

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Allegheny County Provisional :
Ballots in the 2020 General Election : No. 1161 C.D. 2020
: Submitted: November 19, 2020
Appeal of: Nicole Zicarelli :

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE WOJCIK

FILED: November 20, 2020

I respectfully dissent from the majority's decision to reverse the order of the Court of Common Pleas of Allegheny County (trial court) in this matter.

The Pennsylvania Supreme Court has explained:

'The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for 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. * * * 'The purpose in holding elections is to register the actual expression of the electorate's will' and that 'computing judges' should endeavor 'to see what was the true result.' There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.'

In resolving election controversies it would not be amiss to consider the following criteria:

1. Was any specific provision of the Election Code violated?
2. Was any fraud involved?
3. Was the will of the voter subverted?
4. Is the will of the voter in doubt?
5. Did the loser suffer an unfair disadvantage?
6. Did the winner gain an unfair disadvantage?

Appeal of James, 105 A.2d 64, 67 (Pa. 1954) (citation omitted). It is undisputed that only the first of the foregoing six criteria is at issue with respect to the contested ballots herein.

Regarding the submission of a vote by provisional ballot, Section 1204(a) and (a.4)(1)-(3), (5)(i), (ii)(A) and (F) of the Pennsylvania Election Code¹ provides, in relevant part:

(a) At every primary and election each elector who appears to vote and who desires to vote shall first present to an election officer proof of identification. The election officer shall examine the proof of identification presented by the elector and sign an affidavit stating that this has been done.

* * *

(a.4)(1) At all elections an individual who claims to be properly registered and eligible to vote at the election district but whose name does not appear on the district register and whose registration cannot be determined by the inspectors of election or the county election board shall be permitted to cast a provisional ballot. Individuals who appear to vote shall be required to produce proof of identification pursuant to subsection (a)

¹ Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §3050(a), (a.4)(1)-(3), (5).

and if unable to do so shall be permitted to cast a provisional ballot. An individual presenting a judicial order to vote shall be permitted to cast a provisional ballot.

(2) Prior to voting the provisional ballot, the elector shall be required to sign an affidavit stating the following:

I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____ in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania and that this is the only ballot that I cast in this election.

Signature of Voter/Elector

Current Address

Check the Reason for Casting the Provisional Ballot.

Signed by Judge of Elections and minority inspector

(3) After the provisional ballot has been cast, the individual shall place it in a secrecy envelope. The individual shall place the secrecy envelope in the provisional ballot envelope and shall place his signature on the front of the provisional ballot envelope. All provisional ballots shall remain sealed in their provisional ballot envelopes for return to the county board of elections.

* * *

(5)(i) Except as provided in subclause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot if the county board of elections confirms that the individual did

not cast any other ballot, including an absentee ballot, in the election.

(ii) A provisional ballot shall not be counted if:

(A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

* * *

(F) the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

At issue in the instant matter are approximately 270 provisional ballots cast in Allegheny County in the November 3, 2020 General Election that purportedly have one of the following technical defects: (1) the provisional ballot contained an affidavit signed by the voter as required by Section 1204(a.4)(2), but did not contain a signature on the provisional ballot envelope as required by Section 1204(a.4)(3); (2) the provisional ballot contained the signature on the provisional ballot envelope as required by Section 1204(a.4)(3), but did not contain the affidavit signed by the voter as required by Section 1204(a.4)(2); or (3) the provisional ballot was cast by a voter whose absentee or mail-in ballot was timely received by the Allegheny County Board of Elections, but the absentee or mail-in ballot was defective and, therefore, invalid in some respect.

There is no dispute that the voters who cast the questioned 270 ballots were qualified, registered electors. Moreover, there is no allegation that any of the 270 voters in question had voted more than once. The only sins that would lead these votes to be discarded is that the qualified, registered voters failed to properly enter his or her signature on all of the multiple documents required to be signed, or his or her desire to correct a previously submitted, but admittedly invalid absentee or mail-in ballot through the submission of a properly executed provisional ballot.

I view the foregoing technical provisional ballot requirements as similar to the issue of the color of ink that is used to fill in an absentee or mail-in ballot. With respect to such ballots, Sections 1306(a)² and 1306-D(a)³ of the Pennsylvania Election Code plainly state the voter “*shall*, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen.” 25 P.S. §§3146.6(a), 3150.16(a) (emphasis added).⁴ Our Supreme Court approved the marking of absentee ballots with green or red pen to be appropriate despite the General Assembly’s use of the word “shall” when describing the method of marking the ballots. *See In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). There, our Supreme Court construed the Election Code liberally so as to not disenfranchise Pennsylvania voters over a technicality.

In light of the foregoing criteria outlined in *Appeal of James*, I would do so here as well, and I would not blithely disenfranchise those 270 voters who merely neglected to enter a signature on one of the various signed documents of an otherwise properly executed and timely-submitted provisional ballot. Likewise, I would not penalize a properly registered voter’s attempt to exercise his or her right

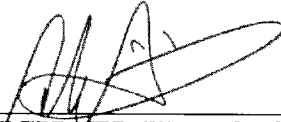
² Added by the Act of March 6, 1951, P.L. 3, as *amended*, 25 P.S. §3146.6(a).

³ Added by the Act of October 31, 2019, P.L. 552, 25 P.S. §3150.16a.

⁴ The same requirements apply to the execution of all documents relating to the submission of a provisional ballot. *See* Section 1204(a.3)(1) of the Pennsylvania Election Code, 25 P.S. §3050(a.3)(1) (“All electors, including any elector that shows proof of identification pursuant to subsection (a), shall subsequently sign a voter’s certificate in blue, black or blue-black ink with a fountain pen or ball point pen, . . . and hand the same to the election officer in charge of the district register.”).

of franchise by correcting a previously submitted, but admittedly invalid absentee or mail-in ballot, by submitting a properly executed provisional ballot.

Accordingly, unlike the majority, I would affirm the trial court's order in this case.



MICHAEL H. WOJCIK, Judge