

IN THE
DISTRICT COURT OF APPEAL
FIFTH DISTRICT
STATE OF FLORIDA

7-11-97
FILED
CLERK OF DISTRICT COURT OF APPEALS
FIFTH DISTRICT
TALLAHASSEE, FLORIDA

91,642

GUS BECKSTROM,

Appellant,

v.

Case Number: 97-617

VOLUSIA COUNTY
CANVASSING BOARD and
ROBERT L. VOGEL, JR.,

Appellees.

_____ /

ON APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF FLORIDA, SEVENTH CIRCUIT

APPELLANT'S REPLY BRIEF

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ARGUMENT

- I. NONE OF THE MULTITUDE OF HISTORIC CASES CITED BY APPELLEES INVOLVE FACTS EVEN REMOTELY RESEMBLING THE MISCONDUCT OF THE VOLUSIA COUNTY ELECTION OFFICIALS THAT DESTROYED THE INTEGRITY OF THE 1996 VOLUSIA COUNTY SHERIFF'S ELECTION.

The Appellees' Answer Brief warrants a reply insofar as it is replete with citations to historic Florida case law, all pre-Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975). The line of cases is misleading because the opinions have no application to the facts of this case. Appellees cite no less than eighteen **cases** to support their argument that the standard for judging the effect of election irregularities does not allow for invalidation of the absentee ballots in this case. First and foremost, all eighteen cases were decided prior to Boardman, in which the Supreme Court reviewed many of the old cases, rejected the holdings of some and affirmed the holdings of others, and ultimately issued a new standard for determining absentee ballot election contests today. That standard requires a court to invalidate absentee ballots if the following factors are present: (1) fraud, gross negligence, or intentional wrongdoing in the absentee ballot process; (2) lack of substantial compliance with the absentee voting law; and (3) an adverse affect on the sanctity of the ballot or the integrity of the election. Id. at 269. In this case, the trial court examined all of those factors and found that there was gross negligence in the handling of the absentee ballots; that election officials did not substantially comply with the absentee voting law; and that both the sanctity of the ballots and the integrity of the election

were irreparably harmed, Further, the court found that it is impossible to determine on many of the ballots how the voter actually voted in the Sheriff's race. Under these circumstances, the trial court was compelled to invalidate **all** of the absentee votes and declare the winner of the election based upon the precinct votes. The court's failure to do so, and its decision to declare Robert Vogel the winner of the election, constituted clear and fundamental error.

Second, Appellees cite carefully selected language from many of the pre-Boardman cases while notably neglecting to discuss the facts on which each **case** depends. The cases stand for the simple proposition that an election should not be overthrown based on mere technical violations of the election laws. With this proposition Mr. Beckstrom wholeheartedly agrees. However, mere technical violations are not the circumstances of this case, None of the cases cited by Appellees involves facts similar to those under review today, where the ballots themselves, the hallmark of our democratic system, were spoiled by election officials who intentionally tampered with them by marking over the voter's original marks on more than **six thousand ballots,**

As examples, Carn v. Moore involved ballots which were not printed properly. 76 So. 337 (Fla. 1917). It did not involve vote tampering. Gilligan v. Special Road and Bridge District involved a bond issue election where inspectors at certain precincts were not properly sworn and some precincts had no deputy sheriff present. 77 So. 84 (Fla. 1917). It did not involve vote

tampering. Titus v. Peacock addressed the constitutionality of the out-of-state absentee voting law. 170 So.2d 309 (Fla. 1936). It did not involve vote tampering. Ervin v. Collins addressed whether a particular state governor was eligible to run for reelection. 85 So.2d 852 (Fla. 1956). It did not involve vote tampering. Bay County v. State involved a bond referendum where the polls were open until sundown rather than 7:00 p.m., contrary to an amended statute. 157 Fla. 47 (Fla. 1946). It did not involve vote tampering. Willets v. North Bay Village addressed whether a referendum election on a village charter was properly called by two members of the village council rather than five. 60 So.2d 922 (Fla. 1952). It did not involve vote tampering. Town of Baldwin v. State addressed the sufficiency of notice prior to a bond issue election. 40 So.2d 348 (Fla. 1949). It did not involve vote tampering. Finally, Wilson v. Revels involved a primary election where certain voters did not sign their ballot stubs and certain absentee ballots were put in the wrong box. 61 So.2d 491 (Fla. 1952). It did not involve vote tampering. Significantly, in the latter case the Supreme Court noted that there was no suggestion, unlike the court's express findings in the instant case, that "the integrity of the election was affected by the way the ballots were handled." Id.

If the old cases are indeed relevant, then Whitley v. Rinehart should be consulted. In that case, the Supreme Court stated that the Constitution mandates a "a pure ballot and pure elections," and that "[t]he result of an election should not depend on an

uncertainty." State ex rel. Whitley v. Rinehart, 190. So. 819, 821-22 (Fla. 1939). In the instant case, six thousand ballots are impure because of tampering by county officials, and the result of the election is uncertain because, as the trial court found, on many of the ballots we simply cannot tell for which Sheriff's candidate the voter actually voted. The Appellees themselves concede in their brief that "numerous ballots were inconsistently marked" and that the incorrect markings involved "virtually every single race." (Answer Brief, pp. 24-25). Simply put, the absentee ballots cannot stand. The result of this race is **entirely** uncertain. Without interviewing all of the absentee voters to try to determine how they voted and what writing instruments they used to mark their ballots, we will never know for sure who won the election. The citizens of Volusia County have lost their confidence in the outcome of the election, and they have lost their trust and confidence in their election officials.

All of the cases cited by Appellees involve, at most, technical irregularities in the election laws as opposed to tampering with ballots. There are no Florida cases involving the obliteration of the voters' marks on 6,000 absentee ballots so as to make the outcome of the election impossible to determine. Other courts that have addressed the issue, however, have shown no hesitation to throw out ballots that have been marked with more than one instrument or where the marks indicate that they were made by more than one person. See e.g. Crowe v. Emmert, 305 S.W. 2d 272 (Ky. 1957). (Notably, in that case the elections personnel all

swore that they had not tampered with the ballots, yet the court determined that the irregularities complained of amounted to at least constructive fraud).

The principle that ballots are sacred, and that election officials are therefore prohibited from tampering with the marks on any official ballot, is so obvious and ingrained in our democratic tradition that it requires no debate. Indeed, at least one Volusia County elections employee testified that she knew that marking on the ballots was wrong and that she refused, therefore, to participate in the process. (T-518-519). She was one of the witnesses who received a threatening, anonymous letter after testifying at trial. (R-557). Yet the trial court found no evidence of fraud! As argued fully in Appellant's Initial Brief, there *certainly* was evidence of fraud. Moreover, the expert testimony established that fraud and negligence were equally likely explanations for the results shown in the marked over ballots.*

Election officials have a sacred, fundamental duty not to mark on the ballots that come under their care. They are responsible for protecting official ballots and preserving them in such a manner that, should a review of any ballot later become necessary, we would always be able to determine how a voter actually voted. In the instant case, however, the true result of the absentee votes will never be known. Therefore, it is entirely clear that the

*Notwithstanding the suggestion and proof that fraud occurred in this **case**, for the purpose of invalidating the absentee ballots it is sufficient that the court found gross negligence. Boardman v. Esteva, supra, 323 So.2d 459.

absentee ballots must be thrown out and the winner of the election declared based upon the result of the precinct votes.

II* **BOLDEN V. POTTER REQUIRES THE INVALIDATION OF
THE ABSENTEE BALLOTS IN THIS CASE,**

Appellees suggest that under Bolden v. Potter, 452 So.2d 564 (Fla. 1984), the trial court was correct in refusing to overturn the 1996 Volusia County Sheriff's election absent a finding of clear fraud that permeated the entire absentee ballot process. In fact, as discussed in Appellant's Initial Brief, the absentee ballots themselves are evidence of fraud and the number of tainted ballots, more than 6,000, is so substantial that they do permeate the entire absentee ballot process. More importantly, however, the Bolden court specifically held that "**when there is present fraud and intentional wrongdoing *which clearly affect the sanctity of the ballot and the integrity of the election process, courts must not be reluctant to invalidate those elections to ensure public credibility in the electoral process.***" Id. at 566 (emphasis added). It is clear from the holding and from a reading of the entire opinion that the Supreme Court's paramount concern was with preservation of the sanctity of the ballot and the integrity of the electoral process. The Court expressly distinguished Boardman v. Esteva as a case depending on an entirely different set of facts wherein the sanctity of the ballot and the integrity of the election were completely unaffected. Id. In the instant case, however, as in Bolden, the trial court specifically found that the election officials' handling of the absentee ballots clearly and irreparably harmed the sanctity of the ballot and the integrity of

the election. Under these circumstances, Bolden required the court to throw out the absentee ballots. Indeed, the Bolden court emphasized that "the failure to do so will cause the electorate to lose confidence in the electoral process, destroy the willingness of individuals to participate, and thereby allow our government to be controlled by corrupt influences." Bolden v. Potter, supra, 452 So.2d at 567.


The citizens of the State of Florida trusted, prior to this litigation, that when they cast their ballots in an election, the ballots would be protected by their government officials and not marked on or otherwise tampered with. That trust has been lost, due to the trial court's refusal to throw out the absentee ballots in the 1996 Volusia County Sheriff's race after determining, as a factual matter not challenged on appeal, that the sanctity of the ballots and the integrity of this election have been irreparably harmed, and that on many of the ballots we cannot determine how the voter actually voted. Indeed, the cumulative effect of the violations of law that took place in this election is such that they disenfranchised many of the voters who cast valid absentee ballots. The harm is irreparable. The trust is gone. The absentee ballots must be thrown out and the winner of the election determined based upon the result of the precinct votes.

CONCLUSION

Based on the foregoing and on the argument set forth in Appellant's Initial Brief, Appellant, Gus Beckstrom, respectfully requests that this court reverse the final order under review and remand the case with directions to the trial court to grant judgment for Appellant in the election contest proceeding by either (1) invalidating all of the absentee ballots cast in the November 5, 1996 Volusia County Sheriff's election or (2) invalidating the 6,497 absentee ballots that were marked on by elections officials in the November 5, 1996 Volusia County Sheriff's election. The trial court should be required to declare Gus Beckstrom the winner of the election and issue an order ousting Mr. Vogel from office. Additionally or alternatively, Appellant requests that this court reverse the trial court's dismissal with prejudice of the election protest and direct the trial court to enter judgment for Appellant thereon. Appellant further requests that this court direct an award of costs and attorney's fees to Appellant.

Finally, Appellant requests, in light of the nature of the matter under review, that the court consider the parties' briefs and schedule oral argument on an expedited basis.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellant's Reply Brief has been furnished via regular U.S. mail this 29th day of July, 1997 to Daniel D. Eckert, Volusia County Attorney, 123 W. Indiana, Deland, Florida 32721-0569 and James R. Clayton, Esquire, 114 West Rich Avenue, Deland, Florida 32720.

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