

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1161 CD 2020

**IN RE: ALLEGHENY COUNTY PROVISIONAL BALLOTS
IN THE 2020 GENERAL ELECTION**

APPEAL OF: NICOLE ZICCARELLI

**BRIEF FOR APPELLEE ALLEGHENY COUNTY
BOARD OF ELECTIONS**

Appeal from the Allegheny County Court of Common Pleas
Memorandum and Order dated November 18, 2020, GD 20-11793

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STATEMENT OF QUESTION PRESENTED

Whether the Allegheny County Board of Elections abused its discretion or committed an error of law in determining that the Single Signature Provisional Ballots should be canvassed in accordance with Section 3050?

Court below correctly answered in the negative.

COUNTER-STATEMENT OF THE CASE

A. Procedural History

On Saturday, November 14, 2020, the Allegheny County Board of Elections (“the Board”) met to consider whether approximately 270 Ballots should be canvassed in accordance with Section 3050 of the Election Code. By a 2-1 vote, the Board determined that the 270 Ballots should be canvassed in accordance with Section 3050. The Board directed the Manager of the County’s Elections Division to proceed with the canvassing of these provisional ballots.

The ballots in question were divided into three categories and a vote was taken on each category. Those categories were as follows:

1. Ballots containing an affidavit signature by the voter under 25 P.S. §3050(a.4)(3), but not a signature pursuant to 25 P.S. § 3050 (a.4)(3);
2. Ballots containing the signature under 25 P.S. § 3050(a.4)(3), but not the affidavit signature under 25 P.S. § 3050(a.4)(3); and
3. Ballots for which a voter voted a provisional ballot which corresponded to a previously submitted mail-in or absentee ballot which was determined to lack the secrecy envelope and which was therefore not

counted by the Board.

The ballots at issue in the first two categories totaled approximately 250. The ballots at issue in the third category totaled approximately 20.

The Board voted, by a vote of 2-1 in each case, to canvass the categories of ballots set forth above.

On November 16, 2020, Nichole Zicarelli, a candidate in the 45th State senatorial district, filed a Petition for Review in the Nature of a Statutory Appeal (the “Petition for Review”) and asked the Court of Common Pleas of Allegheny County to reverse the Board’s determination that it is appropriate to accept, canvass, and compute these 270 provisional ballots. On November 17, 2020, the Honorable Joseph James of the Allegheny County Court of Common Pleas held oral argument on Zicarelli’s Petition for Review.

On November 18, 2020, Judge James issued its Memorandum and Order, holding that the Board had not abused its discretion in deciding to count the 250 ballots in the first two categories. The Court, however, did not address the issue of the provisional ballots in the third category. As the Court recognized, the completion of a date under the declaration on the outer envelope is directive, not mandatory. *Zicarelli v. Allegheny County Board of Elections*, No. GD-20-011793 (C.P. Allegheny Cty. 2020). The court noted that because Zicarelli had not alleged any fraud in connection with approximately 250 Ballots, the eligible voters, “should not be penalized because they were given and relied on incorrect information by the

election administration.” *Id.* Further, the court held, “these provisional ballots submitted by registered and eligible voters must be counted.” *Id.*

B. Provisions of The Election Code At Issue

With respect to provisional ballots, the Election Code states that “prior to voting the provisional ballot,” the voter must sign an affidavit affirming, inter alia, that the provisional ballot is the only one the cast by the elector in that election. 25 P.S. § 3050(a.4)(2). Section 3050(a.4)(3) further states that “after the provisional ballot has been cast,” the voter must place the provisional ballot in a secrecy envelope and “shall place his signature on the front of the provisional ballot envelope.” 25 P.S. § 3050(a.4)(3).

C. Use of Provisional Ballots

A voter may be issued a provisional ballot for a multitude of reasons including if the voter’s name was not in the poll book or supplemental poll book or if the voter is required to show identification but cannot show identification on Election Day. For a voter to be issued a provisional ballot, the following must occur: (1) before a voter can receive the ballot, they must complete the sections on the provisional envelope labeled Voter Information, Voter Affidavit for Provisional Ballot, and Current Address in front of election officials; (2) after a voter receives and marks their provisional ballot, they must seal their ballot in the secrecy envelope and then place the secrecy envelope in the provisional ballot envelope; and (3) the voter must

fill out the Voter Signature section on the provisional ballot envelope in front of the Judge of Elections and the Minority Inspector. The Judge of Elections and the Minority Inspector then signs and dates the envelope after noting the reason for the provisional ballot.

The provisional ballot outer envelope contains two similar voter declarations. The first declaration, contained in Box 1, states: “I do solemnly swear or affirm that my name and date of birth are as I have listed above, and at the time that I registered I resided at the address I have provided above, in the Commonwealth of Pennsylvania and that this is the only ballot that I have cast in this election.” The second declaration, contained in Box 4, states: “The undersigned declares, under penalty of law, that he/she is a properly registered elector in the election district indicated in my affidavit, and that he/she is eligible to vote in this election in this election district.”

Here, the approximately 250 voters presented at their polling location and attempted to follow the steps necessary to vote with a provisional ballot. Poll workers handed them all of the materials and gave them instructions how to fill out the outer envelope. Many people are unfamiliar with this process and rely on the information given to them at the polling location. Although poll workers generally give provisional voters correct advice, administrative breakdowns resulting in incorrect advice are always a possibility. Given the unprecedented circumstances

under which the 2020 General Election was conducted – the existence of a worldwide pandemic, the need for local boards of election and in-person voters to follow social distancing requirements and the record turnover of voters for the election, the probability of either incorrect advice or lack of attention by a local board to how the provisional envelope was filled out by a voter is high.

SUMMARY OF THE ARGUMENT

The Court of Common Pleas correctly determined that the provisional ballots at issue here should be canvassed. Pennsylvania case law plainly provides that while election law provisions are to be strictly enforced to prevent fraud, the overriding concern always must be to construe these provisions in a flexible in order to favor the right to vote. As the Pennsylvania Supreme Court has declared, “Our goal must be to enfranchise and not to disenfranchise.”

Further, our case law firmly recognizes that procedural types of election law requirements, in the absence of any evidence of fraud, can be modified in the event of an administrative breakdown operations of the election system. The Court of Common Pleas correctly determined that the resort to provisional ballots by local boards given the circumstances under which the 2020 General Election was conducted constituted an administrative breakdown justifying the counting of the provisional ballots at issue.

ARGUMENT

A. The Overarching Goal of The Election Code Is to Protect The Right To Vote.

It is the “longstanding and overriding policy in this Commonwealth to protect the elective franchise,” *Shambach v. Bickhart*, 577 Pa. 384, 392, 845 A.2d 793, 798 (2004) (citations omitted). Thus, “[t]he Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice,” *Petition of Ross*, 411 Pa. 45, 48, 190 A.2d 719, 720 (1963); *see also, James Appeal*, 105 A.2d 64 (Pa. 1954).

At issue here are the provisions of the Election Code that require “prior to voting the provisional ballot,” the voter must sign an affidavit affirming, *inter alia*, that the provisional ballot is the only one that was cast by the elector in that election. 25 P.S. § 3050(a.4)(2). The Election Code also provides that “after the provisional ballot has been cast,” the voter must place the provisional ballot in a secrecy envelope and “shall place his signature on the front of the provisional ballot envelope.” 25 P.S. § 3050(a.4)(3).

In this case, there is no dispute that the approximately 250 provisional ballots were cast by qualified electors who did not vote twice in the election. Zicarelli did not and cannot challenge that the fact that the 250 voters were not qualified to vote or voted twice in the election. The Board thus properly held that the 250 Ballots were properly voted and that the absence of a second voter signature on the outer

envelope should not result in the disenfranchisement of a voter. Judge James properly affirmed that determination, recognizing the “longstanding and overriding policy” of this Commonwealth “to protect the elective franchise.”

The “deficiency” identified by Zicarelli is that the electors did not sign both of the boxes containing declarations on the outer envelope, which can only be described as the epitome of a technicality. There is no reason – much less a compelling one – to disenfranchise 250 voters for a minor deficiency or error that likely resulted from the incorrect advice of an election worker.

B. In the Absence of Any Evidence of Fraud, Procedural Requirements in the Election Code Can Be Modified Where There is an Administrative Breakdown Operations of The Election System.

The Court of Common Pleas correctly recognized that administrative breakdown in the election system justifies construing the Election Code to facilitate voting. The Board adopts the well-reasoned position of the Court of Common Pleas as its argument. *See*, Opinion of the Court.

Additionally, the Board incorporates the well-stated arguments made by the Appellees, the Pennsylvania Democratic Party and James Brewster.

CONCLUSION

For the reasons set forth herein, the November 18, 2020 Memorandum Opinion and Order of the Allegheny County Court of Common Pleas upholding the Allegheny County Board of Election’s decision to canvass the provisional ballots in

question should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that the foregoing Brief of Appellee Allegheny County Board of Elections complies with the word count limitation set forth in Pennsylvania Rule of Appellate Procedure 2135 (a) (1).

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CERTIFICATE OF COMPLIANCE

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.

Submitted by: George M. Janocsko

Signature: /s/ George M. Janocsko

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing **BRIEF OF APPELLEE ALLEGHENY COUNTY BOARD OF ELECTION** upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R. A. P. 121:

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