IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY, OHIO

STATE ex rel. DENNIS J. VARNAU,	*	Case No.: CA 2008-09-06
	*	
Relator-Appellant	*	
	*	On Appeal from the Court of Common
vs.	*	Pleas, Brown County, Ohio
	*	
BROWN COUNTY BOARD OF ELECTIONS	*	Case No. CVH 2008-0566
	*	
	*	ACCELERATED CALENDAR
Respondent-Appellee	*	
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BRIEF ON BEHALF OF RESPONDENT/APPELLEE

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THOMAS F. GRENNAN (#0026008)
Prosecuting Attorney

MARY McMULLEN (#0066589)
Assistant Prosecuting Attorney

Brown County Prosecutor's Office
200 East Cherry Street
Georgetown, Ohio 45121
(937) 378-4151

COUNSEL FOR APPELLEE

THOMAS G. EAGLE (#0034492)
3386 N. State Rt. 123
Lebanon, Ohio 45036
(937) 743-2545

COUNSEL FOR APPELLANT

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Authorities Cited

I. STATEMENT OF THE CASE

A. Procedural Posture

The Relator/Appellant, Dennis J. Varnau ("Varnau"), filed a Petition for Writ of Mandamus in the Brown County Court of Common Pleas on May 23, 2008. The Respondent, Brown County Board of Elections ("the Board"), filed a Motion to Dismiss on June 19, 2008 and an Amended Motion to Dismiss on June 23, 2008. Varnau filed a response and the Board filed a reply. A hearing on the Motion to Dismiss was held in front of Magistrate Nathan A. Thompson on July 31, 2008 at which time the parties argued their respective positions and no evidence was taken.

On August 11, 2008, the magistrate denied the Motion to Dismiss. On August 18, the Board filed a Motion to Set Aside Magistrate Order and a Proposed Statement of Proceedings. On September 9, 2008, Judge David Duce Wilson, sitting by assignment, granted the Board's Motion to Set Aside and Amended Motion to Dismiss. This appeal was timely filed.

B. Statement of Facts

On February 28, 2008, Dennis J. Varnau filed his Nominating Petition and Statement of Candidacy for the office of sheriff at the election to be held on November 4, 2008. His candidacy was certified by the Brown County Board of Elections as a valid independent candidate. As such, he was not part of the March primary election.

Dwayne Wenninger was first elected sheriff in 2000, reelected in 2004, and won the Republican primary for sheriff in March 2008. There is no Democrat candidate for sheriff. Thus, the sheriff's contest in November pits Varnau against Wenninger.

On April 11, 2008, Varnau filed a written protest against Dwayne Wenninger's candidacy for sheriff with the Brown County Board of Elections alleging that Wenninger did not possess a valid Ohio police officer certification, therefore, was not qualified to be sheriff.

Pursuant to R.C. 3513.05, this protest must be filed by a qualified elector who is a member of the political party of the protested candidate and who is eligible to vote for the candidate at the primary election. It must also be filed "not later than four p.m. of the forty-ninth day before the day of the presidential primary election," which in this case was January 15, 2008. *Id.*

On May 9, 2008, the Board of Elections denied Varnau's protest because it was untimely and not filed by a member of the appropriate party.[1]

Varnau filed a Petition for a Writ of Mandamus in the Brown County Court of Common Pleas alleging, in part, that because the protest requirements for party candidates and independent candidates were not the same, that R.C. 3513.05 was unconstitutional.[2] (Independent Varnau could never protest Republican Wenninger's candidacy, but Republican Wenninger could protest Independent Varnau's candidacy

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[1] Although Varnau continues to allege that the protest was denied "as not being allowed under the 2008 Ohio Candidate Requirement Guide (OCRG) published by the Ohio Secretary of State," (Appellant's Brief at 1-2.) this is not accurate. The Board has never cited the OCRG. The guide is only a summary of the law, it is not the law.

[2] R.C. 3513.262 provides that a protest against an independent's candidacy may be filed by "any qualified elector eligible to vote for the candidate whose nominating petition he objects to, * * * not later than the end of the twelfth week after the day of [the presidential primary] election." (May 30, 2008)

until May 30, 2008.)[3]

II. ARGUMENT

FIRST ASSIGNMENT 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 for Review

A trial court cannot consider evidence outside the Petition itself in ruling on a Motion to Dismiss for Failure to State a Claim.

Second Issue 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.

The Board agrees that the court cannot consider evidence outside of the Petition when ruling on a Civ.R. 12(B)(6) motion to dismiss. However, neither party presented any additional evidence for the court's consideration. The parties simply argued their positions as set forth in their previously filed memoranda.

The Proposed Statement of Proceedings was just that, a summary of the hearing on the Motion to Dismiss: a brief summary of the arguments of counsel, the decision of the magistrate, and setting of a date for the non-oral hearing on the merits. None of the information contained in the Proposed Statement is evidence.

As stated in the Proposed Statement this was prepared and filed because the

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[3] Varnau often inaccurately refers to himself as a "nonpartisan independent candidate" and continues to do so in this case. Varnau is an independent candidate for a sheriff. The office of county sheriff is not a nonpartisan office. See R.C. 3501.01(J) (definition of nonpartisan candidate) and R.C. 3501.01(I) (definition of independent candidate).

court reporter indicated that the recording of the hearing was unintelligible. The Board followed the procedure contained in App.R. 9(C) for submitting a statement of proceedings when the transcript was unavailable. Varnau filed no objection to this proposed statement and the court accepted the accuracy of the Proposed Statement of Proceeding.

Even if this court finds that App.R. 9(C) was not applicable to a Motion to Set Aside Magistrate's Order, the court should find that this was harmless error. The substance of the arguments mirrored the memoranda submitted by the parties. The magistrate's decision is contained in his entry. And the date for the non-oral hearing is contained in the court's scheduling order. There is simply nothing in the Proposed Statement of Proceedings that is objectionable. Even now Varnau has not pointed to one item that was inaccurate, misleading, or more importantly, prejudicial.

Accordingly, the Board respectfully requests that the court overrule Varnau's First Assignment of Error, or alternatively find that the trial court's acceptance of the Proposed Statement of Proceeding was harmless.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DISMISSING THE PETITION FOR WRIT OF MANDAMUS.

Issue 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 granted the Board's Motion to Set Aside Magistrate's Order and Motion to Dismiss. The trial court held that mandamus was not appropriate because a

legal remedy of quo warranto was available. Additionally the court held that pursuant to R.C. 3513.05, Varnau's protest was properly denied because it was not filed timely nor by a member of the appropriate party.[4]

Mandamus is not appropriate when there is a legal remedy at law.

There are three requirements for a writ of mandamus: 1) the relator must establish a clear legal right to the requested relief; 2) the respondent must have a clear legal duty to perform the requisite relief; and 3) the relator has or had no legal remedy at law. *State ex rel. Tran v. McGrath* (1997), 78 Ohio St.3d 45; *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, paragraph one of the syllabus. All three requirements must be met; failure by the relator to show any one requires the court to deny the petition. *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 202.

It is undisputed that under R.C. 3513.05, Varnau does not have the legal right to protest Wenninger's candidacy. It is also undisputed that the Board does not have the legal duty to accept Varnau's protest because it did not meet the requirements of R.C.3513.05. Because he does not meet the requirements of R.C. 3513.05, Varnau hopes to have that statute declared unconstitutional. However, Varnau has still not addressed that he has a legal remedy at law.

First, Varnau could have raised the issue with the Board of Elections at a time when the Board, pursuant to R.C. 3501.39, could have sua sponte determined whether Candidate Wenninger possessed the necessary qualifications to hold the office of sheriff.

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[4] At page 4 of his brief, Varnau asserts that the Board relied on the 2008 Ohio Candidate Requirement Guide when holding that Varnau had no right to protest Wenninger's candidacy. First, the Board did not make this decision, the trial court did. Second, the court did not rely on the OCRG, but did cite R.C. 3513.05 in support of its decision.

Additionally, upon further review of Varnau's protest of Wenninger's candidacy, it appears that Varnau would have an action in quo warranto available if Wenninger would win the November election. The quo warranto action that could have been filed prior to the expiration of Sheriff Wenninger's first term, which was referenced in the Amended Motion to Dismiss, would have centered on whether Wenninger was qualified to be sheriff based on his *educational background.* However, if Wenninger is elected to sheriff on November 4, 2008, Relator Varnau would have an action in quo warranto as to whether Wenninger is qualified to be sheriff based on whether he has, within the three-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission.

In *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, the court indicated that a losing candidate could file a quo warranto action to challenge the election winner's right to hold office. In *Whitman*, the Democrat candidate for judge filed a protest against the Republican candidate for the same office alleging that the Republican candidate did not meet the eligibility criteria for judge because he had not practiced law for at least six years. The Secretary of State determined that the protest was not timely filed. The Ohio Supreme Court declared that the Relator had a legal remedy, a quo warranto action, should the Republican candidate win the election. *Id.* at ¶24.

Although the court specifically states that the *Whitman* cases is actually a prohibition case and not a mandamus action, it does not change the legal nature of a quo warranto action. If a quo warranto action is a legal remedy for a prohibition case, it stands to reason that it would also be a legal remedy for a mandamus case. Because a legal remedy exists, an action in mandamus is not appropriate and the trial court did not

error in dismissing the case.

Appropriate Remedy

In the alternative, if this court determines that the trial court did error in granting the Motion to Set Aside or the Motion to Dismiss, the proper remedy would by to remand the case back to the trial court for a decision on the merits. The issues addressed thus far in the Board's brief are the issues that were addressed by the trial court. This case is before the Twelfth District Court of Appeals on appeal. This is not an original mandamus action. This court does not, at this time, have the authority to decide the merits of this mandamus action, and the constitutionality of R.C. 3513.05.

Varnau cited *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 133, *State ex rel. Smart v. McKinley* (1980), 64 Ohio St.2d 5, and *State ex rel. Tulley v. Brown* (1972), 29 Ohio St.2d 235, to support why this court can and must issue the requested writ of mandamus directly to the Board without further consideration by the trial court. However, *Zupancic*, *McKinley*, and *Tulley* are all cases in which the Ohio Supreme Court exercised original juridiction as permitted by the Ohio Const. Art. IV, § 2(B) and R.C. 2731.02.

The "suicidal course" that Varnau alleges would prejudice him, is one of his own making. It was Varnau's decision to file this action in the common pleas court. The Ohio Supreme Court, the Ohio courts of appeal, and the common pleas courts all have original jurisdiction in a mandamus action. See R.C. 2731.02; Ohio Const. Art. IV, § 2(B); and Ohio Const. Art. IV, § 3(B). Because Varnau filed in the common pleas court, this court is limited to reviewing on appeal, any decision of that court. It cannot decide the merits of the case.

Constitutionality of R.C. 3513.05 and R.C. 3513.262

If, however, because of the closeness to the November 4th general election, this court does wish to address the merits of the case, the Board maintains that R.C. 3513.05 and R.C. 3513.262 are constitutional.

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Personnel Admin. of Mass. v. Feeney* (1979), 442 U.S. 256, 271-72, 99 S.ct. 2282, 60 L.Ed.2d 870.

Equal protection "requires only that the classification rationally further a legitimate state interest unless the classification categorizes on the basis of an inherently suspect characteristic or jeopardizes the exercise of a fundamental right." *Desenco, Inc. v. City of Akron* (1999), 84 Ohio St.3d 535, 544. This issue in this case is whether an independent candidate for sheriff can protest the candidacy of a partisan candidate for the sheriff.

Varnau's attempt to define this case as the right of a person to practice a profession, or to run for public office, is without merit. The U.S. Supreme Court in *Conn v. Gabbert* (1999), 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399, specifically stated that "the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employement, but a right which is nevertheless subject to reasonable government regulation." *Id.*, 526 U.S. at 291-92, 119 S.Ct. at 1295-96, 143 L.Ed.2d at 406. This case is not about private

employment, nor is it about the right to run for public office. Varnau is on the ballot as a candidate for sheriff. He is running for public office. This case is about a candidacy protest.

The right to protest a candidacy is not a fundamental right. Additionally, there is no suspect class involved here. Therefore, the "law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans* (1996), 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855.

In Ohio, a statute is presumed constitutional. *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 603. It has been repeatedly held that the law and constitution must be clearly incompatibility and incapable of a fair reconciliation before the statute can be held unconstitutional. *Id.* at 603-04. Further, "absent invidious discrimination offensive to constitutional safeguards, state regulation of election procedures will not be disturbed." *Lippitt v. Cipollone* (1971), 337 F.Supp. 1405, 1406.

Varnau alleges that R.C. 3513.05 and R.C. 3513.262 are unconstitutional because a partisan candidate can protest an independent's candidacy, but an independent cannot protest a partisan's candidacy. There are two issues in this case: who may file a protest and the deadline to file a protest.

Person Who May File a Protest

The government has a legitimate interest in providing fair elections. The prohibition contained in R.C. 3513.05 which prevents anyone other than a party member from protesting a party candidate is rationally related to this legitimate interest. This is accomplished by strict enforcement of the election laws. The county

board of election is not given discretion which laws it may follow. The election system provides that each political party may submit one candidate for a particular office in the general election, however, any number of independent candidates may run for the same office.

"Primary elections shall be held for the purpose of nominating persons as candidates of political parties for election to offices to be voted at the succeeding general election." R.C. 3513.01. Election laws are designed so that each political party decides its own candidate. This is done by voting in the primary, and if necessary, by protesting a candidate who is not legally qualified or who did not meet the requirements of the election statutes. Only a member of a political party can vote for candidates of the same political party. Similarly, only a member of a political party can protest candidates of the same political party. Just as a Democrat cannot decide a Republican candidate, a Republican cannot decide a Democrat candidate, and an independent cannot decide a party candidate.

It should also be noted that the rule regarding who can file a protest is the same in both R.C. 3513.05 and R.C. 3513.262. A protest may be filed by a qualified elector who is eligible to vote for the candidate. A protest against a party candidate must be filed prior to the primary election, thus, the protestor must be a party member because only party members can vote in a primary. However, because an independent candidate is not subjected to the weeding out process of the primary election, any qualified elector may protest an independent's candidacy, because any qualified elector can vote in the general election for any candidate.

While it may appear to be unfair that any qualified elector can protest an

independent's candidacy and but an independent may not protest a Republican or Democrat candidate, that perceived unfairness does not mean the candidate protest laws are unconstitutional. Unfair does not equal unconstitutional. It is well-settled that state legislatures are presumed to act within their constitutional authority despite some inequities resulting from their enactments. *Lippitt v. Cipollone* (1971), 337 F.Supp. 1405, 1406, citing *Allied Stores of Ohio, Inc. v. Bowers* (1957), 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480. As previously set forth, there are reasonable and legitimate reasons for the different treatment of party candidates and independent candidates.

Deadline to File a Protest

The deadlines for filing protests must also stand. Deadlines for protests are necessary so that candidates for public office are secure that their candidacy has been settled. Candidates need finality because they will be expending time and money in their efforts to win the election. Any protest of a party candidate must be concluded prior to the primary election. To rule otherwise would be unfair to the party candidates who must go through the primary election. A candidate must be confident in the finality of the protest procedure.

As this court knows, time is of the essence with matters concerning elections. The statutes governing elections ensure that candidates know, well in advance of their particular election, that their candidacy has been declared valid by the board of elections.

The protest rules are different between party candidates and independent candidates because the nature of the candidacies are different. Independents are not subjected to a primary election. Party candidates are. The timing of a protest is therefore different. A candidate must know prior to his election, with enough time to

campaign, that his candidacy is valid and not subjected to any further legal scrutiny.

The protest time for a party candidate is shorter because the primary election is closer. A party candidate must file his declaration of candidacy by four p.m. the sixtieth day before the presidential primary, giving the party candidate only two months before his election. R.C. 3513.05. An independent candidate, however, is not required to file his nominating petition until four p.m. the day before the primary election, eight months before the general election. R.C. 3513.262.

Again, while it may appear to be unfair that the time to protest an independent candidate is longer than the time to protest a party candidate, that perceived unfairness does not mean the candidate protest laws are unconstitutional. The law should be upheld because it advances a legitimate governmental interest even if it disadvantages a particular group. *Romer v. Evans*, 517 U.S. at 632. As previously set forth, there are reasonable and legitimate reasons for the different treatment of party candidates and independent candidates.

III. CONCLUSION

The Board respectfully requests that this court affirm the trial court decision to set aside the magistrate's order, and to dismiss the case. A mandamus action is not appropriate here because there is a legal remedy at law in a quo warranto action. However, if the court disagrees, the proper remedy is to remand the case to the trial court for a decision on the merits.

Respectfully submitted,

THOMAS F. GRENNAN (#0026008)
Prosecuting Attorney
MARY McMULLEN (#0066589)
Assistant Prosecuting Attorney
200 East Cherry Street
Georgetown, Ohio 45121
(937) 378-4151

IV. CERTIFICATE OF SERVICE

I hereby certify that a copy of the State-Appellee's Brief has been served on Thomas G. Eagle, Attorney for the Defendant-Appellant, 3386 N. State Rt. 123, Lebanon, Ohio 45036, by regular U.S. Mail, postage prepaid, on this 6th day of October, 2008.

Mary McMullen
Assistant Prosecuting Attorney