

JR# 60021

STATE OF SOUTH CAROLINA }
COUNTY OF FLORENCE } IN THE COURT OF COMMON PLEAS

Florence County Democratic Party
by Benjamin D. Moore, Chairman

and

Florence City Democratic Party
by Richard L. Granger, Chairman,

Petitioners,

VS

Mordecai C. Johnson,

Respondent.

ORDER

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FLORENCE COUNTY S.C.

This matter came before me on Tuesday, April 14, 1981 at 9:00 A. M., pursuant to a Rule to Show Cause resulting from a Petition filed by the Petitioners against the Respondent, Mordecai C. Johnson, asking that this Court permanently restrain and enjoin the Respondent from offering or campaigning for Florence City Council Seat No. 1 in the Florence municipal general election, to be held on May 5, 1981.

Present at the initial hearing at the aforementioned time were the Petitioners, the Respondent, and Frank E. Cain, Jr., Esquire of the Marlboro County Bar, who appeared as counsel for the Respondent. In addition, Petitioner Moore informed the Court that he was appearing as counsel for both himself and Petitioner Granger, and Respondent Johnson indicated that he would also participate pro se in the presentation of certain matters to the Court.

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Prior to commencement of the hearing, the Respondent presented to the Court his Return to the Petition and Rule to Show Cause, including several motions to be presented to the Court. The first of these motions was a Motion to Recuse, requesting that the Trial Judge recuse himself from consideration of the instant matter, because of his past affiliation with the Democratic Party as Florence County Democratic Party Chairman and as a candidate for the South Carolina House of Representatives on the Democratic Party ticket. In addition, Respondent pointed out that Respondent had been a candidate for the South Carolina House of Representatives on the United Citizen's Party ticket at the same time the Trial Judge was a candidate for

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the same office, arguing that such facts demonstrated the impression of a lack of impartiality in the determination of the issues now before the Court.

The Court took the Motion under advisement and continued the hearing on the remainder of the issues raised by the parties until Wednesday, April 15, 1981 at 5:00 P. M.

At the appointed time, the Court reconvened the hearing, with all parties and counsel present. At that time, the Court informed the parties that it was confident that the prohibition imposed upon the Circuit judiciary concerning participation in political activity sufficiently guaranteed the impartiality of the Trial Judge, and that Respondent's Motion to Recuse was denied.

Next before the Court was Respondent's Demurrer to the Petition of the Petitioners on the ground that the Petition failed to allege a violation of Section 7-11-210, South Carolina Code of Laws, as amended, and that the Petition is overbroad in seeking more in the way of relief than is authorized by the above statute.

The question to be considered in ruling on Respondent's Demurrer is whether or not the Petition of the Petitioners, on its face, contains allegations sufficient to constitute a cause of action. Section 7-11-210, South Carolina Code of Laws, as amended, on which Petitioners base their claim for injunctive relief, requires every person offering as a candidate in a primary election as nominee of a political party for political office including "all county and township offices" to sign and file with the County Chairman or other officer named by the County Committee a notice and pledge as follows:

"I affiliate with the _____ Party, and I hereby pledge myself to abide by the results of the primary and I authorize the issuance of an injunction upon ex parte application by the party chairman, as provided by law, should I violate this pledge by offering or campaigning in the ensuing general election for election to this office or any other office for which a nominee has been elected in the party primary election, unless the nominee for any such office has become deceased or otherwise disqualified for election in the ensuing General Election."

The statute then proceeds to direct the County Chairman of the party which held such primary, in the event that a person defeated in such a

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primary election then offers or campaigns against "any nominee for election to any office in the ensuing General Election", to institute an action requesting an order enjoining that person from so offering or campaigning.

Respondent first argues that the Petition does not allege that Respondent has offered or campaigned for any office in the General Election for Florence City Council to be held on May 5, 1981, and that it also fails to allege that Respondent violated the pledge which he admits to signing as alleged in Paragraph Four of the Petition.

The allegations contained in the Petition allege that Respondent did sign and file with the Florence City Democratic Party the notice and pledge called for in the statute, that he was certified as a candidate in the primary election of the Democratic Party for Florence City Council, Seat One, that he was defeated in the primary election, and that thereafter he authorized the commencement of a Petition drive to have his name placed on the General Election ballot for the same office for which he was defeated in the primary. The Court is satisfied that such conduct constitutes continuing to seek election to the aforementioned office, and therefore Petitioners' allegation is sufficient to demonstrate that Respondent has offered for election in violation of his pledge.

Respondent next argues that the statute in question is applicable to candidates for a number of offices, including county and township offices, but does not apply to election to offices of municipality. Respondent contends that the Petition does not allege that Respondent was a candidate for any office covered by the statute.

Respondent's position in this regard is without merit. The Court has not doubt that the language of the statute referring to "township offices" demonstrates the intent of the General Assembly that the statute should apply to any office for which a primary contest is held prior to the general election.

Respondent also contends that pursuant to the statute that Petitioner Granger and the Florence City Democratic Party were not authorized by the County Democratic Committee to accept Respondent's signed pledge, and that

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the primary election was held prior to March 30, 1981, which is the deadline set by the statute in question for the filing of the candidate's pledge.

The Court notes that Section 7-11-210 places the burden of filing the candidate's pledge upon the candidate, and that it be so filed within the time limit. Petitioners' Petition alleges that the Respondent filed his notice and pledge with the proper party and in a timely manner to become certified as a candidate in the Democratic Primary, and therefore, the requirements of the statute are satisfied.

Finally, Respondent argues that the Petition overreaches the statute in its prayer for relief. Even if this position was correct, the Court would not consider this a proper ground for granting a demurrer to the Petition. However, a reading of the statute as well as the Petition shows that the Petitioners have requested the exact relief authorized by the language of the statute, in the event the candidate violates his or her pledge.

As a result of the foregoing, the Court would deny Respondent's Demurrer to the Petition of the Petitioners.

The next matter considered by the Court was Respondent's Motion to Strike Improper Parties, in which Respondent contends that both the Florence County Democratic Party, through Chairman Moore, and the Florence City Democratic Party, through Chairman Granger, are improper parties to pursue the instant action. Respondent argues that both Chairman Moore and Chairman Granger instituted their action against him without authorization of their respective party committees to pursue the matter in question; in addition, Respondent points out that the Florence County Democratic Party plays no role in the primary election process of selection of Democratic Party nominees for Florence City Council.

Petitioner Moore in response argues that the language of Section 7-11-21- requires his participation in the instant action through the use of the word "shall" in describing the action to be taken by the County Chairman under the circumstances as set forth in the instant action. In addition, Petitioners contend that Petitioner Granger, by implication under the language

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of the statute, and as the party official charged with the administration of the city primary, is a proper party to this action.

The Court, in determining the question of the proper party Petitioners, must consider the legislative intent as indicated by the language of the statute. It is clear from this language that the General Assembly intended to confer upon the Party, whose candidate violates the pledge to continue to seek election after defeat in the primary, the authority, through its elected leaders, to protect the state's interest in reasonable regulation of the election process.

Whether or not such a delegation is constitutional will be considered below. At this juncture, however, it is sufficient to note that such a delegation, concerning an office voted upon by the electors wholly within one county of this state, has been conferred upon the County Chairman, and by implication, in a municipal or township election, upon the City Chairman as well. In addition, the language of the statute clearly demonstrates that Chairman Moore and Chairman Granger acted properly in proceeding on behalf of their respective parties. Whether the language makes their action mandatory or is merely directory, it is clear that the party chairman or chairmen are authorized to proceed without requirement that their action be sanctioned by their respective party committees.

Respondent's final motion to be considered by the Court was a Motion to Dismiss on a variety of constitutional grounds. Specifically, Respondent moves to dismiss the Petition on the grounds that Section 7-11-210 violates the United States Constitution and the Constitution of South Carolina as follows:

1. It unlawfully delegates state power to a private citizen, specifically the Chairman of a local political party;
2. It violates Respondent's right to freedom of speech and right to petition;
3. It violates Respondent's right to vote, make his vote effective, and right to be elected to fill office;
4. It is unconstitutionally vague;
5. It impairs the obligation of contract;

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6. It denies Respondent due process and equal protection of the laws.

In addition, Respondent moves to dismiss on the grounds that Petitioner Granger charged him an exorbitant and illegal filing fee.

The Court will consider the question of the filing fee first before addressing the constitutional issues raised by the Respondent. There is no evidence before the Court concerning this fee other than Respondent's contention that it is too high. In any event, Respondent paid the fee charged and ran in the ensuing primary without protest; only at this juncture, following his defeat, does he raise this issue, and the Court is satisfied that Respondent should be estopped from such a contention at this time.

As was properly pointed out by the Petitioners, a consideration of Respondent's Motion to Dismiss is also a simultaneous consideration of the Petition in this action, due to the fact that there is substantially no disagreement as to the material facts in this matter. Specifically, Respondent admits to signing the candidate's notice form, which has been admitted as Plaintiff's Exhibit No. 1, and filing it with Petitioner Granger. He further admits to being defeated for nomination to Florence City Council, Seat One, in the Democratic Primary held on March 17, 1981, and subsequent to that date, initiating a petition drive for the purpose of having his name placed on the ballot for the General Election to the same office, to be held on May 5, 1981.

Therefore the ultimate question on the merits of this matter, a question of law, is whether or not the language of Section 7-11-210, South Carolina Code of Laws, as amended, places a legally binding obligation upon a candidate for primary nomination to abide by the candidate's notice and pledge set out in the statute which he or she must sign and file with the party conducting that primary; and if so, whether or not, such a requirement is constitutional under the United States Constitution and the Constitution of South Carolina.

In addition to constitutional provisions, Respondent relies on the case of Redfearn vs. Board of Canvassers, 234 S.C. 113, 107 S.E.2d 10, a 1959

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decision of the South Carolina Supreme Court, and Toporek v. South Carolina State Election Commission, 362 F.Supp. 613, a 1973 decision of a Three-Judge Court of the United States District Court for the District of South Carolina. Petitioners base their claim for relief on the more recent case of White, et al. v. West et al., a 1976 unreported decision, also issued by a Three-Judge Court of the United States District Court for the District of South Carolina, contending that the White case is controlling upon the question of whether or not the candidates pledge of Section 7-11-210 legally binds the candidate to abide by its terms.

Following a close reading of the above-cited decisions, this Court is of the opinion that White v. West, which deals directly with facts remarkably similar to those of the instant action, and bases its decision upon the United States Supreme Court decisions of Storer v. Brown, 415 U.S. 724 and American Party of Texas v. White, 415 U.S. 767, decided in 1974, modifies the Toporek case and the Redfearn case in favor of the position of the Petitioners in the case at bar. White v. West was brought by persons who ran for nomination to various offices in the Democratic Primary of Allendale County, South Carolina, and following their defeat, were certified as nominees of the United Citizens Party for the ensuing General Election. The case was commenced for the express purpose of testing the constitutionality of Section 23-400.72, Code of Laws of South Carolina, 1962 (Now Section 7-11-210, Code of Laws of South Carolina, 1976) by the Plaintiffs, who argued substantially the same constitutional issues as the instant Respondent presents here.

The White v. West Court, basing its decision on the Storer decision cited above, found a substantial state interest in preventing a defeated primary candidate from continuing to press his case in the General Election. The Court stated:

"In Toporek this Court raised a doubt as to whether the state has any legitimate interest in keeping a defeated primary candidate from appearing on the general election ballot. This has been clearly answered in Storer, which approved a California election system, much more restrictive than that now under attack in the present action. Justice White speaking for the Court at page 730 stated:

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'Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualification of voters, and the selection and qualification of candidates.

'It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," Dunn v. Blumstein, *supra*, at page 348, very much a matter of consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'

"The state interest in reasonably regulating and simplifying the election process is also supported by the language in Bullock v. Carter, 405 U.S. 134 (1972) at page 145:

'The Court has recognized that a state has a legitimate interest in regulating the number of candidates on the ballot. Jenness v. Fortson, 403 U.S. at 442; Williams v. Rhodes, 393 U.S., at 32. In so doing, the state understandably and properly seeks to prevent clogging of its election machinery, avoid voter confusion and assure that the winner is the choice of the majority, or at least a strong plurality of those voting, without the expense and burden of run-off elections. Although we have no way of gauging candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the state in avoiding overcrowded ballots. Moreover, a state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.'

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The White v. West Court specifically endorses the constitutionality of the statute here in question under the Fourteenth Amendment guarantees of Due Process and Equal Protection of the Laws, noting on pages seven and eight of the opinion:

"It is obvious from a review of §23-400.72 that its purpose is to prevent a primary candidate who has appealed to the entire electorate in seeking his party's nomination and lost to again appeal to the entire electorate as a candidate in the general election. This effort to protect the integrity of the ballot is commendable; and necessary to prevent confusion."

The Court also found no discrimination in the application of the statute due to the lack of discretion afforded the party chairman in bringing the action, through the statutory use of the word "shall."

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Likewise the White v. West Court saw no violation of the right to freedom of speech and right to petition. The opinion states, at page nine:

"The right to petition for redress of grievances does not include the right of a defeated primary candidate to have his name appear on the general election ballot. If plaintiffs consider the election process as a part of the constitutional right to petition for redress of grievances, they had the alternate route to ballot position through nomination by petition rather than by primary."

Also on page ten, the opinion states:

"The plaintiff candidates freely and voluntarily chose to seek nomination by primary and in so doing they signed the pledge required and subjected themselves to the provisions of 23-400.72. Having used the Democratic Party primary they should not complain that it has certain restrictions preventing defeated primary candidates from running against successful primary candidates."

Respondent argues that the statute violates his right to vote and to make his vote effective under the Toporek and Redfearn decisions. The Court in the White case points out that, in addition to being decided prior to the inclusion of the pledge language authorizing the issuance of an injunction if the candidate's pledge is violated, the Redfearn facts concerned a candidate who was elected by write-in following a defeat in a primary election. In addition, one of the Plaintiffs in the White case was elected by write-in after being enjoined from offering or campaigning.

The Petitioners here do not seek, nor are they authorized to seek, an injunction to prevent write-in votes being cast and/or counted on behalf of the Respondent. Therefore, they do not seek a remedy which would impair Respondent's right to vote or to make his vote effective. They seek only to prevent him from offering or campaigning for the office which he sought in the Democratic Primary and from having his name placed on the General Election ballot, which is the relief provided for by the statute in question.

The Court, in stating its modification of the Toporek decision, points out that the state's interest in "protecting the integrity of the ballot" does not impair a candidate's right to be elected to fill office, once that candidate has elected to follow the primary route, and has been defeated.

Likewise, the Court in White found no merit in the contention that the statute unlawfully delegates state power to a private citizen. It noted that "it is both logical and reasonable for the legislature to require the recognized political parties . . . to enforce the provisions of 23-400.72. . . ."

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This position as well as the previous statements by this Court concerning Respondent's Motion to Strike Improper Parties, addresses Respondent's contention that the obligation of contract is unconstitutionally impaired. Respondent's "contract," if one is created by the statute, is with the political party with which he has chosen to affiliate, which in this case is the Democratic Party. By placing the responsibility for enforcement of the contractual terms in the hands of the Party leaders, no impairment of Respondent's right to contract can be found to exist.

Finally, this Court fails to see how the language of the statute is unconstitutionally vague. The White Court found throughout its opinion that the language of the statute was clear as to the obligation of defeated candidates in a primary election to continue to seek office in the adjoining general election.

Respondent has conceded that the decision of White v. West is essentially adverse to his position in the instant action. However, he argues that the facts of White distinguish it from this issue, because in White, the parties defeated in the Democratic primary subsequently offered for election on the United Citizen's Party ticket in the General Election.

This Court can find no merit in such an argument, based upon the White case, and the language of Section 7-11-210. The statute makes no distinction between defeated candidates, who in violation of the pledge, continue to campaign in the General Election, whether individually or as a candidate of another party. As stated by the Court in White, "The state has the right to adopt an effective way of keeping defeated primary candidates off of the general election ballot." This has been accomplished by the use of the candidate's notice and pledge as set out by the statute.

Accordingly, this Court having fully informed itself of the facts and circumstances surrounding this matter, it is hereby

ORDERED that Respondent's Motion requesting that the Trial Judge remove himself from the case at bar is hereby denied.

IT IS FURTHER ORDERED that Respondent's Demurrer of the above captioned action is hereby denied.

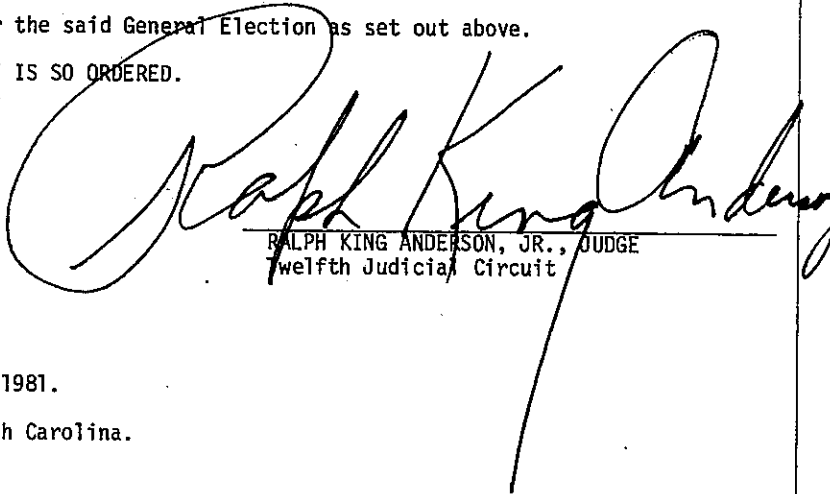
IT IS FURTHER ORDERED that Respondent's Motion to Strike Improper Parties is hereby denied.

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IT IS FURTHER ORDERED that Respondent's Motion to Dismiss the above entitled cause of action is hereby denied.

IT IS FURTHER ORDERED that the relief requested in the Petition of the Petitioners is hereby granted, specifically that the Respondent, Mordecai C. Johnson, is hereby restrained and enjoined from offering or campaigning for Florence City Council, Seat One, in the General Election to be held on May 5, 1981, and that he is specifically prohibited from having his name placed on the ballot for the said General Election as set out above.

AND IT IS SO ORDERED.



RALPH KING ANDERSON, JR., JUDGE
Twelfth Judicial Circuit

At Chambers.

April 23, 1981.

Florence, South Carolina.

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JAMES W. EGG
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