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FILED

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MAR 30 1987

CLERK SUPREME COURT
By: [Signature] Deputy Clerk

SAMUEL C. WADHAMS, WILLIAM HADLEY,
ROBERT G. SIFF, RAYMON J. SWEEZY,
HONOR H. SANBORN, MAXINE B. HOLM,
ROBERT G. MCGREGOR, KAZIMIR ZIELONKA,
JANET S. WILSON, CHARLES P. LEACH, SR.,
WALTER R. PIERSON and BESS C. KNOWLES,

Plaintiffs/Petitioners,

v.

Case No. 70,078
Appeal No. 85-2957

BOARD OF COUNTY COMMISSIONERS OF
SARASOTA COUNTY, FLORIDA,

Defendant/Respondent

ON APPEAL FROM
THE SECOND DISTRICT
COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The following facts relevant to the issue of conflict jurisdiction were omitted by Petitioners' Statement of the Case and Facts:

Coincident with the November 6, 1984, general election, the voters of Sarasota County adopted the subject amendment to the Sarasota County Charter by a 70% favorable vote (63,691 votes for to 27,414 against). More than two months later, Petitioners, members of the Charter Review Board and others filed suit to invalidate the referendum. The Petitioners admitted that the notice of the referendum election was properly published. Furthermore, the evidence referenced in the District Court opinion showed that the purpose of the referendum and the form of the ballot were made known to the Petitioners and the public in general months in advance of the referendum. Thus, on August 22, 1984, notice was published for a public hearing on September 11, 1984, on Ordinance No. 84-72 proposing to amend the Charter "to provide for the Charter Review Board to meet only in 1988 and each four (4) years thereafter". The notice stated that a complete draft of the Ordinance, including the form of the ballot, was on file with the Clerk of the Board.

Petitioner WADHAMS, as well as Petitioners SWEEZY, McGREGOR and HOLM, appeared at the public hearing on September 11, 1984, on the adoption of Ordinance No. 84-72. Following the adoption of Ordinance No. 84-72 on September 11, the Charter Review Board met on September 27, 1984. Petitioners WADHAMS, SWEEZY, SIFF, HOLM and SANBORN were present at the meeting and the Charter Amendment was discussed. Petitioner WADHAMS testified as follows concerning

the discussion (emphasis added):

"...the comments were generally that we didn't think the people would accept it. We had looked at the -- looked at the ballot that the County Commission had approved, the form of the ballot, and we didn't think it would be accepted."

Notice of the referendum on the Charter Amendment proposed by Ordinance No. 84-72 was published twice in the Sarasota Herald-Tribune on October 1 and October 15, 1984, which notice included the full text of the ballot question.

Petitioners' Amended Complaint challenged only the form of the ballot, alleging that the ballot failed to comply with the 75 word limit called for by Section 101.161, Fla. Stat., and that the ballot was misleading. Petitioners' Amended Complaint did not allege fraud or any intention on the part of the Board to mislead the voters.

The trial court ruled that the ballot question, which spread the full text of the Charter Amendment before the voters, was not misleading, and that voters had ample opportunity to become informed on the issues raised by the ballot question before the November 6 election.

The trial court further made a factual finding cited by the District Court that, although the ballot failed to comply with the 75 word limit of Section 101.161, Fla. Stat., the Petitioners had sufficient advance notice of the ballot to bring an action to correct the error prior to the election, and, having failed to do so, the Petitioners were precluded from invalidating the election.

ISSUE

THE DECISION BY THE SECOND DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THIS SAME QUESTION OF LAW.

Contrary to Petitioners' bold claims otherwise, the Second District Court of Appeal's affirmance of the trial court's decision does not conflict with any decision on the same question of law but upholds and follows the applicable precedent. A review of the governing law as applied to the facts shows the following:

Beginning with State ex rel. Landis v. Thompson, 120 Fla. 860, 163 So. 270 (1935) (en banc), this Court ruled that where those attacking a ballot on the grounds that it is misleading or fails to conform to procedural requirements wait until after a favorable vote by the electorate to bring their lawsuit, the asserted defects are deemed cured. This Court held:

{A}ll objections as to the form of ballots employed have now become obviated by the popular voice as the paramount act, and are consequently no longer available to be judicially urged by those who failed to seek correction of such alleged errors in the form of ballots prior to the casting by the people of the alleged irregular tickets furnished to them for voting purposes by the state.

163 So. at 278 (emphasis added). This Court followed such

rationale in Sylvester v. Tindall, 154 Fla. 663, 18 So.2d 892 (1944) (en banc), wherein the Court addressed a post-election claim similar to the one at bar. The petitioners' post-election claim was that the form of the ballot was not sufficient to put the electorate on notice as to just what they were voting on. This Court ruled:

We are inclined to the opinion that the form of the ballot pertaining to this particular amendment was sufficient to put the electorate on notice as to the amendment they were voting upon, especially in view of the three months publication of the amendment and the posting of a complete copy of it in each voting place. But it is not really necessary for us to rule upon this question here.

While it is true that the procedure set forth in Section 1 of Art. XVII is mandatory and should be followed, this Court has recognized the almost universal rule that once an amendment is duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of the submission.

18 So.2d at 895 (citations omitted) (emphasis added).

The Second District Court of Appeal followed this Court's precedent in Nelson v. Robinson, 301 So.2d 508 (Fla. 2nd DCA), cert. den. 303 So.2d 21 (Fla. 1974) wherein the court opined:

[I]t may be observed that it has often been held that one who does not avail himself of the opportunity to object to

irregularities in the ballot prior to the election may not object to them after.

301 So.2d at 512 (footnote omitted) (emphasis added). The Second District Court also held that:

[A]s regards defects in ballots, the courts have generally declined to void an election unless such defects clearly operate to prevent that free, fair and open choice hereinabove spoken of.

Id. at 510 (footnote omitted).

And finally, in the recent case of Winterfield v. Town of Palm Beach, 455 So.2d 359 (Fla. 1984), this Court reaffirmed its adherence to this long established policy by holding:

In preserving elections in the face of post-election challenges to pre-election irregularities, this Court has found that a party is estopped from voiding an election where he was on notice of the irregularity before the election. "The aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election." Pearson v. Taylor, 159 Fla. 775, 776, 32 So.2d 826, 827 (1947) (post-election challenge to sufficiency of petition which lead to election). .. McDonald v. Miller, 90 So.2d 124, 129 (Fla. 1956) (losing candidate, fully aware of blatant pre-election irregularities, barred from raising those irregularities as grounds to invalidate election: "One cannot stand by with full knowledge and acquiesce in this type of conduct prior to an election and then, after being disappointed by the results, successfully overturn the election."

Id. at 362 (emphasis added).

In affirming the trial court's decision, the Second District Court of Appeal followed the foregoing applicable precedent, and, contrary to Petitioners' assertion, there are no other cases, either decided by this Court or decided by any of the other district courts of appeal, which "expressly and directly conflict" on this particular question of law, All of the cases cited by Petitioners are inapplicable because they do not deal with post-election challenges by those aware of ballot irregularities prior to the election and, in addition, several opinions cited by Petitioners have been rejected by subsequent rulings of this Court.

An analysis of the case law authority cited by Petitioners follows:

1. Askew v. Firestone, 421 So.2d 151 (Fla. 1982) was a pre-election suit that dealt with a ballot summary that was so incomplete as to be clearly and conclusively defective, deceptive and misleading. The decision of the Second District Court in the case at bar does not conflict with the case cited by Petitioners. Askew v. Firestone does not address the situation where, as here, a lawsuit is brought post-election by petitioners who were aware of the ballot irregularities prior to the election but failed to bring an appropriate action before the election.

2. Frink v. State ex rel, Turk, 160 Fla. 394, 35 So.2d 10 (1948), incorrectly cited by Petitioners as Frank (sic) v. State ex rel. Turk, 35 So.2d 10 (Fla. 1948), is a case which

held that the language of the absentee ballot statute must be strictly construed; this Court specifically receded from such holding in Boardman v. Esteva, 323 So.2d 259 (Fla. 1975) cert. den. 425 U.S. 967, 96 S.Ct. 2162, 48 L.Ed.2d 791 (1976), wherein the Court held:

Without further analysis of the case law, and realizing as we do that strict compliance has been required by this Court in other cases, we now recede from that rule and hereby reaffirm the rule adopted in Tucker to the effect that substantial compliance with the absentee voting laws is all that is required to give legality to the ballot.

Id. at 264 (emphasis added). The Second District Court's decision in this case does not conflict with Frink, supra, because it is no longer the rule of law in Florida, having been specifically receded from in Boardman, supra. Furthermore, Frink and Boardman are both distinguishable from the case at bar in that they dealt with the absentee voting laws and did not address a claim against the actual contents of a ballot.

3. Hill v. Milander, 72 So.2d 796 (Fla. 1954) (en banc) was a suit in which the petitioners claimed that the failure to set out the entire bill on the ballot as mandatorily required by the governing statute constituted a fatal defect in the election and rendered the same invalid. This Court rejected such conclusion and held:

All that the Constitution requires or that the law compels or ought to compel

is that the voter have notice of that which he must decide. ...What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot. We think the ballot under question amply complies with these requirements.

Id. at 798. Hill v. Milander, supra, actually supports the Second District Court's affirmance of the trial court's decision. The Second District Court specifically noted on page 5 of its opinion that the trial court "concluded that the voters were afforded ample opportunity to become informed on the issue before the election and that the ballot gave the voters fair notice of the decision they were called on to make." The Second District Court's decision in the case at bar does not conflict with the Hill decision because the Second District Court found that the voters had notice of what they were voting on.

4. Special Tax School District No. 1 of Duval County v. State of Florida, 123 So.2d 316 (Fla. 1960) (hereinafter referred to as Duval) and

5. State ex rel. Pope v. Shields, 140 So.2d 144 (Fla. 1962) (hereinafter referred to as Shields) were cases which dealt with the question of compliance with the statutory requirement to publish notice of certain elections once each week for four consecutive weeks before the date of the election. These cases did not address a post-election attack on the adequacy of the form of the ballot by persons who were aware of the technical irregularity prior to the

election, the issue which was before the Second District Court in this case. Furthermore, Petitioners have admitted in the case at bar that there was compliance with all election notice publication requirements. The precedents on post-election attacks on the form of the ballot, Sylvester v. Tindall, supra and State ex rel. Landis v. Thompson, supra, control where the pre-election advertising requirements have been met.

In addition, the Duval and Shields cases apply the strict compliance doctrine with respect to the number of publications of notice for the election. These decisions are rendered suspect by the subsequent decision in State v. County of Sarasota, 155 So.2d 543 (Fla. 1963) which determined that the test to be applied was one of substantial compliance rather than strict compliance. See also Marler v. Board of Public Instruction of Okaloosa County, 197 So.2d 506 (Fla. 1967) (recognizing the sufficiency of substantial compliance with pre-election requirements).

The Second District Court's decision at bar does not conflict with the decisions in Duval and Shields because, assuming arguendo that they are even still good precedent, they dealt with the statutory publication of notice requirement and the decisions are therefore not on point.

6. State v. Dade County, 39 So.2d 807 (Fla. 1949) (en banc) was a case which dealt with the question of compliance with the statutory requirement to list distinct propositions

separately on the ballot. This Court held that since the five bridges contained in the proposition were for a single purpose, they were properly submitted to the voters in one proposition. This case did not address a post-election attack on the adequacy of the form of the ballot by persons who were aware of the technical irregularity prior to the election, the issue which was before the Second District Court in this case. The Second District Court's decision at bar does not conflict with the Dade County ruling because Dade County dealt with the "single purpose" requirement and its ruling, therefore, is not on point.

CONCLUSION

The Second District Court of Appeal's opinion properly follows the well-established law of Florida that the courts will not invalidate an election, absent fraud or substantial evidence that the voters were misled, where the petitioners have waited until after the election to file suit concerning irregularities in the form of the ballot of which they were aware prior to the election.

Accordingly, the Second District Court of Appeal's decision does not expressly and directly conflict with a decision of another district court of appeal or of this Court on the same question of law.

Respectfully submitted,



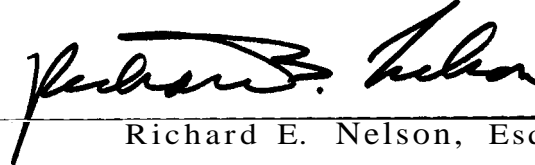
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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Jurisdiction has been furnished to DANIEL JOY, ESQUIRE, 900 First Florida Bank Plaza, 1800 Second Street, Sarasota, Florida 33577, by regular U. S. Mail this 26th day of March, 1987.

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