[J-113A-2019 and J-113B-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: NOMINATION PAPERS OF SHERRIE COHEN AS CANDIDATE FOR THE OFFICE OF PHILADELPHIA CITY COUNCIL-AT-LARGE APPEAL OF: SHERRIE COHEN	:	No. 31 EAP 2019 Appeal from the Order of Commonwealth Court entered on September 5, 2019 at No. 1157 CD 2019 affirming the Order entered on August 16, 2019 in the Court of Common Pleas, Philadelphia County, Civil Division at No. 701 August Term 2019. SUBMITTED: September 30, 2019
IN RE: NOMINATION PAPERS OF SHERRIE COHEN AS CANDIDATE FOR THE OFFICE OF PHILADELPHIA CITY COUNCIL-AT-LARGE APPEAL OF: SHERRIE COHEN	:	No. 32 EAP 2019 Appeal from the Order of Commonwealth Court entered on September 5, 2019 at No. 1158 CD 2019 affirming the Order entered on August 16, 2019 in the Court of Common Pleas, Philadelphia County, Civil Division at No. 703 August Term 2019. SUBMITTED: September 30, 2019

OPINION FOLLOWING THE JUDGMENT OF THE COURT

JUSTICE MUNDY **FILED: February 19, 2020**

On October 3, 2019, this Court reversed the order of the Commonwealth Court and directed that the name of Sherrie Cohen be placed on the November 5, 2019 ballot as an independent candidate for Philadelphia City Council-at-Large. *See In re*

Nomination Papers of Sherrie Cohen, --- A.3d ---, 2019 WL 4865862. Because the Board of Elections only had until the close of business on October 4, 2019 to add Cohen's name to the ballot, we issued our order noting that an opinion would follow. We now set forth our reasons for concluding that Cohen's withdrawal as a candidate in the Democratic primary election for City Council-at-Large did not preclude her from running in the general election as an independent candidate.

On March 12, 2019, Cohen filed nomination petitions to appear on the ballot in the May 21, 2019 Democratic primary election for an at-large seat on City Council. An experienced candidate, she hired a campaign staff, raised money, and sought endorsements. Prior to the primary, a controversy developed over comments that Cohen's campaign manager had made about another candidate, Appellee Deja Lynn Alvarez. As a result, Cohen decided to end her campaign.

Pursuant to Section 914 of the Election Code (Code), a candidate may withdraw her name by filing a written request in the office in which her nomination petition was filed not later than 15 days after the last day for filing nomination petitions. 25 P.S. § 2874. The last date for Cohen to do so was March 27, 2019. However, Section 978.4 of the Code provides that after the deadline has passed, a candidate may petition the court of common pleas to withdraw her name, "and the court shall order the withdrawal of said candidate's name . . . except upon a showing of special circumstances." 25 P.S. § 2938.4.

Cohen filed a petition to withdraw on April 17, 2019, which the court of common pleas granted on April 18, 2019. The same day, Cohen filed a change of registration from the Democratic Party to independent voter.[1]

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[1] Section 951.1 of the Election Code provides, in relevant part:

> Any person who is a registered and enrolled member of a party during any period of time beginning with thirty (30) days before the primary and extending through the general or

On August 1, 2019, Cohen filed nomination papers to appear on the November 5, 2019 general election ballot as the candidate for A Better Council Party for an at-large seat on City Council. On August 7, 2019, Appellee Alvarez and Appellee Christopher M. Vogler, who is a duly qualified elector, filed separate petitions to set aside Cohen's nomination papers. By agreement of the parties, the cases were heard together.

In her petition, Appellee Alvarez asserted that because Cohen "was a *bona fide* [Democratic] candidate" in the municipal primary election, she was barred from running in the November 5, 2019 municipal election pursuant to Section 976(e) of the Code, (commonly referred to as a "sore loser provision"), which provides, in relevant part:

> When any . . . nomination paper is presented in the office . . . of any county board of elections for filing within the period limited by this act, it shall be the duty of said . . . board to examine the same. No . . . nomination paper . . . shall be permitted to be filed . . . if the candidate named therein has filed a nomination petition for any public office for the ensuing primary, or has been nominated for any such office by nomination papers previously filed.

25 P.S. § 2936(e).[2]

> municipal election of that same year shall be ineligible to be the candidate of a political body in a general or municipal election held in that same year[.]

25 P.S. § 2911.1. Because Cohen was not a registered member of a party thirty days before the May 21, 2019 primary, Section 951.1 is not implicated in this matter.

[2] As recognized by the trial court:

> The "ensuing primary" language dates from a time when nomination papers for the general election were required to be filed before the primary election was held. *Baronett v. Tucker*, 365 A.2d 179, 180 (Pa. Cmwlth. 1976). That time requirement was struck down as unconstitutional. *Salera v. Tucker*, 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd mem*., 424 U.S. 959 (1976). The Commonwealth Court subsequently

The trial court held a hearing on August 12, 2019. Cohen testified that she filed nomination petitions to be elected as a Democratic candidate for an at-large seat on City Council. N.T., 8/12/19, at 44. She conceded that she sought the endorsement of the Philadelphia City Democratic Committee but did not receive it despite having been an endorsed candidate in 2015. *Id*. at 48-49. She stated that after the incident involving her campaign manager and Appellee Alvarez, she lost the support of the Victory Fund, an organization that supports LGBT candidates. The Victory Fund had supported Cohen in her unsuccessful City Council campaigns in 2011 and 2015. *Id*. at 53-54. Cohen identified a Facebook post in which she stated that she decided to suspend her campaign because she saw no true path to victory. *Id*. at 62-63.

On August 16, 2019, the trial court issued an order granting the petitions to set aside Cohen's nomination papers. In an opinion in support of the order, the court looked to *Packrall v. Quail*, 192 A.2d 704 (Pa. 1963), where this Court held that when a candidate withdraws his nomination petitions for a primary ballot "within the permitted period," his subsequently filed nomination papers may be accepted. *Id*. at 705. The trial court distinguished the instant matter from *Packrall* because "Cohen required Court intervention to leave the primary ballot." Trial Ct. Opinion at 9. The court determined this to be the decisive factor in concluding that she was "subject to the 'sore loser' provision." *Id*.

Cohen filed a timely appeal to the Commonwealth Court. In a single-judge memorandum and order, the Honorable Michael H. Wojcik affirmed the order of the trial

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> interpreted the "ensuing primary" language of Section 976 of the Election Code to refer to the "primary immediately preceding the general election" in which the candidate seeks a ballot position. *Baronett*, 365 A.2d at 181.

Trial Ct. Op,. 8/16/19, at 4 n.4.

court. The Commonwealth Court rejected Cohen's reliance on *Packrall*, a decision that it had previously explained as follows:

> We believe the basis for the holding in *Packrall* is that a candidate has the time to voluntarily withdraw his or her petition - a grace period in which the person can decide if he or she wants to participate in that election cycle as a candidate of a particular party. When a person withdraws of his or her own volition within the time for filing, it "undoes," *ab initio*, the filing because a person gets to choose whether he or she wants to go through the primary process to seek an office.

Lachina v. Berks County Board of Elections, 887 A.2d 326, 329 (Pa. Cmwlth.), *aff'd* 884 A.2d 867 (Pa. 2005).

The court also rejected Cohen's reliance on *Oliviero v. Diven*, 908 A.2d 933 (Pa. Cmwlth. 2006). In *Oliviero*, the court granted Michael Diven leave to withdraw his nomination petitions as a Republican candidate for state representative pursuant to Section 978.4 of the Code. Diven subsequently launched a write-in campaign, which he won. Petitioners filed a motion for preliminary injunction seeking to prevent Diven from being certified as the Republican candidate. The *Oliviero* court denied the requested relief. Judge Wojcik noted the distinctions between *Packrall* and the instant matter (Packrall's withdrawal of nomination petitions as of right versus Cohen's withdrawal by leave of court) and *Oliviero* and the instant matter (Diven's write-in campaign following withdrawal of nomination petitions by leave of court versus Cohen's filing of nomination papers following withdrawal of nomination petitions by leave of court). Based on these distinctions, Judge Wojcik held, "as a result, neither [*Packrall* nor *Oliviero*] compels a different result in this case." Cmwlth. Ct. Op at 9.

Like the trial court, the Commonwealth Court relied on the portion of this Court's decision in *Benkoski* stating that "a plain meaning approach to the statutory language

warrants the conclusion that the filing of a nomination petition for any public office for a primary election precludes the individual from thereafter submitting nomination papers to appear on the ballot for the general election for the same office." *In re Benkoski*, 943 A.2d 212, 216 (Pa. 2007).

On September 26, 2019, this Court granted allowance of appeal limited to the following issue:

> Did the Commonwealth Court and the trial court err by not considering the withdrawal of Candidate's nomination petition by court order to be a voluntary withdrawal that would allow her to file nomination papers pursuant to *Packrall v. Quail*, 192 A.2d 704 (Pa. 1963)?

In re Nomination Papers of Sherrie Cohen, --- A.3d ---, 2019 WL 4687075.

Cohen asserts that the Commonwealth Court erred by failing to consider withdrawal by court order under Section 978.4 to have the same effect as voluntary withdrawal pursuant to Section 914. Her argument rests on *Packrall*, *supra*, where the Board of Elections of Washington County refused to accept the nomination papers of Mike Packrall as candidate of the Good Government Party for the office of county commissioner. Packrall had filed nomination petitions to be placed on the primary ballot as a Democratic candidate for the offices of county commissioner and county treasurer. However, he withdrew his petitions within the permitted period, and thereafter the Good Government Party filed papers nominating him for county commissioner. The Board of Elections refused to accept the nomination papers because Packrall's prior filing of nomination petitions disqualified him. The court of common pleas affirmed. On appeal, this Court reversed, holding that Section 976 requires only that the person seeking nomination not be the candidate of another political group at the time the nomination paper is filed. *Packrall*, 192 A.2d at 706. Because Packrall had withdrawn his nomination petition, and thus was not a candidate for the Democratic primary, Section 976 did not

prevent the acceptance of his nomination paper as the candidate of the Good Government Party. *Id*. Accordingly, Cohen maintains that *Packrall* has severely restricted Section 976, which provides that a candidate who has filed a nominating petition for any public office during the primary election may not subsequently be nominated by nomination papers.

Section 978.4 was added to the Code in 1980, allowing a candidate to withdraw her nomination petition beyond the deadline set forth in Section 914 by filing a petition in the court of common pleas. Section 978.4 provides that the court shall order the withdrawal "except upon a showing of special circumstances." 25 P.S. § 2938.4.[3] This was the provision under which the court of common pleas permitted Cohen to withdraw her nomination petitions on April 18, 2019.[4]

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[3] Senator Vincent Fumo stated that he was the prime sponsor of the amendment, and noted:

> It was originally drafted to alleviate some of the problems that we have in allowing candidates a sufficient amount of time to withdraw, particularly at the time at issue that we faced in Philadelphia with some 105 candidates running for councilman-at-large for five seats and not having the opportunity to know what their ballot position was until just before the last date of filing. Had they known that they did not have a good ballot position, many of those individuals might have withdrawn and made it much simpler for the Election Commission to conduct the election.

Legislative Journal - Senate, May 21, 1980 at 1669.

[4] Neither the City Commissioners of Philadelphia nor any individual challenged Cohen's withdrawal. In *In re Petition of Dietterick*, 583 A.2d 1258 (Pa. Cmwlth. 1990), the Commonwealth Court found that special circumstances existed to prevent the court from ordering withdrawal where ballots had already been printed and the court had serious doubts about the effectiveness of sticker paste-overs to replace the candidate's name. More importantly, absentee ballots had already been sent out, and there was testimony that amended absentee ballots sent to military personnel could not be returned before the deadline.

Cohen argues that the Commonwealth Court and the trial court erroneously created an artificial line between administrative withdrawals under Section 914 as opposed to court-ordered withdrawals under Section 978. Appellant's Brief at 37. She notes that in *Packrall*, the candidate withdrew his nomination petitions within the fifteen-day time period, and despite the language of the sore loser statute, this Court allowed him to file nominating papers and run as an independent in the general election. Cohen asserts that the Commonwealth Court erroneously limited "the holding of *Packrall* by creating this artificial distinction between administrative and court ordered withdrawal. The Commonwealth Court failed to recognize both withdrawals were voluntary withdrawals, which voided the nominating petitions *ab initio*." *Id*. at 39.

Like the Commonwealth Court, Cohen also relies on *Oliviero*, *supra*. However, she focuses on a different aspect of the decision. As noted, the court of common pleas granted Diven leave to withdraw his nomination petitions as a Republican candidate for state representative pursuant to Section 978.4 of the Code. Diven subsequently launched a write-in campaign, which he won. The Commonwealth Court denied a preliminary injunction seeking to prevent Diven from being certified as the Republican candidate. Judge Wojcik deemed *Oliviero* inapposite because it involved a write-in campaign rather than the filing of nomination papers following court-approved withdrawal.

However, Cohen relies on *Oliviero* for a different point:

> [The] "sore loser" provisions of the Election Code stand for the proposition that once a candidate's name has been stricken from the primary ballot or the candidate loses his party's nomination in the primary, the candidate is then precluded from filing nomination papers for the general election. They are not applicable here as Diven's name was not "stricken" from the ballot and Diven did not "lose" the primary. Rather, Diven withdrew his nomination petition and voluntarily chose not to participate in the primary process. In doing so, Diven's

> voluntary withdrawal "undid" *ab initio* his nomination petition. Once Diven withdrew his nomination petition, his name did not appear on the ballot as a candidate for the Republican Party in the primary election.

Oliviero, 908 A.2d at 939 (citation omitted).

Cohen asserts that *Oliviero* "very clearly indicated there is no distinction between administrative withdrawal in fifteen days through the Board of Elections or later court ordered withdrawal." Appellant's Brief at 42. Cohen points out the trial court "ignored" *Oliviero* when it wrote:

> Unlike in *Packrall*, where the candidate was able to choose whether he wanted to go through with the primary process, [Cohen] required Court intervention to leave the primary ballot. This process did not undo, *ab initio*, her initial filing of nomination petitions and thus she is subject to the "sore loser" provisions.

Trial Ct. Op. at 9. Cohen also asserts that the Commonwealth Court's opinion did not properly address *Oliviero*. *Id.* at 43.

Cohen next draws our attention to *Benkoski*, *supra*. In that case, Edward Benkoski, Sr. filed nomination petitions to appear on the May 2007 ballot as a candidate for Supervisor of Bear Creek Township. However, the petitions were set aside due to non-compliance with the Ethics Act. Benkoski thereafter filed nomination papers as an Independent candidate on the November 2007 general election ballot. The court of common pleas held that because Benkoski was stricken from the primary election ballot, he was precluded from appearing on the general election ballot. A panel of the Commonwealth Court reversed, concluding that the setting aside of a nomination petition or paper undoes, *ab initio*, the initial filing of a candidate's nomination petition or paper. As summarized by this Court:

> [The Commonwealth Court] analogized the setting aside of a nomination petition to a voluntary withdrawal of such a petition to conclude that "there was technically no filing of the nomination petition as the petition has been deemed invalid." Thus, the court held that Section 976(e) does not preclude a candidate from subsequently filing nomination papers to appear on the ballot in the general election where his or her primary nominating petition has been set aside.

Benkoski, 943 A.2d at 214 (citation omitted). This Court granted allowance of appeal and reversed the Commonwealth Court. In doing so, the Court spoke approvingly of *Lachina*, *supra*, where Judge Pellegrini held that a candidate who was removed from the ballot for defects in her nomination petition could not submit nomination papers for the general election for the same office. As noted, Judge Pellegrini recognized that the voluntary withdrawal of the candidate's nomination petition in *Packrall* "'undoes,' *ab initio*, the filing." *Lachina*, 887 A.2d at 329. Furthermore, Judge Pellegrini contrasted *Packrall* to *Baronett*, *supra*, where the Commonwealth Court held that a candidate who ran unsuccessfully in the Democratic primary was precluded from filing nomination papers for the same position on the general election ballot as the candidate of the Federalist Body.

This Court held that the *Lachina* court's construction of "Section 976(e) comports with the . . . reference to that section as a 'sore loser' provision." *Benkoski*, 943 A.2d at 214. We then noted that under the plain meaning of Section 976(e), "the filing of a nomination petition for any public office for a primary election precludes the individual from thereafter submitting nomination papers to appear on the ballot for the general election for the same office." *Id.* at 216. This Court further noted, "[a]lthough *Packrall* is also arguably in tension with the plain language of the statute, we decline to extend a holding concerning the voluntary withdrawal of a nomination petition to unsuccessful candidates attempting to circumvent their filing of defective nomination petitions." *Id*.

Cohen asserts that *Benkoski* affirmed the concept in *Packrall* that a voluntary withdrawal allows a candidate to file nomination papers as an Independent. According to Cohen, it did not overrule *Packrall*, but simply declined to extend its holding to grant relief to a candidate who was removed from the primary ballot. "Nowhere in *Benkoski* does the Supreme Court limit the *Packrall* case to only those cases where the candidates have withdrawn their nomination petitions administratively. Any withdrawal, either administratively or by court order, is treated as a voluntary withdrawal." Appellant's Brief at 50.

Appellees recognize that the withdrawal of nomination petitions prior to the deadline for voluntary withdrawal undoes the filing *ab initio*. However, they do not explain why voluntary withdrawal of nomination petitions with court approval should not have the same effect under this Court's decisions in *Packrall* and *Benkoski*.

We agree with Cohen that "[t]he Commonwealth Court failed to acknowledge that the important dividing line in this area of the law is between voluntary withdraw[als] and candidates getting stricken from the ballot." Appellant's Brief at 47. The decisive factor underpinning this Court's refusal to apply *Packrall* in *Benkoski* is not present in this case. Rather, application of *Packrall*, a case that has been central to our election jurisprudence for more than half a century, is appropriate where a candidate's nomination petitions have not been stricken but have simply been withdrawn. Because there is no principled reason to distinguish between the voluntariness of a withdrawal under Section 914 or Section 978.4, Cohen is entitled to relief from this Court. This is especially so in light of "the longstanding and overriding policy in our Commonwealth to protect the elective franchise." *In re Nomination Petition of Driscoll*, 847 A.2d 44, 49 (Pa. 2014).

For these reasons we ordered that Cohen's name be placed on the ballot for the 2019 general election.[5]

Justice Baer joins the Opinion Following the Judgment of the Court.

Justice Donohue files a concurring opinion in which Justice Todd joins.

Chief Justice Saylor files a dissenting opinion in which Justice Dougherty joins.

Justice Wecht files a dissenting opinion.

[5] Chief Justice Saylor opines that pursuant to *Benkoski*, *Packrall* should be limited to "a voluntary withdrawal of a nomination petition within the statutory period." Saylor, C.J. Dissenting Op. at 3. In *Benkoski*, this Court stated, "we hold that, where a candidate has filed a defective nomination petition to appear on the primary election ballot, Section 976(e) precludes that candidate from thereafter filing nomination papers to appear on the general election ballot for the same position." *Benkoski*, 943 A.2d at 216. Because the decisive factor in *Benkoski* was the defective nomination petition, rather than the nature of the withdrawal (administratively or by court permission), reliance on *Benkoski* to preclude Cohen from filing nomination papers as an independent candidate is unavailing.

With respect to Justice Wecht's position that this Court should overrule *Packrall*, Chief Justice Saylor correctly points out that the Legislature has not altered the material language of Section 976 despite the fact that *Packrall* has existed for more than fifty years. Saylor, C.J. Dissenting Op. at 2, n.2. In addition, the question whether *Packrall* should be overruled as contrary to the plain language of Section 976 was not raised in the courts below and therefore is not properly raised in this Court. *See* Pa.R.A.P. 302(e) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").