

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Allegheny County Provisional :
Ballots in the 2020 General Election : No. 1161 C.D. 2020
: :
Appeal of: Nicole Zicarelli : Submitted: November 19, 2020

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: November 20, 2020

Nicole Zicarelli, a Republican candidate for State Senator from the 45th Senatorial District in the General Election (Candidate), appeals from the November 18, 2020 order of the Court of Common Pleas of Allegheny County (trial court) which denied Candidate's petition for review and affirmed the decision of the Allegheny County Board of Elections (Elections Board) to canvass and count 270 provisional ballots for the November 3, 2020 General Election. The disputed provisional ballots at issue were submitted by voters who either failed to affix the necessary signatures under the Pennsylvania Election Code¹ (Election Code), and/or whose mail-in ballots were timely received, but ultimately found defective.

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

Factual and Procedural Background

Of the approximately 17,000 provisional ballots cast in Allegheny County in the 2020 General Election, these approximately 270 ballots were challenged on one of the following three grounds:

- i. The provisional ballot contained an affidavit signed by the voter under [section 1210(a.4)(2) of the Election Code, 25 P.S. §3050(a.4)(2),] but did not contain the signature required by [section 1210(a.4)(3) of the Election Code,] 25 P.S. §3050(a.4)(3);
- ii. The provisional ballot contained the requisite signature under 25 P.S. § 3050(a.4)(3), but lacked the affidavit signed under 25 P.S. §3050(a.4)(2);
- iii. The provisional ballot was cast by an elector whose mail-in or absentee ballot was timely received by the Elections Board, but was somehow defective (i.e., missing or incomplete secrecy envelope, identifying mark, etc.).

On November 14, 2020, the Elections Board conducted a hearing, during which it considered whether the three classes of disputed provisional ballots described above should be set aside as invalid. Considering each of the three challenges separately, the Elections Board decided, by a vote of 2-1 relative to each category, to canvass and count the disputed provisional ballots.

On November 16, 2020, Candidate filed a petition for review in the trial court. The Pennsylvania Democratic Party and Democratic candidate for State Senator from the 45th Senatorial District, James Brewster, were permitted to intervene. On November 17, 2020, the trial court conducted a hearing. At the hearing, the Elections Board provided the trial court with an example of a provisional ballot envelope.² The

² The provisional ballot envelope used in the Allegheny County 2020 General Election is attached to the Pennsylvania Democratic Party/James Brewster's Brief as Exhibit B.

provisional ballot outer envelope contains two similar voter declarations. The first declaration, contained in Box 1, states: “I do solemnly swear or affirm that my name and date of birth are as I have listed above, and at the time that I registered I resided at the address I have provided above, in the Commonwealth of Pennsylvania and that this is the only ballot that I have cast in this election.” The second declaration, contained in Box 4, states: “The undersigned declares, under penalty of law, that he/she is a properly registered elector in the election district indicated in my affidavit, and that he/she is eligible to vote in this election in this election district.” Notably, at the hearing, counsel for the Elections Board suggested, but provided no evidence, that these 270 electors received faulty instructions from election officials to sign the provisional ballot envelope only once.

On November 18, 2020, the trial court issued an order denying the petition for review and affirming the Elections Board on the grounds that these eligible electors “should not be penalized because they were given and relied on incorrect information by the election administration.” (Trial Ct. Op. at 5.) That same day, Candidate filed a timely appeal with this Court³ contending that the disputed provisional ballots are invalid and cannot be counted. The parties have submitted briefs in support of their respective arguments on the merits.⁴

Candidate submits that the trial court erred when it concluded that provisional ballots lacking one of the necessary signatures could be counted. Candidate argues that the trial court’s decision is in plain contravention of the mandatory language

³ This Court has jurisdiction over this election-related appeal pursuant to Section 762(a)(4)(i)(c) of the Judicial Code, 42 Pa.C.S. § 762(a)(4)(i)(c). See *Dayhoff v. Weaver*, 808 A.2d 1002, 1005-06 & n.7 (Pa. Cmwlth. 2002).

⁴ This matter calls for the Court to review and determine the meaning of the Election Code. “[S]tatutory interpretation of the Election Code . . . as a question of law, is subject to a de novo standard of review and a plenary scope of review.” *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015).

of section 1210 of the Election Code, which states that a provisional ballot “shall not be counted” if “either the provisional ballot envelope . . . or the affidavit . . . is not signed by the individual;” 25 P.S. §3050(a.4)(5)(ii)(A), or if “the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” *Id.*

§3050(a.4)(5)(ii)(F). She asserts that a mail-in ballot that the Elections Board rejected for lack of an inner secrecy envelope is “timely received” by the Elections Board pursuant to section 1210, thus prohibiting the voter from being eligible to cast a provisional ballot. Lastly, Candidate argues that there was no evidence to support the trial court’s finding that the electors were given incorrect instructions, and even assuming *arguendo* that the defects in the disputed provisional ballots were the result of erroneous instructions by election officials, the Elections Board was nonetheless required to set them aside under both settled and recent Supreme Court decisions.

In response, the Pennsylvania Democratic Party, James Brewster, and the Elections Board (collectively, Appellees) concede that 270 voters each filled out a provisional ballot that included one of the signatures referenced in section 1210 of the Election Code, but not the other. (Brief of the Pennsylvania Democratic Party and James Brewster at 6.) They argue however that the absence of a second voter signature on the outer envelope should not result in the disenfranchisement of any of the affected voters. They submit that there is no reason to disenfranchise 270 voters for a “minor technicality” that most likely resulted from an election worker providing incorrect advice. *Id.* at 13.

Discussion

Section 1210(a.4)(2) of the Election Code, 25 P.S. §3050(a.4)(2), provides that, “[p]rior to voting the provisional ballot, the elector *shall be required to sign* an affidavit” stating the elector’s name, date of birth, address at the time of registration,

and attesting that the provisional ballot is the only ballot that the elector cast in the election. 25 P.S. §3050(a.4)(2) (emphasis added). Section 1210(a.4)(3) further provides: “After the provisional ballot has been cast, the individual shall place it in a secrecy envelope. The individual shall place the secrecy envelope in the provisional ballot envelope and *shall place his signature on the front of the provisional ballot envelope.*” *Id.* (emphasis added). These provisions plainly contemplate separate signatures for each delineated item.

Section 1204(a.4)(5)(ii)⁵ specifies the circumstances under which a provisional ballot will not be counted, and provides, in relevant part:

A provisional ballot **shall not be counted** if:

(A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

* * *

(F) the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.

25 P.S. §3050(a.4)(5)(ii)(A), (F) (emphasis added).

We conclude that, pursuant to the plain language of this statute, the provisional ballots at issue **shall not be counted**. **Section 1204(a.4)(5)(ii)(A) makes quite clear that, if “either” the provisional ballot envelope “or” the affidavit are not “signed by the individual,” then the “provisional ballot shall not be counted.”** *Id.* Stated otherwise, *both* signatures are required.

⁵ Added by the Act of October 8, 2004, P.L. 807, and amended by the Act of October 31, 2019, P.L. 552.

Notably, the specificity of the statutory language renders this circumstance quite unlike the question that our Supreme Court confronted in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374-380 (Pa. 2020), concerning mail-in ballots that lack a secrecy envelope—so-called “naked” ballots. The argument presented to the *Boockvar* Court revolved around the absence of any statutory provision requiring such “naked” ballots to be disqualified. *Id.* at 375-76. Ultimately, notwithstanding that absence, our Supreme Court held that the requirement that a voter utilize the secrecy envelope was mandatory, and was so essential to the preservation of secrecy in voting—a constitutional imperative⁶—that the failure of a voter to enclose his ballot in the secrecy envelope necessitates disqualification of the ballot. *Id.* at 380. Here, the analysis is much more straightforward. Unlike the statutory provision at issue in *Boockvar*, Section 1204(a.4)(5)(ii) of the Election Code plainly speaks to the disqualification of provisional ballots that fail to meet the specified requirements.⁷ Here there is a plain, unambiguous, and directly applicable statutory command.

This case is also quite distinct from *Appeal of James*, 105 A.2d 64 (Pa. 1954), relied upon below. In *James*, certain challenged ballots used “sticker votes” to write in a candidate who already appeared on the ballot. *Id.* at 64-65. Noting the importance of “ascertainment of the intent of the voter,” and repeating the admonition

⁶ See *Boockvar*, 238 A.3d at 379 (citing PA. CONST. art. VII, §4 (“All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.”)).

⁷ Moreover, we note that, like “the failure to ‘fill out, date *and* sign the declaration printed on the ballot’ return envelope, as required by 25 P.S. §3150.16(a),” the failure to sign a provisional ballot in the places required by 25 P.S. §3050(a.4)(2)-(3) is a defect that is “capable of objective assessment pursuant to uniform standards,” and requires no resort to “subjective assessments” that could lead to inconsistent determinations. *Boockvar*, 238 A.3d at 389 (Wecht, J., concurring) (emphasis added).

that “[t]echnicalities should not be used to make the right of the voter insecure,” *id.* at 65-66, the *James* Court held that the voters who marked their ballots in the challenged manner had “unmistakably, unerringly and precisely demonstrated their intention” to vote for the candidate. *Id.* at 65. The ballots, therefore, were not to be deemed void. What *James* did not involve, however, is an unambiguous statutory provision directing that ballots shall not be counted if they contain specified deficiencies. Because we are faced with such a statutory provision here, *Appeal of James* is plainly inapposite.

Importantly, Appellees do not dispute that the provisional ballots at issue facially failed to satisfy the statutory requirements. The Elections Board characterizes the ballots in question as “[b]allots containing an affidavit signature by the voter. . . but not a signature pursuant to 25 P.S. §3050(a.4)(3)” and “[b]allots containing the signature under 25 P.S. §3050(a.4)(3), but not the affidavit signature” (Elections Board Br. at 2.) The Pennsylvania Democratic Party and James Brewster similarly state that, “[i]n Allegheny County, 270 voters each filled out a provisional ballot that included one of the signatures referenced in [25 P.S. §3050], but not the other.” (Brief of the Pennsylvania Democratic Party and James Brewster at 6.) Accordingly, it is uncontested that the ballots failed to conform to statutory requirements. Appellees’ position instead is premised upon the rule that we must interpret the Election Code liberally in favor of the right to vote, and that we should avoid disenfranchising voters due to minor irregularities in their ballots. (Elections Board Br. at 11 (citing *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004); Pennsylvania Democratic Party and James Brewster Br. at 7 (same)).) However, unlike matters which involve ambiguous statutory language where courts apply principles of statutory construction to interpret same, this matter requires no application of statutory construction principles, for the language is plain and unambiguous—the provisional ballots at issue “shall not be

counted.” 25 P.S. §3050(a.4)(5)(ii). Although we do not take lightly the disqualification of any ballot, it is a cardinal rule that, “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. §1921(b); *see Trust Under Agreement of Taylor*, 164 A.3d 1147, 1155 (Pa. 2017) (“If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent and not look beyond the statutory language to ascertain its meaning.”).

With regard to the small number of provisional ballots cast by a voter whose mail-in ballots were timely received, our analysis is the same. Section 1204(a.4)(5)(ii)(F) plainly provides that a provisional ballot shall not be counted if “the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. §3050(a.4)(5)(ii)(F). Like the language relating to the requisite signatures, this provision is unambiguous. We are not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.

That said, the decision below cannot stand on numerous grounds. Here, the entire foundation of the decision of the trial court rested on this line of reasoning:

The Board argues that if an error or defect is caused by the misrepresentation or error of the election administration, the voter should not be penalized. Here, voters presented at their polling location and voted with a provisional ballot. Poll workers handed them all of the materials and gave them instructions how to fill out the outer envelope. Many people are unfamiliar with this process and rely on the information given to them at the polling location.

(Trial court op. at 2.)

While counsel’s argument is one thing, evidence is another. Having reviewed the evidence generated in this matter, we conclude that the trial court’s

finding that the 270 or so voters, throughout the entire County of Allegheny, in various and different polling places in that county, were subjected to and heeded misleading advice from election officials, lacks the requisite support in the record. Indeed, there is no evidence in the record to establish that the failure to comply with the Election Code was the result of voters being misled by election officials.

Assuming *arguendo*, there *was* evidence of election officials providing misleading advice to these voters, this Court, nonetheless, would be unable to excuse the defects in the ballot based on Pennsylvania Supreme Court precedent that, because our General Assembly “pronounced a bright-line rule couched in strong admonitory terms,” we “are not free to disregard the explicit legislative direction based on equitable considerations.” *In re Nomination Petition of Guzzardi*, 99 A.3d 381 (Pa. 2014) (candidate not excused from filing timely financial statement through principles of equity, even if the election office provided him with misleading information). In other words, “where the Legislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity,” and this holds true even where, as here, election officials allegedly provide erroneous advice and the recipient relies on that advice. *See id.* As explained above, our General Assembly, in clear and unmistakable language, dictated that, in circumstances like this case, the “provisional ballot[s] **shall not be counted.**” 25 P.S. §3050(a.4) (emphasis added). This Court is not at liberty to ignore this mandate.

Finally, although our decision may be perceived as disenfranchising voters, the Election Code mandates that these deficient ballots **shall not be counted.** This Court emphasizes that it is following and faithfully applying the mandates of our General Assembly and our Supreme Court precedent. Accordingly, the plain language

of the Election Code and the lack of evidence in support of the position advanced by the Appellees require this Court to reverse the trial court's decision.

This matter is remanded to the trial court to issue an order sustaining the Candidate's challenge to the Elections Board's determination and directing the Elections Board to exclude the 270 challenged ballots from the certified returns of election for the County of Allegheny under section 1404 of the Election Code, 25 P.S. §3154.

PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Allegheny County Provisional :
Ballots in the 2020 General Election : No. 1161 C.D. 2020
: :
Appeal of: Nicole Zicarelli :

ORDER

AND NOW, this 20th day of November, 2020, the November 18, 2020 order of the Court of Common Pleas of Allegheny County is hereby REVERSED, and this matter is REMANDED to the court of common pleas for further proceedings in accordance with the accompanying opinion.

PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Allegheny County Provisional :
Ballots in the 2020 General Election : No. 1161 C.D. 2020
: Submitted: November 19, 2020
Appeal of: Nicole Zicarelli :

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE WOJCIK

FILED: November 20, 2020

I respectfully dissent from the majority's decision to reverse the order of the Court of Common Pleas of Allegheny County (trial court) in this matter.

The Pennsylvania Supreme Court has explained:

'The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons. * * * 'The purpose in holding elections is to register the actual expression of the electorate's will' and that 'computing judges' should endeavor 'to see what was the true result.' There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.'

In resolving election controversies it would not be amiss to consider the following criteria:

1. Was any specific provision of the Election Code violated?
2. Was any fraud involved?
3. Was the will of the voter subverted?
4. Is the will of the voter in doubt?
5. Did the loser suffer an unfair disadvantage?
6. Did the winner gain an unfair disadvantage?

Appeal of James, 105 A.2d 64, 67 (Pa. 1954) (citation omitted). It is undisputed that only the first of the foregoing six criteria is at issue with respect to the contested ballots herein.

Regarding the submission of a vote by provisional ballot, Section 1204(a) and (a.4)(1)-(3), (5)(i), (ii)(A) and (F) of the Pennsylvania Election Code¹ provides, in relevant part:

(a) At every primary and election each elector who appears to vote and who desires to vote shall first present to an election officer proof of identification. The election officer shall examine the proof of identification presented by the elector and sign an affidavit stating that this has been done.

* * *

(a.4)(1) At all elections an individual who claims to be properly registered and eligible to vote at the election district but whose name does not appear on the district register and whose registration cannot be determined by the inspectors of election or the county election board shall be permitted to cast a provisional ballot. Individuals who appear to vote shall be required to produce proof of identification pursuant to subsection (a)

¹ Act of June 3, 1937, P.L. 1333, as *amended*, 25 P.S. §3050(a), (a.4)(1)-(3), (5).

and if unable to do so shall be permitted to cast a provisional ballot. An individual presenting a judicial order to vote shall be permitted to cast a provisional ballot.

(2) Prior to voting the provisional ballot, the elector shall be required to sign an affidavit stating the following:

I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____ in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania and that this is the only ballot that I cast in this election.

Signature of Voter/Elector

Current Address

Check the Reason for Casting the Provisional Ballot.

Signed by Judge of Elections and minority inspector

(3) After the provisional ballot has been cast, the individual shall place it in a secrecy envelope. The individual shall place the secrecy envelope in the provisional ballot envelope and shall place his signature on the front of the provisional ballot envelope. All provisional ballots shall remain sealed in their provisional ballot envelopes for return to the county board of elections.

* * *

(5)(i) Except as provided in subclause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot if the county board of elections confirms that the individual did

not cast any other ballot, including an absentee ballot, in the election.

(ii) A provisional ballot shall not be counted if:

(A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

* * *

(F) the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

At issue in the instant matter are approximately 270 provisional ballots cast in Allegheny County in the November 3, 2020 General Election that purportedly have one of the following technical defects: (1) the provisional ballot contained an affidavit signed by the voter as required by Section 1204(a.4)(2), but did not contain a signature on the provisional ballot envelope as required by Section 1204(a.4)(3); (2) the provisional ballot contained the signature on the provisional ballot envelope as required by Section 1204(a.4)(3), but did not contain the affidavit signed by the voter as required by Section 1204(a.4)(2); or (3) the provisional ballot was cast by a voter whose absentee or mail-in ballot was timely received by the Allegheny County Board of Elections, but the absentee or mail-in ballot was defective and, therefore, invalid in some respect.

There is no dispute that the voters who cast the questioned 270 ballots were qualified, registered electors. Moreover, there is no allegation that any of the 270 voters in question had voted more than once. The only sins that would lead these votes to be discarded is that the qualified, registered voters failed to properly enter his or her signature on all of the multiple documents required to be signed, or his or her desire to correct a previously submitted, but admittedly invalid absentee or mail-in ballot through the submission of a properly executed provisional ballot.

I view the foregoing technical provisional ballot requirements as similar to the issue of the color of ink that is used to fill in an absentee or mail-in ballot. With respect to such ballots, Sections 1306(a)² and 1306-D(a)³ of the Pennsylvania Election Code plainly state the voter “*shall*, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen.” 25 P.S. §§3146.6(a), 3150.16(a) (emphasis added).⁴ Our Supreme Court approved the marking of absentee ballots with green or red pen to be appropriate despite the General Assembly’s use of the word “shall” when describing the method of marking the ballots. *See In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). There, our Supreme Court construed the Election Code liberally so as to not disenfranchise Pennsylvania voters over a technicality.

In light of the foregoing criteria outlined in *Appeal of James*, I would do so here as well, and I would not blithely disenfranchise those 270 voters who merely neglected to enter a signature on one of the various signed documents of an otherwise properly executed and timely-submitted provisional ballot. Likewise, I would not penalize a properly registered voter’s attempt to exercise his or her right

² Added by the Act of March 6, 1951, P.L. 3, as *amended*, 25 P.S. §3146.6(a).

³ Added by the Act of October 31, 2019, P.L. 552, 25 P.S. §3150.16a.

⁴ The same requirements apply to the execution of all documents relating to the submission of a provisional ballot. *See* Section 1204(a.3)(1) of the Pennsylvania Election Code, 25 P.S. §3050(a.3)(1) (“All electors, including any elector that shows proof of identification pursuant to subsection (a), shall subsequently sign a voter’s certificate in blue, black or blue-black ink with a fountain pen or ball point pen, . . . and hand the same to the election officer in charge of the district register.”).

of franchise by correcting a previously submitted, but admittedly invalid absentee or mail-in ballot, by submitting a properly executed provisional ballot.

Accordingly, unlike the majority, I would affirm the trial court's order in this case.

MICHAEL H. WOJCIK, Judge