

Opinion issued February 3, 2010



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-10-00070-CV

IN RE C.A. (TONY) SHERMAN, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

In this mandamus, relator C.A. (Tony) Sherman, a candidate in the Democratic primary for Justice of Peace, Precinct 2, Fort Bend County, contends that Joel Clouser's application for the same office does not comply with the Texas Election Code, and he requests that we compel Elaine Bishop, Chairperson of the Fort Bend

Democratic Party, to omit Clouser's name from the ballot.¹

We dismiss the petition for writ of mandamus as moot.

BACKGROUND

On January 8, 2010, Sherman delivered to Bishop a challenge to the petition, which Clouser had filed with his application in lieu of his filing fee, alleging that 394 of the 747 signatures collected by Clouser were invalid and that, therefore, Clouser's petition was supported by an insufficient number of signatures. Sherman filed this petition for writ of mandamus on January 29, 2010. Primary election day is March 2, 2010. The only relief requested by Sherman is that we require Bishop to remove Clouser's name from the ballot.

ANALYSIS

Sherman has standing to bring this suit because he is a candidate in the same primary election for the same office, who has "an interest in not being opposed by an ineligible candidate." *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App.—Dallas 2008, no pet.) (quoting *In re Jones*, 978 S.W.2d 648, 651 (Tex. App.—Amarillo 1998, orig. proceeding)).

"The law is clear that a challenge to the candidacy of an individual becomes

¹ The respondent is Elaine Bishop, Chairperson of the Fort Bend Democratic Party. This Court has jurisdiction to compel an officer of a political party to perform a duty imposed by law in connection with an election. TEX. ELEC. CODE ANN. §§ 161.009, 273.061 (Vernon 2003).

moot ‘when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law.’” *Id.* (quoting *Polk v. Davidson*, 196 S.W.2d 632, 634 (Tex. 1946) (orig. proceeding)). “If a challenge to a candidate’s eligibility ‘cannot be tried and a final decree entered in time for compliance with pre-election statutes by officials charged with the duty of preparing for the holding of the election,’ we must dismiss the challenge as moot.” *Id.* (quoting *Smith v. Crawford*, 747 S.W.2d 938, 940 (Tex. App.—Dallas 1988, orig. proceeding)).

The Texas Election Code provides, “A candidate’s name shall be omitted from the general primary election ballot if the candidate withdraws, dies, or is declared ineligible *on or before* the 62nd day before general primary election day.” TEX. ELEC. CODE ANN. § 172.057 (Vernon 2003) (emphasis added). However, “[i]f a candidate who has made an application for a place on the general primary election ballot that complies with the applicable requirements dies or is declared ineligible after the 62nd day before general primary election day, the candidate’s name shall be placed on the ballot” *Id.* § 172.058 (Vernon 2003).

Here, Sherman filed his petition for writ of mandamus on January 29, 2010, and the primary election date is March 2, 2010. Therefore, less than 62 days remained before primary election day. Accordingly, even if we were to declare Clouser ineligible, his name would remain on the ballot and any votes cast for him would be counted. *See id.*; *Brimer*, 265 S.W.3d at 928 (holding that challenge to

candidate’s eligibility for general election becomes moot when it cannot be tried and final decree entered in time for compliance with pre-election statutes); *accord Smith*, 747 S.W.2d at 940 (“This is true, even though the contestant may have good cause or grounds for the contest.”) (citing *Cummins v. Democratic Executive Comm.*, 97 S.W.2d 368, 369 (Tex. Civ. App.—Austin 1936, no writ)); *see also Polk*, 196 S.W.2d at 634 (holding that case becomes moot when any right determined by tribunal could not be effectuated in manner provided by law). No order that we might enter would be effective to change this result. Sherman’s only legally recognized interest in pursuing this mandamus is to avoid being opposed by an ineligible candidate—an outcome that we cannot, at this point, change. Therefore, this mandamus is moot.

CONCLUSION

We dismiss Sherman’s petition for writ of mandamus as moot.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.