NO. 12-20-00117-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

BOBBY GARMON, APPELLANT	***§***	***APPEAL FROM THE 21ST***
V.		
	§	***JUDICIAL DISTRICT COURT***
MICHAEL TOLBERT, CHAIR OF THE SMITH COUNTY DEMOCRATIC PARTY AND WILLIE MIMS, APPELLEES	***§***	***SMITH COUNTY, TEXAS***

OPINION

Bobby Garmon appeals the denial of a permanent injunction that would have prevented Willie Mims from being declared the winner of a primary election and would have required a runoff election. He presents two issues on appeal. We reverse and render.

BACKGROUND

Garmon, Mims, and Curtis Traylor are Democratic candidates seeking the Democratic nomination for the office of Constable of Precinct 1 for Smith County on the November 2020 general election ballot. There is no Republican candidate. To secure a place on the primary ballot, each candidate was required to file an application accompanied by either a filing fee or petition with Michael Tolbert, the chair of the Smith County Democratic Party, by December 9, 2019. If the application was accompanied by a petition, the petition needed to include valid signatures from at least two-hundred registered voters from Precinct 1. Just before the filing deadline, Mims filed such an application on December 9, purportedly accompanied by two-hundred twelve signatures.

On December 20, Garmon filed a challenge to Mims's application arguing that the petition failed to include at least two-hundred valid signatures. Specifically, Garmon complained that Mims's application was defective because the petition contained signatures that were not

accompanied by the signer's date of birth or voter registration number, signatures that were not accompanied by the date, and signatures of individuals who were not registered to vote in Precinct 1. In his challenge, Garmon asked Tolbert to reject Mims's application and prohibit him from inclusion on the Democratic primary ballot. Tolbert performed an independent investigation and determined that Mims's petition lacked the appropriate number of valid signatures. Tolbert notified Mims of Garmon's challenge on December 23. Tolbert also informed Mims that he agreed with Garmon's allegations. However, Tolbert did not officially reject the application or prevent Mims from appearing on the ballot.

On January 9, 2020, Garmon filed a lawsuit challenging Mims's application and Tolbert's refusal to remove Mims from the ballot. Garmon sought a temporary restraining order as well as temporary and permanent injunctions, prohibiting Mims's name from appearing on the Democratic primary ballot and/or prohibiting Tolbert from certifying Mims as the Democratic nominee if he were to win in the primary. On January 16, Garmon received notice that Judge Jack Skeen, Jr., Judge of the 241st District Court, recused himself and that Judge Jim Parsons, retired Judge of the 3rd District Court, would preside over the case. The hearing on the temporary injunction would not be held until January 21, three days after the overseas and military absentee ballots were to be mailed.

On January 20, Garmon amended his petition to eliminate his request that Mims be removed from the primary ballots. The amended petition sought (1) temporary and permanent injunctions prohibiting Tolbert from certifying Mims as the Democratic nominee in the event he received a majority of votes in the primary, and (2) equitable relief to cure election code violations. Following the January 21 hearing, Judge Parsons found that Mims's petition did not contain at least two-hundred valid signatures as required by the Texas Elections Code. Judge Parsons entered a temporary restraining order enjoining Tolbert from certifying Mims as the Democratic nominee for Precinct 1 Constable, in the event he received a majority of votes in the primary election, until a final judgment could be rendered. A permanent injunction hearing was set for March 12.

The Democratic primary concluded on March 3 with the following results: Mims received 51.2 percent of votes; Garmon received 38.37 percent of votes; and Traylor received 10.43 percent of votes. Because of the temporary injunction, Tolbert could not certify Mims as the Democratic nominee. During the March 12 hearing, Garmon asked Judge Parsons to order a runoff election between Garmon and Traylor. Garmon explained that a runoff election would constitute equitable

relief that would cure the election code violations. He further explained that a runoff was required for the offices of President, U.S. Senator, and Railroad Commissioner. Judge Parsons acknowledged that the undisputed evidence showed Mims should not have been on the ballot and that Tolbert stated in his pleadings that a runoff would be an available remedy because a runoff was necessary for other offices. At the conclusion of the hearing, Judge Parsons granted a permanent injunction preventing Tolbert from certifying Mims as the Democratic nominee for Precinct 1 Constable and ordered that a runoff between Garmon and Traylor be included in the Democratic primary runoff election. Judge Parsons requested Garmon prepare a final judgment for his signature. However, Judge Parsons subsequently entered a final judgment contradicting his oral pronouncement. The written final judgment dismissed Garmon's suit on grounds that his complaints were rendered moot when the overseas and military absentee ballots were mailed in January.

On March 20, Governor Greg Abbott issued a proclamation postponing the primary runoff election from May 26 to July 14. As a result, overseas and military absentee ballots will be mailed on May 30. This appeal followed.[1]

MOOTNESS

In his second issue, Garmon urges Judge Parsons erred by determining that the case was moot because the primary ballots had been mailed in January. We address this jurisdictional issue first.

Standard of Review and Applicable Law

Subject-matter jurisdiction concerns a court's power over cases. ***Reata Constr. Corp. v. City of Dallas***, 197 S.W.3d 371, 379 (Tex. 2006) (Brister, J., concurring). "Subject-matter jurisdiction is essential to a court's power to decide a case." ***City of Houston v. Rhule***, 417 S.W.3d 440, 442 (Tex. 2013) (quoting ***Bland Indep. Sch. Dist. v. Blue***, 34 S.W.3d 547, 553–54 (Tex. 2000)). "It stems from the doctrine of separation of powers, and aims to keep the judiciary from encroaching on subjects properly belonging to another branch of government." ***Reata***, 197 S.W.3d

[1] Mims previously filed an appeal from the temporary injunction ruling but filed a motion to dismiss the appeal after the final judgment was signed. This Court granted the motion and dismissed the appeal. *See* ***Mims v. Garmon***, No. 12-20-00046-CV, 2020 WL 1933598 (Tex. App.—Tyler Apr. 22, 2020, no pet.) (mem. op.) (per curiam).

at 379. Subject-matter jurisdiction is a question of law we review de novo. ***City of Houston***, 417 S.W.3d at 442.

"The mootness doctrine implicates subject-matter jurisdiction." ***In re Smith County***, 521 S.W.3d 447, 453 (Tex. App.–Tyler 2017, orig. proceeding). An appeal is moot when a court's action on the merits cannot affect the parties' rights. ***VE Corp. v. Ernst & Young***, 860 S.W.2d 83, 84 (Tex. 1993). "Appellate courts are prevented from deciding moot controversies." ***Nat'l Collegiate Athletic Ass'n v. Jones***, 1 S.W.3d 83, 86 (Tex. 1999). "This prohibition is rooted in the separation of powers doctrine in the Texas and United States Constitutions that prohibit courts from rendering advisory opinions." ***Id***. The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. ***Tex. Ass'n of Bus. v. Tex. Air Control Bd.***, 852 S.W.2d 440, 444 (Tex. 1993). Texas courts have no jurisdiction to render an advisory opinion. ***Id***.

Under the elections code, an application for a place on the general primary election ballot may not be challenged for compliance with the applicable requirements as to form, content, and procedure after the 50th day before the date of the election for which the application is made. TEX. ELEC. CODE ANN. § 172.0223(b) (West 2020). The balloting materials for voting by mail shall be mailed to voters on or before the forty-fifth day before election day. *See* ***id.*** § 86.004(a), (b) (West 2020).

Analysis

It is well established that "a contest as to the candidacy of an individual must be dismissed as moot where the contest cannot be tried [and] a final decree issued in time for it to be complied with by election officials." ***Law v. Johnson***, 826 S.W.2d 794, 797 (Tex. App.–Houston [14th Dist.] 1992, no pet.); *see also* ***Smith v. Crawford***, 747 S.W.2d 938, 940 (Tex. App.–Dallas 1988, no pet.) ("[t]he established rule is that where a contest between candidates for nomination in a party primary election cannot be tried and a final decree entered in time for substantial compliance with pre-election statutes by officials charged with the duty of preparing for the holding of the election, the courts must dismiss the contest as being moot[ ]"). The case is moot once it becomes "too late to invalidate a candidate and print new absentee ballots in time for the beginning of the casting of ballots." ***Law***, 826 S.W.2d at 797. "[C]onstraints on our action are determined by the election schedule." ***In re Meyer***, No. 05-16-00063-CV, 2016 WL 375033, at *4 (Tex. App.–Dallas Feb. 1, 2016, orig. proceeding) (mem. op.).

Garmon filed his lawsuit on January 9, which was more than fifty days before the election. As a result, his challenge was timely under the Texas Elections Code. *See* TEX. ELEC. CODE ANN. § 172.0223(b). Furthermore, Garmon's lawsuit was filed nine days before the primary ballots were to be mailed out. By no fault of his own, a hearing on the temporary injunction was not held until after the deadline for mailing the military and absentee ballots. In addition, the relief requested by Garmon was not limited to removing Mims's name from the ballot. Garmon also requested the trial court prevent Tolbert from certifying Mims as the Democratic candidate for Smith County Constable for Precinct 1. This distinction is paramount.

Equitable relief in an election contest becomes moot "where the contest cannot be tried [and] a final decree issued in time for it to be complied with by election officials." ***Law***, 826 S.W.2d at 797; ***In re Lopez***, 593 S.W.3d 353, 357 (Tex. App.—Tyler 2018, orig. proceeding). Mims and Tolbert argue that this means *all* equitable remedies are rendered moot after the primary election absentee ballots are mailed. We disagree.

Unlike our previous opinion in ***Lopez*** and the cases cited therein, Garmon's lawsuit did not simply seek to remove Mims's name from the primary election ballot. Garmon sought equitable relief in the form of a runoff election between the two candidates from whom the voters should have chosen. Furthermore, the Texas Supreme Court has allowed challenges to candidate applications to proceed following primary elections without rendering them moot. *See* ***In re Angelini***, 186 S.W.3d 558, 561 (Tex. 2006) (orig. proceeding). In ***Angelini***, a Republican candidate for the Fourth Court of Appeals asked the Supreme Court to order the State Chair of the Texas Democratic Party to prohibit the Democratic candidate from appearing on the November general election ballot. ***Id.*** at 559. The challenge was based on form, substance, and procedure of the application. ***Id.*** at 561. The Supreme Court denied the application, determining that several factual disputes remained. ***Id.*** at 560. In doing so, the Supreme Court expressly noted that "there should be ample time before the general election in November for a trial court to make its findings, and for any appellate review to be conducted first in the court of appeals rather than this Court." ***Id.*** at 561. Therefore, the Supreme Court necessarily concluded that the availability of equitable relief is not automatically rendered moot when the primary election absentee ballots have been mailed, or even the entire primary election has been held. As such, the deadline contained in Section 172.0223 is merely a deadline for filing a challenge to a candidate's application. The Supreme Court implicitly held that a challenge can continue even after the absentee ballots have

been mailed as long as the equitable relief sought does not interfere with the election schedule. *See* ***id.***

Further, the only limitation on a court's authority to grant injunctive relief is the election schedule itself. *See* ***In re Gamble***, 71 S.W.3d 313, 318 (Tex. 2002) (orig. proceeding); ***Sachtleben v. Bennett***, No. 14–10–00322–CV, 2010 WL 3168395, at *2 (Tex. App.—Houston [14th Dist.] Aug. 12, 2010, no pet.) (mem. op.) (per curiam); ***Risner v. Harris Cty. Republican Party***, 444 S.W.3d 327, 336–37 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

This case encompasses a very unique factual scenario. The primary runoff election has been postponed by gubernatorial proclamation until July 14. Therefore, the absentee ballots must be mailed by May 30. Because Garmon seeks equitable relief in the form of a runoff between the two proper candidates, he seeks equitable relief that can be fulfilled without interfering with the current election schedule. Issuance of an injunction at this point would not interfere with the November general election. *See* ***Sachtleben***, 2010 WL 3168395, at *2; ***Triantaphyllis v. Gamble***, 93 S.W.3d 398, 406, 407 (Tex. App.-Houston [14th Dist.] 2002, pet. denied). Accordingly, we conclude that this matter is not moot. *See* ***In re Angelini***, 186 S.W.3d at 561; ***Risner***, 444 S.W.3d at 336-37; ***Fitch v. Fourteenth Court of Appeals***, 834 S.W.2d 335, 337 (Tex. 1992) (orig. proceeding); ***Sachtleben***, 2010 WL 3168395, at *2; ***Triantaphyllis***, 93 S.W.3d at 406, 407. We sustain Garmon's second issue.

DENIAL OF PERMANENT INJUNCTION

Having determined that the controversy before this Court is not moot, we now turn to Garmon's first issue, in which he argues that Judge Parsons erred by revoking his oral ruling providing for a runoff primary election between Garmon and Traylor. In short, Garmon urges that Judge Parsons should have granted the permanent injunction.

Standard of Review

Permanent injunctive relief may be granted upon a showing of (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law. *See* ***Triantaphyllis***, 93 S.W.3d at 401; ***Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n***, 25 S.W.3d 845, 849 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Further, a court determining the appropriateness of a permanent injunction

should balance the competing equities, including the public interest. *See* ***In re Gamble***, 71 S.W.3d at 317; ***Triantaphyllis***, 93 S.W.3d at 401–02.

In an appeal from the denial of a permanent injunction, we apply an abuse of discretion standard. *See* ***Fort Bend Cty. Wrecker Ass'n v. Wright***, 39 S.W.3d 421, 425 (Tex. App.—Houston [1st Dist.] 2001, no pet.). "A trial court abuses its discretion by (1) acting arbitrarily and unreasonably, without reference to guiding rules or principles, or (2) misapplying the law to the established facts of the case." ***Triantaphyllis***, 93 S.W.3d at 402 (citing ***Downer v. Aquamarine Operators, Inc.***, 701 S.W.2d 238, 241–42 (Tex. 1985)). But "where the facts conclusively show that a party is violating the substantive law, the trial court should enjoin the violation, and in such case, there is no discretion to be exercised." ***Terramar Beach Cmty. Ass'n***, 25 S.W.3d at 848. Finally, "[w]e review de novo the trial court's conclusions of law." ***Risner***, 444 S.W.3d at 339.

Applicable Law

The Texas Elections Code requires a county chair to "certify in writing for placement on the general election ballot the name and address of each primary candidate who is nominated for a county or precinct office." TEX. ELEC. CODE ANN. § 172.117(a) (West 2020). There is one exception to this requirement: "A candidate's name may not be certified if, before delivering the certification, the county chair learns that the name is to be omitted from the ballot" because "the candidate withdraws, dies, or is declared ineligible." ***Id.*** §§ 145.035, 172.117(c) (West 2020).

The Texas Elections Code further provides that a "person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring." ***Id.*** § 273.081 (West 2020). And, as discussed above, the determination of a challenge to a candidate's application may be made after the primary election, so long as the determination does not interfere with the election schedule and the challenge was initiated prior to the statutory deadline for bringing such a challenge. *See* ***id.*** § 141.034(a) (West 2020); ***In re Gamble***, 71 S.W.3d at 318; ***Fitch***, 834 S.W.2d at 337; ***Sachtleben***, 2010 WL 3168395, at *2; ***Triantaphyllis***, 93 S.W.3d at 406-07; ***Risner***, 444 S.W.3d at 336-37.

A candidate for a place on the primary election ballot for the position of Constable in Smith County must submit a valid application and either a filing fee or petition containing at least two-hundred valid signatures. *See* TEX. ELEC. CODE ANN. §§ 172.021, 172.025(b)(2) (West 2020).

Analysis

None of the parties argue that Mims was rightfully on the ballot. Furthermore, neither Mims nor Tolbert challenges Judge Parson's findings at either the temporary injunction hearing or the permanent injunction hearing. As previously stated, following the temporary injunction hearing, Judge Parsons found that the petition accompanying Mims's application did not contain at least two-hundred valid signatures from registered voters of Smith County Precinct 1 as required by the Texas Elections Code. As a result, Judge Parsons granted Garmon's request for a temporary injunction, enjoining Tolbert from certifying Mims's name for the November general election ballot. And in the final judgment at issue here, Judge Parsons made the following fact finding:

> 6. [On] January 8, 2019 the Smith County Election Administrator, Ms. Karen Nelson, found thirty-two individuals who signed Mr. Mims' petition were not registered to vote in Smith County. She also found twenty-eight were not registered in Precinct 1.

Mims's application was accompanied by a petition purportedly containing two-hundred twelve signatures. Taking into account the signatures that were not from Smith County or Precinct 1 registered voters, Mims's petition contained less than the statutorily mandated number of signatures. Thus, as of the December 9, 2019 filing deadline, Mims's application did not meet the statutory requirements for a valid application.

For this reason, Mims's name appeared on the Smith County Democratic Party's primary election ballot in violation of the Texas Elections Code. And should Mims's name be certified for inclusion on the November 2020 general election ballot, his name would appear on that ballot in violation of the Texas Elections Code. *See* TEX. ELEC. CODE ANN. §§ 141.031, 141.032(c), (d), 141.062, 141.063, 141.065, 172.021(a), (e), 172.029(d) (West 2020). Garmon, a candidate with a valid application for Smith County Constable Precinct 1, has been harmed by this violation by facing an opponent who has been included on the ballot in violation of the code. *See* ***id.*** § 273.081. Garmon has no adequate remedy at law to redress this injury other than a permanent injunction. Furthermore, the only equitable remedy that would allow Smith County Precinct 1 voters to choose between the proper candidates is to add Precinct 1 Constable to the primary runoff ballot.

Judge Parsons granted temporary injunctive relief but denied Garmon's request for permanent injunctive relief after finding that it lost jurisdiction. As discussed above, this finding was in error. Under Section 273.081 of the Texas Elections Code, Garmon is entitled to injunctive

relief. Accordingly, we conclude that under the circumstances of this case, Judge Parsons had no discretion to deny Garmon's petition for permanent injunction and abused his discretion by doing so. We sustain issue two.

DISPOSITION

Having sustained Garmon's two issues, we reverse the judgment dismissing Garmon's lawsuit and we render judgment granting Garmon's request for a permanent injunction enjoining Tolbert from certifying Mims as the Democratic nominee for Smith County Constable Precinct 1 for the November 2020 general election ballot. We further order that a runoff primary election between Garmon and Traylor be included on the Smith County Democratic primary runoff ballot for July 14.

We direct the Clerk of this Court to issue the mandate immediately. *See* TEX. R. APP. P. 18.1(c). Because of the time constraints on this action, we will entertain no motion for rehearing.

JAMES T. WORTHEN
Chief Justice

Opinion delivered May 21, 2020.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 21, 2020

NO. 12-20-00117-CV

BOBBY GARMON,
Appellant
V.
MICHAEL TOLBERT, CHAIR OF THE SMITH COUNTY DEMOCRATIC PARTY AND WILLIE MIMS,
Appellees

Appeal from the 241st Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 20-0071-C)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment as entered by the court below and that the same should be **reversed** and **rendered**. It is ORDERED, ADJUDGED and DECREED by this Court that the judgment of the trial court dismissing Appellant's lawsuit in favor of Appellees, **MICHAEL TOLBERT, CHAIR OF THE SMITH COUNTY DEMOCRATIC PARTY AND WILLIE MIMS,** be, and the same is, hereby **reversed** and judgment is **rendered** granting Garmon's request for a permanent injunction enjoining Tolbert from certifying Mims as the Democratic nominee for Smith County Constable Precinct 1 for the November 2020 general election ballot and ordering that a runoff primary election between Garmon and Traylor be included on the Smith County Democratic primary runoff ballot for July 14. All costs in this cause expended both in this Court and the trial court below be, and the same are, adjudged against the Appellees, **MICHAEL TOLBERT, CHAIR OF THE SMITH COUNTY DEMOCRATIC PARTY AND WILLIE MIMS**; for which let execution issue; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.