

**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

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**Executive Committee of the
Republican Party of Ohio County, West Virginia,
Elgine McArdle, Robert Luchetti, Gregory William Smith,
George Craig Meyer, Carlee J. Dittmar, Deborah Marie Smith
an Faith Elizabeth Meyer,**
Appellants

v.

Adolph Santorine Jr.,
Appellee

BRIEF OF APPELLEE, ADOLPH SANTORINE, JR.

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Statement of Facts and Statement of the Case

Adolph Santorine, Jr., who has lived at 134 Falls Road, Wheeling, WV 26003 since 2007, was a candidate for election to the Executive Committee of the Republican Party of Ohio County, West Virginia (hereinafter the Committee) at the May 2022 election. After checking his residence with an employee of the County Commission, Mr. Santorine ran for a seat on the Committee from Magisterial District II. (App. at 3, and 58.)

Executive Committees are created by W. Va. Code § 3-1-9(c). That statute provides that members of a committee should be elected by magisterial districts. As a creature of statute, Executive Committees appear to be “public bodies” within the meaning of W. Va. Code § 3-1-45.

The canvas conducted indicated that Mr. Santorine was the high vote getter at that election. (App. at 3 and 59.) Mr. Santorine was subsequently certified on May 24, 2022 as the winner of that election by the Ohio County Commission.(App. at 3 and 60)

West Virginia laws allows for a challenge to that certification. The procedure is contained in W. Va. Code § 3-7-6. The time allowed under W. Va. Code § 3-7-6 for challenging an election, 10 days, expired by June 8, 2022. There was no timely challenge. (App. at 3-4)

After the election, Mr. Santorine contacted Elgine McArdle, the Chair of the Committee.¹ Mr. Santorine inquired, in writing, about the time and place of the organizational meeting of the

¹ W. Va. Code § 3-1-9(g) allows the Chair of the outgoing Committee to schedule and conduct the organizational meeting of the incoming Committee prior to the beginning of the term of office for members of an Executive Committee. Those terms begin on July 1 following a primary election. Ms. McArdle was the Chair of the Committee who had been elected by the outgoing Committee.

Committee following the election. (App. at 4 and 9 and 60.) Ms. McArdle responded in writing and challenged whether Mr. Santorine had been properly elected. (App. at 4 and 10-11 and 60.)

In her response, Ms. McArdle asserted, despite the certification of Mr. Santorine as the winner of the election, and the lack of a timely challenge to that election, that Mr. Santorine was not qualified to be the representative from Magisterial District II on the Committee. She alleged that Mr. Santorine was not a resident of that Magisterial District.

Ms. McArdle's view created an impasse.

Mr. Santorine filed a mandamus petition under W. Va. Code § 3-1-45. The Circuit Court of Ohio County had jurisdiction under that section and pursuant to W. Va. Code § 53-3-1 and § 53-3-2. (App. Vol. I at 1) Mr. Santorine named the Committee and each of the members of the Committee as Respondents.

Respondents filed a motion to dismiss (App. Vol. I at 12), but otherwise never filed an answer.

A hearing was scheduled and rescheduled before Circuit Judge David A. Simms.² The hearing was conducted on July 11, 2022.

At that hearing, Rodd Archey, the Finance Director employed by the Ohio County Commission, was called in response to a subpoena duces tecum served on the County Commission. Mr. Archey testified that part of his duties were election related and that he had adequate knowledge to address the issues before the Court. He confirmed that Mr. Santorine was, and had been, a resident of Magisterial District II. (App. Vol. II at 173).

² Judge Simms was assigned at random. Judge Simms is a former Commissioner of the Ohio County Commission and, in that capacity, has experience with elections, canvases, and certification of elections.

The County Commission last approved Magisterial District boundaries in December 2021. (App Vol. II at 188.) Said boundaries include various precincts, which are the basic unit of voting in West Virginia. W. Va. Code § 3-1-5(a).

Thereafter, following the 2020 census, an employee of the Ohio County Commission involved in preparing maps associated with elections, prepared a map which depicted a shift in which precincts would constitute the precincts in the various Magisterial Districts in Ohio County. This map would have moved a number of residents from Magisterial District II to Magisterial District I. (App. Vol. II at 171). Mr. Santorine was among the residents who would be moved on the map relevant to Magisterial Districts.(App. Vol. I at 58-63).

This map was never approved by the Ohio County Commission as required by W. Va. Code § 3-1-7. No such change to Magisterial Districts was ever approved by the Ohio County Commission. (App. Vol. I at 62-63 and App. Vol. II at 188-189)

Nonetheless, the mapping change had some effect on the May 2022 election. Some voters, which the erroneous map had proposed to move from Magisterial District II to Magisterial District I, were given ballots as if said voters had been lawfully reassigned. In fact, Mr. Santorine was given a ballot on which he did not appear as a candidate. (App. Vol. I at 57)

Mr. Archey was able to describe with extreme detail how many voters were affected. His analysis indicated that the number of voters who could have voted, but were not given the opportunity to vote for Mr. Santorine, or effectively against Mr. Santorine by voting for another candidate, was a number that was not more than 40. This number was far less than the margin of victory, 134, enjoyed by Mr. Santorine over the next highest vote getter.(App. Vol. II at 173-176)

During the hearing, Don Tennant, Esq., counsel for the Ohio County Commission, was permitted to interject. He said that the mapping error was not brought to the attention of the Commission and no formal action was taken with respect thereto. (App. Vol. II at 192-193)

Judge Simms asked for proposed findings of fact and conclusions of law. He made such findings and conclusions. (App. Vol. I at 57-65) He concluded as a matter of fact and law that Mr. Santorine was, and remained a resident of Magisterial District II, and as such had been fully qualified to be elected to the Committee and that he had been so elected. (App. Vol. I at 64)

Because Mr. Santorine had been denied the opportunity to participate as a member from Magisterial District II, Judge Simms voided any purported action of the Committee prior to Mr. Santorine being given the opportunity to participate as he had been elected. (App. Vol. I at 67).

Mr. Santorine filed a motion to be allowed attorney's fees and expenses. (App. Vol. I at 70). This matter was opposed by all Respondents, although no objection was made to the hourly rate, the time spent or individual expenses. (App. Vol. I at 95).

While that motion was pending, and following the August 3, 2022 order entered by Judge Simms, the Committee held a meeting. Mr. Santorine was in attendance but was not allowed to participate as a member of the Committee from Magisterial District II. As a consequence, Mr. Santorine filed a motion to hold Respondents in Contempt. (App. Vol. I at 82)

Judge Simms entered an order again requiring Mr. Santorine to be recognized as a member from Magisterial District I and further ordered that counsel for Mr. Santorine serve each and every member of the Committee. That was done.

A joint hearing on the attorney's fees and contempt motion was scheduled. That hearing was continued on the motion of the Respondents. (App. at 114).

Respondents appealed.

Mr. Santorine has moved to dismiss the appeal for want of a final order. That motion remains pending in this Court.

Questions Presented

1) West Virginia law requires an appeal to be filed from a “final order,” W. Va. Code § 58-5-1, et seq. Mr. Santorine had moved for an award of attorney’s fees and expenses, which had not been ruled on below. As a consequence, Mr. Santorine has moved to dismiss this appeal for want of a final order. That motion raises the issue of whether or not when attorney’s fees are sought, must the lower Court resolve that request before a final order exists or does a final order exist when all issues, other than an award of attorney’s fees have been resolved.

2) Did Judge Simms abuse his discretion in resolving the factual issues presented at the hearing on the mandamus petition?

3) Did Judge Simms make any clearly erroneous conclusions of law in resolving the legal issues presented at the hearing on the mandamus petition?

Standard of Review

The standard of review when considering findings of facts is “clearly erroneous.”

The standard of review when considering conclusions of law is “de novo.” Public Citizen, Inc. v. First Nat’l Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996) cited in Adkins v. Stacy, 589 S.E.2d 513, 214 W.Va. 371 (2003).

Summary of the Argument

The applicable statute governing appeals requires an appeal to be from a final order. When a Circuit Court grants some relief, but does not address a timely request for an award of attorney's fees and costs, the order appealed from does not appear to be final.

Judge Simms made no clearly erroneous finding of fact, or error of law in deciding that Mr. Santorine, the person declared to have been elected to a seat on the Executive Committee of the Republican Party of Ohio County from Magisterial District II by the Ohio County Commission was entitled to be seated on the Committee for that area. No timely challenge to Mr. Santorine's qualifications or his election was ever made. The Committee is without sufficient deference to ignore election results in those circumstances.

Statement Regarding Oral Argument and Decision

Adolph Santorine, Jr. does not believe that oral argument is necessary in this case. If the Court would schedule oral argument, then Mr. Santorine believes oral argument should be conducted under W.Va. Rule of Appellate Procedure 19 instead of W.Va. Rule of Appellate Procedure 20.

Argument

I. Final Order

In order to promote the orderly appeal of decisions of a Circuit Court, it has been recognized that ordinarily an appeal will only lie from a final order. West Virginia Rule of Appellate Procedure 5 (a) governs "all appeals from a circuit court final judgment or other appealable order in a civil or criminal case as set forth in W. Va. Code § 58-5-1, et seq."

That rule and the statutory provision require an appeal to be from a “final order.” This has long been the rule in West Virginia. See State ex rel Koontz v. Smith, 133 W.Va. 635, 57 S.E.2d 532 (1950); Pittsburgh Elevator Co. v. West Virginia Board of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983); Durm v. Heck’s, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991); Sipp v. Yeage, 194 W.Va. 66, 459 S.E.2d 343 (1995); James M.B. v. Carolyn M., 193 W.Va. 289, 456 S.E.2d 16 (1995); Province v. Province, 196 W.Va. 473, 473 S.E.2d 894 (1996); Walker v. Option One Mortgage Corp., 220 W.Va. 660, 649 S.E.2d 233 (2007); Credit Acceptance Corp v. Front, 231 W.Va. 518, 745 S.E.2d 556 (2013); and Erie Insurance Co. v. Dolly, ___ W.Va. ___ 811 S.E.2d 875 (2018).

The requirement of a final order is also a feature of federal law. 28 U.S.C. § 1291. Debit v Harwell Enterprises, Inc., 540 F.2d 690 (4th Cir. 1976)(barring late filed claim for attorney’s fees on the grounds a final order had previously been entered.); and United States v. Holland, 214 F.3d 523 (4th Cir. 2000).

The open question in West Virginia is whether or not an order that disposes of all issues between the parties,³ except for a request for an award of attorney’s fees and expenses, is a final order, or whether such an order is not final because the issue of attorney’s fees remains unresolved. Petitioners indicated that the appeal was not from a final order in documents filed with this Court.

³ Mr. Santorine acknowledges that the decision of Circuit Court Judge Simms did resolve all issues except attorney’s fees.

The motion for contempt is clearly part of a separate matter pertaining to enforcement of an otherwise final judgment.

The United States Supreme Court considered this issue in the context of Federal Rule of Civil Procedure 59(e) in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1981). There the Court held that the 10 day rule for amending a judgment did not apply to requests for attorney's fees and left open the possibility that time limits might be established by local rules. Some part of that analysis suggested that attorney's fees were somewhat collateral to the main issues.

This question remains unresolved as a matter of West Virginia law. In light of the acknowledgment by Respondents, now Appellants, that the order was not a final order, Mr. Santorine urges that this appeal be dismissed for want of a final order.

II. Executive Committees of Political Parties

The Respondents, now the Appellants, have purported to present a different issue for appeal than those presented by Mr. Santorine. The Respondent's appear to assert that the Executive Committee of any County in West Virginia enjoys wide discretion. In many respects, Mr. Santorine agrees.

Where the parties part company is that Appellants insist that wide discretion includes the ability to override election laws that vest the conduct of elections and the determination of who won elections, etc., in specific government officials, subject to challenges as allowed by applicable statutes. Mr. Santorine denies any such discretion exists. In his view, election law supplies the entire universe of law applicable to election to an Executive Committee. No Executive Committee has the power to disregard election results.

Executive Committees are creatures of statute. Such Committees are created in West Virginia by W. Va. Code § 3-1-9.

Election to said Committees is controlled by that provision.

In the ordinary course of elections, there is a process for voting. See generally, W. Va. Code § 3-1-3, § 3-1-34, and §3-2-3. Voters are allocated among precincts, precincts are organized to permit orderly elections, and for precincts to be changed from time to time. W. Va. Code § 3-1-5 and § 3-1-7. Precincts are generally then grouped so that voters for offices to be filled by election are assigned to relevant offices.

There is a process for persons to become candidates for election to various offices. W. Va. Code § 3-5-8. As part of the process for balloting, sample ballots are published, so that any errors may be timely corrected. W. Va. Code § 3-5-10.

There is a process for canvassing those votes. W. Va. Code § 3-5-17 and §3-6-9. There is a process for certification of those votes. W. Va. Code § 3-6-9 and -10. There is a process for challenging election outcomes. W. Va. Code § 3-7-6.

Mr. Santorine would suggest that the broad discretion of an Executive Committee does not include any discretion as it pertains to any matter committed to election law. Said matters are simply committed to other applicable laws, including those described above. The Committee has no discretion in matters governed by other laws.

As a consequence the lack of discretion caused the Mandamus Petition here to be a proper request for relief against persons without discretion and obligated to follow the law.

When vacancies arise on the Executive Committee between elections, members of said Committees enjoy wide discretion to fill such vacancies. State ex rel. Zagula v. Grossi, 149 W.Va. 11, 138 S.E.2d 356 (1964). The position of Respondents, that Executive Committees have unbridled authority and can override provisions of law which call for filling vacancies by a

properly conducted election, is irresponsible. It is contrary to the principle that West Virginia citizens are governed by laws and not by the whims of those who would purport to impose their will. It is a claim without foundation, and without any limiting principle. This is not, and should not become, the law.

III. Findings of Fact

The Ohio County Commission used every effort to conduct an error free elections in May of 2022. That said, mistakes sometimes happen. In this particular situation, the County Commission, the entity responsible for conducting that election, discovered an anomaly after the voting had occurred.

As a consequence, the Commission analyzed what had occurred regarding the election of members of the Executive Committee of the Republican Party of Ohio County. The Commission determined that a mapping error, never approved by the County Commission, had inadvertently been used in some ways.

The mapping error somehow was used to conduct the voting.⁴ Some voters, who should have voted in Magisterial District II, instead were given ballots for Magisterial District I. However, because the margin of victory for Mr. Santorine was sufficient, the inadvertent error that did occur, made no difference in the outcome. Mr. Santorine, who was a voter and resident of Magistrate District II, was elected to the Committee to represent that area.

⁴ Appellants have seemed to insist that some records of the Secretary of State concerning Mr. Santorine had identified him as being in Magisterial District I at the time of the election.

No evidence concerning how the mapping error, what appears to have been an unapproved change to precincts not authorized by the County Commission, was, or could have become, part of the records of the Secretary of State has ever been articulated.

There was no error in any fact finding by Judge Simms that lead to that conclusion. The Committee and its members have not identified any purported errors in fact finding. There was no abuse of discretion by Judge Simms in that regard.

IV. Conclusions of Law

The Circuit Court had jurisdiction over this petition for mandamus pursuant to W. Va. Code § 3-1-45, § 53-3-1; and § 53-3-2. Venue was proper in Ohio County, West Virginia pursuant to W. Va. Code § 53-3-2.

The issues raised herein were a proper subject for resolution by a petition for mandamus. State ex rel. Manchin v. Lively, 170 W.Va. 672, 295 S.E.2d 912 (W. Va. 1982); State ex rel. Maloney v. McCartney, 159 W.Va. 513, 223 S.E.2d 607 (1976); State ex rel. Boley v. Tennant, 228 W.Va. 812, 724 S.E.2d 783 (W. Va. 2012) and MacCorkle v. Hechler, 183 W.Va. 105, 394 S.E.2d 89 (1990).

Once precinct lines have been established, precinct boundaries may only be changed as set forth in W. Va. Code § 3-1-7. Among the requirements of W. Va. Code § 3-1-7(b), any change in precinct boundary lines must be published as a Class II legal advertisement. 46. The Ohio County Commission did not provide notice to voters who would have been affected by a change in precincts as would have been required by W. Va. Code § 3-1-7(c). Among the requirements of W. Va. Code § 3-1-7, precinct boundary changes shall be maintained in an election precinct record. W. Va. Code § 3-1-7(c). The lack of approval of any change in the precinct to which Mr. Santorine was assigned for voting at the May 2022 primary by the Ohio County Commission caused the boundaries of Magisterial District II to remain the same as such boundaries had been defined historically and prior to the primary election of 2022.

Mr. Santorine was therefore domiciled in Magisterial District II at all relevant times for the primary election of May 2022.⁵

Neither did Judge Simms make any clearly erroneous error of law. The assertion that the Committee has unlimited discretion to disregard election law is preposterous and unsupported by any logical or coherent argument. Instead of adopting such a view, Judge Simms made a series of incremental findings outlining applicable law, and applying said law, to the facts he determined existed.

No specific conclusion of law by Judge Simms has been suggested to be erroneous in any way.

Conclusion

WHEREFORE, Mr. Santorine asks that this Court consider whether an order which resolves issues, but leaves open whether attorney's fees and expenses should be awarded is a final order. If not, this appeal should be dismissed.

On the remaining merits, Mr. Santorine asks that the conclusions of law reached by Judge Simms, and the findings of fact determined by him be affirmed.

Respectfully submitted,

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⁵ The Committee and its members have not disputed any of this analysis.

Certificate of Service

I, Martin P. Sheehan, do certify that a copy of the foregoing **Brief of Appellant, Adolph Santorine, Jr.**, was served upon the below listed parties via ELECTRONIC FILING this 21st day of December, 2022:

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