

IN THE MISSISSIPPI SUPREME COURT

ANDREW THOMPSON, JR.

APPELLANT

VS.

NO. 2007-EC-01989

CHARLES LEWIS JONES

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
COAHOMA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

W. ELLIS PITTMAN (MB# [REDACTED])
PITTMAN LAW OFFICE, PLLC
POST OFFICE BOX 1670
CLARKSDALE, MISSISSIPPI 38614-1670
PHONE: 601-624-6680
FAX: 601-627-6791

CURT CROWLEY (MB# [REDACTED])
SCHWARTZ & ASSOCIATES, P.A.
POST OFFICE BOX 3949
JACKSON, MISSISSIPPI 39207-3949
PHONE: 601-353-1215
FAX: 601-948-3822

Attorneys for the Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible bases for disqualification or recusal.

1. Andrew Thompson, Jr., Respondent-Appellant.
2. Charles Lewis Jones, Petitioner-Appellee.
3. Willie Gregory, Co-Chair, Coahoma County Democratic Executive Committee, Respondent.
4. John Newson, Co-Chair, Coahoma County Democratic Executive Committee, Respondent.
5. Rena Butler, Secretary, Coahoma County Democratic Executive Committee, Respondent.
6. Modena Carter, Member, Coahoma County Democratic Executive Committee, Respondent.
7. W. Ellis Pittman, Attorney for Respondent-Appellant.
8. Curt Crowley, Attorney for Respondent-Appellant.
9. Richard T. Phillips, Attorney for Petitioner-Appellee.
10. Parker H. Still, Attorney for Petitioner-Appellee.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
I. TABLE OF AUTHORITIES	iii
II. STATEMENT REGARDING ORAL ARGUMENT	1
III. STATEMENT OF THE ISSUE	2
IV. STATEMENT OF THE CASE	3
V. SUMMARY OF THE ARGUMENT	7
VI. ARGUMENT	9
A. STANDARD OF REVIEW	9
B. THE TRIAL COURT ERRED IN SETTING ASIDE THE CERTIFIED RESULTS OF THE DEMOCRATIC PRIMARY ELECTION	9
1. Burden of Proof and Standard for Invalidating Election Results	9
2. The Court Erred in Setting Aside the Election Results, as There was No Allegation or Evidence of Fraud or Intentional Misconduct	10
VII. CONCLUSION	15
VIII. CERTIFICATE OF SERVICE	16

I. TABLE OF AUTHORITIES

CASES

<u>Boyd v. Tishomingo County Democratic Executive Committee,</u> 912 So.2d 124 (Miss. 2005)	9
<u>Campbell v. Whittington,</u> 733 So.2d 820 (Miss. 1999)	7, 10
<u>In Re Municipal Boundaries of the City of Southaven,</u> 864 So.2d 912 (Miss. 2003)	9
<u>Rogers v. Holder,</u> 636 So.2d 645 (Miss. 1994)	9
<u>Straughter v. Collins,</u> 819 So.2d 1244 (Miss. 2002)	7, 10
<u>T.T.W. v. C.C.,</u> 839 So.2d 501 (Miss. 2003)	9
<u>Wilborn v. Hobson,</u> 608 So.2d 1187 (Miss. 1992)	11

STATUTES

<u>Miss. Code Ann. § 23-15-627 (Supp. 2007)</u>	5
<u>Miss. Code Ann. § 23-15-631 (Supp. 2007)</u>	5
<u>Miss. Code Ann. § 23-15-635 (Supp. 2007)</u>	5

II. STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Andrew Thompson (hereinafter "Thompson"), respectfully requests oral argument in this case. Very important issues are raised in this appeal. This case is an election contest, wherein the results of a valid election were set aside, and a Special Election ordered. As a result, the will of the voters of Coahoma County were disregarded. As the right of suffrage is a bedrock principle of democracy, the issues before the Court are substantial. Due to the importance of the issues raised in this appeal, the Court should hear oral argument from the parties in order to fully explore the parties' respective positions regarding the issues raised herein.

III. STATEMENT OF THE ISSUE

ISSUE: The trial court erred in setting aside the certified results of the Democratic Primary Election for Coahoma County Sheriff.

IV. STATEMENT OF THE CASE

This is an appeal from the Order of the Circuit Court of Coahoma County, Mississippi, entered on November 5, 2007.

I. Course of Proceedings Below

The Appellee, Charles Lewis Jones (hereinafter "Jones") filed his Amended Election Contest Petition (hereinafter "Petition") on October 9, 2007, in the Circuit Court of Coahoma County, Mississippi. [R-2] The Petition contested the results of the 2007 Democratic primary election for Coahoma County Sheriff, and the certification thereof by the Coahoma County Democratic Executive Committee. [R-2] Specifically, the Petition alleged that certain absentee ballots were legally defective, and should not have been counted. [R-4] Further, the Petition requested that the election and certification be set aside, and that the Court order a Special Election for the office of Coahoma County Sheriff. [R-9]

The Appellant, Andrew Thompson (hereinafter "Thompson"), filed an Answer to the Petition on October 25, 2007, and generally denied Jones was entitled to any relief whatsoever. [R-50]

Subsequent to Thompson filing his Answer, the parties stipulated to all material facts. This case was tried on October 26, 2007, before the Honorable Frank Vollor, Special Circuit Judge.

After the trial, the Circuit Court of Coahoma County entered an Order which granted Jones' Petition. [R-54]. The Court ordered

that a Special Election be held for the office of Coahoma County Sheriff. [R-54].

Thompson filed his Notice of Appeal to this Court on November 3, 2007. [R-58]

On November 14, 2007, in response to the Court's Order, Governor Haley Barbour issued a Writ of Election, which commanded that the Special Election be held on December 11, 2007. On November 15, 2007, Thompson filed an Emergency Motion to Stay Pending Appeal, with the Circuit Court. The Circuit Court granted this motion on November 30, 2007, and stayed execution of its Order pending a decision on the merits of Thompson's appeal to this Court.

II. Statement of the Facts

The Democratic Primary Election for Coahoma County Sheriff was held on August 7, 2007.¹ [R-54]. Six candidates appeared on the ballot, including Thompson, who was the incumbent, and Jones. [R-54]. On the date of the primary election, 6,234 votes were cast. [R-54] Of these votes, Thompson received 3,110 votes (49.89%), and Jones received 2,000 votes (32.08%). [R-54] In addition to these "regular" ballots, 542 absentee and affidavit votes were cast. [R-54] After tallying the absentee and affidavit ballots, the total results of the primary election were Thompson: 3,339 (50.16%),

¹The parties stipulated to the facts at trial. [R-54] These facts are accurately recited in the Circuit Court's Order of November 5, 2007.

Jones: 2,135 (31.51%). [R-54] Thompson received a majority of the total votes by a margin of eleven (11) votes. The Coahoma County Democratic Executive Committee certified Thompson the winner of the election. [R-54] Accordingly, no runoff election was held. [R-54]

Of the absentee ballots cast, 103 had not been signed by an official authorized to administer oaths for absentee balloting, in accordance with Miss. Code Ann. § 23-15-627 (Supp. 2007). [R-55]. Further, twenty-nine (29) of the absentee voters' envelopes had not been signed by an attesting witness, in accordance with Miss. Code Ann. § 23-15-631 (Supp. 2007). [R-55] Eleven (11) absentee ballots had miscellaneous violations of Miss. Code Ann. § 23-15-627 (Supp. 2007), Miss. Code Ann. § 23-15-631 (Supp. 2007), and Miss. Code Ann. § 23-15-635. [R-55] Some of the ballots had more than one of the aforementioned defects. [R-55] The total number of absentee ballots found by the Circuit Court to be defective was 124. [R-55] These votes were counted and mixed with other ballots, and there was no way to determine which candidates received these votes. [R-55]

The Circuit Court held that the irregularities with the absentee ballots required that the results of the election and the certification thereof be vacated, and a Special Election held. The Circuit Court held:

The Court is of the opinion that there is such a total departure from the fundamental provisions of the election statutes concerning absentee voting as to destroy the integrity of

the election and make it impossible to ascertain the will of the qualified voters. A Special Election is warranted.

[R-54]

It is from this Order Thompson appeals.

V. SUMMARY OF THE ARGUMENT

The trial court erred in disallowing the subject absentee ballots, and setting aside the results of the election.

The Court has held that the statutory requirements for absentee ballots is mandatory. Straughter v. Collins, 819 So.2d 1244, 1252 (Miss. 2002). These mandatory requirements include:

that the absentee voter must vote his ballot in the presence of an attesting witness, place the ballot in the envelope, and sign the elector's certificate across the flap. The voter and the witness then swear that this process was followed.

Id.

Despite the requirement of strict compliance with the absentee voting statutes, "mere technical irregularities in the casting of a ballot are not grounds for invalidation absent evidence of fraud or intentional wrongdoing." Id. citing Campbell v. Whittington, 733 So.2d 820, 826 (Miss. 1999).

Because there is no evidence of fraud or intentional wrongdoing in this case, the absentee ballots should not have been disallowed for failure to strictly comply with the technical requirements of the statute. In the Court below, Jones and his counsel repeatedly stated that Jones was making no allegations of fraud or intentional wrongdoing on the part of the voters who submitted the ballots, election officials, or Sheriff Thompson.

Due to the absence of evidence, or even an allegation, of fraud or intentional misconduct, the trial court erred in excluding

the ballots, setting aside the election results and ordering a Special Election for the office of Coahoma County Sheriff. The decision of the trial court should be reversed, and judgment rendered in favor of Thompson.

VI. ARGUMENT

A. STANDARD OF REVIEW

As the parties stipulated to all relevant facts, only questions of law are presented in this appeal. This Court conducts a *de novo* review of the trial court's rulings on questions of law. In Re Municipal Boundaries of the City of Southaven, 864 So.2d 912, 917 (Miss. 2003) citing T.T.W. v. C.C., 839 So.2d 501, 503 (Miss. 2003). The Court should reverse the trial court if it finds an erroneous interpretation or application of the law. Id.

B. THE TRIAL COURT ERRED IN SETTING ASIDE THE CERTIFIED RESULTS OF THE DEMOCRATIC PRIMARY ELECTION.

1. Burden of Proof and Standard for Invalidating Election Results

The burden of proof in an election contest is on the Petitioner to show that the election results should be set aside. Boyd v. Tishomingo County Democratic Executive Committee, 912 So.2d 124, 130 (Miss. 2005). To meet his burden of proof, the Petitioner must show either (1) that there were enough illegal votes cast for the contestee to change the result of the election, or (2) "the amount of votes disqualified is substantial enough that it is impossible to discern the will of the voters." Id. quoting Rogers v. Holder, 636 So.2d 645, 648 (Miss. 1994).

As stated *supra*, the challenged absentee ballots were mixed with other ballots. It is, therefore, impossible to ascertain to which candidate the challenged ballots were cast. For this reason,

Jones cannot meet his burden of proof as to the first prong of this alternative test. Therefore, it appears that Jones based his challenge upon the second prong: that the amount of votes disqualified is substantial enough that it is impossible to discern the will of the voters.

2. The Court Erred in Setting Aside the
Election Results, as There was No Allegation or
Evidence of Fraud or Intentional Misconduct

This Court has held that the statutory requirements for absentee ballots are mandatory. Straughter v. Collins, 819 So.2d at 1252. These mandatory requirements include:

that the absentee voter must vote his ballot in the presence of an attesting witness, place the ballot in the envelope, and sign the elector's certificate across the flap. The voter and the witness then swear that this process was followed.

Id.

"If these mandates are not followed and the integrity of the absentee ballots is questioned, the absentee ballots should not be counted." Id. The Court requires strict compliance with the statutes governing absentee voting. Id. However, despite the mandatory nature of the absentee voting statutes and the requirement of strict compliance therewith, "mere technical irregularities in the casting of a ballot are not grounds for invalidation absent evidence of fraud or intentional wrongdoing." Id. citing Campbell v. Whittington, 733 So.2d 820, 826 (Miss. 1999).

In Wilborn v. Hobson, 608 So.2d 1187 (Miss. 1992), this Court considered the meaning of "mere technical irregularities." In Wilborn, Hobson and Wilborn ran against each other for the position of Supervisor for Hinds County, District 3. Id. at 1187. In the general election, the results were as follows: Hobson-5,321, Wilborn-5,352. Id. Not included in those totals were (a) 27 uninitialed affidavit ballots for Hobson, (b) 1 uninitialed affidavit ballot for Wilborn, (c) 1 "curbside" ballot for Hobson, and (d) 6 affidavit ballots for Hobson which were opened by poll workers. Id. These 35 ballots were disallowed by the Hinds County Election Commission, and Wilborn was certified the winner. Id.

Hobson appealed to the Circuit Court of Hinds County. The Circuit Court reversed the Election Commission, and allowed the 35 ballots at issue. Id. After adding these 35 votes to the count, the Circuit Court declared Hobson the winner of the election. Id. Wilborn appealed to this Court. Id.

This Court affirmed the Circuit Court. With regard to the 27 uninitialed ballots, the Court held that

We have had frequent occasions to appraise the effect of non-conformity with this statute. We have been alert to the danger of rendering inefficient the machinery of nomination by a blind insistence upon absolute and ritualistic conformity with minute detail. A sane and practical relaxation indulged under circumstances where, despite trivial lapses, the voters have expressed their will by lawful ballot is not inconsistent with a rigid requirement that such ballot be lawful.

In determining the effect of irregularities through mistakes of voters and election officials, all statutes limiting the voter in the exercise of his right of suffrage are construed liberally in his favor, in order to ascertain the will of the majority of the voters.

This principle is still sound. If the integrity of a ballot is unquestioned, there is no good reason to disenfranchise a voter for some technical aberration beyond his control.

In the instant case, twenty-eight people cast twenty-eight uninitialed affidavit ballots, presumably for the candidate of their choice. Despite the lack of initialing, those ballots fully reflect the will of the voters who cast them. Of course, if there had been even a hint of unseemliness associated with the ballots at issue, then even a technical irregularity might have rendered them void.

Id. at 1192-93. (internal citations omitted).

The case-at-bar is factually similar to Wilborn. The clear holding of Wilborn is that where there is no evidence of fraud or intentional wrongdoing, ballots should not be disallowed for failure to strictly comply with the technical requirements of the statute. In the Court below, Jones repeatedly stated that he was making no allegation of fraud or intentional wrongdoing on the part of the voters who submitted the ballots, election officials, or Sheriff Thompson. On cross-examination by Thompson's counsel, Jones testified as follows:

Q: [By Mr. Pittman]: And in your petition you're not saying there was any fraud taking place on the part of Sheriff Thompson in the election, are you?

A: [Jones]: My attorneys and I, you know, reviewed the case and I let my attorney handle the rest of it, that part of it.

Q: Well, are you saying that there was some fraud?

A: I'm not saying that.

Q: Okay. And you're not saying that there was any fraud on the part of the Circuit Clerk's Office, are you?

A: No, I'm not.

Q: Okay. And you're not saying that there was any fraud by any of the deputy clerks?

A: No, I'm not.

Q: And certainly you're not saying that the Sheriff committed any willful violation of the voter laws?

A: No, I'm not.

Q: You're not saying that any employees in the Circuit Clerk's Office committed any willful violations of the voter laws?

A: No, I'm not.

...

Q: Okay. And you don't know of any fraud that was committed by any of those individuals [absentee voters] in regards to their application, do you?

A: No.

Q: You don't know of any fraud that was committed by anyone that was assisting those 29 people with their applications, do you?

A: No, I don't.

Q: And the same thing for willful violation of the voter laws. You're not testifying that there was any willful violation of the voter laws in regards to those 29 individuals, are you?

A: I can't say.

[Tr. P-61, L-21].

Jones made it crystal-clear in his testimony that he was not claiming, and had no evidence that any person, voter, election officials, or Sheriff Thompson, had committed any fraud in obtaining and submitting the ballots at issue. Jones further unequivocally stated that he was not claiming, and had no evidence, that any person committed any willful violations of the law. In addition to Jones' testimony, no other witnesses testified that any fraudulent or willful misconduct took place as to the absentee ballots. Further, no documentary evidence was produced to support such a conclusion. There was likewise nothing in the circumstances regarding the submission of the absentee ballots which would even raise a mere suspicion that any fraudulent or willful misconduct had taken place.

In accordance with Wilborn, because there was no evidence of fraudulent or willful misconduct, the absentee ballots should have been counted. The trial court erred in excluding the ballots and ordering a Special Election.

VII. CONCLUSION

The trial court erred in setting aside the results of the 2007 Democratic Primary Election for the office of Coahoma County Sheriff. While the absentee ballots at issue did not strictly comply with statutory requirements, said failures were "mere technicalities." Because there were no allegations or evidence of fraud or willful misconduct, the absentee ballots should not have been excluded from the total vote count.

For these reasons, Thompson respectfully requests that this Court reverse the decision of the trial court, and render judgment in his favor.

VIII. CERTIFICATE OF SERVICE

I, the undersigned counsel of record, do hereby certify that I have this day served, by first-class U.S. Mail, postage-prepaid, a true and correct copy of the attached and foregoing document to the following persons:

Richard T. Phillips, Esquire
Parker H. Still, Esquire
Smith Phillips Mitchell Scott & Nowak, LLP
Post Office Box 1586
Batesville, Mississippi 38606-1586

This the 27th day of March, 2008.


CURT CROWLEY