

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Canvassing Observation :
 :
Appeal of: Donald J. Trump : No. 1094 C.D. 2020
for President, Inc. : Submitted: November 5, 2020

BEFORE: HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FIZZANO CANNON

FILED: November 5, 2020

Donald J. Trump for President, Inc. (Petitioner) appeals the November 3, 2020 order of the Court of Common Pleas of Philadelphia County Election Court (trial court) that denied Petitioner’s oral motion to allow closer observation of the canvassing of ballots (Motion). Upon review, we reverse.

On the evening of November 3, 2020, Petitioner, as a representative of presidential candidate Donald J. Trump (Candidate), sent a representative to the Philadelphia Convention Center to observe the canvassing process of absentee and mail-in ballots submitted in Philadelphia County. When its representative proved unable to observe the process to its satisfaction, Petitioner made its Motion in the trial court requesting that the trial court require the Philadelphia County Board of Elections (Board) to allow Petitioner closer access to better observe the canvassing process. The trial court conducted a hearing on the Motion on the night of November 3, 2020,¹ and issued the order denying the Motion on the morning of November 4,

¹ The hearing commenced at 9:51 p.m. and ended at 11:43 p.m. See Notes of Testimony, November 3, 2020 (N.T.) at 4 & 58.

2020. Petitioner appealed to this Court on November 4, 2020, shortly after the trial court issued its order.²

On appeal,³ Petitioner claims the trial court erred in denying its Motion because the Board configured the tables used for ballot canvassing in such a way so as to preclude observation of the canvassing process by candidates, watchers, and candidates' representatives. *See* Appellant's Brief at 16-25.⁴ Specifically, Petitioner argues that the goals of transparency and accountability require that candidates' representatives be allowed an opportunity to observe the canvassing process beyond mere physical presence in the room where the canvassing process is taking place. *See id.* at 16-21. Petitioner argues that the Board's arrangement of and placement of barriers within the canvassing area prevent any meaningful observation by watchers, candidates, or candidates' representatives. *See id.* We note that Petitioner expressly states that its appeal is not based on any alleged ability of observers to challenge individual ballots, but instead on the distinct right provided by the Election Code to observe the proceedings. *See id.* at 22-25.

The Board counters that it has complied with the requirements of the Election Code by allowing Petitioner's representative into the room where the canvassing is occurring. *See* Board's Brief at 12-15. The Board argues that the

² The trial court issued its order at 10:03 a.m. on the morning of November 4, 2020. *See* Philadelphia County Court of Common Pleas Docket No. 201107003 at 1. Petitioner filed its appeal of the trial court's order at 12:36 p.m. *See id.*

³ Matters requiring this Court to engage in statutory interpretation of the Election Code implicate questions of law, which are subject to a *de novo* standard of review and a plenary scope of review. *See Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015).

⁴ Due to the time constraints involved in this matter, on the evening of November 3, 2020, this Court ordered both parties to submit briefs by 8 a.m. on the morning of November 5, 2020, and notified the parties the matter would be decided thereon without argument. *See* Commonwealth Court Order dated November 4, 2020.

evidence illustrated that Petitioner’s representative was able to see every portion of the canvassing process. *See id.* at 15.

This matter requires the Court to interpret the meaning of certain provisions of the Pennsylvania Election Code⁵ (Election Code). Initially, we note that

[i]n matters of statutory interpretation, [appellate courts’] objective is to ascertain and effectuate the intent of the General Assembly. . . . [T]he best indication of legislative intent is the plain language of the statute. In ascertaining the plain meaning of statutory language, [appellate courts] consider it in context and give words and phrases their common and approved usage. When the words of a statute are free and clear of all ambiguity, they are the best indicator of legislative intent; hence, in such circumstances, [appellate courts] cannot disregard the letter of the statute under the pretext of pursuing its spirit.

In re Nov. 3, 2020 Gen. Election, ___ A.3d ___ (Pa., No. 149 MM 2020, filed Oct. 23, 2020), 2020 WL 6252803, at *9 (internal citations and quotation marks omitted). Additionally, our Supreme Court has further explained the following regarding the interpretive principles that govern ambiguous statutes generally and election matters specifically:

[W]e are mindful of the longstanding and overriding policy in this Commonwealth to protect the elective franchise. Moreover, it is well-settled that, although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote. Indeed, our goal must be to enfranchise and not to disenfranchise the electorate. Lastly, in resolving statutory ambiguity, we may consider, *inter alia*, the

⁵ Act of June 3, 1937, P.L. 1333, *as amended*, §§ 2600-3591.

occasion and necessity for, the mischief to be remedied by, and the object to be obtained by the statute.

Pa. Democratic Party v. Boockvar, ___ A.3d ___ (Pa., No. 133 MM 2020, filed Sept. 17, 2020) (internal citations, quotation marks, and brackets omitted).

This matter concerns the following Election Code provisions. First, Section 310(b) provides, in pertinent part, that

[e]very candidate shall be entitled *to be present* in person or by attorney in fact duly authorized, and to participate in any proceeding before any county board whenever any matters which may affect his candidacy are being heard, including any computation and canvassing of returns of any primary or election or recount of ballots or recanvass of voting machines affecting his candidacy.

25 P.S. § 2650(b) (emphasis provided). Next, Section 1308(b) provides that

[w]atchers shall be permitted *to be present* when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

25 P.S. § 3146.8(b)⁶ (emphasis provided). Lastly, Section 1308(g)(1.1) provides, in pertinent part, that

[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted *to remain in the room* in which the absentee ballots and mail-in ballots are pre-canvassed.

25 P.S. § 3146.8(g)(1.1) (emphasis provided).

⁶ Section 1308 was recently amended by Section 7 of the Act of October 31, 2019, P.L. 552, No. 77, and Section 11 of the Act of March 27, 2020, P.L. 41, No. 12.

At issue here is the interpretation of the phrase “to remain in the room” where ballots are canvassed from 25 P.S. § 3146.8(g)(1.1) and the language allowing candidates, watchers, and candidates’ representatives to be “present” during the canvassing process. The Board argues that by using the terms “presence” and “to remain in the room,” the Election Code requires simple physical presence of an observer in the room where ballot canvassing occurs, and nothing more. Petitioner, on the other hand, argues that “presence” and “remaining in the room” implies an ability to observe in addition to physical presence. Because these competing interpretations are each reasonable, the Election Code is ambiguous. *See A.S. v. Pa. State Police*, 143 A.3d 896, 905-06 (Pa. 2016) (explaining that a “statute is ambiguous when there are at least two reasonable interpretations of the text”).

Viewing the language of the Election Code sections in question with an eye toward maintaining the integrity of the elective process in the Commonwealth, as we must, we find the language of these sections imports upon candidates, watchers, or candidates’ representatives at least a modicum of observational leeway to ascertain sufficient details of the canvassing process for the purpose of intelligently assessing and/or reporting to the candidate represented the details of the canvassing process. To find otherwise would completely undercut the intent of the Election Code by reducing candidates’ representatives to tourists incapable of carrying out the observations allowed by the Election Code for the purposes of reporting to the candidate they represent. Obviously, a critical prerequisite to being able to accurately report anything to the represented candidate is that the representatives have the opportunity to observe the processes upon which they are to report. Simply put, allowing candidates, watchers, or candidates’ representatives to be physically “present” or “in the room” during the canvassing process but also

allowing the relegation of those representatives to a position where meaningful observation of the processes they are present to observe is a practical impossibility would be an absurd interpretation of the Election Code that we cannot countenance.⁷ *See Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019) (noting that appellate statutory interpretation must not produce absurd results).

Turning to the facts of the instant matter, Jeremy Mercer testified before the trial court on behalf of Petitioner.⁸ *See* Notes of Testimony, November 3, 2020 (N.T.) at 20-41. Mercer explained he was one of the representatives designated on behalf of Candidate to observe the canvassing process of absentee and mail-in ballots in Philadelphia County on November 3, 2020. *See id.* at 20-21. Despite his status as Candidate's designated representative,⁹ Mercer explained that he was not able to get within 15 feet of the tables where the ballots were being processed.¹⁰ *See id.* at 24. Mercer explained the very large hall where the ballots were being processed had four areas with dozens of tables that spread out away from him at roughly 6-foot intervals behind the closest table, with the farthest one being located over 100 feet from Mercer. *See* N.T. at 23-24. Mercer also testified that a waist-high metal fence

⁷ We note that under the trial court's interpretation of the applicable provisions of the Code, a candidate's representative being relegated to one corner of a convention center hall while ballot canvassing occurs in the opposite corner of the hall would comply with the Code because the representative is present in the room.

⁸ Mercer did not testify in person before the trial court, but instead testified via Zoom videoconferencing from the Philadelphia Convention Center, where the canvassing activities were occurring. *See* N.T. at 17. The trial court, however, did not permit Mercer to use his phone to show the trial court the canvassing setup during the Zoom call. *See id.* at 21-23.

⁹ Mercer testified that, in addition to Candidate, he was also serving as the designated representative for other candidates on the ballot. *See* N.T. at 20-21.

¹⁰ Mercer explained the very large hall where the ballots were being processed had four areas with dozens of tables that spread out away from him at roughly 6-foot intervals behind the closest table, with the farthest one being located over 100 feet from Mercer. *See* N.T. at 23-24.

prevented him from getting any closer to the tables where the ballots were being processed. *See id.* at 25. As a result of these distances and barriers, Mercer explained that he was unable to observe the ballots being processed, the envelopes that contained them, whether the secrecy envelopes were present, or any markings on those envelopes. *See id.* at 27-30. Mercer explained that he even used binoculars to attempt to get a better view of the proceedings and ballots, but to no avail. *See id.* at 32.

The Board presented no evidence during the hearing.

In its Pennsylvania Rules of Appellate Procedure 1925(a) opinion filed November 4, 2020 (Trial Court Opinion), the trial court concluded:

The Board designed the layout of the Philadelphia Convention Center for the canvassing process in keeping with CDC guidelines on social distancing between individuals and safety protocols.¹ In creating this physical layout, the Board struck the proper balance between the observer's ability to observe the canvassing process and the paramount interest of voter privacy as there are declaration envelopes that are being opened, secrecy envelopes that are being opened, and ballots that are being extracted.

¹ The Election Board allows the public to observe the canvassing process on You Tube on their website at <https://youtu.be/-Zzb-7EH-MQ>.

Trial Court Opinion at 3 (some footnotes omitted). These conclusions were unsupported by the record and contrary to the uncontradicted testimony of Mercer, the only witness to present testimony in this matter and who the trial court did not find lacked credibility. Nor does the record contain any evidence regarding the

Board's thought process, justification for, or strategy in designing its chosen canvassing setup layout.

Based on this testimony, we conclude that, while he was technically in the room where the canvassing was occurring in strict compliance with the text of the Election Code, Mercer's inability to actually observe the canvassing processes in any meaningful way completely frustrates the intent of the Election Code in allowing a representative in his position to be in the room for observation purposes in the first place. Accordingly, the trial court erred as a matter of law in determining that the Board had sufficiently complied with the requirements of the Election Code and denying Petitioner's Motion.

Further, we acknowledge the Board's argument that closer observation by Petitioner is pointless because Petitioner may not challenge individual ballots in any event. *See* Board's Brief at 18-21. We appreciate that "the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives[.]" *In re Nov. 3, 2020 Gen. Election*, at *14. We agree with Petitioner, however, that this matter involves the issue of the right of observation, not the right to challenge. *See* Petitioner's Brief at 22-25. As discussed *supra*, the Election Code provides candidates, watchers, and candidates' representatives this right to observe the canvassing process. *See* 25 P.S. §§ 3146.8(b) & 3146.8(g)(1.1).

For these reasons, we reverse the trial court order denying Petitioner's Motion.

s/Christine Fizzano Cannon

CHRISTINE FIZZANO CANNON, Judge

Certified from the Record

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And Order Exit