

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: :
Nominating Petition of :
Meghan Brown, Democratic :
Candidate for the Office of :
Committeeperson, First Ward, :
Division 4 :
: No. 507 C.D. 2014
Appeal of: Richard Pierce, III : Submitted: April 4, 2014

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: April 8, 2014

Richard Pierce, III (Objector) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) which denied Objector's petition to set aside the nominating petition of Meghan Brown (Brown) for the office of Committee Person for the First Ward, Division 4 in the City of Philadelphia.

Objector challenged Brown's nomination petition on the ground that Brown did not reside in the First Ward, Division 4.

The trial court conducted a hearing on March 25, 2014. Alan Kurtz (Kurtz), a private investigator, testified on behalf of Objector that on March 17, 2014, at approximately 2:00 p.m. he proceeded to 3008 South 16th Street in an effort to verify Brown's home address. 3008 South 16th Street was a previous known address of Brown and was not located in the First Ward. At approximately

3:00 p.m. on March 17, 2014, Kurtz observed a woman, who fit the description of Brown, leave 3008 South 16th Street and walked south toward Packer Avenue. Notes of Testimony, March 25, 2014, (N.T.) at 10-11. Kurtz again observed Brown at 4:47 p.m. on March 18, 2014, leaving 3008 South 16th Street and walking south. N.T. at 12. Kurtz did not see Brown at her registered address of 918 Sigel Street. N.T. at 14. On cross-examination, Kurtz admitted that he never entered 3008 South 16th Street, did not know if there were furniture inside, and did not know that the lease Brown had there expired on February 1, 2014. N.T. at 16. Kurtz did not know why Brown was at the 16th Street address. N.T. at 17.

After hearing Kurtz's testimony, the trial court stated:

This witness' testimony is entirely credible. I believe everything he said about what he did, but it's really thin. Seeing somebody go in and out of a house on limited occasions for limited amounts of time is hardly enough to establish residency or overcome the presumption that comes with a sworn affidavit from the candidates saying that they live at a different address.

N.T. at 19.

Objector's attorney wanted to have Brown testify, but she was not present. Objector's attorney asked for an adverse inference which the trial court denied. N.T. at 19.

The trial court determined that Objector failed to meet his burden of proof and denied the petition. With respect to the adverse inference, the trial court reasoned:

Drawing an adverse inference from Ms. Brown's absence at the hearing is clearly within the discretion of the Court. Ms. Brown was present when the hearing on her petition was originally listed on March 24, 2014. Due to the number of cases listed for that day, the Court did not reach her matter until the following day. Counsel explained that Ms. Brown had been present the prior day but was at work on the day of the hearing. . . . The Court did not draw an adverse inference.

Trial Court Opinion, April 2, 2014, at 2-3.

Objector contends that the trial court erred when it found that Brown resided in the First Ward, 4th Division and did not strike the nominating petition. Objector further contends that the evidence presented demonstrated that Brown still lived at the 16th Street address. Objector also contends that the trial court erred when it did not draw an adverse inference against Brown when she did not appear at the hearing.¹

In a challenge to a candidate's nominating petition, the objector bears the burden of proving defects in the petition. In Re: Nomination Petition of Flaherty, 564 Pa. 671, 770 A.2d 327 (2001). Here, Objector attempted to prove through the testimony of Kurtz that Brown did not reside within the First Ward, Division Four and instead lived at 3008 South 16th Street which is not in the First Ward, Division Four. Kurtz saw Brown exit 3008 16th Street twice. He admitted that he did not know why she was there and did not spend much time conducting

¹ This Court's review is limited to a determination of whether the trial court's findings of fact are supported by substantial evidence, whether the trial court abused its discretion or whether the trial court committed an error of law. In re Petition to Set Aside the Nomination Petition of Francis J. Hanssens, Jr., 821 A.2d 1247, 1250 (Pa. Cmwlth. 2003).

surveillance at the address listed on her voter registration. The trial court found Kurtz credible but also found that there was not enough evidence presented to persuade the trial court to overcome the presumption that Brown resided at the address listed on her petition and voter registration card. This Court finds no error of law on the part of the trial court. Kurtz's testimony that he twice saw Brown leaving the other address was, as the trial court noted, "really thin." N.T. at 19.

Objector also contends that the trial court erred when it refused to make an adverse inference when Brown did not appear at the hearing. The general rule in Pennsylvania is that if a party fails to call a witness or offer other evidence which is within the control of that party, the factfinder may be permitted to draw an adverse inference. Downey v. Weston, 451 Pa. 259, 301 A.2d 635 (1973).

In Fitzpatrick v. Philadelphia Newspapers, Inc., 567 A.2d 684, 687-688 (Pa. Super. 1989), our Pennsylvania Superior Court stated:

It is indeed settled law that a party's failure to testify at a civil trial raises an inference of fact that the party's testimony would have been adverse or unfavorable to him. . . . However, if a plaintiff has not supplied evidence sufficient to meet his burden of proof, the adverse inference created by the defendant's failure to testify will not supply it for him. . . . [W]hat may be inferred from a defendant's failure to testify is that the plaintiff and his witnesses truthfully described the happening of the events at issue. . . . (Citations omitted).

Our Superior Court stated in Fitzpatrick that a party who benefits from an adverse inference still must shoulder its burden of proof and that an adverse inference cannot meet that burden. Further, the effect of the adverse

inference is to make the witnesses of the party who benefits from the adverse inference credible.

Here, Objector's attorney desired to call Brown. Brown's attorney informed Objector's attorney that Brown would not appear because she had been in the courtroom the previous day when the case was not called, but she had to work on March 25, 2014. Although the trial court did not draw an adverse inference from Brown's failure to testify, the trial court found Kurtz credible. However, the trial court reasonably concluded that Kurtz's testimony failed to establish that Brown did not live in the district for which she sought elected office. An adverse inference would not affect the disposition because Objector failed to meet his burden even though the trial court credited Kurtz's testimony.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 8th day of April, 2014, the order of the Court of
Common Pleas of Philadelphia County in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge