

16-0779

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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STATE OF WEST VIRGINIA ex rel.
CHARLES T. MILLER, the Prosecuting
Attorney in and for the County of Kanawha,

CAPITOL BUILDING, ROOM 1017
KANAWHA COUNTY CIRCUIT COURT

Petitioner,

Civil Action No. 16-P-364
Judge Charles E. King, Jr.

v.

ERIK PATRICK WELLS,

Respondent.

ORDER

On the 12th day of August, 2016, came the petitioner, Charles T. Miller, the Prosecuting Attorney of Kanawha County, West Virginia, and as well came the Respondent, Erik Patrick Wells, personally and by counsel, Patrick Maroney, for the purpose of a hearing on the Petitioner's *Amended Petition for Writ of Quo Warranto* pursuant to the provisions of W.Va. Code §53-2-1 and Respondent's *Motion to Join Indispensable Parties* and *Motion to Dismiss*.

After careful consideration of the pleadings in this case, the argument and representation of counsel, and the testimony of witnesses Erik Patrick Wells; David Dodd, Chief Deputy Clerk for Kanawha County; and Carol Bright, Deputy Clerk for Kanawha County, this Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW with respect to this action:

1. On July 18, 2016, Respondent Erik Patrick Wells filed with the County Clerk of Kanawha County a "Candidate's Certificate of Announcement for 2016 Partisan Elections" and

paid the requisite filing fee for the office of Kanawha County Clerk. The Certificate of Announcement was filed under oath, but paragraph (9) of the Certificate of Announcement was left blank. That part reads as follows:

“I am a member of and affiliated with the following political party: (left blank). I am a member of and affiliated with this political party as evidenced by my current voter’s registration and I have not been registered as a member of another political party within sixty days of this date. (W. Va. Code §3-5-7(d)(6)).”

See the Respondent’s Certificate of Announcement attached to Petitioner’s Amended Petition for Writ Quo Warranto as State’s Exhibit 3.

2. The Respondent filed the necessary signatures with the County Clerk prior to the August 1, 2016, deadline imposed by W. Va. Code §3-5-24 bearing signatures of registered voters. The signatures totaled 1,019. 656 signatories were registered Democrats, 135 were registered Republicans, 137 registered as having no party affiliations, and 13 were registered Independents. 119 of the signatures were invalidated by the Clerk, leaving 900 signatures as valid. Slightly over 500 signatures were required to place the Respondent on the ballot if all other aspects of the certificate were proper. Respondent satisfied that mark.

3. On August 10, 2016, the Petitioner filed the *Petition for Writ Quo Warranto*. On August 11, 2016, the Petitioner filed the *Amended Petition for Writ Quo Warranto*. On August 12, 2016, the Respondent filed a motion to join the Board of Ballot Commissioners as an indispensable party to this action and a motion to dismiss. The parties agreed that the motion to join the Board of Ballot Commissioners would be held in abeyance. A hearing on the Petitioner’s amended petition and Respondent’s motion to dismiss was held on August 12, 2016.

4. A key issue at the August 12, 2016, hearing was the fact that the Respondent did not complete paragraph 9 of the Certificate of Announcement. Although the Respondent left paragraph 9 regarding his party affiliation blank on the Certificate of Announcement, the Respondent did in fact have a party affiliation. Respondent was registered as a Democrat, and last voted in the May 10, 2016, Democratic primary. See the Respondent's voter registration details attached to Petitioner's Amended Petition for Writ Quo Warranto as State's Exhibit 1. During the August 12, 2016, hearing, the Respondent testified that he was and remains a registered Democrat.

5. The Respondent also testified that he was running for the office of County Clerk as an "Independent". This is supported by the "Minor Party or Independent Candidate Nomination Petition" form which the Respondent asked registered voters to sign in his attempt to have his name placed on the November 8, 2016, General Election ballot. See the Respondent's "Minor Party or Independent Candidate Nomination Petition" form admitted into evidence at the hearing as State's Exhibit 7.

6. During the August 12, 2016, hearing, the Respondent testified he read and was aware of the requirements imposed on a candidate filing a certificate of announcement. The Respondent also testified that he was told by Carol Bright, a deputy county clerk for Kanawha County, that the Respondent could leave blank the provision of paragraph (9), which identified his political party affiliation, of his Certificate of Announcement. Carol Bright testified that the Respondent refused to provide the information required by W. Va. Code §3-5-7(d)(6). She stated that she ultimately told the Respondent that the deputy clerk would take the certificate of announcement as presented and that the clerk's office would deal with it later. However, Carol

Bright testified that she did not tell the Respondent that he did not have to complete paragraph (9) of the certificate of announcement. David Dodd, Chief Deputy County Clerk, testified that he told Carol Bright to go ahead and take the certificate of announcement and that they would deal with it later.¹ This Court finds that the deputy clerks did not act to relieve the Respondent from fully completing his certificate of announcement, nor could they under the law.

7. The provisions of W. Va. Code §3-5-7(a) provide that “[A]ny person who is eligible and seeks to hold an office or political party position to be filled by election in any primary or general election held under this provisions of this chapter shall file a certificate of announcement declaring his or her candidacy for the nomination or election to the office.” Pursuant to this code section, the Respondent was required to file a certificate of announcement.

8. The provisions of W. Va. Code §3-5-7(d)(6) require that a candidate’s certificate of announcement contain the following information:

“For partisan elections, the name of the candidate’s political party and a statement that the candidate: (A) is a member of and affiliated with that political party as evidenced by the candidate’s current registration as a voter affiliated with that party; and (B) has not been registered as a voter with any other political party for a period of sixty days before the date of filing the announcement.”

9. The Respondent’s certificate of announcement is not in compliance with the provisions of W. Va. Code §3-5-7(d)(6) which requires the party affiliation be identified. By failing to include the party affiliation in the certificate of announcement, the Court finds that

¹At a later point in time, the County Clerk’s computer system was adjusted and the Respondent’s Certificate of Announcement was entered into the system. Subsequently, the County Clerk sent a letter to the Respondent that he had a sufficient number of validated signatures of registered voters in his certificate of candidacy. The letter was admitted as Respondent’s Exhibit 1.

Respondent created confusion for the voters regarding precisely who is running for office and what party and party philosophies the Respondent is affiliated with. Further, the failure to include a party affiliation in the certificate of announcement will create an impossible situation for election officials in preparing the ballot and for voters when voting. The impossible situation is that a party affiliation must be attached to the Respondent's name on the ballot because the Respondent is running in a partisan election. If Respondent's name appears as Erik Wells, Democrat – which is how he is registered at vote, it creates the impression to the voters that the Respondent is on the ballot because he either won the primary election or had his name placed on the ballot by the Kanawha Democratic Executive Committee or the Chairperson thereof, which did not happen. If Respondent's name appears as Erik Wells, Independent – which is how he testified he is running, it is simply false or untrue because the Respondent is a registered Democrat. Either option would be inaccurate and create voter confusion.

10. The Respondent argued in his pleadings and at the hearing that this case is a ballot access case. However, the Respondent, as a registered Democrat, had access to the ballot. West Virginia Code §3-5-7 *et seq.* sets forth the procedure that major party candidates must follow to run for office in West Virginia. The Respondent could have followed these procedures and run for election for the office of Kanawha County Clerk as a Democrat.

A. The Respondent could have filed a certificate of announcement for a county-wide office with the county clerk no earlier than the second Monday of January of the year immediately preceding the primary election and no later than the last Sunday of that same January. W. Va. Code §3-5-7(b)(2). This Court takes judicial notice that those dates for the

2016 primary election process are January 11, 2016, and January 31, 2016. The Respondent could have filed to run for election, but did not.

B. Where a party has a vacancy in a nomination for an office, the county party executive committee may nominate a candidate 30 days after the last day for a candidate to file under W. Va. Code §3-5-7. In this case, the period for the county executive committee to act and place a person on the ballot for County Clerk would have been March 1, 2016. See, W. Va. Code §3-5-19(a)(3). The Respondent could have, but did not pursue, having the Kanawha County Democratic Executive Committee place his name on the ballot.

C. The chair of the county party executive committee has an additional two days to nominate a candidate for an open ballot position where the county executive committee fails to act. See, W. Va. Code §3-5-19(a)(1). That date would have fallen on March 3, 2016. The Respondent also could have, but did not request that the chair of the Kanawha County Democratic Executive Committee place his name on the ballot.

11. Because, as Respondent testified, he did not decide to run for office until after the primary election, the procedure outlined above was no longer available to him due to the expiration of filing deadlines. The Respondent asserted that his only means of “ballot access” was via the provisions of W. Va. Code §3-5-23². West Virginia Code §3-5-23 provides a means of access to the ballot for other-than-major-party candidates. See, West Virginia Libertarian Party v. Manchin, 165 W. Va. 206, 270 S.E.2d 634, 640 (1980). This statute permits, “[g]roups

² The Respondent argues that because he was in active federal military service from early January, 2016, through February 16, 2016, he could not file to run for election. The Petitioner argued that pursuant to the Hatch Act, 5 U.S.C.S. §§7321-7326, and under the military regulations as contained in the Department of Defense Directive Number 1344.10; the Respondent could have filed to run for office. Further, the Petitioner argued that the Respondent had sufficient time and opportunity upon his release from active military to have the Kanawha County Democratic Executive place his name on the ballot.

of citizens having no party organization “to nominate candidates who are not already candidates in the primary election for public office. See W. Va. Code §3-5-23(a). This is not a case of ballot access, but rather, a case of too little, too late. When the Respondent finally decided he wanted to run for office, after the primary election, it was too late to get on the ballot as a Democrat, so he was forced to try to go through the back door when legally he could not go through the front door.

12. The Respondent’s candidacy for the position of Kanawha County Clerk is controlled by the provisions of W. Va. Code §3-5-7 as a registered member of the Democratic Party by virtue of his voter’s registration at the time of his filing his Certificate of Announcement for candidacy as the County Clerk of Kanawha County.

13. The Respondent’s candidacy for the position of Kanawha County Clerk is not governed by W. Va. Code §3-5-23 since, at the time of the filing of the Respondent’s Certificate of Announcement the Respondent was a registered voting member of the Democratic Party. The provisions of W. Va. Code §3-5-23 are a means of ballot access for persons who seek elective office and who are not members of an organized party having a nominating election or a nominating convention. See, West Virginia Libertarian Party v. Manchin, 165 W. Va. 206, 270 S.E.2d 634, 640 (1980). Again, Respondent was a member of an organized political party; he was a registered Democrat.

WHEREFORE, this Court, based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, does hereby **ORDER** as follows:

1. The Respondent’s name in this action shall be amended to the name “Erik Patrick Wells”; and

2. The petition for a Writ Quo Warranto by the State of West Virginia, at the relation of the Prosecuting Attorney of Kanawha County, West Virginia, is hereby **GRANTED**; and

3. The candidacy of Respondent Erik Patrick Wells for the office of Kanawha County Clerk in the November 8, 2016, General Election is **DISALLOWED**.

4. Any party's objection and exception to the content of this Order are preserved; and

5. A certified copy of this Order shall be delivered by the Clerk of this Court via First Class United States Mail, or by other means in her discretion, to

a. Petitioner Charles T. Miller, Prosecuting Attorney of Kanawha County, West Virginia, 301 Virginia Street East, Charleston, West Virginia 25301; and

b. Respondent Erik Patrick Wells, by and through his attorney, Patrick Maroney, Maroney, Williams, Weaver and Pancake, 608 Virginia Street, East, Charleston, West Virginia, 25301; and

c. Ms. Vera McCormick, Kanawha County Clerk, Voters Registration Office, 415 Quarrier Street, Charleston, West Virginia 15301.

ENTERED this 19TH day of Aug, 2016.



CHARLES E. KING, JR.
CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND BY SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL ON SAID DATE THIS 18
DAY OF August 2016

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK