847 A.2d 44 (2004); *In re Nomination Petition of Flaherty*, 564 Pa. 671, 770 A.2d 327 (2001).

II. COUNTER STATEMENT OF FACTS

On August 3, 2020, the Green Party filed nomination papers and related documents with the Pennsylvania Department of State pursuant to the Pennsylvania Election Code, **25 P.S. § 2911 & 2913**. The Nomination Papers were accepted by Jessica Mathis pending review of Presidential Electors information. **See: Ex P-3**. The Presidential Elector's candidate's affidavits were subsequently filed via email on August 3, 2020. **25 P.S. §2913**. The Candidate Affidavits of Howie Hawkins and Angela Walker were filed on August 3 with the Pennsylvania Department of State. **See: Ex P-3**. The candidate affidavit of Elizabeth Scroggins was faxed to the Department of Sate on August 3 at 433PM. The candidate affidavit of Gales was not filed.

Subsequently, as part of the normal procedures for minor party candidates, a withdrawal and substitution of candidate was filed with the Department of State on August 10, 2020. Howie Hawkins was substituted for Elizabeth Scroggins as the

Green Party Presidential candidate. Angela Walker also filed a substitution form.
See: Ex P-5.

On August 10, 2020, a challenge was filed to the Green Party Nomination Papers including a signature challenge to the 8551 lines on the 710 pages of the Green Party Nomination Papers. In addition to the signature challenges, Objectors challenged the candidate affidavits of Scroggins and Gale as not being filed. **See Par 17-18; Petition to Set Aside.**

On August 24, Objectors filed an Application for Summary Relief.

On August 25, the Department of State acknowledged that it did receive the Scroggins affidavit via its fax number. Candidate Gale did not timely file a candidate affidavit.

Subsequently, on September 3, 2020, the parties filed a Joint Stipulation which removed the two jurisdictional issues raised by candidate Walker and Faison. Appellants abandoned their challenges to approximately 8000 of the 8551 signatures submitted on 710 pages of the Green Party Nomination Papers. Appellants then withdrew their challenge to the Green Party state office candidates which required only 2500 valid signatures.

On September 4, 2020 the Commonwealth Court issued an order for a hearing on September 7, 2020, limited to:

challenges as to the nomination of Green party candidates for the offices of President and Vice President, including the challenge to the efforts to substitute candidates in those positions.

The hearing was held on Labor Day, September 7, 2020 commencing at 1:00 in the afternoon via a videoconference/Webex connection. Jessica Mathis, the Director of the Bureau of Elections, was the only witness called by both parties.

Mathis first testified on direct for the Appellants which binds them to the facts elicited from Mathis at the Hearing. The deadline for filing Nomination Papers was August 3, 2020. (TT p10 lines 12-14). The Department of State issued a Nomination Paper General information sheet and Exhibit P 4 is the current version. Paragraph 10 speaks to Candidate Affidavits and Paragraph 12 lists the time and place for filing. Mathis was manning the desk at 210 North Office Building on August 3. (TT pp 19-20, lines 22-25 and 1-13). Howie Hawkins, Appellee, filed an original candidate's affidavit with the Nomination Papers (TT, p 28, lines 1-17).

Mathis was fully aware that substitution candidates would follow the Green Party Nomination Papers. (TT. P29, lines 1-25). Mathis also testified that major party Presidential candidates do not file candidate affidavits (TT.

P 30 lines 3-8) **See: 25 P.S. §2870.** Mathis further testified that she had a candidate's affidavit for each office on the Green Party Nomination Papers and further noted after consultation with her supervisor Johnathan Marks and department attorneys she would not reject solely on the basis of not receiving the affidavit of a placeholder candidate (TT 34, lines 3-7). Mathis was satisfied on August 3 that she had affidavits for each office on the Nomination Papers ((TT 36, lines2-7).

Mathis testified that the only outstanding issue on the Green Party filing was Presidential elector information, not candidate affidavits. **See Exhibit P-3.** (TT. Pp39-41). More importantly, Mathis noted that because of Covid 19 the Election Bureau was accepting unsworn statements (TT -44, lines 21-25).

Mathis described the substitution process used by third parties and noted that the Green Party filed the necessary paperwork on August 10, 2020. (TT pp49 lines 16-19). A candidate files a withdrawal notice and then there is a substitution. (TT 55, lines 22-23).

Mathis testified that the Scroggins candidate affidavit was sitting in the machine in her office in some electronic form and was discovered by her

on August 25, 2020, pursuant to a request by Appellee's counsel on August 24. See Ex P-9; (TT pp58-60).

Upon further examination by Appellee's counsel Mathis stated that the only issue with the Green Party paperwork was "Pending review of Presidential Electors Information" and there was no check mark on the box for invalid candidate's affidavit. See Ex P-3; TT66-67, lines 8-25 and 1-7)

She further testified that the missing information was sent via email as she instructed Mr. Runkle. (TT 67, lines 5-17).

Mathis further explained the Green Party Nomination Papers were accepted because they had a candidate's affidavit for each office listed on the papers, (TT 68, lines16-25 and p 69 lines 1-10).

Mathis testified that the fax machine in question was located in her office and the Scroggins affidavit was electronically there on August 3, 2020. (TT 69, lines 11-22).

Mathis testified that the information sheet was used over the years but she did not draft it See: Ex P-4. Paragraph 10 did not contain the word "appended" as it relates to Candidate affidavits. (TT 70, lines 1-19).

Mathis testified that the office did receive the withdrawal forms from the stand in presidential and vice presidential candidates of the Green Party. (TT 71, lines 2-23).

On cross examination by Appellant's counsel , Mathis again explained the withdrawal and substitution process followed by minor political parties in Pennsylvania. (TT p 78-81, lines 1-25).

The Court below determined as a matter of fact that the Scroggins' affidavit was timely received by the DOS. **Opinion P 7**. Further as a matter of fact supported by the testimony of Jessica Mathis that the DOS was accepting electronic filings until midnight on August 3, 2020. **Opinion p 8**.

While the Scroggins Affidavit was not "appended" in the traditional sense, i.e., fastened or attached to the Nomination Paper, the DOS instructions to political bodies do not contain the word "append" in paragraph 10. In Exhibit P 4. Signature pages and candidate affidavits are separate documents. **Opinion pp 8-9**.

The Court below found "the more compelling circumstance unique to the acceptance of the Nomination Papers here is that the DOS staff did not advise the Green Party that there was any defect in the submission of

Candidate Affidavits for national office, or non compliance with the Candidate Affidavit requirement generally” **Opinion p 9.**

III. SUMMARY OF ARGUMENT

The Appellants’ arguments elevate form over substance in the highly unusual year of Covid 19. There is no dispute that the Green Party filed its Nomination Papers with the Department of State and that the Director of the Bureau of Elections, Jessica Mathis, personally received and processed the material on August 3, 2020, the last day to file. The only pending problem was the receipt of affidavits from the Presidential Electors which were emailed to the Bureau on August 3, 2020. 25 P.S. §2913. The Department was short staffed during the relevant time period.

Appellants timely filed their objections to the Green Party Nomination Papers on August 10 which included a voluminous signature challenge of approximately 8000 of the 8500 signatures filed. Appellants were forced to abandon their signature challenge when they realized they could not prevail and conceded that the Nomination Paper had 5000 valid signatures. They did make timely claims dealing with candidate affidavits and the withdrawal and substitution procedure taken by the Green Party Presidential and Vice Presidential candidates. They suffered no prejudice to their claims after the Department of State discovered

that they had a fax from Elizabeth Scroggins, the Greens Pennsylvania stand in candidate, since august 3 but not discovered in its fax/copier machine within the office of the Bureau of Elections.

Appellants complain about that the Scroggins affidavit was not “appended”, in the usual sense, to the Nomination Papers. Again, they elevate form over substance. The Scroggins candidate affidavit was in the timely possession of the State Department on the last day to file, albeit that it was not discovered by Jessica Mathis until August 25. This bureaucratic snafu is not a fatal defect.

Appellants argument that the date on the Scroggins affidavit, August 3, 2020 renders it false and invalid is absurd on its face. The Appellants bore the burden of proof at all times and offered no evidence of bad faith, fraud, or other disability on the date issue other than the date itself. This is yet another example of their distraction and spaghetti on the wall litigation tactics. It simply does not stick.

Objectors challenged the withdrawal of the Pennsylvania stand in candidates and the substitution of Howie Hawkins and Angela Walker. The facts do not support their challenge to Howie Hawkins. All the procedural dots were connected and the State Department accepted the Green Party paperwork for withdrawal of the stand ins and the substitution of Hawkins and Walker. Appellees conceded from the beginning that Gales did not timely file his candidate’s affidavit and that

would cause problems for Angela Walker later on. The Court below struck her from the ballot on September 9.

Another spaghetti on the wall litigation theory and distraction was the alleged failures of the State Department in accepting the Green Party papers with “purported” defects. Objectors preserved their rights by challenging the filing pursuant to **25 P.S. §2937**. The Election Code worked.

Continuing to beat a dead horse, Objectors cited *In re Guzzardi*, **627 Pa. 1, 99 A.3d 381 (2014)** which purportedly urges judicial restraint in election cases.

Objectors ignore the other line of election case law which notes the “longstanding and overriding policy in our Commonwealth [is] to protect the elective franchise.” *In re Nader*, **580 Pa 22, 38, 858 A.2d 1167, 1177 (2004)**. “The Election Code must be liberally construed in order to protect a candidate’s right to run for office, and a voters’ right to elect the candidate of their choice.” *In re Nomination Petition of Flaherty*, **564 Pa. 671, 678, 770 A.2d 327, 331, (2001)**.

IV. LEGAL ARGUMENT

A. This Court must first decide the standard and scope of review.

The parties disagree on a fundamental issue on this appeal. Appellants seek a plenary and de novo review based upon their conclusion that the only issue is a matter of law in which no facts are in dispute. *In re Benkoski*, 596 Pa 267, 943 A. 2d 212 (2007). Appellee respectfully suggests that another standard is the proper one. In reviewing an order concerning the validity of a challenge to a nomination petition or paper, this Court may reverse only if the findings of fact are not supported by substantial evidence, there was an abuse of discretion, or there was an error of law. *In re Nomination Petition of Driscoll*, 577 Pa. 501, 847 A.2d 44 (2004); *In re Nomination Petition of Flaherty*, 564 Pa. 671, 770 A.2d 327 (2001). The Hearing on September 7 established the facts which are supported by the testimony of Jessica Mathis and the exhibits which establish that the proper paperwork was filed for the Green Party nominees and a proper withdrawal and substitution was made between August 3, the date of filing, and August 10, the last day to file substitution of the Presidential and Vice Presidential candidates.

B. The Scroogin's affidavit was properly and timely filed and within the possession of the Department of State on August 3, 2020.

The requirement of the affidavit is to ensure the legitimacy of information crucial to the election process, *In re Nomination Petition of Driscoll*, 847 A.2d 44 (Pa. 2004). A false candidate's affidavit is a fatal defect that cannot be amended. *In re Beyer*, 115 A.3d 835 (Pa. 2015) (law school graduate's listing of occupation on candidate's affidavit was fatal defect). *In re Nomination Petition of Cianfrani*, 359 A.2d 383 (Pa. 1976). Similarly, petitions that fail to include an affidavit at all are fatally defective and cannot be amended. *In re Werner*, 662 A.2d 35 (Pa. Cmwlth. 2008); *In re Nomination Petition of Kloiber*, 362 A.2d 484 (Pa. Cmwlth. 1976). There is precedent for the position that improperly completed candidate's affidavits are amendable at the discretion of the Court. *In re Graham*, 574 A.2d 1182 (Pa. Cmwlth. 1990); *In re Nomination Petition of Fowler*, 574 A.2d 127 (Pa. Cmwlth. 1990); *In re Nomination Petition of Kloiber*, 362 A.2d 484 (Pa. Cmwlth. 1976); compare *In re Shimkus*, 946 A.2d 139 (Pa. Cmwlth. 2008) (court must review candidate's intent and if candidate made the mistake in bad faith in order to deceive the public, the documents are not amendable). There is not a scintilla of evidence that Scroggins acted in bad faith in faxing her affidavit to the machine in Jessica Mathis's office where the other paperwork was filed.

The Court below clearly found that the record reflects Scroggin's Affidavit was timely received by DOS, **Opinion, p. 8**. Based upon the record developed in the Hearing, the Court below examined all the other challenges to Scroggin's Affidavit to determine if it was invalid and thus preclude the substitution of Howie Hawkins. The court found no challenge to the Scroggin's signature. The Court found that the means of submission, i.e. fax instead of filing, is not critical to compliance with the Candidate affidavit requirement. The Court specifically noted that the Director, Jessica Mathis, confirmed that candidates were permitted to submit electronic filings by Midnight on August 3, 2020. **Opinion p. 8**.

As it turns out the Scroggin's fax was actually received as an email at 4:31 pm on August 3, 2020, the last day to file. While the Candidate Affidavit was not "appended" in the traditional sense and the DOS instructions do not mention the word "appended". **Opinion, p 9, See Footnote 7**.

This Court may have to determine if the Court below abused its discretion on the fax of the Candidate's Affidavit. Appellee respectfully suggests that the Court below, given the record from the Hearing on September 7 did not abuse its discretion.

Appellee notes the Appellants highlighted text at the bottom of page 23 in their brief. With all due respect, this statement is absurd on its face and is more of

their spaghetti on the wall litigation tactics. It does not stick. Appellants continue to cry about the challenge period but they did make a proper challenge which preserved this issue for judicial review. You cannot beat a dead horse and expect to get to the finish line.

Appellants opine that the “missing affidavit is a fatal defect” Appellant Brief at p 26. This conclusion ignores the record that they created at the Hearing. The Scroggins fax was in the office of Jessica Mathis in an electronic form that had to be called up. Mathis did find the fax in her machine on August 25 but it was dated August 3. It was timely filed in the short staffed office of the bureau of elections on the last day to file with 29 minutes to spare.

Appellants continue to flog the dead horse argument that the Scroggins Affidavit was not filed. See Appellant’s Brief at pages 27-28. Wishing does not make it so. The evidence is clear that the affidavit was in the office of the Bureau of Elections on August 3. Any filing snafu was caused by the Department of State not the Green Party. It also did not prejudice the filing of the Appellants’s Challenge. Reference to Pennsylvania civil procedure is inapt as the Rules of Civil Procedure do not apply in this Election case. ***In Re Johnson, 502 A.2d 142, 145 (Pa. 1985)*** (“We disagree with the notion that this Rule [Pa.R.C.P. No. 1024(a)] or any other Rule of Civil Procedure is applicable to a challenge to a nomination

petition or paper.”); *see also In re Keller, 994 A.2d 1165, 1168 (Pa. Cmwlt. 2010)* (reviewing roles of civil and appellate rules of procedure in Election Code matters).

Appellants then argue in the alternative that even if the Scroggins Affidavit was filed and appended , its date renders it false and invalid. Really? The Appellants did not offer any testimony or other evidence in support of this theory.

Appellants return with another variation of the failure to file theory which suggests that Scroggins was never duly nominated thereby making the Hawkins substitution ineffective. The Court below disposed of all the appellants variations on the filing of the Scroggins affidavit. **See Opinion pp 7-10**

Appellants argument at D on pp31-32 of their brief are variations on the date of Scroggins affidavit which is really of no moment in this matter. There was no evidence of fraud on the part of Scroggins. Plaintiff bears the burden of proof at all times and simply did not produce any evidence on this argument.

Appellants argument E at pp 33-34 merely proves that the challenge system as outlined in the Election Code, works. Appellants found what they believed to be defects in the Green Party Nomination Papers and filed multiple challenges. They abandoned all but the one surrounding the Scroggins and Gales affidavits. If they believed that the Department made a mistake in accepting the papers they could

challenge them and they did. Unfortunately for them only one challenge worked, i.e., Angela Walker is no longer on the ballot and the Green Party did not appeal that finding.

Appellants final salvo relies on **In re Guzzardi, 672 Pa. 1, 99 A.3d 381 (2014)** where the candidate in that case did not file a Statement of financial Interest at all. This case is factually and legally different since Scroggins did in fact timely file her candidate's affidavit by fax. Objectors ignore the other line of election case law which notes the "longstanding and overriding policy in our Commonwealth [is] to protect the elective franchise." **In re Nader, 580 Pa 22, 38, 858 A.2d 1167, 1177 (2004)**. "The Election Code must be liberally construed in order to protect a candidate's right to run for office, and a voters' right to elect the candidate of their choice." In re *Nomination Petition of Flaherty*, **564 Pa. 671, 678, 770 A.2d 327, 331, (2001)**.

This is another distraction

V. CONCLUSION

It is the “longstanding and overriding policy in our Commonwealth [is] to protect the elective franchise.” **In re Nader, 580 Pa 22, 38, 858 A.2d 1167, 1177 (2004).** “The Election Code must be liberally construed in order to protect a candidate’s right to run for office, and a voters’ right to elect the candidate of their choice.” In re *Nomination Petition of Flaherty, 564 Pa. 671, 678, 770 A.2d 327, 331, (2001).*

The evidence and testimony adduced at the September 7 , 2020 Hearing showed that the Bureau of Elections was short staffed on August 3, 2020, the last day to file Nomination Papers. Jessica Mathis, Director of the Bureau of Elections accepted the Nomination Papers of the Green Party on that date. The Scroggins Candidate Affidavit was timely faxed to the Bureau of Elections on August 3 at 4:30 PM. It was timely filed but not discovered by Jessica Mathis until August 25, 2020. The Scroggins Affidavit while not “appended” in the normal understanding of the term in the Election Code but the entire relevant time it was in the possession of the Department of State. Appellants suffered no harm in their challenge to this discovery.

The Opinion of the Court below is supported by the facts adduced at the Hearing on September 7, 2020. The Scroggins and Hawkins candidate affidavits were properly filed and the withdrawal and substitution process was validly completed.

See: 25 P.S. §2938 (Withdrawal) and §2939 (Substitution).

There was no abuse of discretion nor error of law.

Accordingly, the September 9th Order of the Court should be AFFIRMED and Howie Hawkins should remain on the Pennsylvania statewide ballot for President of the United States.

Respectfully submitted,


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