

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEE COUNTY

Court of Common Pleas

The Honorable George C. James, Jr.

Appeal No.: 2016-000299

RECEIVED

MAR 29 2016

S.C. SUPREME COURT

Edward Byrd, Mike Morrow, Ennis Bryant, Willie Mae Muldrow and Ken Currie

Appellants,

v.

Craig Nesbit and John Y. Latimer

Respondents.

INITIAL BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

The sole question presented for review on this appeal is whether the circuit court committed any errors of law in affirming the decision of the City of Bishopville Municipal Election Commission to hold a new election for City Council seats.

STATEMENT OF THE CASE

I. Procedural History

This matter arises from the municipal election held by the City of Bishopville for seats on the City Council on May 12, 2015. Following the publication of the election results, Respondents timely submitted a protest contesting the results based upon what they deemed to be a violation of the election statutes and the South Carolina Constitution in the counting of the ballots. (Letter of Protest dated May 13, 2015). In response to Respondents' timely protest, the City of Bishopville Municipal Elections Commission (hereinafter "MEC"), held a timely hearing on the protests three (3) days later, on May 15, 2015. (MEC Order). Witnesses and testimony were presented, arguments were made, witnesses were cross-examined, and a written decision was issued on May 19, 2015, after due deliberation by the MEC in consultation with legal counsel and filed with the Lee County Clerk of Court on May 22, 2015. (MEC Order). The MEC Order provided that a new election must be held in light of the evidence and testimony presented that access to the Ward 2 building was denied while votes were being counted. (MEC Order).

Appellants appealed the MEC Order providing a new election shall be held for the City Council seats to the circuit court. All parties fully briefed the issues and presented the testimony and evidence presented to the MEC to the circuit court. After a hearing on

the matter, the circuit court issued an Order on February 12, 2016 affirming the MEC Order and ruling providing a new election must be held. (Circuit Court Order).

Appellants now appeal the Circuit Court Order directly to this Court pursuant to South Carolina Appellate Court Rule 203(d)(1)(E).

II. Statement of Facts

An at large election was held by the City of Bishopville on May 12, 2015 for six (6) city council seats. The polls opened at 7:00 a.m. and closed at 7:00 p.m. (Tr. p. 21, l. 9-12). At the MEC hearing held on May 15, 2015, Respondent Craig Nesbit testified he attempted to gain entry to the building at Ward 2 Precinct, which is the fire department building, sometime after the polls were closed at 7:00 p.m. on May 12, 2015, and the door appeared to be locked. (Tr. p. 18, l. 6-15). Respondents also presented the testimony of Tyler Wilson, who testified he also attempted to enter the building at Ward 2 Precinct after the polls were closed and could not gain entry. (Tr. p. 35, l. 3). Mr. Wilson specifically testified that when he pulled on the door, “[i]t was totally locked.” (Tr. p. 17). Respondent Nesbit also testified that he notified City Election Commission Chairperson Delphine Peterson about the door and that she told him “she went in there and told them it didn’t need to be locked but it was locked again.” (Tr. p. 17). Ms. Peterson stated that she went by Ward 2 around “7:30ish” and the door was locked. (Tr. p. 18). MEC member Meociania Wells (incorrectly identified as Weeks in the transcript) also spoke of her knowledge as to the door being locked or the building inaccessible. The circuit court did not consider these statements made by these MEC members as they were not “sworn witnesses” in the proceeding but Respondents submit they are further evidence in the record to support the MEC’s decision.

Testimony was also presented at the MEC hearing that the door may not have been locked, but rather was stuck or otherwise malfunctioned as there had been a history of such problems. Specifically, Petitioner Willie Mae Muldrow stated that in the past she had experienced difficulty opening the door in question even though she knew the door was unlocked. (Tr. p. 26-27). Edward Byrd, a City of Bishopville employee, testified that he had been called out several times to work on the door in question and acknowledged the door is very hard to open. (Tr. p. 28). Regardless of the reason, however, there was competent evidence presented to the MEC that at least two persons were unable to gain access to the building while ballots were being counted and the ballots were thus not counted “publicly” but rather were counted “in secret.”

STANDARD OF REVIEW

In municipal election cases, this Court reviews the judgment of the circuit court only to correct errors of law. *Cole v. Town of Atlantic Beach Election Commission*, 393 S.C. 264, 712 S.E.2d 440 (2011); *Gecy v. Bagwell*, 372 S.C. 237, 642 S.E.2d 569 (2007); *Taylor v. Town of Atlantic Beach Election Commission*, 363 S.C. 8, 609 S.E.2d 500 (2005); *George v. Mun. Election Comm’n of the City of Charleston*, 335 S.C. 182, 516 S.E.2d 206 (1999). This Court’s review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. *Id.* The rule is well established in this State that courts will not disturb the ruling of an administrative board on a certiorari hearing unless such findings are entirely without support in the evidence. *Smith v. Pratt*, 258 S.C. 504, 189 S.C. 2d 301 (1972); *McKnight v. Smith*, 182, S.C. 378, 189 S.C. 361 (1937).

ARGUMENT

South Carolina Code Ann. § 5-15-120 provides, in pertinent part, that, “immediately upon the closing of the polls at any municipal election, the managers shall count publically the votes cast.” (emphasis added). Section 1, Article 2 of the South Carolina Constitution further provides that “[A]ll elections by the people shall be by ballot, and elections shall never be held where the ballots are counted in secret.” Respondents contend that the door to the building at Ward 2 Precinct was either locked, stuck or just malfunctioning after the closing of the polls and while ballots were being counted.

Respondents submit it does not matter whether the door was intentionally locked, inadvertently locked, stuck, malfunctioning, or some other issue. The only fact that matters is that persons were unable to gain access to the building to watch the ballots being counted. Both the MEC and the circuit court properly ruled that a new election must be held in accord with *McKnight v. Smith, supra*, in which the South Carolina Supreme Court held that a new election must be held when votes have been counted in secret, even if the votes counted were otherwise correct. (MEC Order, p. 2).

Appellants spend much of their Brief attempting to reargue the facts considered, or present facts not considered, by the MEC, such as whether the door was intentionally locked, whether there was another door through which someone could have entered the building, the specific time the witnesses attempted to enter the building, and other factual issues. South Carolina law is very clear, however, that this Court cannot reconsider the MEC’s findings of facts or consider or hear new facts, but rather is limited to determining whether there is any evidence in the record to support the MEC’s decision or whether the circuit court committed any errors of law. There can be little doubt there was evidence

presented to the MEC that at least two persons were unable to gain access to the building while the ballots were being counted, in addition to the undisputed evidence concerning a history of problems with the door. Therefore, there was sufficient evidence to support the MEC's finding that ballots were not counted publicly.

The election process in South Carolina is exclusively controlled by statute. S.C. Const. art. II, § 10. Where there is a disregard of the statute, the violation cannot be treated as a mere irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal. See *Gecy*, 372 S.C. at 237; see also *George*, 335 S.C. at 182. The Court will not sanction practices or circumvent the plain purposes of the law and open the door to fraud. *Gecy*, at 572; *May v. Wilson*, 199 S.C. 534, 19 S.C. 2d 467 (1942). Respondents are not alleging any intentional fraud on the part of any person but it is clear the plain purposes of the law, i.e., counting ballots publicly, was circumvented by the inability of persons to access the building at Ward 2 Precinct while ballots were being counted.

Appellants argue some factual or legal distinction between the "locked door" which was found in the case of *McKnight* versus what may be what may be generally categorized a "sticky door" which barred entrance to the Ward 2 Precinct in this case. (Brief, p. 6-7). There is, however, no distinction, or at least a distinction without a difference, and the end result is the same: the ballots were not counted publicly.

Appellants seem to concede that votes were not counted publicly in violation of the South Carolina Constitution, but argue that this "constitutional violation must be rendered a simple irregularity" and that because it did not render the results of the election doubtful the election should be upheld. (Brief, p. 9). Appellants cite no authority for this proposition,

most likely because all the cases cited by Appellants hold just the opposite: i.e., that an election contest does not have to establish that the purported irregularity rendered the outcome doubtful where the irregularity was either a constitutional violation or where a statute provides that such irregularity invalidates the election. *Taylor*, 363 S.C. at 16 (citing *Butler v. Town of Edgefield*, 328 S.C. 238, 246, 493 S.E.2d 838, 843 (1997)). As cited hereinabove, constitutional and statutory violations have long been considered by this Court to be more than mere “irregularities.” In this instance, there is both a constitutional violation and a statutory violation. Thus, Respondents are not required to establish the outcome of the election is rendered doubtful, although they would submit any time ballots are counted secretly the results should be presumed doubtful.

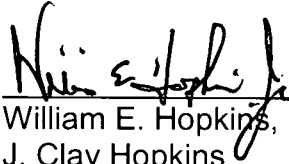
In sum, the MEC’s factual findings and decision set forth in its May 19, 2015 Order are fully supported by the record and evidence from the hearing and no errors of law occurred on the part of the circuit court. The MEC correctly applied the clear language of the statute, which prohibits counting ballots in secret, to the facts of the case in which it is undisputed persons could not gain access to the building. Since there is evidence in the record to support the MEC’s findings and no errors of law occurred, both the circuit court and the MEC’s Orders should be affirmed and a new election should be scheduled and held as soon as practicable.

CONCLUSION

Based on the foregoing, Respondents respectfully request this Court issue an Order affirming the MEC’s May 19, 2015 Order, as well as the circuit court’s February 12, 2016 Order, and that a new election be ordered as soon as possible.

Respectfully submitted,

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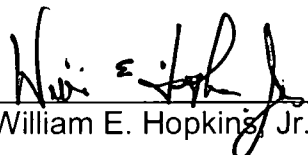
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Respondents.

PROOF OF SERVICE

I do hereby certify that on this day I served a copy of the foregoing Initial Brief of Respondents upon Counsel for the Petitioners by depositing copies in First Class U.S. mail, postage paid, to the following address:

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March 28, 2016

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