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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JEFFERY J. HARRIS, Petitioner/Appellant, v. THE CITY OF BISBEE, ARIZONA; and BISBEE CITY CLERK, GLORIA GONZALEZ, Respondents/Appellees.	2 CA-CV 2010-0215 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CV201000728, CV201000732, and CV201000733 (Consolidated)

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Jeffery J. Harris — Bisbee
In Propria Persona

John A. MacKinnon, Bisbee City Attorney — Bisbee
Attorney for Respondents/Appellees

V Á S Q U E Z, Presiding Judge.

¶1 In this election challenge, Jeffery Harris appeals from the trial court's order granting the City of Bisbee's ("the City") motion to dismiss, filed pursuant to Rule 12(b)(6), Ariz. R. Civ. P. He contends the court erred in finding his complaints were filed untimely and in failing to rule on the merits of his claims or address certain alleged defects in the City's motion to dismiss. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 3, 92 P.3d 882, 885 (App. 2004). In 2006, the City approved two ordinances regulating outdoor storage, junk, litter, abandoned vehicles, and dilapidated buildings. Harris obtained referendum petitions from the City clerk to challenge the ordinances and, after collecting signatures, filed the petitions with the City clerk for processing.

¶3 Following protracted litigation, the details of which need not be set forth here, the City ultimately certified that the referendum petitions contained enough valid signatures to refer the ordinances to the voters. The election for the two contested ordinances, as well as for another measure entitled: "Extension of the Alternative Expenditure Limitation," was set for August 24, 2010. On July 22, 2010, the City mailed the publicity pamphlet for the election to each household that contained a registered voter. Early voting began on July 29, and the election was held as scheduled on August 24. All three measures passed.

¶4 On August 19, Harris separately filed three complaints in the Cochise County Superior Court, one for each proposed measure, entitled "Petition to Set Aside

Election." In each complaint, Harris alleged there were various procedural defects in the wording of the ballot or publicity pamphlet and sought an order "setting aside and nullifying the Election" for the particular measure. Although the complaints were filed three working days before the election, Harris did not request an emergency hearing, and he did not serve the City with the summons and complaint until August 31, a week after the election.

¶5 The City moved to consolidate the three actions and to dismiss all three, pursuant to Rule 12(b)(6), arguing they were filed untimely. At a hearing on the motions, the trial court granted the motion to consolidate. The court took the motion to dismiss under advisement, ultimately granting it with prejudice. This appeal followed.

Discussion

¶6 Harris contends the trial court erred in ruling his complaints were untimely and in its interpretation of controlling authority on that issue. "We review a trial court's grant of a motion to dismiss for an abuse of discretion[,]" *Old Republic Nat'l Title Ins. v. New Falls Corp.*, 224 Ariz. 526, ¶ 9, 233 P.3d 639, 641 (App. 2010), "but, we resolve questions of law involving statutory construction de novo," *Harris v. City of Bisbee*, 219 Ariz. 36, ¶ 13, 192 P.3d 162, 165-66 (App. 2008).

¶7 In its minute entry decision and order, the trial court noted correctly that "Arizona has long adhered to the proposition that procedural defects relating to elections must be asserted when there is time and opportunity to correct those defects, not after the election is over and the votes are counted." And, relying primarily on *Sherman v. City of Tempe*, 202 Ariz. 339, ¶¶ 9-10, 45 P.3d 336, 339 (2002), and *Rapier v. Superior Court of*

Greenlee County, 97 Ariz. 153, 155, 398 P.2d 112, 113 (1964), the court concluded Harris's complaints were untimely because they had been filed only three working days before the election. Specifically, it determined that something "more [wa]s required by the law than simply filing a complaint [before the election]. A complaint such as this must be filed *and heard*—that is, considered and determined by the court—before the election, and even before early voting begins."

¶8 On appeal, Harris maintains *Sherman* requires only that "a procedural challenge must be brought before the actual day of the election" and the filing of his complaints five days before the election was sufficient. Thus, he contends the trial court erred both in its interpretation of *Sherman* and in its reasoning that Harris needed to file his complaints before early voting began.

¶9 In *Sherman*, the plaintiffs challenged city election results, alleging publicity pamphlets had been mailed to the voters untimely. 202 Ariz. 339, ¶ 7, 45 P.3d at 338. The issue addressed by our supreme court was whether A.R.S. § 19-141(B), which provides that "[publicity] pamphlets . . . [must] be mailed . . . [no] less than ten days before the election at which the measures are to be voted upon," requires the pamphlets to be mailed ten days before absentee voting or merely ten days before the actual election day. *Sherman*, 202 Ariz. 339, ¶ 7, 45 P.3d at 338. The court concluded that "[t]he legislative history behind Arizona's election statutes, the legislature's recent changes to section 19-141, other Arizona statutes that employ the word 'election,' and the language of the statute itself, all demonstrate that section 19-141.A refers to election day, not the start of early voting." *Id.* ¶ 13.

¶10 Based on this language, Harris argues the requirement that procedural election challenges be brought before the election refers only to the actual election day and not the start of early voting. We disagree. *Sherman* dealt only with the meaning of the term "election" in the context of § 19-141. It did not address whether a procedural challenge must be brought before early voting begins.[1] And, relying on *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987), the court in *Sherman* stated that "[c]hallenges concerning alleged procedural violations of the election process must be brought prior to the actual election," and that by filing their complaint after the election, the plaintiffs "essentially [were] ask[ing the court] to overturn the will of the people, as expressed in the election [, and] to overlook [the court's] own mandate that courts should review alleged violations of election procedure prior to the actual election." 202 Ariz. 339, ¶¶ 9, 11, 45 P.3d at 340; *see also Tilson*, 153 Ariz. at 471, 737 P.2d at

[1]We do not decide whether Harris was required to file his election challenge before early voting began because the trial court did not base its decision solely on that finding, and we can affirm the court's decision on other grounds. *See Harris v. Purcell*, 193 Ariz. 409, n.7, 973 P.2d 1166, 1171 n.7 (1998). Notably, however, several cases indicate procedural challenges to elections are mooted when the time for absentee balloting begins, at least when the plaintiff has knowledge of the procedural defect being challenged before absentee ballots are delivered to registered voters. *See, e.g.*, *Rapier v. Superior Court*, 97 Ariz. 153, 155, 398 P.2d 112, 113 (1964) (challenge to results of primary election mooted when absentee ballots delivered for general election); *Carson v. Gooding*, 4 Ariz. App. 252, 253, 419 P.2d 382, 383 (1966) (finding *Rapier* applies to procedural challenge to general election; matter mooted by either holding of general election or start of absentee balloting). But in any event, as we state above, we need not reach this issue.

1370 (procedural violations in elective process itself "must be reviewed by the court prior to the actual election").[2] We believe this reasoning also applies in the present case.

¶11 Harris filed his complaints on August 19, 2010, a mere three working days before the actual election. He neither sought an emergency hearing nor served the City with the complaints prior to the election. Consequently, there was no opportunity for the trial court to review the matter until the election was over and the "will of the people [had been] expressed in the election." 202 Ariz. 339, ¶ 11, 45 P.3d at 340. And although, unlike the plaintiffs in *Sherman*, Harris filed his complaints before the election, we agree with the trial court that something "more [wa]s required by the law than simply filing [his] complaint [before the election]."[3] The court did not err in granting the City's motion to dismiss.[4]

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[2]Although the plaintiffs in *Sherman* had filed their complaint after the election, the supreme court decided the case on the merits because neither party had raised the timeliness issue. 202 Ariz. 339, ¶ 11, 45 P.3d at 339.

[3]Harris argues for the first time in his reply brief that his complaints were timely filed because they met the requirements of A.R.S. §§ 16-672 through 16-674. Because he makes this argument for the first time in his reply brief, it is waived. *See Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91, 163 P.3d 1034, 1061 (App. 2007). But in any event, although the headings to his complaints state that the relief being sought was a set-aside of the election results, which would be governed by §§ 16-672 through 16-674, Harris in fact challenges only procedural defects, which are governed by the principles set forth in *Tilson* and *Sherman*, not by §§ 16-672 through 16-674.

[4]Harris also maintains the trial court erred by not affording any leniency to him as a pro se litigant or allowing him to amend his complaints to correct any deficiencies, something he claims it was required to do. But "[p]arties who choose to represent themselves 'are entitled to no more consideration than if they had been represented by counsel' and are held to the same standards as attorneys." *In re Marriage of Williams*, 219 Ariz. 546, ¶ 13, 200 P.3d 1043, 1046 (App. 2008), *quoting Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963).

¶12 Although Harris contends the trial court erred by failing to rule on the merits of his claims, we need not address this issue because we affirm the court's ruling that Harris's complaints were untimely. Finally, Harris argues the court erred in failing to address alleged defects in the City's motion to dismiss. However, he neither develops this argument nor provides citation to the record or to authority, and so it is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (brief must contain "contentions of the appellant . . . with citations to the authorities, statutes and parts of the record relied on"); *Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P.3d 101, 108 n.5 (App. 2006) (same).

Disposition

¶13 For the reasons stated, we affirm the trial court's order.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge