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84 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 84 MAP 2019

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; AND LORRAINE HAW,
Petitioners-Appellees,

v.

KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH,
Respondent-Appellant.

APPELLEES' EMERGENCY APPLICATION TO LIFT SUPERSEDEAS

Appeal from the Order of the Commonwealth Court entered on October 30, 2019, at No. 578 MD 2019

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Dated: November 1, 2019

Appellees League of Women Voters of Pennsylvania and Lorraine Haw, for the reasons expressed herein, respectfully request that this Court lift the automatic supersedeas in this matter, thereby maintaining the injunction ordered by the Commonwealth Court pending final disposition of the merits of this matter.

A. PROCEDURAL HISTORY

The present action was commenced by Appellees on a Petition for Review, filed on October 10, 2019 in the Commonwealth Court under its original jurisdiction. The Petition to Review raised three counts against Kathy Boockvar, the Acting Secretary of the Commonwealth ("Secretary"): 1) the Ballot Question violates the requirement of Article XI, § 1 of the Pennsylvania Constitution that "when two or more amendments shall be submitted they shall be voted upon separately"; 2) the Ballot Question violates Article XI, § 1's requirement that a "proposed amendment or amendments shall be submitted to the qualified electors of the State"; and 3) in the alternative, the Ballot Question violates the electorate's right to be fully informed of the question to be voted on because it does not fairly, accurately, and clearly apprise voters of the issue. Petitioners requested the court preliminarily and permanently enjoin the Secretary of the Commonwealth from tabulating and certifying the votes on the Ballot Question.

On October 17, 2019, pursuant to Pa.R.A.P. 1531(b), Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams, victims of crimes, filed an

application for intervention in opposition to the Petition for Review. On October 18, 2019, also pursuant to Pa.R.A.P. 1531(b), Ronald L. Gleenblatt, a veteran criminal defense attorney, filed his own application for intervention in support of the Petition for Review. No party objected to the applications for intervention, and their applications were granted prior to the hearing.

The Commonwealth Court ordered expedited briefing, and a hearing on Petitioners' requested preliminary injunction was held on October 23, 2019. Immediately prior to this hearing, counsel for the parties and Intervenors stipulated to the following: 1) Haw and Moore Intervenors are registered voters in the Commonwealth; 2) the General Assembly and Office of Attorney General properly adhered to the process by which the General Assembly and the Secretary can place the Proposed constitutional Amendment ballot question on the November 2019 ballot; and 3) the costs incurred by the Department of State for publication of the Proposed Amendment, the plain English statement, and the ballot question throughout the Commonwealth.

During the October 23 hearing, the Commonwealth Court heard testimony only from Intervenor Greenblatt concerning the irreparable harm that would result if the Proposed Amendment became part of the Pennsylvania Constitution. Mr. Greenblatt testified that based on the plain language of the proposed amendment, victims of crime and anyone directly impacted by those crimes will have the absolute

constitutional right "to reasonable protection from the accused or any person acting on behalf of the accused," as well as the right "to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused." Hr'g Tr. (H.T.) at 24-24. Mr. Greenblatt explained that he would be stymied in his ability to obtain discoverable material pursuant to Article I, § 9 of the Pennsylvania Constitution. H.T. at 30. He further testified that where the accused seeks to examine a crime victim, or anyone who is impacted by a crime (often including witnesses), on delicate, personal matters that are germane to the case, the victim or anyone who is impacted by the crime, could invoke the right to dignity and privacy established in the Proposed Amendment. H.T. at 36-37. He also stated that without compulsory discovery as mandated by Article I, § 9 of the Constitution, the Proposed Amendment would hamstring defense attorneys' efforts to negotiate plea agreements. H.T. at 41-42.

The Secretary, by contrast, presented no evidence of any kind of irreparable harm. Counsel for the Secretary presented speculative argument that last-minute changes to the composition of the ballot had confused voters, but proffered no evidence—as opposed to argument—that the existence of an injunction would change voter behavior. The Secretary did not object on the record to the court's decision not to hear the witness from the Department of State nor lodge any objection to the court's conduct of the hearing. Counsel for Shameekah Moore, Martin

Vickless, Kristin June Irwin, and Kelly Williams also presented argument at the hearing, but again did not present evidence of irreparable harm, nor did counsel lodge any kind of objection to the conduct to the hearing.

The Commonwealth Court issued a Memorandum Opinion and Order on October 30, 2019, granting a preliminary injunction enjoining the Secretary from tabulating and certifying the votes of the November 2019 General Election on the Ballot Question. Importantly, the preliminary injunction does not strike the question from the ballot, and Pennsylvania voters will vote on the question, and if the courts ultimately determine that the Ballot Question complies with Article XI, I's requirements, their votes will be counted. The Commonwealth Court also lifted the automatic supersedeas under Pa.R.A.P. 1736(b).

Petitioners posted the preliminary injunction bond required under Pa.R.A.P. 1531(b) with the Prothonotary of the Commonwealth Court on October 30, 2019. The Secretary and Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams filed notice of their respective appeals to the Pennsylvania Supreme Court on October 31, 2019.

B. ARGUMENT

THE TEST FOR LIFTING OF THE AUTOMATIC SUPERSEDEAS IS READILY MET IN THIS MATTER.[1]

The test for the lifting of an automatic supersedeas is set forth in this Court's decision in *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199 (Pa. 1989): "The petitioner must make a substantive case on the merits, demonstrating the stay will prevent petitioner from suffering irreparable injury, and establishing other parties will not be harmed and the grant of the stay is not against the public interest." *Id.* at 203. *See also Solano v. Pennsylvania Bd. of Prob. & Parole*, 884 A.2d 943, 944 (Pa. Commw. Ct. 2005).

Those standards are amply well met in this matter.

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[1] In their Emergency Application to Reinstate the Automatic Supersedeas, Appellant raises questions about whether the lower court committed a procedural error by ordering the automatic supersedeas lifted *sua sponte*, without an application on this specific issue being filed by Appellants. While Appellees dispute those questions, they seek to eliminate any questions about the procedure. Therefore, Appellees are, simultaneously with this Application, filing an Application to Lift the Automatic Supersedeas in the Commonwealth Court.

In any event, this Court clearly has the authority, pursuant to Pa. R.A.P. 1732(b) to, independent of action by the lower court, lift the supersedeas and, as will be discussed herein, should do so in this matter. *Patterson v. Armco, Inc.*, 515 A.2d 657, 660 (1986) (an appellate court "has the power to lift an automatic supersedeas even if a trial court has not done so. In light of that power, this court can avoid further delay by simply affirming the trial court's order.").

1. Appellees are likely to succeed on the merits.

First, Appellees have *more than* "made a substantive case on the merits." *Jubelirer*, 614 A.2d at 203. Indeed, Judge Ceisler in her decision clearly found that: (a) Appellants have demonstrated a likelihood of prevailing on the merits on the substantive issues before the court (i.e., whether the Proposed Amendment violates Article XI, Section 1 of the Constitution ("[w]hen two or more amendments shall be submitted they shall be voted on separately"), and whether the ballot question fails to fairly, adequately and clearly inform the electorate of the Proposed Amendment"); and (b) Appellants established their entitlement to the ordered preliminary injunction to bar the tally and certification of the votes on the ballot question until the matter has been finally decided on the merits.

The Commonwealth Court in its Opinion set forth clearly why Appellees are likely to prevail on the merits on the issue of the constitutional validity of the Proposed Amendment, as well as the misleading and incomplete nature of the ballot question in which the voters will cast their ballots. (Opinion at 21-36). Nothing in Appellant's Application in any way casts doubt on this finding. Indeed, Judge Ceisler's Opinion in total is thorough, complete, and well-reasoned. It must be emphasized that Appellant presented *no testimony* at the hearing either to rebut Mr. Greenblatt's testimony, or to establish, as they now merely speculate, that the grant of the injunction will somehow "undermine the reliability of the ballot question."

(Appellant's App. at 8). While Appellees will more fully address the merits of the issues before the Commonwealth Court in their response brief, it is clear that nothing in Appellant's Application casts any doubt on Judge Ceisler's conclusion that Appellees are likely to succeed on the merits of their suit.

2. Vacating the supersedeas will prevent irreparable injury.

It is also clear that vacating the supersedeas will prevent irreparable injury, both to those accused of crime and the criminal justice system, and to the voters of this Commonwealth.

Initially, it is clear that, contrary to the Secretary's claim to the contrary, the amendment is indeed self-executing, and will immediately become law upon passage and certification of the results. *Commonwealth v. Tharp*, 754 A.2d 1251, 1254 (Pa. 2000).[2] The Secretary claims that it is not self-executing because the wording of the Proposed Amendment evinces an "intent to require legislation" for it to become effective. (Appellant's App. at 10-11). This is incorrect. The Proposed Amendment states: "To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim *shall have* the following rights, as *further* provided and as defined by the General Assembly, which *shall* be protected

[2] Even if the Secretary is correct that crime victims will have no additional rights under the Proposed Amendment until enabling legislation is passed, that may result in a delay of only several weeks until the amendment becomes effective.

in a manner no less vigorous than the rights of the accused." (Emphasis added). This language makes clear that, upon passage, crime victims "shall" have all of the myriad constitutional rights set forth in the Proposed Amendment. The language "as further provided and defined by the general assembly," *allows* "further" action by the legislature to "provide" and "define" rights pursuant to the amendment, but in no way *requires* any further action by the legislature. Thus, it is clear that, upon passage and certification, crime victims "shall" have the enumerated rights without any *requirement* that "further" action be taken by the legislature.

Due to its immediate effect, passage of the Proposed Amendment, as specifically found by Judge Ceisler (Opinion at 8-12, 19) will cause immediate, irreparable harm to the rights of criminal defendants and the administration of the criminal justice system. Ronald L. Greenblatt, Esquire, a highly experienced criminal defense attorney, testified as the only witness at the preliminary injunction hearing, and set forth how the enactment of Marsy's Law will, among other harms, substantially and negatively harm the rights of criminal defendants to perform sufficient investigations to mount an effective defense; will impair the ability of defendants to effectively cross-examine accusers; will negatively affect the ability of defense counsel to knowingly and effectively negotiate plea agreements on their clients' behalf; and will necessarily cause delays in proceedings, thereby impacting defendants' right to a speedy trial and causing them to spend unnecessary time in

jail. He further testified that passage of Marsy's Law would cause massive confusion in and strain to the criminal justice system due to the need for defendants to file numerous motions to preserve appealable claims stemming from Marsy's Law; due to the increased number of appeals resulting therefrom; and, if Marsy's Law is found unconstitutional, the massive number of persons who will stand wrongfully convicted and incarcerated who will have to turn to the courts for relief (H.T. at 23-81). Judge Ceisler concisely summarizes Mr. Greenblatt's testimony in her Opinion, and fully credited it in her finding of the immediate and irreparable injury that would result if Marsy's law becomes effective prior to its constitutionality being determined.

Mr. Greenblatt's testimony was *unrebutted* by the Secretary and crime victim intervenors. Thus, the record fully supports Judge Ceisler's finding that Marsy's Law becoming effective will result in immediate and irreparable injury.

3. If the supersedeas is vacated, other parties will not be harmed and doing so is not against the public interest.

Finally, no harm will result to other parties or the public interest if the supersedeas is vacated.

Appellant claims that the "Commonwealth Court overlooked the impact the injunction will have on voter participation and turnout, indelibly affecting the integrity of the election." (Appellant's App. at 7-8). However, there was nothing to "overlook" on this point. The Secretary presented *no evidence whatsoever* to

substantiate their claims on this (or any other) point. It is mere speculation that, indeed, defies common sense. The injunction does no more than prevent tabulation of the votes on the Proposed Amendment and certifying the results, all in an effort to avoid the Proposed Amendment *automatically* going into effect before its legal validity can be finally decided by courts. It does nothing to prevent or discourage anyone from voting on the Proposed Amendment, and there is nothing about the circumstances of the injunction that would indicate that it would in any way affect "voter participation or turnout." In fact, it is apparent (especially in the absence of any countervailing evidence) that, if the injunction remains in place, the voters will still come to the polls in the ordinary course, cast their votes on the Proposed Amendment and the other myriad issues/contests on the ballot, with the *only* result that the votes on the Proposed Amendment will not be immediately counted, or the results certified. Nor could there possibly be any effect on the "tens of thousands" of votes that already have been cast on this issue (Appellant's App. at 9). Those votes, like others cast on November 5, will be tabulated, and the results certified, if necessary, at the appropriate time.

Notably, the Secretary had the opportunity to present ostensible evidence on this point on the hearing before Judge Ceisler, but failed to do so. She now complains as follows:

> The Secretary had a 20-plus year veteran election administrator from the Department of State available at the hearing who was prepared to

> testify about the impact of an injunction on voting behavior. The Commonwealth Court, however, discouraged such testimony because, as indicated in the opinion, the court deemed it to be "purely speculative." Opinion at p. 16.

Appellant's App. at 8. If the Secretary had a witness "available" on this issue, but chose not to call that person to give testimony at the hearing, she had the obligation to do so, whatever ostensible "discouragement" the lower court gave. The lower court did not prevent the Secretary from calling this witness, nor did she even make an offer of proof about his expected testimony. The Secretary cannot be now heard to speculate about what this *available* witness may have said if he was, in fact, called, and to somehow present such *speculation* as *proof* of the injunction's effect on "voter participation and turnout."[3]

The Secretary cites *Costa v. Cortes*, 143 A.3d 430 (Pa. Commw. 2016), as if it is an analogous case to this one that somehow supports her unsupported speculation that maintaining the injunction will have some unspecified "impact…on voter participation and turnout" (Appellant's App. at 7, 8). It does no such thing. In that case, the petitioners sought an injunction to prevent the implementation of a legislative resolution, H.R. 738, which provided that a proposed constitutional

[3] Even now, the Secretary can only state that the unnamed witness would have testified generally "about the impact of an injunction on voting behavior." She does not set forth what the "impact" would be and, the foundation for any opinion testimony about "impact," or even specify the type of injunction that would cause such alleged "impact."

amendment would be moved from the April 26, 2016 General Primary Election Ballot and placed on the November 8, 2016 General Election Ballot. *Id.* at 433. For various reasons, the court denied the requested injunction, including on the basis that, *based on evidence presented at the injunction hearing,* granting the injunction shortly before the April 26, 2016 primary election would create "further" uncertainty among the voters as to what date the amendment would actually be voted on—April 26 or November 8—and whether the votes cast on April 26 would count. *Id.* at 442.

The situation in *Costa* is not even remotely analogous to this one in terms of potential "uncertainty" resulting from the requested injunction. As noted, the court in *Costa* relied on *evidence* in support of its conclusion; here, the Secretary presented no evidence in support of its speculation regarding voter participation and turnout. Equally importantly, the injunction in this case will *not* create uncertainty about *when* the Proposed Amendment will be voted on. Unlike the two possible dates in *Costa*, here the Proposed Amendment will be on the ballot on only one date—November 5, 2019, with the voters casting their votes on the Proposed Amendment in the ordinary course, but with the votes simply not tabulated or the results verified until the appropriate time. The injunction as granted herein creates no "uncertainty" about "whether" the voters should vote on the Proposed Amendment on November 5 because, unlike in *Costa*, there is no alternative date for the vote. In any event,

having presented no evidence on this issue, the Secretary has no factual basis to assert her unfounded, vague claims about the "impact" of the injunction.

Very simply, despite having had an opportunity to present evidence regarding the alleged harm that will befall voters if the injunction is not granted, the Secretary failed to do so, and now bases its position on this prong on sheer speculation. The Secretary has not even *attempted* to prove that harm to others or the public interest will result from maintaining the injunction.

C. CONCLUSION

Appellees have clearly demonstrated under the applicable analysis its entitlement to the lifting of the automatic supersedeas. Therefore, Appellants respectfully request that the automatic supersedeas be lifted in this matter, and that the preliminary injunction remain in place pending final disposition of the appeal on the merits.

Date: November 1, 2019

Respectfully submitted,

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CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsyvlania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 1, 2019

/s/ Tiffany E. Engsell
Tiffany E. Engsell (Pa. 320711)

CERTIFICATE OF SERVICE

I, Tiffany E. Engsell, hereby certify that on November 1, 2019, I caused a true and correct copy of the foregoing document titled Appellees' Emergency Application to Lift Supersedeas to be served via electronic filing to all counsel of record.

Date: November 1, 2019

/s/ Tiffany E. Engsell
Tiffany E. Engsell (Pa. 320711)

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA and LORRAINE HAW, Appellees, v. KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH, Appellant.	:	No. 84 MAP 2019

ORDER

AND NOW, this day of , 2019, upon consideration of the Emergency Application to Lift Supersedeas filed by Petitioners-Appellees League of Women Voters of Pennsylvania and Lorraine Haw, it is hereby ORDERED that the Application is GRANTED.

BY THE COURT:

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, J.