

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Terri B. Jamison, :
Relator, :
v. : No. 12AP-507
Franklin County Board of Elections, : (REGULAR CALENDAR)
Respondent. :

D E C I S I O N

Rendered on July 31, 2012

Richard A. Cline, for relator.

Ron O'Brien, Prosecuting Attorney, *Nick A. Soulas*, and
Harold J. Anderson, III, for respondent.

IN MANDAMUS

CONNOR, J.

{¶ 1} Relator, Terri B. Jamison, brings this original action in mandamus seeking a writ ordering respondent, Franklin County Board of Elections, to certify relator's candidacy for judicial office in Franklin County and include her name on the ballot.

{¶ 2} The matter is before the court upon a joint stipulation of evidence submitted by the parties, the briefs of the parties, and oral argument before this court. The joint preparatory work by the parties allows the court to recognize that this matter presents no disputed issues of fact and can be reduced to a single legal issue, albeit a novel one for which there is only sparse precedent in the law of Ohio.

I. Stipulated Facts and Procedural Posture

{¶ 3} Relator is an attorney licensed to practice law in Ohio and otherwise eligible to hold the judicial office that she seeks. On March 5, 2012, relator filed her petition with

the Franklin County Board of Elections, to run as an independent candidate for judge for the Franklin County Court of Common Pleas. Relator intended to file as a candidate for a judicial seat in the general division to be vacated by the retirement of Judge John P. Bessey at the end of the current term (the "open seat"). Within Franklin County, the various seats on the court of common pleas are distinguished by their term beginning and ending dates, with these dates varying by a few days for all terms beginning in any given year. Judge Bessey's current term ends on January 5, 2013, and his successor's term will therefore commence on January 6, 2013.

{¶ 4} Relator's nominating petition states that she is a candidate for "Judge" for the "full term commencing January 5, 2013." Joint stipulation of record, at 145. Based upon this date, the nominating petition does not describe a candidacy for the open seat created by the full-term retirement of Judge Bessey, but rather for a seat on the Franklin County Court of Common Pleas, Division of Domestic Relations currently held by Judge Christopher Geer, who will seek re-election to a full term commencing January 5, 2013 (the "domestic seat").

{¶ 5} At the time of filing, the Franklin County Board of Elections verified that relator's petition was facially valid, timely filed, contained sufficient valid signatures, and that the required filing fees were paid.

{¶ 6} When circulating her petition and soliciting signatures, relator or her agents informed some electors that the petition would present relator as a candidate for the open seat currently held by the retiring Judge Bessey. Several persons who signed relator's nominating petition would subsequently testify before the board of elections that they signed the petition only based upon these representations, and that they would not have signed a petition to qualify relator as a candidate for the domestic seat for which Judge Geer will seek re-election. Relator similarly testified that, while collecting signatures, she or her agents, to the extent some signatories asked, informed electors that she was running for the open seat to be vacated by Judge Bessey, and that these statements were entirely in good faith because relator was as-yet unaware of the erroneous dates specified in her petition. In fact, in conversations with board of elections personnel before and immediately after submitting her petition, she was told that her petition did indeed describe a candidacy for the open seat.

{¶ 7} Upon submission, the board of elections examined the date given in the petition and determined that relator's petition constituted a declaration of candidacy for the domestic seat, rather than the open seat. Relator then requested that the board of elections correct the petition to reflect her candidacy for the open seat. The board of elections informed her that this was not permitted by Ohio law. Board of elections Director William Anthony initially indicated to relator that she would, however, be eligible as a candidate for the domestic seat described by the date given in her petition. After some hesitation, relator decided to continue her candidacy with the modified goal of running against Judge Geer for the domestic seat.

{¶ 8} The board of elections then voted on May 7, 2012 to refuse to certify relator as a candidate for the domestic seat. Relator appealed that determination and the board heard her appeal on June 4, 2012. The board again refused to certify her candidacy for the domestic seat. The board based its rejection of her petition on R.C. 3599.14, a criminal statute that prohibits a candidate, while soliciting signatures for an electoral petition, from making any *knowing* misrepresentation of the effect or object of the petition. Despite its reliance on the criminal statute, the board took care to specify that any such misrepresentations by relator in the present case are doubtless inadvertent. In a similar spirit, relator has assumed full responsibility for her error and makes no assertion that she was intentionally misled by board personnel in their initial, informal assurances that she had correctly described the open seat in her petition.

{¶ 9} Relator now asks this court to issue a writ of mandamus ordering the board of elections to certify her candidacy.

II. Jurisdiction and Requisites for a Writ of Mandamus; Standard of Review

{¶ 10} The parties have attempted to stipulate that this court has jurisdiction in mandamus over the matter. However, the parties' stipulation as to jurisdiction is not effective to establish jurisdiction where none will lie, and we must independently determine our own jurisdiction in this matter. *Beatrice Foods Co. v. Porterfield*, 30 Ohio St.2d 50 (1972), paragraph two of the syllabus ("Although adverse parties may not confer jurisdiction upon a court by mutual consent, where none would otherwise exist, they may stipulate the truth of facts that are sufficient to confer jurisdiction.").

{¶ 11} It is settled law that in order for a writ of mandamus to issue, relator must demonstrate that (1) she has a clear legal right to the relief prayed for; (2) respondents are under a clear legal duty to perform the acts requested; and (3) relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29 (1983).

{¶ 12} For this court to issue a writ of mandamus in a matter stemming from a dispute before the board of elections, the candidate must "establish a clear legal right to certification of his candidacy and placement of his name on the [general] election ballot, a corresponding clear legal duty on the part of the board of elections to certify his candidacy and place his name on the ballot, and the lack of an adequate remedy in the ordinary course of law." *State ex rel. Duncan v. Portage Cty. Bd. of Elections*, 115 Ohio St.3d 405, 2007-Ohio-5386, ¶ 8. In the absence of any forum for a direct appeal from the board of elections, and given the inherent time constraints inherent to such disputes, "[i]n election cases, Ohio courts have been inclined to entertain original actions, even though alternative remedies such as declaratory judgment and injunction may be available, due to the protracted nature of such proceedings." *State ex rel. South-Western City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Elections*, 10th Dist. No. 04AP-869, 2004-Ohio-4893, ¶ 6, citing *State ex rel. Smart v. McKinley*, 64 Ohio St.2d 5, 6 (1980), and *State ex rel. Smith v. Sandusky Cty. Bd. of Elections*, 155 Ohio App.3d 211, 2003-Ohio-5856 (6th Dist.).

{¶ 13} We accordingly find that because of the lack of an effective remedy at law, the remedy of a writ of mandamus will lie in the present case if the other requirements therefore are met.

{¶ 14} In original actions challenging the quasi-judicial decision of a board of elections, the applicable standard is whether the board engaged in fraud or corruption, abused its discretion, or acted in clear disregard of applicable legal provisions. *State ex rel. Crossman Communities of Ohio, Inc. v. Greene Cty. Bd. of Elections*, 87 Ohio St.3d 132, 135-36 (1999). Although boards of elections "are the local authorities best equipped to gauge compliance with election laws," *State ex rel. Sinay v. Sadders*, 80 Ohio St.3d 224, 231 (1997), a court considering an action in mandamus need accord no special deference to a board of elections' interpretation of state election law. *State ex rel. McCord*

v. Delaware Cty. Bd. of Elections, 106 Ohio St.3d 346, 2005-Ohio-4758, fn. 2. Fraud or corruption are not at issue in this case. We therefore review the matter to determine whether the board of elections abused its discretion or acted in clear disregard of election law when it refused to certify relator's petition, and in doing so we accord the requisite deference to the board's application of the law while giving less deference to the board's interpretation thereof.

III. Disposition

{¶ 15} The question before us is whether the board of elections abused its discretion when it denied ballot access to a declared candidate whose petitions were in all respects facially valid, but who inadvertently provided incorrect information to some potential signatories when soliciting their signatures.

{¶ 16} The general duties of the boards of election in Ohio with respect to nominating petitions are set forth by R.C. 3501.11, providing in pertinent part as follows:

Each board of elections shall exercise by a majority vote all powers granted to the board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall do all of the following:

* * *

(K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers, and, after certification, return to the secretary of state all petitions and nomination papers that the secretary of state forwarded to the board[.]

{¶ 17} Pursuant to R.C. 3501.39, it is the board's duty to determine, first, whether any petition is facially valid, and second, whether the petition should be invalidated for certain enumerated reasons:

(A) The secretary of state or a board of elections shall accept any petition described in section 3501.38 of the Revised Code unless one of the following occurs:

(1) A written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition is invalid, in accordance with any section of the Revised Code providing a protest procedure.

(2) A written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition violates any requirement established by law.

(3) The candidate's candidacy or the petition violates the requirements of this chapter, Chapter 3513 of the Revised Code, or any other requirements established by law.

{¶ 18} The parties have stipulated that relator's nominating petition, on its face, meets the legal requirements under R.C. 3501.38 to qualify her as candidate for the domestic seat. As set forth above, the board of elections is generally required to accept any petition that complies with that statute, with three exceptions. R.C. 3501.39(A). Two of these arise only when the board has received a written protest against the petition. R.C. 3501.39(A)(1) and (2). The board has received no written protest in this case, and these are thus inapplicable. The board here relies on the third exception, which arises when the "candidate's candidacy or the petition violates the requirements of [Chapters 3501 or 3513] * * * or any other requirements established by law." R.C. 3501.39(A)(3).

{¶ 19} The legal infirmity cited by the board of elections when rejecting relator's petition is that relator has violated the provisions of R.C. 3599.14, providing in pertinent part as follows:

(A) No person shall knowingly, directly or indirectly, * * *.

(1) Misrepresent the contents, purpose, or effect of the petition or declaration for the purpose of persuading a person to sign or refrain from signing the petition or declaration[.]

R.C. 3599.14 is a criminal statute that defines a fifth-degree felony. R.C. 3599.14(B); *State ex rel. Baur v. Medina Cty. Bd. of Elections*, 90 Ohio St.3d 165, 169 (2000). The statute expressly states that a violation must be "knowing," and this constitute the mens rea of the defined crime. *Id.* ("The record is devoid of evidence of a willful or knowing misrepresentation * * * by the * * * petitioners or any purpose on their part * * * .")

{¶ 20} The board of elections in its proceedings considering this matter has carefully and circumspectly concluded that relator made no more than an honest mistake when preparing her petition and describing to potential signatories the details of her candidacy. There is no hint in this matter of even the most remote potential for criminal

prosecution of relator. The record therefore demonstrates that as the case now stands, relator has not violated R.C. 3599.14. If relator has not violated R.C. 3599.14 through a knowing misrepresentation, that statute cannot serve as a basis for finding that relator's petition can be invalidated under R.C. 3501.39(A)(3). Relator's petition does not violate any requirements established by law, and R.C. 3501.39(A)(3) does not apply.

{¶ 21} Moreover, even if there were some assertion here that relator's conduct could give rise to a violation of R.C. 3599.14, the Supreme Court of Ohio's decision in *Baur* indicates, albeit in dicta, that such a violation of itself would not invalidate the petition: "[E]vidence of a violation of R.C. * * * 3599.14(A)(1) would not have invalidated the referendum petition. Instead, the General Assembly specifies * * * criminal sanctions for violations of R.C. 3599.14(A)(1)." (Citations omitted.) *Id.* at 169.

{¶ 22} In addition to relying on R.C. 3599.14 as it did in its own proceedings, the board of elections now argues the independent ground that the board is required to examine the sufficiency of a petition under R.C. 3501.11(K), and in this case was unable to verify the sufficiency of the petition because under the circumstances some of the signatures might be considered invalid. The board asserts that both relator's own testimony and that of several signatories substantiates the effect of the inadvertent misrepresentations. The board reasons that such signatures must be considered as not valid, and that there is no way to ascertain how many were thus obtained. The board proposes that it would be within the board's discretion to shift the burden to relator to demonstrate that a sufficient number of signatures are not so tainted. The board suggests that pursuant to its duty to maintain the integrity of the electoral process, it could reasonably require relator to establish, via affidavit or otherwise, that enough signatures were obtained that were not impacted by the erroneous representations.

{¶ 23} Courts must tread lightly when considering outcomes that would deny the voting public an opportunity speak on a candidate or issue: "Active participation in the election process is the foundation of democracy. Whether selecting a candidate for public office or deciding issues of public concern, voting is a basic right without which all other rights become meaningless. It follows that where the Ohio Constitution or statutes establishing the requirement for placing issues on election ballots create doubt, such doubt should be resolved in favor of providing the citizens with access to the ballot." *State*

ex rel. Lewis v. Hamilton Cty. Bd. of Elections, 74 Ohio St.3d 1201, 1202 (1995) (Moyer, C.J., concurring).

{¶ 24} The baseline requirement under Ohio election law is that a candidate submit facially valid signatures to a petition. Where exceptions exist, they are carefully circumscribed as set forth in the code sections discussed above addressing fraud and improper inducement. Beyond these defined exceptions, boards of election and courts would properly hesitate before venturing to examine the state of mind or degree of understanding of a person signing an election petition, much less before calling upon a candidate to explain these factors for each signature. The board here proposes what amounts to an informally-adopted supervalidation procedure. Such an additional procedural hurdle to candidacy would inevitably involve complexities that are difficult to implement by judicial fiat after the fact, and would be best left to the legislature to implement by detailed legislation. We decline to sanction such a burden-shifting precedent.

IV. Conclusion

{¶ 25} On these facts we find that the Franklin County Board of Elections had a clear legal duty to certify relator's name to the ballot as a candidate for the Franklin County Court of Common Pleas, Division of Domestic Relations seat with a term beginning January 5, 2013, that relator had a clear legal right to have her name so certified to the ballot, and that relator has no adequate remedy at law. We grant the requested writ of mandamus ordering the Franklin County Board of Elections to certify relator's name to the ballot.

{¶ 26} In addition to the requested writ, relator seeks an award of costs and attorney fees in this action. Because the matter involves a case of first impression and presents no basis in the underlying proceedings for such an award, we deny this request.

*Writ of mandamus granted;
costs and attorney fees denied.*

TYACK, J., concurs.
BROWN, P.J., dissents.

BROWN, P.J., dissenting.

{¶ 27} I respectfully dissent from the majority's ultimate disposition of this case. Pursuant to R.C. 3501.11(K), the board of elections has the authority to "[r]eview, examine, and certify the sufficiency and validity of petitions." Further, the decision of the board "is final, and is subject to judicial review only for fraud, corruption, abuse of discretion, or a clear disregard of statutes or applicable legal provisions." *State ex rel. Zonders v. Delaware Cty. Bd. of Elections*, 69 Ohio St.3d 5, 7 (1994). Local boards of election undertake the essential function of preserving the integrity of the electoral process. In fulfilling its duty, the board of elections ("board") must be given discretion to review and examine the sufficiency and validity of the petitions; however, such discretion cannot be unlimited. In the instant case, the sole basis cited by the board for denying the protestor's appeal was a violation of R.C. 3599.14. The board acknowledged, however, that any misrepresentations in this case were unintentional; therefore, the board itself has negated any finding of "knowingly" as required by that statute.

{¶ 28} Pursuant to R.C. 3501.39(A)(3), the board may invalidate a petition or declaration of candidacy if it violates R.C. Chapters 3501 and 3513, "or any other requirements established by law." To the extent the board may have based its decision to refuse certification on a requirement of law other than R.C. 3599.14, it has failed to adequately articulate a legal basis, impeding our ability to review for abuse of discretion. I would therefore grant relator a limited writ, remanding this matter to the board for the purpose of clarifying the basis for its decision refusing to certify relator's candidacy.
