

RENDERED: OCTOBER 12, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court Of Appeals**

2001-CA-000215-MR

BETTY RICHARDS; APPELLANTS
WILLARD HANSFORD, IN HIS OFFICIAL CAPACITY
AS PULASKI COUNTY CLERK AND MEMBER OF THE PULASKI
COUNTY BOARD OF ELECTIONS;
JACK DETHERIDGE, CHARLES MEADE, AND SAM CATRON, IN
THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE PULASKI
COUNTY BOARD OF ELECTIONS

v. APPEAL FORM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS
ACTION NO 00-CI-01139

MARK HAMM APPELLEE

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OPINION
REVERSING AND REMANDING

BEFORE: BUCKINGHAM, SCHRODER, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: This matter is before the court pursuant to KRS¹ 120.175 on review of a decision of the Pulaski Circuit Court voiding an election for a seat on the Pulaski County School Board. The issue to be determined is whether the failure of the county clerk to code the voter roster in one split precinct necessarily constitutes fraud so as to invalidate the election. The trial court concluded that it does, but we conclude that under the facts in this case it does not. Thus, we reverse and remand.

¹ Kentucky Revised Statutes.

At the November 2000 general election, Betty Richards and Mark Hamm were opposing candidates for the Division II seat on the Pulaski County Board of Education. Division II includes eight precincts, and seven of the precincts are completely contained within Division II. The Somerset precinct (No. 5-A) is a split precinct in which only a minority of the voters are eligible to vote in Division II.

After a re-canvass of the close election results, Richards was credited with 1,459 votes and Hamm with 1,450 votes. The trial court found that 187 votes were cast in the Somerset precinct. We have been unable to find in the record a statement concerning how the votes of the Somerset precinct were divided between the candidates.

Hamm, as the unsuccessful candidate, filed an election contest in the Pulaski Circuit Court contending that the county clerk's failure to provide a coded list of eligible voters in the split precinct as required by KRS 116.200(2) constituted fraud. Hamm sought the removal of Richards from the board, the setting aside of the results of the election, the voiding of the results of the election in the Somerset precinct, and a declaration that he had been the winner of the school board seat. Richards responded that Hamm had failed to identify any vote affected by the alleged fraud.

By motion to dismiss, Richards challenged Hamm's right to maintain the election contest based on his failure to allege his innocence of any violation of the election laws. Richards

also sought dismissal based on Hamm's alleged ineligibility for the office due to his financial interest in the relationship between his company and the board of education. Other named defendants filed similar motions to dismiss and also moved to dismiss on the ground that Hamm had failed to attempt to obtain a summary order of the circuit court under KRS 117.055(6)(a) to enforce the provisions of KRS 116.200.

On January 16, 2001, prior to trial of the contest, the circuit court entered an order disposing of the motions to dismiss. The circuit court denied the motion to dismiss the action based on Hamm's failure to identify voters affected by the failure to provide the required list. Next, the circuit court ruled that Hamm could not be declared the successful candidate due to his failure to plead his own innocence of any violations of the election laws. However, the court stated that Hamm was not prevented from seeking to have the election itself declared void.

The circuit court further held that Hamm's failure to seek an order requiring that the coded list be produced before the election was not a bar to his election contest. The circuit court also denied Richards' efforts to have Hamm declared ineligible for the office because of the contractual relationship between his company and the board. Finally, the circuit court dismissed various defendants who would not be involved in the granting of relief if Hamm were successful in having the election voided.

After a trial before the bench, the circuit court

entered a final judgment determining that the failure of the county clerk to prepare a coded list of eligible voters as required by KRS 116.200 constituted constructive fraud and raised the possibility that ineligible voters had cast ballots in the election. While finding neither deliberate misconduct nor any effort to favor the successful candidate, the circuit court held that the neglect of the county clerk required the voiding of the election. Richards and the members of the board of elections appealed.

The only issues for resolution in this appeal are (1) whether Richards was entitled to have Hamm's contest dismissed because Hamm was not eligible for the office due to the contract between his company and the board, (2) whether Hamm's contest petition was defective in failing to lists voters affected by the failure to produce the coded list, and (3) whether the failure to produce the coded list rose to the level of constructive fraud so that the entire election must be voided.

The central issue in this appeal is whether the county clerk's failure to comply with KRS 116.200 and provide a coded list of eligible voters constitutes sufficient grounds in this case for voiding the election. The applicable statute, enacted in 1994, provides:

(1) Each city and school district board shall provide the clerk of the county in which the city or school district is located with whatever information the county clerk requires to maintain a roster of voters who are eligible to vote in city and school board elections. This information shall be provided to the county clerk not later than sixty (60) days

preceding the date of a primary election in each year in which an election for city officers or school board members shall be held in that county.

(2) Each county clerk shall code all registered voters in that county in such a manner that precinct election officers may determine their eligibility to vote in city and school board elections.

KRS 116.200. KRS 116.200 was enacted to provide precinct election officers with a reliable tool to determine who is eligible to vote in an election in which less than all the voters of the precinct are so eligible. The value of such a coded list is demonstrated by the situation in the Somerset precinct.

The circuit court found that the current number of registered voters in the precinct was 1,413. In 1996 (the date of the board's last reliable estimate), the number of those voters eligible to vote in Division II was 225. The circuit court found that the actual number would now be considerably higher based on growth in the area.

There is no question concerning the county clerk's failure to produce the statutorily required list. The circuit court stated, "[i]t appears to the Court that the county clerk, although aware of the statute, simply neglected to apply it, and instead conducted the election as it had always been done, long before the 1994 changes." The question is whether this failure justifies invalidating the election.

The courts have "no inherent power to hear and decide election contests. To accomplish that purpose, the General Assembly must act. This, it has done." Wood v. Kirby, Ky., 566 S.W.2d 751, 752 (1978). KRS 120.165(4) sets out the limit of the

court's authority in resolving an election contest:

(4) If it appears from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the Circuit Court, or an appellate court, on appeal, may adjudge that there has been no election. In that event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify. If one of the parties is adjudged by the court to be elected to the office, he shall, on production of a copy of the final judgment, be permitted to qualify or be commissioned.

Further, when courts do hear election contests, "it is the policy of the law to sustain elections where the proof is doubtful and to uphold the validity of an election if it can reasonably be done." Hale v. Goble, Ky., 356 S.W.2d 33, 34 (1961).

Many years ago, Kentucky courts set the burden of proof in election contest cases and the extent of proof necessary to sustain the burden of proof. In Skain v. Milward, 138 Ky. 200, 127 S.W. 773 (1910), the court held:

The burden of proof is on the contestant to show such fraud, intimidation, bribery, or violence in the conduct of the election that neither the contestant nor contestee can be adjudged to have been fairly elected. These things are not presumed, but it must be affirmatively shown, not only that they existed, but that they affected the result to such an extent that it cannot be reasonably determined who was elected. (Citations omitted.)

Id. at 777.

In the case *sub judice*, any impact on the vote totals is purely speculative. Hamm did not prove that any voter or voters were improperly denied the right to vote in this election.

Further, Hamm did not prove that any voter or voters improperly voted in the election. The most that can be said is that the statutory failure opened up the possibility of such behavior. The circuit court correctly noted that a majority of the voters in the Somerset precinct live outside the school district and were not eligible to vote in the contested election. However, there is no support in the record for the circuit court's follow-up statement: "It is very probable, given the fact that no coded list was prepared, that some of them [the ineligible voters] mistakenly or intentionally voted in the school board race."

Only one of the precinct election officers, Norma Durham, testified. She testified that both she and the other election officers had served previously in numerous elections. Her testimony indicated that eligibility to vote in the school board race was a frequent topic of conversation in the polling place on election day. Most voters indicated a knowledge of their eligibility, and the election officers locked the machine appropriately for each voter. Ms. Durham's deposition testimony summed up the election officers' response to voters uncertain of their eligibility as follows:

I asked them where they lived and, the best of our ability, you know, the best we knew about the lines, we would advise them or discuss with them where -- and, if they still didn't understand, they were asked, Do you pay city school taxes, county school taxes, and that helped clarify. Another thing that I asked them -- being a retired teacher, I guess I was a little more aware of the school situation, as far as where do the children on your street or in your community, you know,

where do they attend school. If you don't have children, where do your neighbors attend school, city or county? That would tell you if you were living within those boundaries. That clarified a lot – for a lot of people, and, some, I even asked, What school bus runs in front of your house, city or county?²

Without the list, the precinct officers were deprived of a valuable tool for expediting the verification of voter eligibility. However, the precinct officers were aware of the problem of conducting the election in a split precinct and were attentive to their duties. There is no showing that a single voter was improperly deprived of the right to vote or exercised that right improperly.

The county clerk's failure to provide a properly coded list does raise the possibility that an improper vote was cast. However, Hamm showed no more than the possibility, and that is not an adequate basis for invalidating an election under the statutory standard. Skain, supra.

That is what distinguishes this case from Wood v. Kirby, supra, where a defective machine failed to account for 251 votes in an election decided by 177 votes. The apparent winner could not claim any of the missing votes since the counter had appeared to record his votes appropriately. The missing votes made the result achieved doubtful and justified voiding the election. But in Drennan v. Roberts, 234 Ky. 574, 28 S.W.2d 735 (1930), the appellate court reversed a judgment invalidating an

² Ms. Durham's trial testimony was consistent with her deposition testimony but, due to the interspersing of questions, is less succinct.

election decided by nine votes. In a split precinct, the election officers were supplied with just enough ballots to supply the number of voters eligible to vote in a certain race. Ballots were apparently given to ineligible voters resulting in ballots not being available to eligible voters. The court found the proof was not sufficient to show that a sufficient number of voters were deprived of their votes to change the result. Id. at 737. As the court stated, “[i]t is the policy of the law to sustain elections where the proof is doubtful.” Id.

We cannot condone the failure of the county clerk to prepare the coded list as directed by statute. But, there was no showing in this case that the integrity of the election was compromised by the casting of improper ballots or the denial of the ballot in sufficient numbers to alter the result of the election. In short, we conclude that Hamm did not meet his burden of proof under KRS 120.165(4). See Skain, supra.

Since we have determined that the failure to produce the coded lists did not justify the voiding of the election, we do not need to address the issue of the failure to identify voters casting ineligible votes or voters being improperly being deprived of their vote. Likewise, we need not address the issue of Hamm’s business relationship with the board.

The judgment of the circuit court is reversed, and this matter is remanded for entry of a judgment upholding the election.

TACKETT, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT BETTY
RICHARDS:

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BRIEF FOR APPELLEE HAMM:

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BRIEF FOR APPELLANTS
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