

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jacque Whaumbush, :
Appellant :
v. :
John Green : No. 2046 C.D. 2007
Submitted: May 2, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: July 3, 2008

Jacque Whaumbush (Objector), *pro se*, appeals from the order of the Court of Common Pleas of Philadelphia County (common pleas court) which dismissed his Petition to Set Aside the Nomination Petition of Sheriff John D. Green (Sheriff Green) as untimely.

The Parties

Sheriff Green was the incumbent candidate for the Democratic Party for the Office of Sheriff of Philadelphia County. Sheriff Green timely¹ petitioned the Philadelphia County Board of Elections to have his name printed upon the official ballot for the Primary Election on May 15, 2007. He verified that his nomination petition contained the requisite number of signatures of qualified electors of Philadelphia County. After the primary, the Board of Elections certified Green as the nominee for the Democratic Party.

¹ According to the certified record, the nomination petitions had to be filed on May 6, 2007, by 5:00 o'clock p.m. in the office of the Board of Elections.

Objector filed his nomination petition to run for Office of Sheriff as an independent candidate on August 1, 2007.

Sheriff Green ultimately won the general election held on November 6, 2007, and is currently serving his fourth term as the Sheriff of Philadelphia County.

Objector's Petition to Set Aside Sheriff Green's Nomination Petition

Objector filed a petition to set aside Sheriff Green's nomination petition on October 25, 2007. However, the petition to set aside was dismissed due to lack of proper service.

Objector then filed an emergency petition to set aside Sheriff Green's nomination petition on November 2, 2007.

In his "emergency petition" Objector alleged that Sheriff Green's nomination petition was invalid because (1) various signatures were forged; (2) many of the signatures were signed by persons other than those persons whose name appeared on the petition; (3) various signatures were obtained by fraud; (4) many of the affidavits of the circulators were falsely executed by individuals who did not actually circulate the petitions; and (5) many of the addresses in the petition were vacant or nonexistent. Emergency Petition to Set Aside Nomination Petition at Paragraph 6(a)-(e) at 2.

With respect to the obvious untimeliness of his petition, Objector alleged that Sheriff Green engaged in various elaborate schemes to conceal and prevent Objector from discovering the alleged fraud:

5. That respondent [Sheriff Green] in obtaining the required signatures and affidavits, engaged in various elaborate schemes to conceal and prevent petitioner [Objector] from discovering the fraud contained in the designating petitions filed with the Philadelphia County Board of Election.

Emergency Petition to Set Aside Nomination Petition at Paragraph 5 at 1-2.

The Common Pleas Court's Disposition

On November 2, 2007, the common pleas court dismissed Objector's emergency petition as moot and untimely pursuant to Section 977 of the Pennsylvania Election Code², 25 P.S. §2937.

On appeal³, Objector contends that the common pleas court erred when it dismissed his petition as untimely.

Section 977 of the Election Code

Section 977 of the Election Code, 25 P.S. §2937, provides:

All nomination petitions and papers received and filed within the periods limited by this act shall be deemed to be valid, *unless, within seven days after the last day for filing said nomination petition or paper, a petition is presented to the court specifically setting forth the objections thereto, and praying that the said petition or paper be set aside.....*

² Act of June 3, 1937, P.L. 1333, as amended.

³ This Court's review of a challenge to a candidate's nomination petition is limited to whether the common pleas court committed an error of law and whether its findings are supported by adequate evidence. In re Nomination Petition for Paul Denick, 729 A.2d 168 (Pa. Cmwlth. 1999).

25 P.S. § 2937 (emphasis added).

It is undisputed that the last day for filing nomination petitions was May 6, 2007. Therefore, Objector's petition to set aside the nomination petition had to be filed within seven days from that date, or by May 13, 2007. Objector's petition to set aside was not filed until *165 days later* on October 25, 2007, long after the seven-day period provided by Section 977 of the Election Code, 25 P.S. § 2937, had expired.

Our Pennsylvania Supreme Court definitively held in In re Nomination Papers of American Labor Party, 352 Pa. 576, 581, 44 A.2d 48, 50 (1945), that the deadlines set by Section 977 of the Election Code, 25 P.S. § 2937, are *mandatory*, and a court has no authority to waive them. Consequently, neither this Court nor the common pleas court has authority to grant Objector the requested relief.

Nevertheless, in an effort to invoke the "discovery rule" and circumvent the compulsory deadline set by Section 977 of the Election Code, 25 P.S. § 2937, Objector asserts that Sheriff Green "engaged in various elaborate schemes to conceal and prevent petitioner [Objector] from discovering the fraud." Beyond this bare allegation, Objector failed to describe any independent act of fraud or concealment which misled or prevented Objector from discovering the facts.

To invoke the discovery rule, it must be established that the perpetrator of the fraud made efforts to conceal the fraud if the statutory period for appeal has expired. Turtzo v. Boyer, 370 Pa. 526, 530, 88 A.2d 884, 886 (1952)

("[a]ssuming, as alleged, there was fraud in the execution of the affidavits to the instant nomination petition, there was no independent act of fraud or concealment which mislead plaintiff of prevented discovery.>").

Here, other than inserting boiler plate language into the petition to the effect that Sheriff Green attempted to conceal the fraud from Objector, there is no averment in the petition that Objector examined or attempted to examine the nomination petition during the seven-day period and there is no allegation explaining how the true facts were concealed by fraud or otherwise. Merely asserting that Sheriff Green engaged in various elaborate schemes to conceal and prevent Objector from discovering the fraud is not enough. It must be alleged how Objector was kept in ignorance, and why the facts could not have been discovered by the exercise of due diligence.

Because there is no contention in the petition that diligent inquiry during the seven-day period would not have revealed the facts Objector now believes to be true about the signatures on Sheriff Green's nomination petition, it is neither clear how Objector's petition may be entertained, nor how the relief may be granted.

The order of the common pleas court dismissing Objector's petition to set aside the nomination petition of Sheriff Green is affirmed.⁴

BERNARD L. MCGINLEY, Judge

⁴ Objector also asserts for the first time in this appeal that the common pleas court judge who issued the order and opinion in this matter should have recused himself because he was a member of the same political party as Sheriff Green. A review of the certified record reveals that the judge was neither asked to recuse himself before the actual decision was rendered, nor did Objector file a motion to recuse or make it known to the judge that he was seeking disqualification based on the judge's political affiliation. As a result, the judge never had the opportunity to decide whether to recuse. Objector has, therefore, waived the issue. Commonwealth v. Boyd, 835 A.2d 812 (Pa. Super. 2003).

Moreover, the standard for determining whether recusal is proper is whether there is "*substantial reasonable doubt* as to the judge's ability to preside impartially." Steinhouse v. Workers' Compensation Appeal Board (A.P. Green Services), 783 A.2d 352, 356 (Pa. Cmwlth. 2001). It is presumed that a judge is qualified to make the decision whether to recuse for himself/herself and that decision will not be overturned absent an abuse of discretion. To overcome this presumption, the party making the allegation that the judge was not capable of being impartial must show **actual bias on the record**. Dow v. Workers' Compensation Appeal Board (Household Finance Co.), 768 A.2d 1221, 1225 (Pa. Cmwlth. 2001). Merely being a member of the same political party as one of the parties is not sufficient in and of itself to establish actual bias on the record. There is otherwise not one scintilla of evidence to suggest that the judge was not capable of being impartial.

