

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

Docket No. 676 MAL 2020

**IN RE: CANVASS OF ABSENTEE AND/OR MAIL-IN BALLOTS OF
NOVEMBER 3, 2020 GENERAL ELECTION; PETITION OF DONALD J.
TRUMP FOR PRESIDENT, INC.**

**ANSWER OF APPELLEE BUCKS COUNTY BOARD OF ELECTIONS
IN OPPOSITION TO PETITION FOR ALLOWANCE OF APPEAL**

*Appeal from the November 19, 2020 Judgment and Opinion of the Bucks County
Court of Common Pleas at 2020-05786.*

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ANSWER TO PETITION FOR ALLOWANCE OF APPEAL

This case concerns the appeal of Donald J. Trump for President, Inc. (the “Campaign”) of the Bucks County Board of Elections’ decisions to count 1,995 absentee and mail-in ballots that were timely cast by eligible Bucks County voters and received by the Bucks County Board of Elections (the “Board”) on or before Election Day at 8:00 p.m. Although the Campaign admits and stipulates that the voters that cast the ballots are qualified, registered electors and that no fraud or impropriety was involved with the casting of these ballots, and that the voters all affixed their signature to their ballot-return envelopes, the Campaign claims that these 1,995 ballots should not be counted because the voters (a) failed to handwrite their name, street address, date, or some combination thereof on the ballot-return envelope or (b) enclosed their ballot in a secrecy envelope that, at some point, became unsealed. The Bucks Court of Common Pleas upheld the Board’s decisions to count these ballots on November 19, 2020. This Court settled the issue of handwritten names, addresses and dates on outer envelopes in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 2020 WL 6866415, at *1 (Pa. Nov. 23, 2020), which resolved appeals from decisions by the Philadelphia and Allegheny County Boards of Elections. On November 25, 2020, the Commonwealth Court affirmed the trial court in this matter, consistent with this Court’s decision in *In re Canvass*.

I. THERE IS NOT A SUFFICIENT BASIS TO GRANT THE PETITION FOR ALLOWANCE OF APPEAL.

Review of a final order of the Commonwealth Court of Pennsylvania “is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.” Pa.R.A.P. 1114(a). Those standard reasons are enumerated in Section 1114(b); a review of same provides no persuasive reason for this Court to grant the petition for allowance of appeal.

The Campaign’s apparent assumption that this is special and important matter necessitating an emergency application is bewildering; the total number of ballots at issue in this case, 1,995, is far fewer than the certified margin of victory in the Pennsylvania’s presidential election. In other words, no matter how those 1,995 voters cast their ballots, resolution of this case cannot possibly change the winner of Pennsylvania’s presidential election. *See Donald J. Trump for President, Inc. v. Pennsylvania*, 2020 WL 7012522, at *1 (3d Cir. 2020)(“Nor does the Campaign deserve an injunction to undo Pennsylvania’s certification of its votes. . . .The number of ballots [the Campaign] specifically challenges is far smaller than the roughly 81,000-vote margin of victory.”). Put simply, this matter is neither emergent nor important, and it is certainly not deserving of this Court’s discretionary review.

Even more perplexing is that the Campaign appeals to this Court to review an issue that it has already carefully addressed at length and decided in *In Re: Canvass*

of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election, 2020 WL 6866415, at *1 (Pa. Nov. 23, 2020).

This Court has already clearly held that a county Board does not err by counting absentee and mail-in ballots cast in the November 2020 general election that were returned within outer envelopes that either had no printed name or address and/or no handwritten date.¹ The Campaign cannot offer any sound rationale as to why this Court should take that matter up again.

The only distinct issue in the matter *sub judice* that was not addressed by the foregoing holding is the issue of 69 ballots that were fully enclosed within secrecy envelopes, which were not fully sealed upon their removal from the outer envelopes. The Campaign offers no rationale or argument at all as to why it believes the Commonwealth Court and Bucks County Court of Common Pleas erred, except that it raises, for the first time, an argument that the decision has raised “serious equal protection concerns.” *See* Petition at 25. It appears the Campaign’s entire Petition for Allowance of Appeal turns on its argument that the Board’s counting of these ballots violates the equal protection clause of the U.S. Constitution.

II. THE CAMPAIGN FAILED TO RAISE ITS CONSTITUTIONAL CONCERNS BEFORE THE COURT OF COMMON PLEAS AND THEY ARE THEREFORE WAIVED.

¹ In Bucks County, the Board counted 1,196 ballots whose outer envelopes did not contain a handwritten date or contained only a partial handwritten date; 644 ballots whose outer envelopes did not include a handwritten name or address; and 86 ballots whose outer envelopes contained a partial written address. This accounts for a total of 1,926 ballots that fit into these categories.

The Campaign submits that the Commonwealth Court and trial court erred in failing to address or resolve what it describes as a significant constitutional issue. Notably, the issues raised in its Petition for Allowance of Appeal were not raised before the trial court, and pursuant to Pa.R.A.P. 302(a), “issues not raised in the trial court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a). As a general rule, Pennsylvania courts do not permit the raising of constitutional issues for the first time on appeal. *See In re: F.C. III*, 2 A.3d 1201 (Pa. 2010); *see also In re Bah*, 215 A.3d 1029 (Pa. Cmwlth. 2019) *citing Kuziak v. Borough of Danville*, 125 A.2d 470 (Pa. Cmwlth. 2015). This Court has ruled:

Issue preservation is foundational to proper appellate review. Our rules of appellate procedure mandate that ‘[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.’ Pa.R.A.P. 302(a). By requiring that an issue be considered waived if raised for the first time on appeal, our courts ensure that the trial court that initially hears a dispute has had an opportunity to consider the issue. This jurisprudential mandate is also grounded upon the principle that a trial court, like an administrative agency, must be given the opportunity to correct its errors as early as possible. Related thereto, we have explained in detail the importance of this preservation requirement as it advances the orderly and efficient use of our judicial resources. Finally, concepts of fairness and expense to the parties are implicated as well.

In re F.C. III, 2 A.3d 1201, 1211-12 (Pa. 2010) (citations omitted).

Here, the Campaign did not raise its constitutional concerns in its original Petition for Review before the trial court. It did not argue any constitutional concerns in oral argument, or in its legal briefs to the trial court. The trial court therefore, did not address any constitutional concerns in its trial court opinion. The first time the constitutional issues were raised was on appeal, before the Commonwealth Court. The Campaign argues that the Commonwealth Court did not address their equal protection concerns; however, they fail to inform this Court that the Commonwealth Court specifically addressed the issue, stating in footnote 7 the following:

To the extent Appellant seeks to “incorporate” Equal Protection arguments into this case that were raised in other cases, Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them. Pennsylvania Rule of Appellate Procedure 302(a), Pa.R.A.P. 302(a) (“Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.”).

Slip Memorandum Opinion, page 6.

Further, even aside from the threshold bar of waiver, the Campaign failed to provide or present any evidence to support or underpin its constitutional claims. Although the Campaign asserts in its Petition that the standards applied in Bucks County are different than in other Pennsylvania counties, there is no basis for these factual assertions within the record at all. The Campaign did not present any evidence or testimony in their case that demonstrated at all what standards were

being observed in other counties. Instead, the Campaign agreed to a stipulated factual record on which it knew the trial court would base its decision. Had the Campaign raised these arguments at the trial level, there could have been an opportunity to present and question witnesses to elicit facts to support or negate these assertions. The trial court would have had an opportunity to consider the issue.

In the absence of an equal protection claim being properly raised, not to mention the absence of any record to support such an argument, review by this Court is foreclosed.

III. THE DECISIONS BY THE COMMONWEALTH COURT AND COURT OF COMMON PLEAS WERE CONSISTENT WITH THIS COURT'S RECENT PRECEDENT.

Though the Campaign does not present any argument other than its waived constitutional claim, even if it had raised the statutory arguments it presented to the Court of Common Pleas, there would be no basis for discretionary review. The judgments of the courts below, which upheld the Board's decision to count the ballots in question, were clearly correct. The Election Code does not require county boards to disqualify mail-in or absentee ballots submitted by qualified electors whose ballots lack a date or have a partial, printed name, printed address or partial address, or ballots which were enclosed but not fully sealed in the secrecy envelope, where no fraud or irregularity has been alleged, and there is no way of knowing when and/or how the envelopes became unsealed.

A. THE MAJORITY OF THE ISSUES IN THE UNDERLYING APPEAL WERE ALREADY SETTLED BY THIS COURT.

On November 23, this Court’s decision in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 2020 WL 6866415, at *1 (Pa. Nov. 23, 2020) settled the issue regarding the need for printed names, addresses, and signatures on the declarations on outer envelopes of mail-in or absentee ballots. For the reasons stated therein, the trial court rightfully concluded that the Board properly accepted and counted votes of qualified Bucks County electors who, by way of technical omissions, did not include a printed name, address, or date on their declarations. *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 2020 WL 6866415, at *15 n.6 (Pa. Nov. 23, 2020) (“[T]he Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court’s precedent in doing so.”). The holding in that case consequently addressed 1,926 of the 1,995 ballots that were the subject of the Campaign’s appeal to the Commonwealth Court: the Board appropriately counted 1,196 ballots whose outer envelopes did not contain a handwritten date or contained only a partial handwritten date; 644 ballots whose outer envelopes did not include a handwritten name or address; and 86 ballots whose outer envelopes contained a partial written address. Accordingly, the

Commonwealth Court found there was no error in the trial court rejecting the Campaign's challenges to these categories. *See* Slip Memorandum Opinion, at 5-6.

B. THE ELECTION CODE DOES NOT REQUIRE THE BOARD TO INVALIDATE A BALLOT WHEN THAT BALLOT IS FULLY ENCLOSED WITHIN A PRIVACY ENVELOPE AND ITS SECRECY HAS BEEN MAINTAINED

With the above issues settled by this Court, the only remaining issue is whether 69 qualified electors in Bucks County – absent any allegations of fraud or irregularity – should have their votes counted. The Campaign would have this Honorable Court grant review and overturn the trial court's sound decision to deny the Campaign's request to disenfranchise these voters due to minor technical deficiencies with the sealants on the voter's secrecy envelopes. The parties stipulated that these were ballots contained within secrecy envelopes; therefore they do not implicate the privacy concerns that troubled this Court in *Pennsylvania Democratic Party v. Boockvar*, 283 A.3d 345, 378-80 (Pa. 2020) (recognizing the “inescapable conclusion that a mail-in ballot *not enclosed* in the statutorily-mandated secrecy envelope must be disqualified.”). For the reasons that follow, the trial court's decision was supported by the factual record and should be upheld.

As summarized by the Commonwealth Court, the following record supports the trial court's decision:

Relevant specifically to [the unsealed privacy envelope] challenges, [the Bucks County Board of Elections]

Director indicated that “the privacy of the ballots were not jeopardized in any manner,” there was no “view of the ballots” “to his knowledge,” and that there was no “way to determine by the Board whether or not the secrecy envelope had been sealed at one point and became unsealed.” He testified that the Board provided the envelopes, including the secrecy envelopes, which were the type that had “to be either moistened by licking or water or glue,” and agreed that people would have to rely on the type of envelopes provided by the Board as to the quality of the seal. Director agreed that the Board discussed the possibility that voters may have concerns about licking the envelopes, given the pandemic, which appeared to be a factor in its decisions. He further agreed that the “ballots that were enclosed within unsealed secrecy envelopes” were “enclosed within the outer envelope.” Director was subjected to limited cross-examination, but not on this issue.

...

[The] Common pleas held that “there is no factual evidence that supports a conclusion that the envelopes had not been sealed by the elector prior to” the time of canvassing. Instead, common pleas pointed to the parties’ stipulation that “with respect to Category 5 . . . the Board could not determine whether the secrecy envelopes were initially sealed by the elector but later became unsealed.” Accordingly, common pleas found “there was no evidence that the electors failed to ‘securely seal the ballot in the secrecy envelope,’ as required by the . . . Code.” It explained that “the elector was provided the envelope by the government” and “if the glue on the envelope failed, that would be the responsibility of the government.” Therefore, common pleas held “there was insufficient evidence to determine whether the specific language of the mandated law was violated” and “it would be an injustice to disenfranchise these voters when it cannot be shown that the ballots in question were not ‘securely sealed’ in the secrecy envelope prior to the canvassing of those ballots,” particularly where “there had been no suggestion

or evidence that the absence of a sealed inner envelope in anyway jeopardized the privacy of the ballot.”

Slip Memorandum Opinion, at 4, 6-7 (internal citations and edits omitted).

The Campaign asserted that these voters made technical mistakes in sealing their secrecy envelopes and, therefore, that they should be disenfranchised. But no evidence was produced to permit the trial court to determine that any mistake had in fact been made by the voters. To the contrary, the only evidence submitted was that these 69 voters took the following steps to cast their votes: They submitted an application to vote by mail or absentee ballot, therein providing their name, address, driver’s license number and/or social security number, and date of birth. N.T. 11/17/20, pg. 65. Their applications were individually reviewed by the Board and approved. *Id.* at 66. The voters then completed the ballots they received in the mail from the Board, and properly placed and enclosed their ballots inside the privacy envelope. There was no evidence submitted by the Campaign that the voters did not seal the envelopes. The voters then enclosed their privacy envelope within an outer envelope. These voters also all affixed their signature to their ballot envelope, on the declaration, declaring that they were “qualified to vote”, and printed their name, address, and date on the outer envelope. Court Exhibit 1, Joint Stipulation of Facts, pg. 6. These 69 voters, despite mail delays, successfully returned their ballots to the Board on or before Election Day. Court Exhibit 1, Joint Stipulation of Facts, pg. 7.

The electors at issue may have made errors in the effectiveness of their sealing of the inner privacy envelopes; it is impossible, on this record, to tell. Notably, the Campaign, which carried the burden of proof in challenging the Board's decision, *see City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d 535, 537, 539-40 (C.P. Luzerne Cnty. 1967); *Petrucci Appeal*, 38 Pa. D. & C.2d 675, 677 (C.P. Luzerne Cnty. 1965); *City of Duquesne Election Appeals*, 39 Pa. D. & C.2d 545, 551 (C.P. Allegheny Cnty. 1965), provided no evidence of fraud or failure to seal. Rather, the factual record was one that was largely stipulated to and agreed upon by the Campaign and the Board.

In any event, the fact that the privacy envelope became unsealed had no impact on the secrecy or sanctity of the ballot. As held by this Court, "the power to throw out a ballot for minor irregularities . . . must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons." *See Appeal of James*, 105 A.2d 64, 66 (Pa. 1954). Any procedural mistakes on the voter's behalf, even if the Campaign had proven that the voter had made that mistake, are similar to the types of minor mistakes that Pennsylvania courts have held should not result in ballots being stricken. *See Shambach v. Bickhart*, 845 A.2d at 798-99 (Pa. 2004); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972).

Even if the Board could discard ballots under these provisions, it is not at all clear that they must. The Board took into consideration that the privacy of these ballots was not compromised, and that they were still sealed within an outer envelope. Further, in accordance with the conclusion in *Boockvar*, the ballots were fully enclosed within the secrecy envelope and were not bound by authority to be disqualified. As this Court discussed in *Boockvar*, the “omission of a secrecy envelope defeats the intention” of securing the voter’s privacy in their ballot. *See id* at 380. In light of such language, the Board properly accepted the ballots which were fully enclosed within their secrecy envelopes.

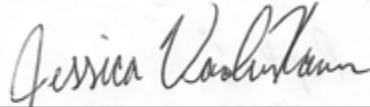
The Campaign failed to produce any factual evidence that to support their position. It failed to present any evidence indicating whether the voter had failed to seal the privacy envelope or if the envelope had instead become unsealed through no fault of the voter. The Campaign further failed to demonstrate how the Board’s decision to count these ballots is “based on a clear error of law.” In sum, because the Campaign has failed to identify anything calling into question the Board’s decision to count these ballots, there is no reason to review the judgments below.

IV. CONCLUSION

For the foregoing reasons, the Board respectfully requests this Court to deny the Campaign’s Petition for Allowance of Appeal.

Date: December 7, 2020

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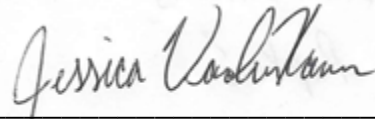
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CERTIFICATIONS

This 7th day of December, 2020, I certify that:

Certificate of Compliance with Confidential Information Rule. I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Word Count. I certify that this Answer contains 3,114 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate I have relied on the word count of the word-processing software system used to prepare this brief.



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