

UNPUBLISHED
OPINION
File
D. Holloman

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

M. ALFRED "AL" FAGAN,)
)
Plaintiff,)
)
v.)
COMMONWEALTH OF VIRGINIA,)
STATE BOARD OF ELECTIONS,)
et al.)
Defendants.)

Civil Action No. 86-0172-A

MEMORANDUM OPINION

This challenge to the constitutionality of section 24.1-129 of the Code of Virginia arises out of a general election, held on November 5, 1985, to elect a candidate to serve on the Stafford County Board of Supervisors. Plaintiff Fagan and Defendant Reed were opposing candidates in the election. The initial results of the election, as determined by the count of the officers of election, gave plaintiff a margin of two votes. On November 13, defendant Reed filed a "Petition for Recount" pursuant to section 24.1-249(B) citing the closeness of the vote and requesting examination of each paper ballot cast and the retabulation of machine cast votes.

On December 4, a three-judge election recount panel comprised of Circuit Judges John A. Jamison, Ligon L. Jones, and Alex H. Sands, Jr. was convened to hear the Petition for Recount and the arguments of counsel. Upon examination of the paper ballots and deliberation, the panel determined that the election resulted in a tie vote.¹ This result was based on the panel's

1. The tie was broken at a special meeting of the Stafford County Electoral Board on December 5, 1985. Reed was declared the winner by a drawing of lots.

decision to count a previously improperly challenged and uncounted paper ballot and the finding that a previously counted ballot was defaced and should not be counted. It is this defaced paper ballot which gives rise to this action. The panel invalidated the disputed ballot after consulting and applying section 24.1-129 of the Code of Virginia.

On December 23, plaintiff filed a "Motion for Rehearing" with the election recount panel challenging the panel's disallowance of the absentee ballot of "Voter Dixon." According to plaintiff Fagan and Voter Dixon's affidavit, Dixon's absentee ballot is the disputed ballot in this case. Dixon's affidavit acknowledges mismarking the ballot and attempting to correct this mistake by obliteration. The affidavit does not address why Voter Dixon failed to comply with the absentee voter instructions which require absentee voters to obtain a new ballot in the event their ballot is mismarked. The election recount panel again considered the application of section 24.1-129 to the disputed ballot, and held in its order of January 9, 1986 that the ballot was defaced within the meaning of the statute and was therefore invalid.

Plaintiff also filed an election contest complaint pursuant to section 24.1-240 on December 17, 1985. A three-judge election contest panel, comprised of Circuit Judges Ligon L. Jones, Dixon L. Foster, and William E. Spain, found that the election was valid and dismissed the election contest complaint. This order was dated January 18, 1986.

The testimony of the officers of election, as taken before

this Court and as stipulated establishes that only three of the nine officers present on the night of the election examined the disputed ballot - Mrs. Patricia Studley, Mrs. Shirley Kutz, and Mrs. Sally Wyatt (now deceased). The testimony of Mrs. Studley establishes that she questioned the ballot because of the two x's on it. Both Mrs. Studley and Mrs. Kutz deferred to Mrs. Wyatt in deciding whether to count the disputed ballot. The officers of election did not follow procedures requiring a majority vote of all the officers in determining the validity of a questioned ballot. While Mrs. Kutz remembers saying that the ballot looked all right to her, Mrs. Studley remembers no discussion of whether the ballot was defaced. Section 24.1-129 was not consulted or applied by these officers in the decision to count the ballot.

The plaintiff essentially makes two arguments: (1) that Va. Code Ann. section 24.1-129 is unconstitutional because it violates the doctrine of vagueness as guaranteed by the due process clause of the fourteenth amendment; and (2) that the application of section 24.1-129 by the recount panel violated the voter's constitutional rights and was in direct contradiction of the legislative intent.

The plaintiff argues for strict scrutiny of the challenged statute, while the defendants argue that strict scrutiny is not warranted in this case. Many voting rights cases require the application of strict scrutiny but those cases usually involve class or race based restrictions on voting that do not exist here. Section 24.1-129 does involve a fundamental right - that of a qualified voter to cast his or her ballot effectively.

The Supreme Court has explained the application of the vagueness doctrine to statutes. "The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depend in part on the nature of the enactment." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). The Court notes that there is greater tolerance for acts with civil penalties than for acts with criminal penalties, Id. at 498-99. The most important factor, however, according to the Court, is whether a law "threatens to inhibit the exercise of constitutionally protected rights." Id. at 499.

The Fifth Circuit considered a vagueness challenge to the Voting Rights Act of 1965, 42 U.S.C. section 1973, by the City of Lubbock, Texas. Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984). The City argued that the act was unconstitutionally vague because it did not inform municipalities how they must structure their electoral system to avoid violating the act. Id. at 372. The Fifth Circuit concluded that the appropriate standard to be applied is whether the statute commanded compliance in standards "so vague and indefinite as really to be no rule or standard at all, [citation omitted] or was 'substantially incomprehensible.' [citation omitted]." Id. at 373.

A district court in the Fourth Circuit also considered a vagueness challenge to an election statute recently. In LaRouche v. Sheehan, 591 F. Supp. 917 (D. Md. 1984), Chief Judge Kaufman reviewed much of the case law relating to the void-for-vagueness doctrine in election cases. Judge Kaufman made a distinction

between "traditional, content-based free speech rights" and other "fundamental" rights, noting that the latter are not as "fundamental" as the former and thus do not necessarily require the strict scrutiny analysis. Id. at 923-26.

Even assuming the application of strict scrutiny, section 24.1-129 is not unconstitutionally vague. The statute provides that a defaced ballot shall not be counted. The state has compelling interests which demand this result. States have an overriding interest in protecting the secrecy of the ballot so that neither candidates nor the government can determine how particular persons voted. Many jurisdictions prohibit the counting of ballots containing marks other than those permitted by statute to reduce the possibility of fraud by election workers or bribery or harassment of voters.

In addition, there are other factors which reduce even more the very slight burden this statute places on the exercise of the fundamental right to vote and to have one's vote count. Clear instructions are given to the voter. The voter is advised to leave unmarked the square preceding the name of those for whom he does not wish to vote. An absentee voter may receive a new ballot if there is time prior to the election.² A voter at the polling place may also request a new ballot if the original one is defaced. The right to vote is not absolute. The state has a compelling interest in insuring fair and honest elections, free from intimidation, bribery, and fraud. A state may establish reasonable guidelines to insure fairness in the election process.

2. There was ample time in this case since the voter returned her ballot on October 7, 1985, 29 days before the general election.

Further, the state election statute provides other protections in the form of state judicial review proceedings. Sections 24.1-239, -249, and -250 provide for an election recount panel and section 24.1-240 provides for an election contest complaint hearing. A rehearing with the recount panel is also allowed. Plaintiff Fagan availed himself of each of these state remedies in this case. This Court, like the court in LaRouche is unwilling to conclude that "the speculative danger of arbitrary enforcement renders the challenged statute void for vagueness." 591 F. Supp. at 925. The state election statute in Virginia provides these proceedings to protect against arbitrary enforcement by election officers. The application of section 24.1-129 by the recount panel was not arbitrary. The panel applied the word "defaced" to the disputed ballot, giving "defaced" its common meaning, and found the ballot to be defaced and thus void.

While a legislative definition of every substantive word in a statute would make life easier for judges, such a definition is not necessary here. The word "defaced" is self-explanatory and was given its common dictionary meaning. The challenged statute is not unconstitutionally vague and the recount panel's interpretation of the statute did not violate the voter's constitutional rights.

Moreover, the recent Fourth Circuit opinion in the case of Hutchinson v. Miller, No. 85-1548 (decided August 7, 1986), makes it clear that federal courts should intervene in state election disputes only in extraordinary circumstances. Justice Wilkinson

points out the "delegation of such disputes to other authorities" and notes that "[e]quitable relief, though theoretically available, has properly been called a '[d]rastic, if not staggering' intrusion of the federal courts, and 'therefore a form of relief guardedly exercised.'" Id. at 24-25. Justice Wilkinson notes that federal courts should refrain from intervening in state and local elections.

To do otherwise would be to intrude on the role of the states and Congress, to raise the possibility of inconsistent judgments concerning elections, to erode the finality of results, to give candidates incentives to bypass the procedures already established, to involve federal courts in the details of state-run elections, and to constitute the jury as well as the electorate as an arbiter of political outcomes. These costs, we believe, would come with very little benefit to the rights fundamentally at issue here -- the rights of voters to fair exercise of their franchise.

Id. at 18.

For the reasons stated above, the Court holds that Virginia Code Ann. section 24.1-129 is not unconstitutionally vague on its face or in its application by the recount panel. An appropriate order shall enter.

Let the Clerk send a copy of this opinion and the Court's order to all counsel of record.

Oct. 1, 1986

Richard L. Williams

DATE

UNITED STATES DISTRICT JUDGE