IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO, ex rel DENNIS J. VARNAU,	)	**CASE NO. CA2008-09-06**
	)	
	)	**ACCELERATED CALENDAR**
Relator/Appellant,	)	
	)	
-vs-	)	
	)	
BROWN COUNTY BOARD OF ELECTIONS,	)	
	)	
	)	
Respondent/Appellee.	)	

APPEAL FROM COURT OF COMMON PLEAS
FOR BROWN COUNTY, OHIO

BRIEF OF APPELLANT DENNIS J. VARNAU

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STATEMENT OF THE CASE

Procedural Posture

On May 23, 2008, the Appellant filed a Petition for Writ of Mandamus in the Brown County Common Pleas Court seeking to compel the Brown County Board of Elections to accept as valid the Appellant's protest of a candidate for the office of Brown County Sheriff. A Magistrate of the Court overruled the Appellee's Motion to Dismiss the Petition for failure to state a claim. On the Appellee's Motion to Set Aside the Magistrate's Decision, a judge of the Common Pleas Court, by assignment, overruled the Magistrate's Decision and dismissed the Petition on September 9, 2008. This timely appeal was then filed.

Statement of Facts

The Petition for Mandamus (filed May 23, 2008) set forth the following facts (which, for purposes of the Appellee's Motion to Dismiss for failure to state a claim, per Ohio R. Civ. P. 12(B)(6), are to be accepted as true and all inferences therefrom to be construed in Appellant's favor[1]). Petitioner (Appellant) filed a nominating petition as nonpartisan independent candidate for the office of Brown County Sheriff for the November 4, 2008, general election, and has been certified by the Brown County Board of Elections (BCBOE) as a valid candidate to be placed on the November ballot. After the March 4, 2008, primary election results Appellant was researching the historical events of the tenure in office of the current sheriff (Wenninger), now the Appellant's opponent in the November 4, 2008 election. This research suggested that Wenninger's Ohio Peace Officers' Training Academy (OPOTA) certificate expired on January 1, 2005. If true, Wenninger would be ineligible to be a candidate for sheriff in the general election.

Appellant filed a written protest against Wenninger's candidacy with the BCBOE on April 11, 2008 (Exhibit 1 to the Petition). The protest was denied May 9, 2008 (Exhibit 2) as not being

allowed under the 2008 Ohio Candidate Requirement Guide (OCRG) published by the Ohio Secretary of State (Exhibit 3). Under those regulations Appellant was not allowed to protest Wenninger's *partisan* candidacy prior to the March 4, 2008 primary only because Appellant, even though a qualified elector, is not "a member of the *same party* as the candidate whose petition is the subject of the protest." OCRG, p. 21, ¶ 3, "PROTESTS" (emphasis added). Under those regulations Appellant is denied the right to protest the candidacy of his opponent, either before the primary election on March 4, 2008, or after the primary election and before the general election on November 4, 2008, only because they are not in the same party.

Appellant's opponent however *is* an "elector eligible to vote on the candidacy of a candidate for nonpartisan office [and] *may protest* [Appellant's] candidacy. Because Appellant is an independent candidate, Appellant's opponent could protest Appellant's candidacy up to May 30, 2008. OCRG, p. 22, ¶2. Petition for Mandamus, May 23, 2008, ¶ 1-7. The Petition for Mandamus therefore alleged that the determination that the protest was invalid, because of timeliness and eligibility, only because of party membership (not belonging to the same party, as well as running as a non-party, independent candidate), was unconstitutional. Petition for Mandamus, May 23, 2008, ¶ 8-10.

The Respondent, BCBOE (hereinafter Appellee) filed a Motion to Dismiss the Petition pursuant to Ohio R. Civ. P. 12(B)(6) on June 19, 2008 (Amended June 23, 2008), for failure to state a claim. A Magistrate overruled the Motion and ordered the matter set for trial, finding the allowance of a candidate to challenge a non-party or independent candidate, but not the other way around, or setting different time limits for challenges by candidates depending on party affiliation, at least set forth a triable claim. Order, Aug. 11, 2008. Trial was set on the merits for August 21, 2008. Notice, August 8, 2008.

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[1] State ex rel. Fuqua vs. Alexander, 79 Ohio St.3d 206, 207, 1997-Ohio-169.

The Appellee filed a Motion to Set Aside the Magistrate's Order (Aug. 18, 2008), and a "Proposed Statement of Proceedings" purporting to set forth the posture of the case and the presentation before the Magistrate. The trial was reset to September 4, and then apparently, September 11. Notice, August 18, 2008. On September 8, the pending Motion to Set Aside was decided by a visiting judge (Judge David Deuce Wilson). The Judge accepted as true the Appellee's "Proposed Statement of Proceedings," overruled the Magistrate's Decision, and granted the Appellee's Motion to Dismiss the Petition for Mandamus, dismissing the case and vacating the trial. Judgment Entry, September 9, 2008. This timely appeal was then filed.

FIRST ASSIGNEMENT OF ERROR: THE TRIAL COURT ERRED IN ACCEPTING AND CONSIDERING THE "PROPOSED STATEMENT OF PROCEEDINGS" ON A MOTION TO SET ASIDE A MAGISTRATE'S ORDER OVERRULING A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

First Issue Presented for Review: A trial court cannot consider matters outside the Petition itself in ruling on a Motion to Dismiss for Failure to State a Claim.

The trial court erred in considering a unilaterally filed "proposed statement of proceedings" in ruling on Motion to Set Aside a Magistrate's Decision overruling a Motion to Dismiss for Failure to State a Claim. Judgment Entry, Sept. 9, 2008, p. 1. The law is clear that on a motion to dismiss for failure to state a claim, the "facts" to be considered are only those in the target pleading (here, the Petition for Mandamus), and those are all to be taken as true. State ex rel. Fuqua vs. Alexander, 79 Ohio St.3d 206, 207, 1997-Ohio-169. This includes all material attached to and incorporated into the pleading. State ex rel. Crabtree vs. Franklin County Board of Health, 77 Ohio St.2d 247, 1997-Ohio-274. A trial court errs in considering any outside material. State ex rel. Fuqua, *supra.* Here, the trial court accepted a unilaterally filed and drafted "proposed statement of proceedings." That was error and should be reversed, and the "proposed statement of proceedings" not be considered for any purpose, including in this appeal.

Second Issue Presented for Review: A trial court cannot consider a unilateral "proposed statement of proceedings" in ruling on a motion to set aside a magistrate's decision or order.

Ohio R. Civ. P. 53(D) provides the procedure for challenging rulings by a magistrate, and there is no procedure for a "proposed statement of proceedings," filed by one party, as opposed to a transcript or sworn affidavit. Generally, failure of an objecting/moving party to document the actual proceedings before the magistrate is a waiver of any factual error and requires the magistrate's findings to be accepted as true. See, e.g., Music Express Broadcasting vs. Aloha Sports, Inc., 161 Ohio App.3d 737, 2005-Ohio-3401. The trial court therefore should not have considered the "proposed statement of proceedings" for any purpose and nor should this Court.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DISMISSING THE PETITION FOR WRIT OF MANDAMUS.

First Issue Presented for Review: A rule that allows a partisan candidate to challenge an independent candidate's candidacy, but does not allow the independent candidate to challenge the partisan candidate, and provides different time limits for doing so, is a denial of equal protection of the law and due process of law.

The trial court erred in dismissing the Petition for Writ of Mandamus for failure to state a claim. Judgment Entry, Sept. 9, 2008. Appellant sought a writ of mandamus directing the Brown County Board of Elections (BCBOE) to follow a constitutional course in accepting Appellant's protest of Wenninger's candidacy for sheriff in the 2008 general election. Appellant contended that the candidate protest provisions of R.C. 3513.05 and 3513.262 violated his right to equal protection, as guaranteed in Section 2, Article I of the Ohio Constitution and the Fourteenth Amendment to the U.S. Constitution. The BCBOE held that, under the guidelines and regulations set forth in the 2008 Ohio Candidate Requirement Guide (OCRG), published by the Ohio Secretary of State (Exhibit #3), Appellant had no right to protest Wenninger's candidacy only because he is an independent and not a member of the opponent's political party. The Petition was dismissed on a motion under Civil Rule 12(B)(6).

"[T]he fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits." State ex rel. Becker v. Eastlake (2001), 93 Ohio St.3d 502, 505. "Fairness and justice are best served when a court disposes of a case on the merits." Dehart v. Aetna Life Ins. Co. (1982), 69 Ohio St.2d 189, 193. See also, Wellington v. Mahoning Cty. Bd. of Elections, 117 Ohio St.3d 143, 2008-Ohio-554, ¶33. "A motion to dismiss, filed pursuant to Civ.R. 12(B)(6), is a procedural mechanism which tests the sufficiency of the complaint." State ex rel. Hansen v. Guernsey Cty. Bd. of Commrs, 65 Ohio St.3d 545, 548, 1992-Ohio-73. In determining whether a complaint states a claim upon which relief can be granted, all factual allegations of the complaint must be presumed to be true and all inferences must be made in favor of the nonmoving party. Perez v. Cleveland (1993), 66 Ohio St.3d 397, 399; State ex rel. Jennings v. Nurre (1995), 72 Ohio St.3d 596, 597. In order to dismiss a complaint under Civil Rule 12(B)(6), it must appear beyond doubt that the party filing the complaint or petition can prove no set of facts warranting relief. O'Brien v. Univ. Community Tenants Union, Inc. (1975), 42 Ohio St.2d 242, syl. See also, State ex rel. Craig v. Luebbe, 2004-Ohio-6933, ¶6 (Fay. App.); Knoop v. Orthopedic Consultants of Cincinnati, Inc., 2008-Ohio-3892, ¶8 (Cler. App.).

A court reviewing such a motion, either a trial court or appellate court conducting *de novo* review of a trial court's decision to dismiss a complaint under Civil Rule 12(B)(6), is confined to the allegations set forth in the complaint or Petition and cannot consider outside materials. State ex rel. Fuqua vs. Alexander, 79 Ohio St.3d 206, 207, 1997-Ohio-169. The court may, however, consider written documents if they are attached to the complaint. State ex rel. Crabtree vs. Franklin County Board of Health, 77 Ohio St.2d 247, 1997-Ohio-274; National City Mtge. Co. v. Wellman, 174 Ohio App.3d 622, 2008-Ohio-207, ¶17; Knoop, 2008-Ohio-3892, ¶9.

The allegations of this Petition establish that the candidate protest provisions of R.C.

3513.05 and 3513.262 are unconstitutional, insofar as they deny an independent the right to protest a partisan candidate's candidacy for elected office, while allowing any qualified elector the right to protest an independent candidate's candidacy -- regardless of party affiliation. The candidate protest provisions of R.C. 3513.05 and R.C. 3513.262 in combination operate to prohibit Appellant from protesting the Wenninger candidacy *at any time*, but allow Wenninger to protest the nominating petition of Appellant until 4:00 P.M. on Friday May 30, 2008, in violation of the right to equal protection of the law as guaranteed in Section 2, Article I of the Constitution of the State of Ohio and the Fourteenth Amendment of the Constitution of the United States. As an independent candidate, Appellant's candidacy could have been protested by any partisan (Democrat or Republican) elector up to May 30, 2008, in accordance with R.C. 3513.262. Appellant's protest was filed on April 11, 2008. Under R.C. 3513.05, Appellant, an independent, was denied the right to challenge any partisan candidate's candidacy at any time. There is no rational relationship to a legitimate state goal or interest in the unequal treatment of independent candidates versus partisan candidates under the protest provisions.

"In order to be entitled to the writ of mandamus, relator must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of the respondents to provide it, and the lack of an adequate remedy in the ordinary course of the law." State ex rel. Moore v. Malone, 96 Ohio St.3d 417, 2002-Ohio-4821, ¶20. See also, State ex rel. Steele v. Morrissey, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶16. "A petition in mandamus will be deemed to state a claim, for the purposes of Civ.R. 12(B)(6), so long as it alleges the existence of a legal duty and the want of and adequate remedy at law." State ex rel. Bush v. Spurlock (1989), 42 Ohio St.3d 77, 80; State ex rel. Alford v. Willoughby (1979), 58 Ohio St.2d 221, 224; see also, State ex re. Karmasu v. Tate (1992), 83 Ohio App.3d 199, 202. As recognized by the Ohio Supreme Court:

> [W]e have at times permitted mandamus actions to test the constitutionality of legislation. See, e.g., State ex rel. Mill Creek Metro. Park Dist. Bd. of Commrs. v. Tablack (1999), 86 Ohio St.3d 293, 297, 714 N.E.2d 917 ("We have recognized, however, that the constitutionality of a statute or ordinance may in certain circumstances be challenged by mandamus"); State ex rel. Watson v. Hamilton Cty. Bd. of Elections (2000), 88 Ohio St.3d 239, 242, 725 N.E.2d 255 ("It is appropriate to consider the merits of Watson's constitutional claim in this mandamus action because an action for declaratory judgment and prohibitory injunction would not be sufficiently speedy in this expedited election case").

State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. Of Workers' Comp., 108 Ohio St.3d 432, 2006-Ohio-1327, ¶44; see, also, State ex rel. Purdy v. Clermont Cty. Bd. of Elections (1997), 77 Ohio St.3d 338, 341; State ex rel. Zupancic v. Limbach (1991), 58 Ohio St.3d 130, 133. As the Supreme Court further recognized:

> This court has previously held that a mandamus action may test the constitutionality of a statute. State, ex rel. Michaels, v. Morse (1956), 165 Ohio St. 599, 608 ("[t]he right of Appellant to question, by mandamus, the constitutionality of the statute is recognized in Ohio"); State, ex rel. Brown, v. Summit Cty. Bd. of Elections (1989), 46 Ohio St.3d 166, 167. Moreover, where this court has found a statute unconstitutional *it may direct the public bodies or officials to follow a constitutional course in completing their duties*. See State, ex rel. Park Invest. Co., v. Bd. of Tax Appeals (1971), 26 Ohio St.2d 161 (where this court in a mandamus proceeding directed the Board of Tax Appeals to comply with this court's earlier decision in the same case after finding two tax statutes unconstitutional).

Zupancic, 58 Ohio St.3d at 133 (emphasis added).[2]

At unnumbered page 6 of Respondent's Memorandum in Support of Respondent's Amended Motion, Appellee acknowledges that Appellant does not have an adequate remedy in the ordinary course of law: "Because the Board of Elections did not invalidate Mr. Wenninger's Declaration of Candidacy and no protest was filed before January 15, 2008, pursuant to R.C. 3501.39, *the Board of Elections must accept Mr. Wenninger's candidacy as valid and Relator does not have a legal remedy at law*." (Emphasis added).

In State, ex rel. Brown v. Summit Cty. Bd. of Elections, *supra* at 168, the Court stated, citing State, ex rel. Pressley v. Indus. Comm. (1967), 11 Ohio St.2d 141:

> [A] mandamus action will lie where a public officer or agency is under a clear legal duty to perform an official act and there is no adequate remedy in the ordinary course of the law. The board of elections in this case was merely following the residency requirement of the Stow Charter and, at the time of its ruling, had no clear duty to place the name of the Appellant on the ballot because it could not declare a city charter section unconstitutional. However, if we determine that the charter section in question is unconstitutional, *then the duty of the board of elections to place the name of the Appellant on the ballot will relate back to the time Appellant filed his nominating petition and a writ of mandamus will properly issue."* (emphasis added)

If the court finds that the protest provisions in R.C. 3513.05; 3513.262 are unconstitutional, as applied to protests of candidacy, then the court has the power and authority to issue a writ of mandamus and order the BCBOE to accept Appellant's protest of April 11, 2008 as valid and timely filed. It is a violation of equal protection and due process of law to allow only partisan party candidates to challenge an independent's candidacy, and allow time to do so that this independent candidate met, but not the other way around. The essence of these claims is that no rational relationship exists between the terms of the ordinance and a legitimate government purpose. Romer vs. Evans, 517 U.S. 620, 631 (1996); Gustafson vs. City of Lake Angelus, 76 F.3d 778, 790 (6th Cir. 1996). These allegations assert Fourteenth Amendment protection against denial of privileges and immunities. See Saenz v. Roe, 526 U.S. 489 (1999).

To the extent it creates non-uniform standards -- both as to time and eligibility based on political party candidacy -- for the challenge of an opponent's eligibility to run for the disputed office, it is an equal protection violation. As the United States Supreme Court stated it:

> The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary. . . . As seems

[2] It is this authority that permits, and compels, this Court to issue the Writ directly to the BCBOE and without further consideration by the trial court or any remand. See also, State ex rel. Smart v. McKinley (1980), 64 Ohio St.2d 5, citing State ex rel. Tulley v. Brown (1972), 29 Ohio St.2d 235, 237.

> to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county, but indeed within a single county from one recount team to another. . . . This is not a process with sufficient guarantees of equal treatment. . . . [T]here must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Bush v. Gore, 121 S. Ct. 525 (2000). Substantive due process includes the right that government action, that deprives one of life, liberty, or property, be rationally related to health, safety, or welfare of the community, see, e.g., Nebbia vs. New York, 291 U.S. 502 (1934); and protects fundamental rights. See Moore vs. City of East Cleveland, 431 U.S. 494 (1977):

> [w]ithout doubt [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges, long recognized . . . as essential to the orderly pursuit of happiness by free men [and presumably also women].

Meyer vs. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added). See also Craigmiles vs. Giles, 110 F.Supp.2d 658, 661 (E.D. Tenn. 2000) ("The touchstone of due process is protection of the individual against arbitrary action of the government"), quoting County of Sacramento vs. Lewis, 523 U.S. 833, 845 (1998). Liberty interests and fundamental constitutional rights are not necessarily the same things. See, e.g., Cruzan vs. Director, Missouri Department of Health, 497 U.S. 261, 279 n.7 (1990); Washington vs. Glucksberg, 117 S.Ct. 2258 (1997). Restrictions on the simple right to practice a profession -- or run for public office one would hope -- can be a deprivation of liberty, subject to substantive due process analysis. Conn vs. Gabbert, 119 S.Ct. 1292 (1999).

It is not "equal treatment," it is not a "uniform standard," and it is indeed arbitrary, when a party member and a non-party member each file an election protest on the very same day, and one would be valid, and the other not, merely because of political party affiliation. The BCBOE

agreed that independent voters have been disenfranchised "from challenging the qualifications of a party candidate," but were bound to follow the OCRG. Petition, Exhibit # 3.

Appellee cited Whitman v. Hamilton Cty. Bd. of Elections, 97 Ohio St.3d 216, to support the premise that Appellant's proper legal remedy is a *quo warranto* action. However, the Ohio Supreme Court stated in Whitman, *supra* at 217, that "Whitman's mandamus claim is an ill-disguised request for prohibitory injunctive relief: to prevent Nelson's candidacy at the November 5, 2002 general election." Thus, Whitman does not apply.

Any remedy should be aimed at making the Appellant constitutionally whole without further delay. In State ex rel. Smart v. McKinley (1980), 64 Ohio St.2d 5, citing State ex rel. Tulley v. Brown (1972), 29 Ohio St.2d 235, 237, the Ohio Supreme Court stated that "the [Appellant] need not follow a suicidal course under the 'ordinary course of the law' doctrine," which in that case meant that the Court allowed Petitioner Smart to file her mandamus petition as an original action, circumventing the normal appellate process, since the election was less than one week hence. Here, the November 4th general election is approximately six weeks away. The Court cannot now gaze into a "crystal ball" to determine the outcome of a future election as a prophetic solution to the validity of an underlying protest not before this Court, thereby completely avoiding and ignoring the constitutional questions at issue.

Appellant, whether certified by the BCBOE as a valid candidate or not, had absolutely no statutory right under the current election laws, including R.C. 3501.39, to challenge Wenninger's candidacy at any time prior to the primary election, nor after, whereas Wenninger had the statutory right to challenge Appellant's candidacy up to May 30, 2008. This dichotomy depicts a clear disparity in the statutory rights of two individuals certified as candidates for the same elected office of sheriff, in violation of Appellant's constitutional rights under both the Ohio and

U.S. Constitutions. The issue before this Court is not whether the substantive material contained within Appellant's underlying protest to the BCBOE has merit or not, but rather that Appellant's constitutional rights were violated on May 9, 2008, when his protest was rejected.

CONCLUSION

Therefore, Appellant is entitled to a writ of mandamus directing the BCBOE to accept his April 11, 2008 protest of Dwayne Wennigner's candidacy, and would ask this Court to grant same, as to do otherwise forces the Appellant to take that "suicidal course" for protection of his constitutional rights; or in the alternative only, remand to the trial court for a hearing on the merits of the mandamus petition.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon Mary McMullen, Attorney for Respondent/Appellee, 200 East Cherry Street, Georgetown, Ohio, 45121, by ordinary U.S. mail this ___ day of September 2008.

____

Thomas G. Eagle (#0034492)