ELECTIONS & VOTING RIGHTS

Elections & Voting Rights: Challenges

***Wexler v. Lepore*,**
878 So. 2d 1276 (Fla. 4th Dist. App. 2004)

The preclusion of a manual recount does not render touchscreen voting statutorily invalid. Subsequent to the filing of this case, but prior to its resolution, the Department of State adopted a rule specifically excusing any requirement of manual recounts when touchscreen voting is employed, reconciling any potential statutory conflict.

FACTS AND PROCEDURAL HISTORY

Following the 2000 presidential elections, the Florida Legislature adopted The Electronic Voting System Act authorizing the use of electronic voting systems in Florida's elections. Fla. Stat. §§ 101.5601–101.5614 (2003) The Florida Department of State is responsible for developing and adopting standards for electronic voting and has certified two types of electronic voting, touchscreen and optical scan. Palm Beach County employs the touchscreen voting method. In a touchscreen system, a voter makes his or her selections on a computer screen rather than on a paper ballot. The voter's selections are recorded in the computer's electronic memory.

Congressman Robert Wexler, a candidate for re-election, filed a complaint against the Palm Beach County Supervisor of Elections Theresa Lepore and Secretary of State Glenda Hood, seeking declaratory and injunctive relief. Wexler claimed that Palm Beach County's touchscreen voting system failed to provide the opportunity for a manual recount as required by Florida Statutes. Wexler requested that the court declare that Lepore and Hood failed to meet their statutory duty to approve a voting system that complied with Florida law. Wexler claimed that injunctive relief was appropriate because the absence of a manual recount mechanism created an immediate threat to the rights of both candidates and voters for which there was no adequate remedy at law.

The trial court dismissed Wexler's complaint with prejudice, holding that he lacked standing to bring suit and that he had failed to state a cause of action for which injunctive relief was available. The trial court did not, however, expressly rule on the issue of declaratory relief. The Fourth District Court of Appeal found that Wexler's request for declaratory judgment was moot, reversed the trial court's ruling on the issue of standing, and affirmed the lower court's holding on the request for injunctive relief.

ANALYSIS

Standing

To establish standing, the complaining "party must allege that he [or she] has suffered or will suffer a special injury." *Wexler*, 878 So. 2d at 1280 (citing *Alachua County v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st Dist. App. 2003)). Lepore and Hood argued that, because Wexler was unopposed in his bid for re-election, he had in effect been automatically re-elected and therefore suffered no injury. The Fourth District Court rejected this argument, finding that, as a candidate for re-election, opposed or not, he had an interest in the resolution of the recount process. The court also found that this controversy was capable of repetition and could possibly evade review.

Declaratory Relief

The Florida Legislature has established procedures for mandatory recounts under two circumstances. First, when the margin of victory is one-half of a percent or less, a machine recount is required, with separate, specific procedures delineated for jurisdictions using electronic voting systems and those using paper ballot systems. Fla. Stat. § 102.141(6). A second recount is also required when the margin of victory in the first recount is one-quarter of a percent or less. Fla. Stat. § 102.166(1). When this situation occurs, a manual recount of all the undervotes and overvotes within that voting district must be conducted. The manual recount shall record votes cast "if there is a clear indication . . . that the voter has made a definite choice." Fla. Stat. § 102.166(5)(a). The Department of State is responsible for drafting recount procedural rules for all certified voting methods and for determining when

there is a clear indication that the voter has made a definitive choice. Fla. Stat. § 102.166(5)(b).

On April 3, 2004, after Wexler filed his original complaint, the Department of State amended its rules related to recount procedures to address touchscreen voting. When touchscreen voting is employed, a manual recount of undervotes and overvotes will not be required. The system will not permit overvotes, and a review of undervotes would be futile because the touchscreen system does not provide a means to determine voter intent. Fla. Admin. Code Ann. r. 1S-2.031(7) (2004). The results of a mechanical recount shall provide the final count of touchscreen votes.

The Fourth District Court held that when the Department of State adopted a rule that specifically eliminated any requirement of a manual recount on certified touchscreen systems, it rendered Wexler's request for declaratory judgment moot. The proper means to challenge this new rule would be through the Administrative Procedures Act.

Injunctive Relief

A party moving for injunctive relief is required to establish the following: (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has no adequate remedy at law; (3) he has a clear legal right to the relief granted; and (4) a temporary injunction will serve the public interest. *Duryea v. Slater*, 677 So. 2d 79, 81 (Fla. 2d Dist. App. 1996) (citations omitted). He or she must also demonstrate "a substantial likelihood of success on the merits." *Wexler*, 878 So. 2d at 1281 (quoting *In re Guardianship of Schiavo*, 792 So. 2d 551, 562 (Fla. 2d Dist. App. 2001)).

In *Wexler*, the trial court found that Florida's statutory scheme did not require verification by paper ballot. Therefore, Wexler did not have a clear legal right to such relief. The Fourth District Court affirmed the trial court's ruling, explaining that a complete reading of the statutes concerning recounts indicated that Wexler would have very little chance of succeeding on the merits of his claim.

Additionally, the Florida Supreme Court has held that injunctive relief is proper only when a "palpable violation" of an election law is imminent. *Id.* at 1282 (citing *Joughin v. Parks*, 143 So. 145, 145 (Fla. 1932)). Furthermore, equitable relief is not available as a remedy for issues involving purely political rights.

The Fourth District Court found that, because neither Hood nor Lepore had violated her statutorily mandated duty, Wexler had not alleged a palpable violation adequate to justify equitable redress.

SIGNIFICANCE

Wexler establishes that there is no statutory right or requirement for a verifiable paper-trail in Florida's voting systems. The case recognizes the Department of State's statutory authority to adopt rules relative to voting methods and recounts, and also clarifies, to some extent, when injunctive relief is and is not appropriate in the context of election issues. However, the Fourth District Court did not specifically rule on whether the Department's rule forgoing manual recounts for touchscreen voting exceeded the Department's delegated authority.

RESEARCH REFERENCE

- Jon Mills, *Reforms in Florida after the 2000 Presidential Election*, 13 U. Fla. J.L. & Pub. Policy 69 (2001).

Nicole Guillet

Elections & Voting Rights: Provisional Ballots

***American Federation of Labor and Congress of Industrial Organizations v. Hood*,**
885 So. 2d 373 (Fla. 2004)

The precinct-specific requirement for provisional ballots is not an unreasonable restraint on the right to vote, nor does it impose an additional qualification on the voter to exercise that right.

FACTS AND PROCEDURAL HISTORY

Petitioners, four voters and several labor unions, claimed that Florida Statutes § 101.048 (2004), which regulates the execution and counting of provisional ballots, violates the Florida Constitution. The petitioners sought declaratory and injunctive relief, which the circuit court denied. On appeal, the district court certified the matter to the Florida Supreme Court. The petitioners contended "that the precinct-specific [requirement for provisional

ballots] . . . operates as an unnecessary restriction on the right to vote . . . and imposes an additional qualification on the right of suffrage." *Am. Fedn.*, 885 So. 2d at 374. Because the petitioners challenged the facial constitutionality of the statute, the Court applied the de novo standard of review. It subsequently affirmed the circuit court's ruling and found the precinct-specific requirement constitutional.

ANALYSIS

Florida Statutes § 101.045(1) (2004) provides that "[n]o person shall be permitted to vote in any election precinct or district other than the one in which the person . . . is registered." This provision "has been a feature of Florida election law for decades." *Id.* at 376. In 2001, the Florida Legislature enacted a statute that allows a voter for whom eligibility cannot immediately be determined to cast a provisional ballot. Fla. Stat. § 101.048. Under this statute, a provisional ballot is not counted until officials confirm "that the voter is registered and . . . eligible to vote *at the precinct* where the ballot was cast." *Am. Fedn.*, 885 So. 2d at 374 (referencing Fla. Stat. § 101.048(2) (emphasis added)).

The petitioners in *American Federation* mounted a facial challenge to the precinct-specific requirement for provisional ballots and claimed that it conflicted with two provisions of the Florida Constitution. Article VI, § 1 of the Florida Constitution provides for the regulation of elections and states, in relevant part, that "[r]egistration and elections shall . . . be regulated by law." This provision directs the legislature to enact laws that regulate the election process. Article VI, § 2 of the Florida Constitution addresses voter qualifications, stating that every adult, "permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered."

The Florida Supreme Court has ruled that voters must comply with laws regulating the place and time when votes may be cast. *State ex rel. Gandy v. Page*, 169 So. 854, 858 (1936). However, the legislature may not impose a regulation that creates "[u]nreasonable or unnecessary restraints on the elective process." *Treiman v. Malmquist*, 342 So. 2d 972, 975 (Fla. 1977).

In analyzing the petitioners' arguments, the Court noted that they had challenged the precinct-specific requirement in § 101.048, the provisional ballot regulation, but not the precinct-

specific requirement in § 101.045, the regulation that "applies to all voters." *Am. Fedn.*, 885 So. 2d at 376. The Court found the precinct-specific requirement for provisional ballots to be "no more unreasonable or unnecessary than the [general voter requirement], which has been operative for decades." *Id.* Thus, the Court saw no justification to overturn the provision in one statute but not the other. It concluded that "[t]he Legislature reasonably may have determined that both regulations are necessary to ensure the integrity of the election process." *Id*. The Court held that the precinct-specific requirement for provisional ballots simply regulates the voting process and is not an unconstitutional additional qualification placed on the voter.

SIGNIFICANCE

In *American Federation*, the Florida Supreme Court validated the precinct-specific requirement that the legislature created in 2001 for provisional ballots. This case not only clarifies the circumstances under which provisional ballots may be counted, it also provides insight into what the Court may consider to be a reasonable regulation of the election process.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Elections* § 124.1 (2004).

Nicole Guillet