

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| In Re: The Nomination Petitions | : | |
| and Papers of Carl Stevenson | : | |
| As A Candidate For | : | |
| State Representative In The 134 th | : | No. 643 M.D. 2010 |
| Legislative District | : | |
| | : | |
| Objection of: Michael W. Gibson | : | |
| and Robert W. Mader | : | |

**JURISDICTIONAL STATEMENT
IN SUPPORT OF NOTICE OF APPEAL**

Carl Stevenson, Respondent in the above-captioned matter, by and through his counsel, Mary Catherine Roper and Witold Walczak of the American Civil Liberties Union of Pennsylvania, respectfully submits this Jurisdictional Statement in Support of his Notice of Appeal.

I. INTRODUCTION

This appeal arises from the August 19, 2010, Opinion and Order of the Honorable James R. Kelley (“Judge Kelley”) of the Commonwealth Court of Pennsylvania. Therein, Judge Kelley granted the Petition of Michael W. Gibson and Robert W. Mader to set aside the nominating petitions and papers of Carl Stevenson (“Candidate”) as candidate for the office of Representative in the General Assembly from the 134th Legislative District and ordered the Secretary of the Commonwealth to strike Candidate’s name from the ballot. The Court upheld a global challenge, relying upon 25 Pa. Cons. Stat. § 2911 (Section 951(d) of the Election Code), to strike 3 pages and 97 signatures because the petition circulator was not a resident of the electoral district. The statute on which the Court relied, Section 951(d), was, however, declared unconstitutional and the Commonwealth was permanently enjoined from enforcing it in 2002. *See Morrill v. Weaver*, 224 F. Supp. 2d 883 (E.D. Pa. 2002). The forms and instructions given to

Candidate and other candidates by the Commonwealth conform to *Morrill* and thus do not require the candidates to use only petition circulators who reside in the voting district. But for the invalidation of signatures based solely on the petition circulator's residency, Candidate would have had sufficient signatures to qualify for the ballot.

Candidate files this Jurisdictional Statement seeking review and reversal in its entirety of Judge Kelley's August 19, 2010 Order.

II. REFERENCE TO OPINION OF THE COURT BELOW

Candidate appeals from the unreported August 19, 2010, Opinion and Order of Judge Kelley, No. 643 M.D. 2010, a copy of which is appended to this Jurisdictional Statement.

III. BASIS FOR SUPREME COURT'S JURISDICTION

The Supreme Court of Pennsylvania has jurisdiction to review Judge Kelley's Opinion and Order pursuant to 42 Pa. Cons. Stat. § 723(a). *See also In re Nomination Petition of Driscoll*, 577 Pa. 501, 508 n. 7 (2004) (citing 42 Pa. Cons. Stat. § 723 as basis of Court's jurisdiction for appeal under Pennsylvania Election Code concerning the validity of challenge to nomination petition).

IV. TEXT OF THE ORDER IN QUESTION

The Order from which Candidate appeals reads as follows:

AND NOW, this 19th day of August, 2010, the Petition to Set Aside the Nominating Petitions and Papers of Carl Stevenson, as a Candidate for the Office of Representative in the General Assembly from the 134th Legislative District is GRANTED and said Nomination Paper of Carl Stevenson is hereby set aside.

The Chief Clerk of the Commonwealth Court is directed to notify all parties and Counsel of record of the entry of this order, and shall further certify a copy hereof to the Secretary of the Commonwealth who shall STRIKE the name of Carl Stevenson as a candidate for the Office of Representative in the General Assembly from the 134th Legislative District on the Pennsylvania General Election Ballot.

Each party shall bear his own costs in regard to this litigation.

V. CONCISE STATEMENT OF PROCEDURAL HISTORY

On August 2, 2010, Candidate filed a Nomination Paper with the Secretary of the Commonwealth seeking to have his name printed on the Pennsylvania General Election Ballot in the General Election to be held on November 2, 2010, for the Office of Representative in the General Assembly from the 134th Legislative District. On August 9, 2010, Petitioners below, Michael W. Gibson and Robert W. Mader, filed their Petition to Set Aside Candidate's Nominating Petitions and Papers ("Petition to Set Aside"), in the Commonwealth Court of Pennsylvania. Petitioners sought to invalidate 257 of the signatures contained in Candidate's Nominating Paper.

A hearing on the Petition was held before Judge Kelley on August 18, 2010. Petitioners were represented by counsel and Candidate appeared *pro se*. Candidate conceded that "approximately 90" of the challenged individual signature lines might be invalid. On August 19, 2010, Judge Kelley issued an Opinion striking a total of 162 signature lines, adding to those conceded by Candidate as possibly invalid a total of 72 based solely on the fact that the petition circulator for those 72 signatures was not a district resident.¹ The ruling left the Candidate with an insufficient number of signatures to remain on the Ballot under Section 951, 25 Pa. Cons. Stat. § 2911. On the same day, Judge Kelley issued an Order granting the Petition to Set Aside and ordering Candidate's name struck from the Ballot. That Opinion and Order are the subject of this appeal.

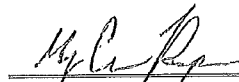
¹ The three pages submitted by the non-district circulator contained 97 signatures, but 25 were included in the approximately 90 that had other defects, leaving a total of 72 stricken solely because of the petition circulator's residence.

VI. QUESTION PRESENTED FOR REVIEW

Did the court below err in relying upon Section 951(d) of the Election Code (25 Pa. Cons. Stat. § 2911(d)) to strike 97 signatures appearing on pages 19, 20 and 21 of Candidate's Nominating Paper on the ground that the circulator of those pages does not reside in the 134th District, when the Section 951(d) residency requirement was in 2002 declared to violate the First and Fourteenth Amendments to the United States Constitution and the Commonwealth was permanently enjoined from enforcing the provision, *see Morrill v. Weaver*, 224 F. Supp. 2d 883 (E.D. Pa. 2002), and Section 951's residency requirement clearly violates the First and Fourteenth Amendments based on numerous court decisions, decided both before and after *Morrill*, striking similar residency requirements in other states.

Addressed and answered in the negative by the court below at pp 6-7 of the opinion.

Respectfully Submitted,



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*Counsel for Candidate,
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Dated: August 27, 2010

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Department of State
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In Re: The Nomination Petitions
and Papers of Carl Stevenson
As A Candidate For
State Representative In The 134th
Legislative District

No. 643 M.D. 2010

Heard: August 18, 2010

Objection of: Michael W. Gibson
and Robert W. Mader

BEFORE: HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: August 19, 2010

Before this Court is a Petition to Set Aside the Nominating Petitions and Papers of Carl Stevenson (Candidate), as a Candidate for the Office of Representative in the General Assembly from the 134th Legislative District (Petition to Set Aside) in the Pennsylvania General Election to be held on November 2, 2010. The Petition to Set Aside was filed in this Court on August 9, 2010 by Michael W. Gibson and Robert W. Mader (Objectors), who are duly registered and qualified electors of the 134th Legislative District.

Pursuant to Section 951 of the Election Code¹, a candidate seeking independent nomination for a non-State-wide office, must file a nomination paper containing signatures of qualified electors of the electoral district equal to two per

¹ Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §2911.

centum of the largest entire vote cast for any officer, except a judge of a court of record, elected at the last preceding election in said electoral district for which said nomination papers are to be filed. The Secretary of the Commonwealth calculated that nomination papers for the Office of Representative in the General Assembly from the 134th Legislative District must contain 577 valid signatures in order for a candidate's name to appear on the ballot.

On August 2, 2010, Candidate filed a Nomination Paper with the Secretary of the Commonwealth seeking to have his name printed on the Pennsylvania General Election Ballot in the General Election to be held on November 2, 2010, as a Political Body Candidate for the Office of Representative in the General Assembly from the 134th Legislative District. Candidate's Nomination Paper consists of 21 pages containing 702 signatures. Objectors seek to invalidate 257 signatures -- 185 of which are individual line challenges; 97 are global challenges.

On August 10, 2010, this Court entered a case management order scheduling a hearing on the Petition to Set Aside for August 18, 2010, at 10:00 a.m., and imposing certain duties and obligations upon Objectors and Candidate. Therein: (1) Objectors were ordered to personally serve Candidate or an adult member of Candidate's family on or before 5:00 p.m. on August 12, 2010; (2) Objectors and Candidate were ordered to identify all witnesses intended to testify at the hearing; (3) Objectors were ordered to immediately arrange to meet with Candidate or his representative, and if appropriate with the designated representative of the county office responsible for the SURE system, to review before the hearing each and every challenged signature line; (4) Objectors and Candidate were ordered to file a stipulation of the parties identifying the total number of signatures submitted, the total number of uncontested signatures, the

total number of signatures challenged, each and every signature to which there is an objection, identified by page number and line number, and the basis for the objection, and each and every signature to be stricken off as invalid or for which an objection is to be withdrawn, identified by page number and line number, if the parties can reach such a stipulation; (5) Objectors and Candidate were ordered to file a list of all signatures, identified by page number and line number, that are facially defective and that Candidate intends to rehabilitate, and the manner in which he intends to do so; and (6) Objectors and Candidate may each file a memorandum of law in support of their respective positions by 12:00 noon on August 16, 2010. Objectors were also ordered to serve personally or by registered mail a copy of the Scheduling and Case Management Order on the Secretary of the Commonwealth, and to offer proof at the hearing of timely service of the Petition to Set Aside on the Secretary of the Commonwealth.

Pursuant to the foregoing, Objectors filed a certificate of service attesting that a copy of the Scheduling and Case Management Order was served upon Candidate and the Secretary of the Commonwealth. Objectors filed a "Stipulation of the Parties after Signature Review", which was not signed by the Candidate, and a Memorandum of Law. Candidate filed his own report.

Ultimately, the hearing on the Petition to Set Aside was held on August 18, at 10:00 a.m. Objectors were represented by counsel. Candidate appeared *pro se*. Counsel for Objectors presented credible proof of timely service of the Petition to Set Aside on the Secretary of the Commonwealth, which was marked as Objectors' Exhibit No. 1, and admitted into evidence.

Before the Court, the parties stipulated that Candidate's Nomination Paper consists of 21 pages containing 702 signatures. Objectors seek to invalidate 185 individual signature lines and three pages consisting of 97 signatures on a

global challenge. However, 25 of the signatures included in the global challenges have also been challenged on individual grounds. Candidate concedes that approximately 90 of the 185 individual signature challenges are valid.² The parties stipulated that if Objectors succeed on the global contest, Candidate would not have the requisite 577 signatures to have his name appear on the ballot. The Court shall begin by addressing the global challenges.

Objectors assert that pages 19, 20 and 21 of Candidate's Nomination Paper should be stricken on the basis that the circulator of those pages resides outside the 134th legislative district. Objectors presented a copy of the circulator's voter registration records and voter registration application, which were marked as Objector's Exhibit No. 2, and admitted into evidence. Objectors maintain that this defect is incapable of amendment and therefore fatal.

Initially, this Court notes that it is well established that the Election Code should be construed liberally "so as to not deprive an individual of his right to run for office, or the voters of their right to elect a candidate of their choice." Ross Nomination Petition, 411 Pa. 45, 190 A.2d 719 (1963). Furthermore, the party alleging defects in a nominating petition has the burden of proving such. Nomination Petition of Wagner, 516 A.2d 1275 (Pa. Cmwlth. 1986).

Where the court is not convinced that challenged signatures are other than genuine, the challenge is to be resolved in favor of the candidate. In re Nomination of Flaherty, 564 Pa. 671, 682, 770 A.2d 327, 333 (2001). However, the Court is mindful that it must strike a balance between the liberal purposes of the Election Code, and the provisions of the Election Code relating to nominating petitions that are necessary to prevent fraud and to preserve the integrity of the

² The Court notes that the Secretary of Commonwealth struck 39 signature lines.

election process. In re Nomination Petition of Shimkus, 946 A.2d 139 (Pa. Cmwlth. 2008).

Pursuant to Section 951(d) of the Election Code,³ a circulator of a nomination paper must be a "qualified elector duly registered and enrolled as a member of the designated party of the State, *or of the political district, as the case may be, referred to in said petition*". 25 P.S. §2911(d) (emphasis added). Section 909 of the Election Code, 25 P.S. §2869, contains a similar residency requirement for circulators of nomination petitions.⁴ This Court has consistently held that

³ Section 951(d) of the Election Code more fully provides:

Each sheet shall have appended thereto the affidavit of some person, not necessarily a signer, and not necessarily the same person on each sheet, setting forth--(1) *that the affiant is a qualified elector of the State, or of the electoral district, as the case may be, referred to in the nomination paper*; (2) his residence, giving city, borough or township with street and number, if any; (3) that the signers signed with full knowledge of the contents of the nomination paper; (4) that their respective residences are correctly stated therein; (5) that they all reside in the county named in the affidavit; (6) that each signed on the date set opposite his name; and (7) that, to the best of affiant's knowledge and belief, the signers are qualified electors of the State, or of the electoral district, as the case may be.

25 P.S. §2911(d) (emphasis added).

⁴ Section 909 of the Election Code provides:

Each sheet shall have appended thereto the affidavit of the circulator of each sheet, setting forth--(a) *that he or she is a qualified elector duly registered and enrolled as a member of the designated party of the State, or of the political district, as the case may be, referred to in said petition*, unless said petition relates to the nomination of a candidate for a court of common pleas, for the Philadelphia Municipal Court or for the Traffic Court of Philadelphia or for justice of the peace, in which event the circulator need not be a duly registered and enrolled member of the designated party; (b) his residence, giving city, borough or

(Continued...)

circulators of nomination petitions must be registered voters within the specific district referred to in the petition. In re Nomination Papers of Mann, 944 A.2d 119, 125 (Pa. Cmwlth. 2008) (nomination petition pages circulated by electors who did not live in the county in which the pages were circulated were stricken); In re Nomination Petition of Shannon, 573 A.2d 638, 640 (Pa. Cmwlth. 1990) (signatures collected in district where circulator of a nomination petition was not registered could not be counted); In re Nomination Petition of McDermott, 431 A.2d 1180, 1181-1182 (Pa. Cmwlth. 1981) (petitions were fatally defective where the circulator was not a resident within the district where the Candidate sought office). The failure of a circulator to reside in the district in which the pages were circulated is a fatal defect to those nomination petitions filed by that circulator. Id. The purpose of the residency requirement for affiants is to ensure that papers are circulated by persons with at least some interest and stake in their communities in order to express the true will of the people within that electoral district.

Candidate concedes that the circulator of pages 19, 20 and 21 resides outside of the 134th legislative district. Candidate, however, argues that a circulator of a nomination paper must only be a qualified elector of the

township, with street and number, if any; (c) that the signers thereto signed with full knowledge of the contents of the petition; (d) that their respective residences are correctly stated therein; (e) that they all reside in the county named in the affidavit; (f) that each signed on the date set opposite his name; and (g) that, to the best of affiant's knowledge and belief, the signers are qualified electors and duly registered and enrolled members of the designated party of the State, or of the political district, as the case may be.

25 P.S. § 2869 (emphasis added).

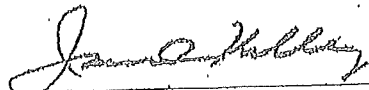
Commonwealth and need not be a resident of the electoral district referred to in the nomination paper, citing Morrill v. Weaver, 224 F.Supp.2d 882 (E.D. Pa. 2002).

In Morrill, a federal district court judge, in a preliminary injunction action filed by Green Party candidates, held the requirement in Section 951(d) of the Election Code that circulators of nomination papers for nomination by political bodies be registered voters and residents of the district was unconstitutional as it violated the rights of free speech and freedom of association under First and Fourteenth Amendments to the United States Constitution. However, the decisions of the federal district courts and courts of appeal, including those of the Third Circuit Court of Appeals, are not binding on Pennsylvania courts, even when a federal question is involved. Lindner v. Mollan, 544 Pa. 487, 677 A.2d 1194 (1996); Breckline v. Metropolitan Life Insurance Co., 406 Pa. 573, 178 A.2d 748 (1962); Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Cmwlth. 1997). Indeed, this Court has previously noted that Morrill is not binding upon this Court. In re Payton, 945 A.2d 279 (Pa. Cmwlth.), aff'd, 596 Pa. 469, 945 A.2d 162 (2008); In re Nomination Paper of Rogers, 908 A.2d 942 (Pa. Cmwlth. 2006); In re Petition for Agenda Initiative, 821 A.2d 203 (Pa. Cmwlth. 2003). Accordingly, pages 19, 20, and 21 of Candidate's Nomination Papers, which contain 97 signatures, are stricken in their entirety.

By combining these 97 signature strikes with the 90 signatures Candidate conceded were invalid, less 25 lines to compensate for any duplicate challenges that have occurred between the global and individual line strikes, a total of 162 signature lines are hereby stricken. Subtracting 162 stricken signatures from the 702 signatures obtained, Candidate is left with only 540 signatures, which

is short of the requisite 577 signatures needed for Candidate to remain on the ballot.⁵

Accordingly, Candidate's Nomination Paper must be set aside.



JAMES R. KELLEY, Senior Judge

⁵ The Court notes that Candidate was prepared to rehabilitate signatures had he succeeded on the global challenge. Candidate presented 23 affidavits along with copies of four voter registration cards and one driver's license, as Candidate's Exhibit No. 1, which the Court admitted into evidence.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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As A Candidate For
State Representative In The 134th
Legislative District

No. 643 M.D. 2010

Objection of: Michael W. Gibson
and Robert W. Mader

ORDER

AND NOW, this 19th day of August, 2010, the Petition to Set Aside the Nominating Petitions and Papers of Carl Stevenson, as a Candidate for the Office of Representative in the General Assembly from the 134th Legislative District, is GRANTED and said Nomination Paper of Carl Stevenson is hereby set aside.

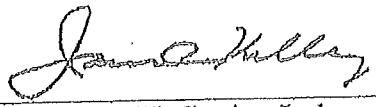
The Chief Clerk of the Commonwealth Court is directed to notify all parties and Counsel of record of the entry of this order, and he shall further certify a copy hereof to the Secretary of the Commonwealth who shall STRIKE the name of Carl Stevenson as a candidate for the Office of Representative in the General Assembly from the 134th Legislative District on the Pennsylvania General Election Ballot.

Each party shall bear his own costs in regard to this litigation.

Certified from the Record

AUG 19 2010

and Order Exit



JAMES R. KELLEY, Senior Judge