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In Re: St. Thomas Township election

IN RE: ELECTION OF TOWNSHIP SUPERVISORS
OF ST. THOMAS TOWNSHIP,
FRANKLIN COUNTY, PENNSYLVANIA
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Miscellaneous Docket — Volume 2003, Pages 2823, 2824 and 2825

Petitions for ballot recount under the Election Code

1. The Pennsylvania Election Code, which provides for vote-counting by way of an automated, electronic optical scan device, requires that a voter blacken the oval next to a candidate's name on the ballot in order for that vote to be deemed valid.
2. The Pennsylvania Supreme Court has stated that the Commonwealth's voting laws should not frustrate a citizen's right to vote, but should instead uphold the voter's choice where the voter's clear intent can be determined.
3. Constrained by the legislative scheme, the trial court was unable to count certain ballots as votes for either candidate, despite what the trial court found was a clear intent on the part of those voters to cast their ballots for the write-in candidate.

Appearances:

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OPINION

Herman, J., February 6, 2004

Introduction

Before the court are three petitions for recount of votes in accordance with the Pennsylvania Election Code for the office of Township Supervisor, Saint Thomas Township, Franklin County. The court recognizes the extreme importance of this matter and will dispense with the full discussion ordinarily reserved for such issues in the interest of a prompt decision.

Suffice it to say that on November 4th, 2003 the citizens of Franklin County participated in a general election in which the office of township supervisor in Saint Thomas Township, Franklin County held by David C. Ramer was before the voters for re-election. Mr. Ramer's name appeared on the ballot in the space provided for that office and no other candidates were named on the ballot for that office. Frank Stearn, a registered voter of Saint Thomas Township, conducted a write-in campaign for this same office. At the

conclusion of the election the Franklin County Election Board began the official vote tabulation as required by law. Upon completion of the count but prior to certification of the count, three qualified electors of each of the three election districts of Saint Thomas Township filed petitions with this court to open the ballot boxes and conduct a court supervised manual vote count in accordance with section 3261 of the Election Code (25 P.S. 3261). The court granted this request and appointed two registered voters and residents of Franklin County to open the ballot boxes and manually conduct the count. The ballot boxes were opened on December 9th, 2003 and the count was completed under the supervision of the court in the presence the candidates and counsel for the candidates on December 15th, 2003.

During the recount, counsel for the candidates were instructed to designate the individual ballots they intended to challenge. Out of the total of 1,200 votes cast for either Ramer or Stearn, counsel selected 88 votes for review by the court. Excluding the group of 88 challenged votes, the recount showed 564 votes for David C. Ramer and 548 votes for Frank Stearn.

On January 23rd, 2004 the court held argument on the candidates' positions with regard to the challenged votes. At that time counsel advised the court that the candidates had come to an agreement that the number of challenged votes was reduced by 40 to 48 and that of that group of 40 votes, 3 votes should be assigned to Ramer and 37 votes should be assigned to Stearn. This adjustment positioned the candidates at 567 votes for Ramer and 585 for Stearn. The task before the court is to determine which of the remaining 48 challenged votes have been validly cast and if validly cast, for which candidate did the voter intend to vote.

Award of the Challenged Votes

Of the remaining 48 challenged votes, the largest and most troublesome category concerns 17 ballots on which the voter failed to blacken the oval next to the write-in candidate's name. Frank Stearn was the only person to wage a write-in campaign for the office of township supervisor. Mr. Stearn distributed a label approximately 2 x 3 inches in size which contained a request for a vote and a removable smaller sticker which could be placed on the line provided for a write-in for the office of township supervisor. The 17 ballots in question all have either the Frank Stearn sticker or the name Frank Stearn written in the space provided for a write-in campaign or close thereto. However, the voter did not blacken the oval next to the sticker or written name in accordance with the instructions on the ballot. Each ballot provided to the voters in the municipal election provided the following instruction for voting for a write-in candidate:

INSTRUCTIONS TO VOTER

...4. To vote for a person whose name is not on the ballot, you must blacken the oval to the left of the line provided, and write, print or paste the name in the blank space provided for that purpose.

In addition the Election Code at 25 P.S. Section 3031.12(b)(3) provides:

...the voter shall vote for the candidates of his choice for each office to be filled, according to the number of persons to be voted for by him for each office, by making a cross (x) or check (√) mark or by making a punch or marks sense mark in the square opposite the name of the candidate, **or he may so mark the write-in position provided on the ballot for the particular office and, in the space provided therefore on the ballot and/or ballot envelope, write the identification of the office in question and the name of any person not already printed on the ballot for that office, and such mark and written insertion shall count as a vote for that person for such office.** (Emphasis added.)

On July 1, 2003, the Pennsylvania Department of State adopted standards on what constitutes a vote. These standards are published in Pa. Bulletin, Vol. 33, No. 31 August 2, 2003.

The preamble at page 3935 states:

The definition of "Mark Sense mark" at page 3935 includes, "A properly cast vote on an optical scan voting system which can include blackening the oval ..."

This standard is consistent with Section 303.12(b)(3) of the Election Code that requires a voter for a write-in to mark the written portion provided on the ballot and write-in the name of the person to "count as a vote for that person for such office."

These specific provisions of the Election Code and the standards promulgated by the Department of State indicate that a voter's failure to blacken the oval next to the name of a candidate written in on the ballot or a candidate whose sticker was placed on the ballot will invalidate the voter's choice. We note in passing that the standards of the Department of State are not binding on the Court but are intended as a guide as to what constitutes a valid vote.

In the vote counting process, an electronic optical scan device reads the areas of the ovals to determine if a voter has made a write-in choice. If the oval is not blackened, the scanner will not pick-up the voter's choice. The specific provision of Section 3031.12(b)(3) of the Election Code defining a validly cast write-in vote is designed to prevent fraud, expedite the vote counting process and protect the right to vote. The Pennsylvania Supreme Court has stated that our voting laws should not frustrate a citizen's right to vote but instead should uphold the voter's choice where the voter's clear intent can be determined. *Appeal of James*, 377 Pa. 405, 105 A.2d 64 (1954). In reality, there is a clear conflict between the legislature's intention to automate the vote tabulating process and the voter's right to have a ballot count in accord with the voter's intent.

These interests are difficult to reconcile. In the end we are constrained by the current state of the law, which takes the decision on the interpretation of these 17 votes out of the hands of the Court. In the case of *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Cmwlth. 2002), the Commonwealth Court of Pennsylvania, in a similar situation, instructs us that the legislative scheme for providing fair elections as contained in the Election Code must be strictly enforced. The reasoning is that the strength of citizen's right to vote depends on the integrity of the entire election process.

When dealing with a comprehensive and carefully drawn legislative scheme for the conduct of elections, we must take care not to consider the particular elements of the scheme without regard to their place in the entire structure. Otherwise, the legislative plan may be frustrated by deviations, each seemingly reasonable in itself but destructive of the carefully designed structure.

The technicalities of the Election Law (and there are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed. *Appeal of Yeager*, 460 Pa. 537, 333 A.2d 902 (1975).

As noted previously, this court has difficulty in following this mandate -- where it clearly appears these 17 voters intended to cast a vote for write-in candidate Frank Stearn. We believe this matter needs serious attention from the Legislature and the Department of State. Nonetheless, we will follow what we believe is the current state of the law. The result is that the 17 votes which are identified by number in the category of "No marked oval" on the Addendum to this Court's Opinion will count as a "no vote" and will not be awarded to either candidate in accordance with Section 3031.12(b)(3) of the Election Code. See also *In re: Brundzo*, 53 Cumb. 7 (2003).

There remains for consideration by the court 31 votes which are subject to various challenges by the candidates and we will address these votes by category.

First is the ballot identified as 2-51. This ballot contained a valid vote for a straight-party ticket and in addition the name of Frank Stearn was written in the write-in position for township supervisor but the oval next to his name was not blackened. As noted previously, this constitutes an invalid vote for the write-in candidate Frank Stearn. However, since candidate Ramer was running as the Democrat/Republican candidate, he would receive the benefit of the validly-cast vote for the straight party choice and this vote would be awarded to him pursuant to Section 3031.12(b)(3) and (b)(4); Standard Optical Scan 8.

The next ballot is designated as 3-12 on which the voter placed a sticker for the write-in candidate Frank Stearn directly over the printed name of David Ramer and did not blacken the oval next to either candidate's name. This is an invalid vote under Section 3031.12 b(3) and constitutes a "no vote" for either candidate.

The next grouping contains 8 ballots, which are specifically by number on the Addendum to the Court's Opinion. On these ballots the voter either blackened the oval or placed an "X" in the oval next to Ramer's name. These are valid votes under Section 3031.12(b)(3). All 8 ballots should be counted as votes for Ramer. In particular, we note the following:

(a) On ballots 1-2, 2-29, 2-31, and 2-34, although the voter placed the Stearn sticker on the ballot in the proper location, the voter did not mark or blacken the oval next to Stearn's name as required by Section 3031.12(b)(3). Also, on ballots 2-29 and 2-31, although the voter placed the Stearn sticker on the ballot, the voter blackened the oval, which indicates his or her intention to vote a straight-party ticket in addition to properly marking the target area for candidate Ramer. These four ballots should be counted as votes for Ramer. Section 3031.12(b)(3),(b)(4).

(b) On ballots 2-50 and 3-11, the voter blackened the oval, which indicates his or her intention to vote a straight-party ticket, and properly marked the target area for candidate Ramer. These two ballots should be counted for Ramer. Section 3031.12(b)(4).

There now remain 20 votes in the challenged group and each ballot is marked differently and is not subject to easy categorization. We will identify them as follows:

A. **Ballots 2-38, 2-39, 2-40.** Each contains an invalid over-vote under Section 3031.12(b)(3). Specifically on ballot 2-38 the voter wrote in Stearn's name and blackened the corresponding oval, but the voter also blackened in the oval next to Ramer's name and placed an "X" through the Ramer oval. On 2-39, the voter placed a small Stearn sticker in the proper spot and blackened the corresponding oval, but the voter also placed a double "X" mark in the oval next to Ramer's name. Ballot 2-40 features two blackened ovals -- one next to each candidate's name. Ballots 2-38, 2-39 and 2-40 each constitute an invalid over-vote under Section 3031.12(b)(3) and 3031.13(e).

B. **Ballot 2-36.** On ballot 2-36, an oval is blackened next to the blank line where a write-in candidate's name would appear, but the voter did not write a name on that line. The voter inserted a sticker with Frank Stearn's name, but placed it outside the space provided for that office. This ballot is not a valid ballot under Section 3031.12(b)(3); Standard Optical Scan 14.

C. **Ballots 1-9 and 3-1.** On ballot 1-9, the voter wrote Stearn's name on the appropriate line, blackened the corresponding oval, and also placed a Stearn sticker under Stearn's name. In ballot 3-1, the voter placed the sticker with Stearn's name in the proper spot and also blackened in the corresponding oval. The court finds that these 2 ballots should be counted as votes for Stearn. Section 3031.12(b)(3); Optical Scan Standard 14.

D. **Ballots 1-12, 2-25, 2-53 and 2-54.** The voter blackened the oval on the front page of the ballot, indicating his or her intention to vote a straight-party ticket. The voter also placed a Stearn sticker on the ballot and blackened the oval next to Stearn's name. However, instead of being placed on the blank line designated for a write-in candidate, the sticker completely covers Ramer's name and is therefore in the wrong place. These ballots should be counted as votes for Ramer. Section 3031.12(b)(3) and (b)(4); Optical Scan Standard 8.

E. **Ballots 2-4, 2-19, 2-46 and 2-47.** The voters completely covered candidate Ramer's name with a Frank Stearn sticker and blackened the oval next to the Stearn sticker on the line that contained the printed name of candidate Ramer. According to Section 3031.12(b)(3) of the Election Code these votes are not in proper position to be validly counted for Frank Stearn. However, the court believes in this instance the voter's choice is clear and should be upheld. Appeal of James, 377 Pa. 405, 105 A.2d 64 (1954). Therefore, these four votes are awarded to candidate Stearn.

F. **Ballots 2-43, 2-44 and 2-59.** The voter did not write in Stearn's name on the blank line designated for a write-in candidate, but did properly place a sticker directly beneath the blank line, and blackened the oval next to Stearn's name. These 3 ballots should be counted as votes for Stearn. Section 3031.12(b)(3); Optical Scan Standard 14.

G. **Ballots 1-8 and 2-48.** The voter blackened the oval on the first page of the ballot, indicating his or her intention to vote a straight-party ticket. The voter placed a Stearn sticker on the blank line designated for a write-in candidate and also blackened the oval next to Stearn's name. The Court finds that these two ballots should be counted as votes for Stearn. Section 3031.12(b)(3) and (b)(4).

H. **Ballot 2-10.** The voter wrote in the name of "Sterner" and blackened the oval next to the line for the write-in candidate. The court believes that this is a clear indication of the voter's intent to vote for candidate Stearn and this vote will be awarded to Frank Stearn. Appeal of James, 377 Pa. 405, 105 A.2d 64 (1954).

I. **Ballot 3-2.** The voter wrote what appears to be "Stiner" on the ballot. The court finds that this writing is sufficient to indicate an intent to vote for candidate Stearn in view of the fact that candidate Stearn was the only person who waged a write-in campaign for the office of township supervisor. Appeal of James, 377 Pa. 405, 105 A.2d 64 (1954).

As a result of the above findings, with regard to the 88 challenged votes, the court determines that there are 598 votes for candidate Frank Stearn and 580 votes for David C. Ramer. There are 22 no votes, which are not to be awarded to either candidate. Therefore the court will enter a Order directing the Franklin County Elections Board certify the results of the election for the office of Township Supervisor in Saint Thomas Township in accordance with this determination.

ORDER OF COURT

Now this 6th day of February 2004, in accordance with the court's determination of the challenges to the 88 votes arising out of the petitions for recount in the matter of the election for the office of supervisor for Saint Thomas Township, Franklin County, the court hereby orders the Franklin County Elections Board to forthwith certify the following results for the said office:

1. 598 votes for Frank Stearn.

2. 580 votes for David C. Ramer.
3. 22 no-votes not to be award to any candidate.
4. All other votes cast in the election to be certified in accordance with the Board's first official count.