
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

628 CD 2024

**IN RE: CANVASS OF PROVISIONAL BALLOTS IN THE 2024
PRIMARY ELECTION,**

APPEAL OF: MIKE CABELL

**BRIEF OF APPELLEE LUZERNE COUNTY BOARD OF ELECTIONS &
REGISTRATIONS**

**APPEAL FROM ORDER DATED MAY 15, 2024 IN THE COURT OF
COMMON PLEAS OF LUZERNE COUNTY IN NO. 05082 OF 2024
DISPOSING OF TWO PROVISIONAL BALLOTS**

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STATEMENT OF JURISDICTION

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).

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ORDER IN QUESTION

This is an appeal from the May 15, 2024 Order of the Court of Common Pleas of Luzerne County:

AND NOW, this 15th day of May, 2024, after a hearing on the *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code*, wherein Shohin H. Vance, Esquire, Gene M. Molino, Esquire, Paula L. Radick, Esquire, and Jamie Walsh, pro-se, appeared, and after review and consideration of said petition and the responses filed thereto, **IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:**

The Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code is **DENIED**. Accordingly, the decisions of the Luzerne County Election Board are **AFFIRMED**.

The May 15, 2024 Order of the Court of Common Pleas of Luzerne County and Opinion in Support of Order Pursuant to Pa. R.A.P. 1925(a) are attached hereto, as Exhibits “A” and “B,” respectively.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

An appellate court's review in election contest cases is limited to examination of the record to determine whether the trial court committed errors of law and whether the trial court's findings were supported by adequate evidence. *See Dayhoff v. Weaver*, 808 A.2d 1002, 1005 n.4 (Pa. Cmwlth. 2002).

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STATEMENT OF QUESTIONS INVOLVED

- A. Whether Mr. Cabell's appeal should be dismissed as moot where his challenges to two provisional ballots are not capable of altering the outcome of the election?

Suggested Answer: Yes.

- B. Whether the trial court correctly held that the *Wagner* provisional ballot should be counted where the evidence showed that Mr. Wagner appeared in person at his polling place, followed the directions of a poll worker when completing his ballot, and unmistakably demonstrated intention to vote and there was no evidence of fraud?

Suggested Answer: Yes.

- C. Whether the trial court correctly held that the *O'Donnell* provisional ballot should not be counted where Mr. O'Donnell was registered to vote in Schuylkill County as of December 2023 when he changed his address on his vehicle registration and had the ability to vote in the precinct in which he lived and was registered in Schuylkill County on election day?

Suggested Answer: Yes.

STATEMENT OF THE CASE

A. Introduction

This is an appeal challenging two provisional ballots cast in the April 23, 2024 primary election for the Republican nomination for the office of representative of the 117th District in the Pennsylvania House of Representatives. Appellant Mike Cabell (“Mr. Cabell”) is one of two candidates on the Republican ballot. He has three fewer votes than his opponent, Jamie Walsh.

The first provisional ballot at issue (“*Wagner* Ballot”) was cast in person by Timothy James Wagner, a registered voter who could not locate his mail ballot and voted in person by provisional ballot at his polling place. The *Wagner* Ballot included an affidavit signed by Mr. Wagner but did not have a second signature on the outer envelope. The Luzerne County Board of Elections and Registrations (the “Board”) decided to count the *Wagner* ballot. The trial court, crediting Mr. Wagner’s testimony that he completed the ballot in person and as directed by the election worker, affirmed that decision. The second ballot at issue (“*O’Donnell* Ballot”) was cast by Shane Francis O’Donnell, a registered voter whose voter registration was changed to Schuylkill County in December 2023 after he bought a new house there in June 2023. Mr. O’Donnell, who is a first cousin of Mr. Cabell, resided in Schuylkill County since March 29, 2024. The Board rejected his provisional ballot, finding that he was registered and able to vote in his new home

county. After hearing testimony from both Mr. O'Donnell and Acting Director of Luzerne County Elections Emily Cook who explained the process by which the registration was transferred, the trial court affirmed the decision not to count his provisional ballot.

Mr. Cabell has not pointed to any error of law by the trial court and cannot avoid the trial court's factual findings which are supported by substantial evidence. The decisions below should be affirmed.

B. Statement of Facts

In the April 23, 2024 primary election, Mr. Cabell and his opponent, Jamie Walsh, both sought the Republican nomination to represent the 117th District in the Pennsylvania House of Representatives. The race has not yet been certified. Mr. Walsh leads Mr. Cabell by three votes. *See Luzerne County April 23, 2024 Primary Election Results*, available at https://results.enr.clarityelections.com/PA/Luzerne/120843/web.317647/#/summary?category=C_5 (last visited May 27, 2024).

Post election, Mr. Cabell and Mr. Walsh have lodged various challenges to ballots cast in the April 23, 2024 primary election. Three disputes are currently on appeal in this Court. This appeal by Mr. Cabell challenges the Court of Common Pleas of Luzerne County's decision affirming the Board's decision to count the *Wagner* Ballot and reject the *O'Donnell* Ballot. A second appeal docketed at 651

CD 2024, also commenced by Mr. Cabell, challenges the decision to reject his request to cumulate and count write-in votes cast for him. The board decided not to cumulate the write-in votes and the trial court affirmed that decision. A third appeal docketed at 629 CD 2024, *In re Six Ballots in the 2024 General Primary Election*, challenges six mail and absentee ballots which lack the year within the date on the return envelope. The Board counted these ballots and the trial court affirmed that decision.

C. The Wagner Ballot

On April 23, 2024, Mr. Wagner appeared in person at his Lake Township polling place to vote in the primary election. *See* Tr. of May 9, 2024 Hr'g at 21:20-25. At that time, Mr. Wagner was informed that, because he had been issued and did not return a mail ballot, he would need to complete a provisional ballot. *Id.* at 21:20—22:11. Mr. Wagner thereafter completed his provisional ballot in person at his polling place with the assistance of a poll worker. *Id.* He testified:

If I can, if I'm allowed, I was more or less being led on how to do this. I have never had to go and sit down at a table and do this throwing out of ballots. And the lady, I guess whatever she was, the head, she basically was leading me through everything. She was telling me what to do, what not to do.

And yes, by the time I finished she had actually said I put the date on something for you so you didn't have to. And she gave me this paper and said this – I said, What's this? She goes, Well, read it and follow the directions on it. It said call in five days to check and see if my ballot was accepted. And I did call. And they gave me another phone

number to call. And when I called the other number they said, Yep, we have you ballot. It's good. It's accepted. You're verified.

Id. at 22:15—23:4. Mr. Wagner further testified that he followed the instructions of a senior election worker in completing the ballot and accompanying envelope. *Id.* at 24:12-18; *id.* at 24:22-23 (“[S]he was telling me what to do. I guess she was the boss.”). He later called the telephone number provided to him and verified that his vote was valid. *Id.* at 24:24-25:2. Mr. Wagner signed the required affidavit for his provisional ballot but did not add a second signature on the outer envelope. He testified unequivocally that he intended to cast his vote in the 117th District. *Id.* at 23:13-24.

D. The O’Donnell Ballot

On April 23, 2024, Mr. O’Donnell, a first cousin of Mr. Cabell, appeared in person to vote in the 2024 general primary at a polling place in Butler Township. *See* Tr. of May 9, 2024 Hr’g at 34:7-16; 35:14-18. Mr. O’Donnell was informed that, because he was no longer registered to vote in Butler Township, he would be permitted to complete a provisional ballot. *Id.* at 34:13-17. Mr. O’Donnell’s voter registration had been transferred to Schuylkill County in December 2023 when he provided a new address while renewing his vehicle registration. *Id.* at 33:12-34:6. Mr. O’Donnell testified that he bought a new home in McAdoo, Schuylkill County in June 2023, that he changed his address on his vehicle registration to Schuylkill

County when he renewed his vehicle registration in December 2023, that he spent time between the two homes, and that he began to spend all of his time at the Schuylkill County address on March 29, 2024. *Id.* at 31:8-14; 33:12-20; 32:15-33:11; 32:5-12.

E. Proceedings Below

At a May 3, 2024 hearing, the Board voted unanimously to count the *Wagner* Ballot and not count the *O'Donnell* Ballot. *See* Opinion in Support of Order Pursuant to Pa. R.A.P. 1925(a) (Exh. B) at 3, 7. Mr. Cabell's Petition for Review in the trial court sought to reverse those decisions of the Board, arguing that (1) the *Wagner* Ballot should not have been counted because a signature on the outer envelope is required by 25 P.S. § 3050(a.4)(5)(ii) and (2) the *O'Donnell* Ballot should have been counted pursuant to 25 P.S. § 2811(3).

The trial court rejected both arguments. *First*, the trial court affirmed the decision to count the *Wagner* ballot, explaining in its Opinion issued pursuant to Pa. R.A.P. 1925(a) that "the Pennsylvania Supreme Court has repeatedly recognized the need to construe the Election Code liberally in favor of enfranchisement where fraud is not an issue and a voter's intent is clear." *Id.* at 4. Applying that election law principle, the trial court, crediting the testimony of Mr. Wagner, found no fraud and that that his intent to vote was "exceedingly clear." *Id.* at 4-5.

Second, after hearing testimony from Mr. O'Donnell and election officials describing the change of address process, the trial court dismissed Mr. Cabell's Petition regarding the *O'Donnell* Ballot. The trial court reasoned that "no danger of disenfranchisement exists where such a voter elects to attempt to cast a vote in the municipality of their former residence while fully possessing the ability to instead cast a vote in the municipality of their current residence." *Id.* at 7.

SUMMARY OF ARGUMENT

Mr. Cabell's appeal should be dismissed as moot or, assuming this Court considers the merits, the decision of the trial court should be affirmed. First, having only placed two votes in controversy, Mr. Cabell's appeal is incapable of altering the outcome of the election where he faces a three-vote deficit, and the Court cannot fashion an order with any practical effect. There is no applicable exception requiring the Court to decide this moot question.

But even if the Court were to consider the merits of this dispute, and it should not, Mr. Cabell has not pointed to any error of law by the trial court and cannot avoid the trial court's factual findings which are supported by substantial evidence. For the *Wagner* Ballot, the record below demonstrates that Mr. Wagner filled out his provisional ballot with the assistance of and instruction from a poll worker in the polling place and intended to and believed that he did cast his vote in the 117th District nominating contest. Well-settled precedent requiring interpretation of the

Election Code in favor of enfranchisement dictates that the trial court was right to affirm the Board's decision to count this ballot. And the trial court was similarly right to affirm the Board's decision not to count the *O'Donnell* Ballot. The record below demonstrates that Mr. O'Donnell was registered to vote Schuylkill County and retained the ability to cast his vote in that county. The court should not disturb these well supported findings of the trial court. The decision below should be affirmed.

ARGUMENT

A. Because Mr. Cabell's Challenges to Two Provisional Ballots Are Not Capable of Altering the Outcome of the Election, His Appeal Should Be Dismissed As Moot.

Mr. Cabell is trailing his opponent by three votes. His challenges to the *Wagner* and *O'Donnell* ballots are not capable of changing the outcome of the election and, as a result, this appeal is moot.

"[A]n actual case or controversy [must] exist[] at all stages of the judicial or administrative process." *Kupersmidt v. Wild Acres Lakes Property Ass'n*, 143 A.3d 1057, 1061 (Pa. Cmwlth. 2016) (internal citations omitted). Thus, "[a] claim of mootness 'stands on the predicate that a subsequent change in circumstances has eliminated the controversy so that the court lacks the ability to issue a meaningful order, that is, an order that can have any practical effect.'" *Id.* (quoting *Burke v. Independence Blue Cross*, 103 A.3d 1267, 1271 (Pa. 2014)). Because reversing the

decisions on the provisional ballots at issue will not change the outcome of the election, the Court cannot craft an order with practical effect for Mr. Cabell and this appeal should be dismissed as moot.

Mr. Cabell's challenge concerns only *two* provisional ballots. Even if this Court were to reverse the trial court regarding both the *Wagner* and *O'Donnell* ballots, this reversal would be insufficient to close Mr. Cabell's *three* vote deficit against his opponent. See *Luzerne County April 23, 2024 Primary Election Results*, available at <https://results.enr.clarityelections.com/PA/Luzerne/120843/web.317647/#/summary> (last visited May 27, 2024). And Mr. Cabell cannot escape the reach of the mootness doctrine by citing his appeal at 551 CD 2024 which concerns an unknown number of ballots. See Tr. of May 9, 2024 Hr'g at 78:2-12.

Nor is there an exception to the mootness doctrine which would justify this Court's intervention. The court may consider technically moot issues "when the issue presented is one of great public importance or is one that is capable of repetition yet evading review." *Association of Pennsylvania State College and University Faculties v. PLBR*, 8 A.3d 300, 305 (Pa. 2010). Neither of those exceptions apply here.

First, the issues presented here are not likely to evade review. The Election Code provides a specific procedure for challenging provisional ballots and that

procedure was invoked and completed. *See, e.g.*, 25 P.S. § 3050(a.4)(4) (detailing the process for resolution of challenges to provisional ballots). Review was not evaded, but rather further review will not change the outcome. *Second*, the public importance exception is very rarely applied and has no application here. *See Harris v. Rendell*, 982 A.2d 1030, 1037 (Pa. Cmwlth. 2009), *aff'd*, 992 A.2d 121 (Pa. 2010) (“It is only in very rare cases where exceptional circumstances exist or where matters or questions of great public importance are involved, that this [C]ourt ever decides moot questions.”) (quoting *Wortex Mills, Inc. v. Textile Workers Union of Am.*, 85 A.2d 851, 857 (Pa. 1952)). This case does not involve the broad type of societal harm necessary for invocation of the public interest exception, especially where Mr. Cabell himself will not suffer detriment absent a decision from the Court. Even if this Court were to grant the relief sought, Mr. Cabell would, as explained above, be unable to overtake his opponent.

B. The Trial Court Correctly Held that the *Wagner* Ballot Should Be Counted.

Even if this Court were to entertain this appeal despite the lack of a live controversy, the trial court’s decision to count the *Wagner* ballot was correct as a matter of both fact and law and should be upheld.

Mr. Cabell argues that the *Wagner* ballot is invalid based on 25 P.S. § 3050(a.4)(5)(ii)(A) which provides that a provisional ballot “shall not be counted” unless accompanied by a signed affidavit and a signed outer envelope. *See*

Statement of Issues To Be Presented on Appeal ¶¶ 1-2. Mr. Cabell’s narrow reliance on the word “shall” is unavailing because it ignores the actual record and caselaw acknowledging that the word is sometimes interpreted in a directory, not mandatory, sense.

First, “the word ‘shall’ has also been interpreted to mean ‘may’ or as being merely directory as opposed to mandatory.” *Com. v. Baker*, 690 A.2d 164, 167 (Pa. 1997) (collecting cases). And that’s the better interpretation here. No mandatory requirement is created by the use of “shall” in 25 P.S. § 3050(a.4)(5)(ii)(A) where the voter appeared in person, completed and signed the affidavit, and complied with specific direction received from an election worker. Rather, the “technical requirements” within this provision are better understood “as similar to the issue of the color of ink that is used to fill in an absentee or mail-in ballot,” which the Supreme Court excused despite a similar use of the word “shall.” *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 at *7 (Wojcik, J., dissenting) (citing *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972)). This interpretation is in keeping with the principle that “the Election Code should be liberally construed so as to not deprive, *inter alia*, electors of their right to elect a candidate of their choice.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020).

Mr. Cabell cites *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election* as support for his argument that the statutory text of 25 P.S. § 3050(a.4)(5)(ii)(A) prohibits the Board from canvassing the *Wagner* ballot, but this decision is non-precedential and not binding. See 210 Pa. Code § 69.414; see *DeGrossi v. Com., Dep't of Transp.*, 174 A.3d 1187, 1191 (Pa. Cmwlth. 2017) (“It is well-settled that unpublished decisions from this Court are not binding.”). Moreover, in *In re Allegheny County*, unlike this case, there was no evidence that any voter’s mistake was the result of advice received from an election official. See *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d at *4 (“[T]here 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.”).

At the May 9, 2024 hearing, Mr. Wagner had testified that he filled out his provisional ballot and completed this process with the assistance of and instruction from an election worker in the polling place and intended to and believed that he did cast his vote in the 117th District nominating contest. See Tr. of May 9, 2024 Hr’g at 22:12—23:4; 23:13-24. Based on this testimony, the trial court found as matters of fact supported by substantial evidence that Mr. Wagner personally appeared and completed a ballot in the presence of election workers, that there was no fraud, and that Mr. Wagner’s “electoral intent was made exceedingly clear.” See Opinion in Support of Order Pursuant to Pa. R.A.P. 1925(a) (Exh. B) at pp. 4-

5. This Court cannot substitute its own factual findings for the well supported findings of the trial court. *See In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d at 1070 (“[T]he Court of Common Pleas’ decision is reviewed on appeal ‘to determine whether the findings are supported by competent evidence’”) (quoting *In re Reading Sch. Bd. of Election*, 634 A.2d 170, 171–72 (Pa. 1993)). This is not the rare case where an elector’s exercise of the right to vote may be disregarded. *See Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955) (“Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.”).

Mr. Cabell’s remaining arguments in his Statement of Issues were not presented below and, in any event, cannot save his challenge to the *Wagner* ballot. He first argues that Mr. Wagner waived his right to cure his ballot by failing to appear before the Board. *See* Statement of Issues To Be Presented on Appeal ¶ 3. First, Mr. Wagner testified before the trial court that he lacked prior knowledge of the Board hearing. *See* Tr. of May 9, 2024 Hr’g at 26:21-14. But even if he had, this argument misunderstands the facts. Mr. Wagner was not invited to correct or alter his ballot and the trial court did not find that the *Wagner* ballot had been cured. Rather, the trial court found that the lack of a signature on the outer envelope did not justify invalidation given Mr. Wagner’s personal appearance, reliance on election

officials, and undisputed expression of voter intent. That voter intent was made apparent during Mr. Wagner's participation in the trial court.

Finally, Mr. Cabell also argues that Mr. Wagner's ballot was invalid because he voluntarily disclosed the candidate he voted for "in violation of the secrecy requirement enshrined in Article VII, Section 4 of the Pennsylvania Constitution." *See* Statement of Issues to Be Presented on Appeal ¶ 4. Article VII, Section 4 is concerned with voting procedures and "endows the General Assembly with the authority to enact methods of voting subject only to the requirement of secrecy. *McLinko v. Dep't. of State*, 279 A.3d 539, 576-77 (Pa. 2022). It does not apply to voters and, if it did, Mr. Wagner waived any right to secrecy by volunteering how he voted. *See Maylie v. Nat'l R.R. Passenger Corp.*, 601 A.2d 308, 313 (Pa. Super. 1991) ("The provisions of the Constitution do not reach the acts of purely private actors.").

Accordingly, supported by competent evidence and containing no legal error, the trial court decision's regarding the *Wagner* ballot should be affirmed.

C. The Trial Court Decision Not to Count the *O'Donnell* Ballot is Correct and Should Be Affirmed.

The trial court's decision rejecting the *O'Donnell* ballot should also be affirmed.

Mr. Cabell first argues that the trial court erred in affirming the Board's decision to reject the *O'Donnell* ballot because Mr. *O'Donnell* resided in Luzerne

County within “thirty days immediately preceding the election” and was thus eligible to vote there pursuant to 25 P.S. § 2811. *See* Statement of Issues To Be Presented on Appeal ¶¶ 5-6. While the trial court weighed the need to liberally construe the Election Code in favor of enfranchisement when it considered the *Wagner* ballot, the court correctly found that no danger of disenfranchisement existed for Mr. O’Donnell as he “possess[ed] the ability to instead cast a vote in the municipality of [his] current residence.” *See* Opinion in Support of Order Pursuant to Pa. R.A.P. 1925(a) (Exh. B) at p. 7. This finding of fact was premised on the Acting Director of Luzerne County Elections’ testimony, credited by the trial court, that Mr. O’Donnell was registered and able to vote in his new county of residence (Schuylkill County) by virtue of his change in voter registration that accompanied his change of address on his vehicle registration. *See* Tr. of May 9, 2024 Hr’g at 21:20-25. Mr. O’Donnell was not disenfranchised, but rather was registered and able to vote in his new home on election day. This factual finding, which is supported by substantial evidence, is binding for purposes of this appeal.

Mr. Cabell’s additional arguments challenging Pennsylvania’s automatic voter registration practices as violating a voter registration statute and/or unlawfully promulgated are likewise unavailing. These arguments were not presented below and are thereby waived. *See* Pa.R.A.P. 302(a) (stating, as a general rule, “[i]ssues not raised in the trial court are waived and cannot be raised for the first time on

appeal”); *Commonwealth v. Tejada*, 107 A.3d 788, 797 (Pa. Super. 2015) (“It is axiomatic that issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”) (internal citations omitted). But even on the merits, the arguments fail. Under Pennsylvania’s voter registration law, a driver’s license application “shall serve as an application to register to vote unless the applicant fails to sign the voter registration application” and “[t]he secretary [of the Commonwealth] has the primary responsibility for implementing and enforcing the driver's license voter registration system created under this section.” 25 Pa.C.S. § 1323(a)(1). What’s more, the Secretary of the Commonwealth (along with the Secretary of Transportation) is vested with authority to “determine[] and prescribe[]” “the format of the driver’s license/voter registration application.” *Id.* § 1323(b)(2). These provisions specifically allow the Secretary to direct that address changes in motor vehicle registrations will be reflected automatically in voter records.

CONCLUSION

For the reasons addressed above, the May 15, 2024 decision of the Court of Common Pleas of Luzerne County should be affirmed.

Date: May 27, 2024

Respectfully submitted,

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EXHIBIT A

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IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

IN RE: CANVASS OF PROVISIONAL
BALLOTS IN THE 2024 PRIMARY
ELECTION

CIVIL ACTION

NO. 2024-05082

ORDER

AND NOW, this 15th day of May, 2024, after a hearing on the *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code*, wherein Shohin H. Vance, Esquire, Gene M. Molino, Esquire, Paula L. Radick, Esquire, and Jamie Walsh, pro-se, appeared, and after review and consideration of said petition and the responses filed thereto, **IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:**

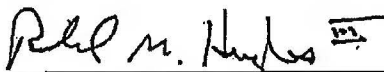
The *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code* is **DENIED**. Accordingly, the decisions of the Luzerne County Election Board are **AFFIRMED**.

The Clerk of Judicial Records is directed to serve notice of the entry of this Order pursuant to Pa.R.C.P. 236.

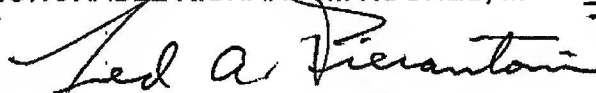
BY THE COURT,



THE HONORABLE TINA POLACHEK GARTLEY



THE HONORABLE RICHARD M. HUGHES, III



THE HONORABLE FRED A. PEIRANTONI, III

EXHIBIT B

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IN RE: CANVASS OF PROVISIONAL BALLOTS IN 2024 PRIMARY ELECTION.	: IN THE COURT OF COMMON PLEAS : OF LUZERNE COUNTY : CIVIL DIVISION : : LUZ. CO. C.C.P. NO.: 2024-05082 : : PA. COMMW. CT. NO.: 628 C.D. 2024
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OPINION IN SUPPORT OF ORDER PURSUANT TO Pa.R.A.P. 1925(a)

Mike Cabell (hereinafter referred to as “Appellant”) appeals from this Court’s order of May 15, 2024 (hereinafter referred to as the “Order”), wherein Appellant’s Petition for Review in the Nature of a Statutory Appeal pursuant to Section 1210 of the Election Code (hereinafter referred to as the “Petition”) was denied and two decisions of the Luzerne County Board of Elections and Registration (hereinafter referred to as the “Election Board”)—from each of which Appellant had appealed to this Court—were affirmed. On May 17, 2024, Appellant filed a notice of appeal from the Order. On May 21, 2024, at 628 C.D. 2024, the Commonwealth Court of Pennsylvania directed that this Court transmit by no later than May 22, 2024, at 4:00 P.M., the record in this matter—including an opinion or statement in accordance with Pa.R.A.P. 1925(a). We now submit to the record our opinion in accordance with Pa.R.A.P. 1925(a) and the May 21, 2024, order of the Commonwealth Court.

In his Petition, Appellant challenged the decisions of the Election Board with regard to each of two provisional ballots cast in the 2024 Primary Election for nomination of Republican Party candidate for Representative in the General Assembly from the 117th District: (1) to accept

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a provisional ballot cast in Lake Township without the required signature on the provisional ballot envelope (hereinafter referred to as the “Wagner Ballot”); and (2) to reject a provisional ballot cast in Butler Township by a voter registered to vote in a district other than the 117th District (hereinafter referred to as the “O’Donnell Ballot”). On May 8, 2024, a hearing was held, at which counsel for the Appellant, counsel for the Election Board, and Appellant’s challenger in the primary race—Jamie Walsh, *pro se*—appeared and had the opportunity to present witnesses and evidence. This Court received testimony and evidence with respect to the challenged issues. After the hearing, and upon consideration of the testimony, evidence, and argument presented, we issued the Order—affirming each of these decisions made by the Election Board—and herein set forth our reasons therefor.

I. THE WAGNER BALLOT

The Election Board presented the testimony of Timothy James Wagner (hereinafter referred to as “Wagner”) in support of its decision to accept his provisional ballot as cast in Lake Township. Wagner testified that he appeared in person at his Lake Township polling place to vote in the 2024 Primary Election and, upon presentment, was instructed to complete a provisional ballot.¹ Wagner testified the election workers at his polling place informed him the completion of a provisional ballot was necessary due to his having been provided but not having appeared with a mail-in ballot.² Wagner did fill out his provisional ballot and completed this process with the assistance of and instruction from a poll worker at his polling place.³ Wagner followed the instructions of the poll worker with respect to the mechanics of casting his vote by way of

¹ *Notes of Testimony*, May 8, 2024, p. 21:17-25.

² *N.T.*, pp. 21:21—22:6; Emily Cook, Acting Director of Luzerne County Elections, also confirmed by way of her testimony that Wagner had been issued a mail-in ballot for the 2024 Primary Election but had not cast his mail-in ballot. *N.T.*, p. 27:16-24.

³ *N.T.*, pp. 22:7—23:19.

provisional ballot⁴ and testified, unequivocally, that he intended to and believed that he did cast his vote in the 117th District nominating contest for Jamie Walsh.⁵ When it came time for Wagner to place his ballot in the provisional ballot envelope and cast his vote, Wagner testified that he couldn't remember whether he affixed his signature to the provisional ballot envelope, but affirmed that he followed the instructions of the poll worker and provided the poll worker with the final envelope containing his ballot inside its secrecy envelope.⁶ We found the testimony of Wagner credible.

It was undisputed before this Court that Wagner's provisional ballot envelope did not bear his signature. Section 1210 of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591, provides, in pertinent part, as follows:

(a.4) ... (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. ...

...

(5) ... (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

25 P.S. § 3050(a.4). Nonetheless, the Election Board voted unanimously to accept the Wagner Ballot as cast⁷ and—in light of the seemingly explicit proscription of Section 1210 of the Election Code—Appellant filed his challenge to the Wagner Ballot before this Court. We note that the Election Board relied upon, *inter alia*, guidance for state-wide uniformity published by the Pennsylvania Department of State in reaching its decision to accept the Wagner Ballot.⁸

⁴ *N.T.*, pp. 22:15-20; p. 24:12-15.

⁵ *N.T.*, pp. 23:23—24:1.

⁶ *N.T.*, p. 24:12-25.

⁷ *N.T.*, pp. 17:19—18:11.

⁸ *Pennsylvania Provisional Voting Guidance*, Pennsylvania Department of State, Ver. 2.1, March 11, 2024.

In reviewing the decision of the Election Board to accept the Wagner Ballot, we are mindful of those election law principles long-recognized by our appellate courts, including by the Commonwealth Court in its opinion in *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Commw. Ct. 2002), wherein the Commonwealth Court wrote:

The vote may be the central act in our democratic form of government. To advance the goal of free and fair elections, the legislature enacted the Election Code, and it is often said that in the interest of preventing fraud, the terms of the Election Code must be strictly enforced. *E.g.*, *In re Luzerne County Return*, 447 Pa. 418, 290 A.2d 108 (1972). At the same time, the purpose of the Election Code is to protect, not defeat, a citizen's vote. Our Supreme Court has directed that technicalities should not make the right to vote insecure, but instead, the statute should be construed to indulge that right. *Appeal of James*, 377 Pa. 405, 105 A.2d 64 (1954). These principles are difficult to reconcile. On balance, we believe that they mean that the terms of the Election Code must be satisfied without exception, but where, as a factual matter, voter intent is clear, questions should be resolved in favor of holding that the Election Code has been satisfied.

Dayhoff, 808 A.2d at 1006. As noted by the Commonwealth Court in its opinion in *Dayhoff*, the Pennsylvania Supreme Court has repeatedly recognized the need to construe the Election Code liberally in favor of enfranchisement where fraud is not an issue and a voter's intent is clear. In its opinion in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 663 Pa. 283, 241 A.3d 1058 (2020), our Supreme Court wrote:

We begin by recognizing from the outset that it is the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793, 798 (2004). "The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice." *Ross Nomination Petition*, 411 Pa. 45, 190 A.2d 719, 719 (1963). It is therefore a well-settled principle of Pennsylvania election law that "[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." *Appeal of Norwood*, 382 Pa. 547, 116 A.2d 552, 554-55 (1955).

Id., 241 A.3d at 1062. Here, in reliance on these principles, and in light of the fact that there has been no assertion of fraud with respect to the Wagner Ballot and also noting that Wagner's

electoral intent was made exceedingly clear by his credible testimony, we affirmed the decision of the Election Board to accept for canvassing Wagner's provisional ballot as cast.

II. THE O'DONNELL BALLOT

Appellant presented the testimony of Shane Francis O'Donnell (hereinafter referred to as "O'Donnell") in challenging the decision of the Election Board not to accept his provisional ballot as cast in Butler Township. O'Donnell testified that he appeared in person at a Butler Township polling place to cast his vote in the 2024 Primary Election.⁹ Upon presentment, O'Donnell was informed by poll workers at the Butler Township polling place that he was not currently registered to vote in Butler Township, but as he had been registered to vote previously at that polling place, he was allowed to fill out and cast a provisional ballot.¹⁰ As of the date of the Primary Election—April 23, 2024—O'Donnell was no longer registered to vote in Butler Township, Luzerne County, because he had opted to change his voter registration to the Borough of McAdoo, Schuylkill County, when he renewed his vehicle registration to register his vehicle at the McAdoo address in December of 2023.¹¹ In June of 2023, O'Donnell had purchased a home in McAdoo.¹² Between June of 2023 and March 29, 2024, O'Donnell had been renovating the McAdoo home for the purpose of transferring his residence there, and had been residing with his mother and brother in Butler Township.¹³ On March 29, 2024, O'Donnell took up residence at the McAdoo home.¹⁴ We found the testimony of O'Donnell credible.

Emily Cook (hereinafter referred to as "Cook"), Acting Director of Luzerne County Elections, confirmed by way of her testimony on this issue that at the time of the April 23, 2024,

⁹ *N.T.*, p. 34:7-16.

¹⁰ *N.T.*, p. 34:13-17.

¹¹ *N.T.*, pp. 33:12—34:6.

¹² *N.T.*, p. 31:13-14.

¹³ *N.T.*, pp. 31:13—32:22.

¹⁴ *N.T.*, p. 32:5-12.

Primary Election, O'Donnell was actively registered to vote in Schuylkill County and did not have an active voter registration in Luzerne County.¹⁵ Cook also testified that subsequent to a change in the Pennsylvania Department of Transportation (DOT) vehicle registration system in the summer of 2023, a person registering their vehicle would have to affirmatively opt out of concurrently updating their voter registration to the address at which a vehicle is being registered.¹⁶ Cook testified that the Election Board received a notification from DOT that as of December 21, 2023, O'Donnell had transferred his voter registration to Schuylkill County,¹⁷ and that when the Election Board receives such a notification, the procedure is to cancel the active voter registration within Luzerne County and transfer the voter's registration data to the new county in which the voter is registered.¹⁸ Cook testified that the effect of the policy of the Election Board with respect to the issue of a voting registration having been transferred to another county is that voters no longer registered in Luzerne County are no longer able to vote in Luzerne County, but instead are able to vote in their county of residence and registration.¹⁹ We found the testimony of Cook credible.

Section 701 of the Election Code provides as follows:

Every citizen of this Commonwealth, eighteen years of age, possessing the following qualifications, shall be entitled to vote at all elections, provided he or she has complied with the provisions of the acts requiring and regulating the registration of electors:

...

(3) He or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his residence within thirty days preceding the election.

¹⁵ *N.T.*, p. 39:5-13.

¹⁶ *N.T.*, pp. 39:22—40:14.

¹⁷ *N.T.*, p. 45:11-15.

¹⁸ *N.T.*, pp. 40:15—41:8.

¹⁹ *See N.T.*, p. 47:20-23.

25 P.S. § 2811. Despite, again, the seemingly permissive 30-day window provided for by Section 701 of the Election Code, the Election Board decided not to accept the O'Donnell Ballot.

In reviewing the decision of the Election Board not to accept this ballot—and in light of the credible testimony of record—we, again, keep in mind the principles enunciated by the appellate courts of our Commonwealth with respect to the preference for a liberal construction of the Election Code to favor enfranchisement where there is no evidence of fraud and a voter's intent is clear. *See, e.g., Dayhoff, supra*. We read the jurisprudence of our Commonwealth to emphasize protection against disenfranchisement. Where, however, the record demonstrates clearly that a voter, such as O'Donnell, maintains his elective franchise with an active voter registration at his place of residence on the date of an election, no danger of disenfranchisement exists where such a voter elects to attempt to cast a vote in the municipality of their former residence while fully possessing the ability to instead cast a vote in the municipality of their current residence. O'Donnell registered his vehicle in and changed his voter registration to McAdoo in December of 2023, and transferred his residence to McAdoo in March of 2024. But for O'Donnell's decision not to attempt to cast a vote in McAdoo, nothing prevented O'Donnell from exercising his franchise in the place of his residence and active voter registration for the April 23, 2024, Primary Election. As the decision of the Election Board not to accept the O'Donnell Ballot has visited upon O'Donnell no actual disenfranchisement, we find no fault with and affirm the decision of the Election Board.

III. CONCLUSION

For all of the above reasons we entered our Order of May 15, 2024, and enter the attached order for transmission of the record in accordance with the directive of the May 21, 2024, Order of the Commonwealth Court filed to 628 C.D. 2024.

CERTIFICATE OF COMPLIANCE

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

/s/ Timothy E. Gates
Timothy E. Gates

Date: May 27, 2024

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify under Pa. R.A.P. 2135(d) that this document complies with the type-volume limit of Pa. R.A.P. 2135(a)(1) because, excluding the parts of the document exempted by Pa. R.A.P. 2135(b), this document contains 4,021 words.

/s/ Timothy E. Gates

Timothy E. Gates

Dated: May 27, 2024

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PROOF OF SERVICE

I, Timothy E. Gates, hereby certify that I served the forgoing Brief in Opposition upon all counsel of record via the Court's PACFile eService system, which service satisfies the requirements of Pa. R.A.P. 121.

/s/ Timothy E. Gates
Timothy E. Gates

Date: May 27, 2024

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