

Cite as 2011 Ark. 188

SUPREME COURT OF ARKANSAS

No. 10-1181

THOMAS L. FITE

APPELLANT

VS.

MICHAEL W. GRULKEY; FRANKLIN
COUNTY ELECTION COMMISSION;
CRAWFORD COUNTY ELECTION
COMMISSION; CHARLIE DANIELS,
ARKANSAS SECRETARY OF STATE

APPELLEES

Opinion Delivered April 28, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,

NO. CV-2010-6013

HON. RAYMOND C. KILGORE, JR.,
JUDGEDISMISSED.**COURTNEY HUDSON HENRY, Associate Justice**

This case concerns a preelection contest brought by appellee Michael Grulkey seeking to disqualify appellant Thomas L. Fite as a candidate for the General Assembly. Fite appeals an order entered by the Pulaski County Circuit Court declaring him ineligible to hold office and directing that his name be removed from the ballot, prohibiting election officials from counting any votes in his favor, and precluding the certification of the election with him as the prevailing candidate. For reversal, Fite contends that the circuit court erred in finding that he received valid service of process. He also asserts that Grulkey's petition for writ of mandamus and declaratory judgment was not timely filed and that, because the petition was untimely, the circuit court lacked jurisdiction to afford appropriate relief. As this appeal pertains to elections and election procedures, this court has jurisdiction pursuant to Ark. Sup.

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Ct. R. 1-2(a)(4). Because the election has been held, the issues raised by Fite are moot, and we dismiss the appeal.

On July 28, 2010, the Republican Party of Arkansas certified Fite as its candidate for state representative in district eighty-three for the upcoming general election on November 2, 2010. District eighty-three includes portions of Crawford and Franklin Counties. On October 20, 2010, Grulkey, a registered voter in the district, petitioned the Pulaski County Circuit Court for a writ of mandamus and declaratory judgment.¹ In the petition, Grulkey alleged that Fite was not eligible to hold office under article 5, section 9 of the Arkansas Constitution, because in 1984 Fite had been convicted of Medicaid bribery in federal court.² The circuit court scheduled a hearing for October 26, 2010. However, prior to the hearing, Fite filed a motion to quash service of process, asserting that he had not been properly served. As a consequence, the circuit court postponed the hearing for one day. When the hearing convened the next day, Fite was not in attendance, but his attorney appeared via Skype teleconferencing.

The circuit court first addressed the issue of service. The question before the court was whether service was valid under the provisions of Rule 4(d)(1) of the Arkansas Rules of Civil

¹ In the petition, Grulkey also named as defendants the Crawford County Election Commission, the Franklin County Election Commission, the Crawford County Circuit Clerk, the Franklin County Circuit Clerk, and the Secretary of State. The inclusion of the Secretary of State as a defendant was proper and fixed venue of the action in Pulaski County. *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000).

² Article 5, section 9 of the Arkansas Constitution provides that “[n]o person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime, shall be eligible to the General Assembly or capable of holding office of trust or profit in this State.”

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Procedure. After hearing conflicting evidence, the circuit court found that the residence of Fite's father was Fite's usual place of abode and that service was perfected on Fite when his father accepted service at the residence. At this juncture in the proceedings, Fite made an appearance in court. Grulkey introduced into evidence a 1984 judgment and disposition order from the United States District Court of the Eastern District of Arkansas reflecting the conviction of "Thomas L. Fite III" for "Medicaid bribery in violation of 42 USC § 1395nn(a)(1)(ii)" and sentence of three years' probation. Further, Fite testified that he was the person who stood convicted of this offense. The parties also stipulated that persons in both Crawford and Franklin Counties voted electronically; that the ballots could not be altered at that point in time; and that, once cast, any votes would be tabulated. Following argument of counsel, the circuit court ruled that Fite's conviction for Medicaid bribery rendered him ineligible to hold office. The court promptly entered an order setting forth its ruling that same date, October 27, 2010. Fite filed a notice of appeal on November 4, 2010.³ Thereafter, on November 23, 2010, Fite filed a motion to expedite review, which we granted on December 9, 2010.

Grulkey filed this action pursuant to Arkansas Code Annotated section 7-5-207(b) (Supp. 2009). This statute provides the means for a voter to raise a preelection attack on a candidate's eligibility to stand for election and for the removal of that ineligible candidate's name from the ballot. *Clement v. Daniels*, 366 Ark. 352, 235 S.W.3d 521 (2006); *State v.*

³ On October 29, 2010, Fite filed a petition for writ of prohibition with this court. We denied the petition without prejudice on November 1, 2010.

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Craighead County Bd. of Election Comm'rs, 300 Ark. 405, 779 S.W.2d 169 (1989). This court has consistently recognized that the proper procedure to enforce section 7-5-207(b) is an action for writ of mandamus coupled with declaratory relief, which provides prompt consideration of determining a candidate's eligibility. See *Tumey v. Daniels*, 359 Ark. 256, 196 S.W.3d 479 (2004); *Helton v. Jacobs*, 346 Ark. 344, 57 S.W.3d 180 (2001); *Ivy v. Republican Party of Ark.*, 318 Ark. 50, 883 S.W.2d 805 (1994); *Craighead County Bd. of Election Comm'rs*, *supra*. A voter may avail himself or herself of this right at any time prior to the general election. *Tumey*, *supra*; see also *Oliver v. Phillips*, 375 Ark. 287, 290 S.W.3d 11 (2008). However, in a long line of cases, we have observed that the issue of a candidate's eligibility under section 7-5-207(b) becomes moot once the election takes place. *Oliver*, *supra*; *Clement*, *supra*; *Ball v. Phillips County Election Comm'n*, 364 Ark. 574, 222 S.W.3d 205 (2006); *Tumey*, *supra*; *Benton v. Bradley*, 344 Ark. 24, 37 S.W.3d 640 (2001); *McCuen v. McGee*, 315 Ark. 561, 868 S.W.2d 503 (1994); *Craighead County Bd. of Election Comm'rs*, *supra*. We have made exceptions in cases where the public interest is involved and where the issues presented are ones that are likely to recur. *Jenkins v. Bogard*, 335 Ark. 334, 980 S.W.2d 270 (1998) (holding that violation of the two- to-seven-day provision in Ark. R. Civ. P. 78(d) for conducting hearings does not deprive a circuit court of jurisdiction); *Craighead County Bd. of Election Comm'rs*, *supra* (holding that proper procedure for challenging the eligibility of a candidate is by writ of mandamus in conjunction with declaratory relief); see also *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000) (addressing issues of necessary and indispensable parties and venue

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arising from a primary-election-eligibility contest); *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000) (addressing issue of standing arising from an eligibility contest in a primary election).

Of particular significance to the case at hand is our decision in *Benton, supra*. There, the circuit court denied the appellant's preelection eligibility challenge to a candidate for municipal judge, who subsequently won the election and had been seated in office at the time of our review. Under those circumstances, we dismissed the appeal as untimely and moot. In the opinion, we contrasted the appeal with the one in *Benton v. Gunter*, 342 Ark. 543, 29 S.W.3d 719 (2000), that involved another eligibility contest filed before the election. Although the same circuit court had resolved the issues in *Gunter* and *Benton* on the same date, the appeal in *Gunter* was expedited and decided by this court before the election.

Our courts have in place adequate procedures for accelerating consideration of these matters. Beginning with the circuit court, Rule 78(d) of the Arkansas Rules of Civil Procedure requires petitions for writs of mandamus in election contests to be heard no sooner than two and no longer than seven days after filing. An aggrieved party may then pursue an expedited appeal pursuant to Rule 6-1(b) of the Rules of the Arkansas Supreme Court and Court of Appeals. A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Shipp v. Franklin*, 370 Ark. 262, 258 S.W.3d 744 (2007). In this instance, Fite did not file a notice of appeal until after the election was over, and thereafter he waited fifteen days to request expedited review. The lapse

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of time has rendered moot the issues presented on appeal. We perceive no need to issue an opinion that would be purely advisory, as the interests raised are not likely to recur and do not implicate the public interest.

Dismissed.