[Cite as *State ex rel. Van Auken v. Blackwell,* 2004-Ohio-5355.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Bill Van Auken et al.,	:	
Relators,	:	
v.	:	No. 04AP-952
J. Kenneth Blackwell, Secretary of State of Ohio,	:	(REGULAR CALENDAR)
Respondent.	:	

D E C I S I O N

Rendered on October 4, 2004

Newman & Meeks Co., L.P.A., and *Robert B. Newman,* for relators.

Jim Petro, Attorney General, *Richard N. Coglianese* and *Damian W. Sikora,* for respondent.

IN MANDAMUS AND
ON MOTION TO DISMISS

PER CURIAM.

{¶1} Relators, Bill Van Auken, Jim Lawrence, and David Lawrence, filed the present petition seeking a writ of mandamus that orders respondent J. Kenneth Blackwell, Secretary of State of Ohio, to place Van Auken and Jim Lawrence on the Ohio ballot as

independent joint candidates for President and Vice President of the United States for the November 2, 2004 election.

Facts and Procedural Posture

{¶2} Bill Van Auken and Jim Lawrence are respectively presidential and vice presidential candidates for the Socialist Equality Party. Because their party lacks legal standing for electoral purposes in Ohio, they seek a place on the ballot as joint independent candidates under R.C. 3513.257. David Lawrence is a registered voter in the state of Ohio who claims standing in this matter by virtue of an alleged infringement of his right to cast a ballot for the candidate of his choice. J. Kenneth Blackwell is the Secretary of the State of Ohio, charged by statute with the supervision and conduct of elections in the state. R.C. 3501.04.

{¶3} Relators, on August 18, 2004, filed with the Secretary of State a nominating petition containing 7,983 signatures. The Secretary of State then transmitted the part-petitions to the respective local boards of elections in the counties where the signatures were collected for the local boards to "examine and determine the validity or invalidity of the signatures on the petitions" under R.C. 3513.05 and eventually return them to the Secretary of State who would, if sufficient valid signatures were found on the petitions, place the candidates on the Ohio ballot.

{¶4} The local boards of elections disallowed 3,811 signatures on relators' petition for a variety of reasons, leaving relators well below the 5,000 required signatures to be placed on the ballot pursuant to R.C. 3513.257. When informed that their candidates' names could not be placed on the ballot, relators commenced their own

review to compare their petitions with the rules of the local boards of elections in the belief that a number of signatures had been improperly invalidated. As a result of their comparison and review of the voter registration rolls and petitions, and assessment of the local boards' notations giving reasons for the disqualification of various signatures, relators assert that they have "recovered" sufficient signatures to have a valid total of 5,231 signatures, meeting the statutory requirement. While the Secretary of State has offered an informal review of the petition signature count, as of the time of this decision, no resolution of the situation has been forthcoming from the Secretary of State's office.

{¶5} The "informal" review the Secretary of State offered "as a courtesy" apparently is so termed because there is no statutory requirement for the Secretary of State to respond to a challenge to the local boards' signature disqualifications. While Ohio has a statutory mechanism providing a means to protest against a petition or candidacy that has been found *valid*, R.C. 3501.39, no statutory provision provides a means by which a candidate whose petitions have been disallowed can protest that decision: "It is undisputed that there exists no statutory or administrative procedure for protesting a decision to *disqualify* a candidate from the general election ballot." *Miller v. Lorain Cty. Bd. of Elections* (1998), 141 F.3d 252, 259. (Emphasis added.)

{¶6} The remedy in such a case is to pursue a writ of mandamus with the appropriate court of appeals or the Supreme Court of Ohio. *State ex rel. Stine v. Brown Cty. Bd. of Elections,* 101 Ohio St.3d 252, 2004-Ohio-771, ¶11-12. The court "may vacate the decision of a board of elections and grant a writ of mandamus if [the relator] establishes that the board's decision resulted from fraud, corruption, abuse of discretion,

or clear disregard of applicable law." *State ex rel. Commt. for the Referendum of Lorain Ord. No. 77-01 v. Lorain Cty. Bd. Elections,* 96 Ohio St.3d 308, 2002-Ohio-4194, ¶23. The term "abuse of discretion" in this context connotes an unreasonable, arbitrary, or unconscionable decision. *Stine,* at ¶12, citing *State ex rel. Stevens v. Geauga Cty. Bd. of Elections* (2000), 90 Ohio St.3d 223, 226.

{¶7} Relying on *Anderson v. Poythress* (N.E.Dist.Ga.1980), No. C80-1671A (slip opinion), vacated and remanded as moot (C.A.5, 1981), 656 F.2d 702, relators have pursued a roughly contemporaneous parallel action in federal court seeking a temporary restraining order that requires the Secretary of State to place their candidacies on the ballot. In *Anderson,* the federal court ordered that a presidential candidate be placed on the Georgia ballot because of a denial of due process arising from an inadequate procedure and impossibly narrow time constraints available to a potential candidate under Georgia state law to contest invalidation of petitions. Relators similarly have raised before the federal court a variety of constitutional issues related to a denial of due process. The Southern District has denied a temporary restraining order, principally on the basis that an action for a writ of mandamus in state court was available and presented relators with an adequate remedy that weighed against granting a temporary restraining order in federal court. *Van Auken v. Blackwell* (Sept. 17, 2004), S.D. Ohio No. C2-04-891 (slip opinion). The balance of the case remains pending.

{¶8} Respondent initially opposes this action on procedural grounds. Respondent asserts that the action must be dismissed for failure to join a necessary party. According to respondent, relators essentially seek to compel a different outcome

based solely on the results of duties that are statutorily delegated to the local boards of elections, which are not parties to this action. Relators respond that, once they have established the local boards of elections abused their discretion in invalidating signatures for improper reasons, it is incumbent upon respondent to exercise his legal duty to place relators' candidates on the ballot because they submitted the necessary number of petition signatures. The absence of the local boards of elections as parties corresponds to relators' approach to the matter, in that we must determine only whether respondent has a clear legal duty to place relators on the ballot. The matter need not be dismissed for failure to join any necessary parties.

Substantive Merits

{¶9} For a writ of mandamus to issue, a relator must prove a clear legal right to the relief prayed for, a clear legal duty on the part of the respondent to provide such relief, and the absence of any other adequate remedy at law. *State ex rel. National City Bank v. Board of Edn.* (1977), 52 Ohio St.2d 81. Because no statutory mechanism exists for the relief sought, the third prong will be taken as shown in this case. The existence of a legal right and corresponding legal duty are at issue.

{¶10} Relators set forth two principal assertions in support of a writ. Relators first argue that the current statutory scheme governing elections in Ohio did not allow them a meaningful and timely opportunity to contest their disqualifications because of the severe time constraints inherent in the brief statutory intervals between the dates when petitions must be filed, forwarded by the Secretary of State to the local boards, and returned to the Secretary of State so that the Secretary of State may place candidates on the ballot.

{¶11} Relators then argue that the local boards improperly disqualified petition signatures for reasons that are either contrary to statute, or, if in compliance with the letter of Ohio election law, contrary to fundamental rights protected by the First and Fourteenth Amendments to the United States Constitution. The two principal reasons for disqualification that relators challenge are (1) the address given on the petition did not correspond exactly, or at all, to the address carried on the local voter rolls, and (2) signatures were not written in full cursive handwriting.

{¶12} With respect to relators' assertion that Ohio election law does not allow a meaningful and timely opportunity to be heard and contest a disqualification based upon invalid signatures, we note that, assuming the issue properly may be addressed in mandamus, we are bound by the Supreme Court of Ohio's prior decisions in similar cases.

{¶13} Election law necessarily must incorporate a rather precarious balance between the need to conduct elections in a fair, timely, and orderly manner, and yet provide due process to persons affected by a decision undertaken pursuant to election law. *Valenti v. Mitchell* (C.A.3, 1992), 962 F.2d 288. The Supreme Court of the United States has recognized, most recently in *Timmons v. Twin Cities Area New Party* (1997), 520 U.S. 351, 358, 117 S.Ct. 1364, the states have the right and power to enact "reasonable regulations of parties, elections, and ballots to reduce election and campaign-related disorder." Reasonable, nondiscriminatory restrictions that weigh the "character and magnitude" of the burden of the state's regulatory scheme imposed on those seeking to become candidates must be weighed against the interest of the state in

the orderly, fair, and efficient conduct of elections. Id., citing *Burdick v. Takushi* (1992), 504 U.S. 428, 434, 112 S.Ct. 2059.

{¶14} Neither the Ohio Supreme Court, nor any other Ohio court, has held that the validation of signatures through current voter registration addresses promotes discriminatory or impermissible restriction on voter or candidate rights. The cases relators cite, *Morrill v. Weaver* (E.D.Pa. 2002), 224 F.Supp.2d 882 and *Rockefeller v. Powers* (E.D.N.Y.1996), 917 F.Supp. 155, turn on entirely different and more burdensome statutory restrictions and therefore are not instructive on the present facts.

{¶15} In Ohio, independent candidates must submit declarations of candidacy and nominating petitions containing at least 5,000 signatures of qualified electors by 4:00 p.m. on the 75th day before the general election. R.C. 3513.257. Once the Secretary of State receives the declaration on candidacy and petition, he is required to transmit the part-petitions to the respective boards of elections concerned, so the boards can examine and validate the petition signatures of the electors. R.C. 3513.263. The boards of elections have until the 68th day before the general election to "examine and determine the sufficiency of the signatures on the petition papers." Id. The interval between the Secretary of State's decision based upon the results of the actions of the boards of elections and the Secretary of State's subsequent qualification of candidates and printing of ballots is necessarily rather narrow: Absentee ballots must be "printed and ready for use on the thirty-fifth day before the day of the election." R.C. 3509.01.

{¶16} Implicit in the Supreme Court of Ohio's disposition of comparable mandamus actions, such as *Stine, State ex rel. Yiamouyiannis v. Taft* (1992), 65 Ohio

St.3d 205, and *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, is the premise that the time afforded to bring a mandamus action, compare petitions with local voter registration rolls, and substantiate a claim of abuse of discretion on the part of the local boards is adequate. Because Supreme Court precedent concludes that the chronology set forth in Ohio election law does not, of itself, constitute a deprivation of due process, then similarly the absence of a specific statutory remedy, and the resulting need to resort to an action in mandamus, does not of itself constitute a deprivation of due process, since the Ohio Supreme Court has not so held in similar election cases, despite ample opportunity to do so.

{¶17} The second prong of relators' argument concerns the state of the evidence in support of relators' assertion that the local boards abused their discretion in failing to follow Ohio election law, and the Secretary of State must accordingly place relators' candidates on the general election ballot. Relators stress two particular grounds for disqualification in asserting that the signatures were improperly disqualified.

{¶18} First, relators argue that the local boards sweepingly disqualified all printed signatures under the assumption that a signature must be in cursive to be valid. They further assert that in individual cases the local boards disqualified signatures that contained a diminutive of the voter's legal name as carried on the rolls, omitted or added a middle initial, or transposed given and surnames in the case of voters of Asian origin. For election purposes, R.C. 3501.011 is clear regarding the definition of signatures or legal marks:

> (A) * * * as used in the sections of the Revised Code relating to elections and political communications, whenever a person

> is required to sign or affix a signature to a declaration of candidacy, nominating petition, declaration of intent to be a write-in candidate, initiative petition, referendum petition, recall petition, or any other kind of petition, or to sign or affix a signature on any other document that is filed with or transmitted to a board of elections or the office of the secretary of state, "sign" or "signature" means that person's written, cursive-style legal mark written in that person's own hand.
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> (B) For persons who do not use a cursive-style legal mark during the course of their regular business and legal affairs, "sign" or "signature" means that person's other legal mark that the person uses during the course of that person's regular business and legal affairs that is written in the person's own hand.
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> (C) Any voter registration record requiring a person's signature shall be signed using the person's legal mark used in the person's regular business affairs. For any purpose described in division (A) of this section, the legal mark of a registered elector shall be considered to be the mark of that elector as it appears on the elector's voter registration record.

{¶19} Pursuant to R.C. 3501.011, if an elector's legal signature as found on the elector's voter registration card is a printed signature, the elector's signature may be printed. Similarly, if the elector's signature on the registration card contains a minor variation from the form carried on the computerized rolls, such as "Rick" for "Richard," the version on the card is the acceptable one for petition purposes. Respondent seeks to justify the practice of striking all printed signatures from electoral petitions on the grounds that the need to match actual signature styles between petitions and voter registration cards would be "onerous and impractical." Even if that be so, R.C. 3501.011 requires it, and we must assume the legislature contemplated the burden imposed upon the boards of elections, as the statute plainly states that "[f]or any purpose described in division (A) of

this section, the legal mark of a registered elector shall be considered to be the mark of that elector as it appears on the elector's voter registration record." The statute in its current version postdates and effectively overrules *State ex rel. Green v. Casey* (1990), 51 Ohio St.3d 83, which interpreted former law to require a cursive signature. Relators are therefore correct in asserting that boards of elections' blanket disqualification of printed signatures when reviewing petitions would be an abuse of discretion, as would disqualification for the other individual variations cited.

{¶20} Relators then assert that the boards of elections improperly invalidated signatures for defects related to the address provided for each petition signature. In particular, relators assert that the local boards used outdated voter registration rolls in determining the addresses of registered voters and improperly disqualified signatures with spelling variations or other minor errors in the address given. Relators provide statistical evidence in an attempt to demonstrate the nationwide relocation rate among registered voters on an annual basis. From that they seek to extrapolate that a four to eight week delay between the date of voter registration rolls and the dates upon which signatures were collected for relators' petitions implies a certain rate of improperly invalidated signatures on the basis of address, as the voter's address in fact may have changed in the interim and be correct on the petition.

{¶21} With respect to variations in addresses not caused by a relocation of the voter, but rather resulting from misspellings, voter error, transposition of numbers and the like, many of the grounds relators contest appear in accordance with law. R.C. 3501.38(C) provides "[t]he voting address given on the petition shall be the address

appearing on the registration records at the board of elections." The local boards do not abuse their discretion in rejecting signatures as a result of strictly applying this statutory requirement.

{¶22} As to the allegedly outdated voter registration rolls and their impact on signature disqualification for incorrect addresses, relators' argument presents the same evidentiary problem the Supreme Court addressed in *Yiamouyiannis*, where the relator sought a writ compelling the Secretary of State to place relator's name on the 1992 presidential election ballot.

{¶23} The relator in *Yiamouyiannis* asserted that the local boards abused their discretion by improperly disqualifying signatures, and he sought to establish the abuse of discretion with evidence that a certain proportion of Franklin County petitions, over half of the names excluded as invalid, were actually valid. The relator then extrapolated this rate of alleged improper invalidation statewide in an attempt to prove that the excluded signatures, if improperly invalidated at a similar rate in all counties, would have given him the necessary 5,000 signatures to be placed on the ballot.

{¶24} The Supreme Court held the evidence, with extrapolation, was insufficient to establish a clear legal duty on the part of the Secretary of State to place the relator on the ballot. As the court explained, "we find relator's evidence unreliable because it does not account for the variety of reasons for which petition signatures may be properly disqualified under R.C. 3501.39(C). Moreover, relator cites no authority to suggest that a writ of mandamus may be granted based on the probability of a duty to act. Accordingly, we are not persuaded by this record to conclude that all boards of elections in Ohio

commit errors at the same rate when reviewing petition signatures or that relator is entitled to relief for this reason." *Yiamouyiannis*, at 209.

{¶25} Much like *Yiamouyiannis*, relators' evidence calls for the same type of extrapolation, albeit on a lesser scale, that the Supreme Court of Ohio refused to accept. In the absence of the necessary petitions and rolls to support relators' contentions, we are reluctant to undertake such a venturesome extrapolation from purely statistical evidence of uncertain origin regarding the rates at which voters change their addresses.

{¶26} In summary, examining the totality of the evidence relators present in the case before us, we conclude, as the Supreme Court did in *Yiamouyiannis,* that the evidence is insufficient to demonstrate that respondent has a clear legal duty to place relators' candidates on the ballot due to an abuse of discretion by the local boards of elections in rejecting signatures. While we accept relators' assertion that the local boards may have abused their discretion in undertaking a blanket disqualification of printed signatures without reference to voter registration cards, the evidence in that regard does not generate a sufficient number of "recovered" signatures to meet the statutory minimum. The other grounds for "recovery" of signatures relators advance are, for the most part, based on disqualification of signatures that is legal under Ohio statutory law, and, moreover, would require an extrapolation from statistical evidence regarding the rate at which persons both change addresses and update their board of election records. We cannot ascertain from the evidence before us whether relators have achieved the required 5,000 valid signatures on their petition, and accordingly we conclude they have

not established a clear legal duty on the part of respondent to act. Accordingly, the requested writ of mandamus is denied, rendering moot respondent's motion to dismiss.

Writ denied; motion to dismiss rendered moot.

BRYANT, KLATT and SADLER, JJ., concur.

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