

IN THE SUPERIOR COURT OF LONG COUNTY
STATE OF GEORGIA

BOBBY HARRISON SMITH)
Petitioner,)
)
)
v.)
)
LONG COUNTY BOARD OF)
ELECTIONS AND REGISTRATION,)
and TERESA L. ODUM, Candidate)
for Long County Probate Judge—June)
9, 2020)
Respondents.)

Civil Action File No: SUV-2020-000089

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LONG COUNTY, GA

**FINAL ORDER ON PETITION TO CONTEST ELECTION RESULTS
&
REQUEST FOR NEW ELECTION OF JUNE 9, 2020
LONG COUNTY, GEORGIA PROBATE JUDGE ELECTION**

The above captioned action came before the Court for a bench trial on September 8, 2020 through September 10, 2020. All parties appeared with counsel and consented to conducting the proceedings remotely. After receipt of the evidence and argument, and upon consideration of the largely stipulated record and applicable law, the Court determines the following:

I. Procedural Background

The Long County Board of Elections and Registration (hereinafter “Board”) conducted an election for the office of Probate Judge of Long County on June 9, 2020 (hereinafter “Election”).¹ Petitioner Bobby Harrison Smith (hereinafter “Smith” or “Petitioner”) and Respondent Teresa L. Odum (hereinafter “Odum”) were the candidates

¹ Verified Answer of Long County Board of Elections and Registration to First Amended Petition of Bobby H. Smith p. 2. The Probate Judge of Long County was not the sole race on the ballot for the election held on June 9, 2020, but it is the only challenged race resulting therefrom and at issue in this action.

in the Election. The Election results were initially certified by the Board on June 19, 2020, showing 2,735 total votes cast in the Election, with 1,372 votes cast for Odum and 1,363 votes cast for Smith.² Thereafter the Board conducted a recount in which additional mail-in absentee ballots were counted and one provisional vote was determined to be cast for Smith and not Odum as reflected in the initial certification.³ Both Smith and Odum had the option to be present for the recount. The results of the recount were certified on June 26, 2020, showing 2,741 total votes cast in the Election, with 1,375 votes cast for Odum and 1,366 votes cast for Smith.⁴ The margin of victory remained the same as the initial certification.

On July 1, 2020, Smith filed his underlying Petition to Contest Election Results and Request for New Election of June 9, 2020 Long County, Georgia Probate Judge Election. On August 28, 2020, Smith filed a First Amended Petition to Contest Election Results and Request for New Election of June 9, 2020 Long County, Georgia Probate Judge Election (“Amended Petition”).

The Amended Petition alleges 11 categorical errors which individually and collectively form the basis of three counts for relief: Count I: Irregularities by Election Officials; Count II: Illegal Votes Cast in the Election; and Count III: Wrongfully Rejected Votes. At trial, Petitioner identified various aspects of 30 recorded votes that he alleges are sufficient to change or cast doubt on the Election results. Of those 30 votes, 29 of the voters each testified that they voted in the election, their ballot reflected their will,

² Board Answer ¶¶15.

³ Board Answer ¶¶ 24.

⁴ Board Answer ¶¶ 28.

and they wanted their vote to count.^{5 6} The Petitioner grouped the challenged votes in five “buckets”/categories: Doubles, Movers, Blanks, Unverified, and Outsiders.

The Doubles are seven voters⁷ Petitioner alleged voted twice in the Election. Only one voter, VIN 0103844, intentionally cast two ballots in the election. The Board concedes that six voters cast two ballots in the Election without their absentee ballot being properly cancelled or other curative action taken by the Board. As to VIN 05380280, and contrary to documentation submitted to the Secretary of State, the Board⁸ and the voter testified that he only voted in person on June 9, 2020.

The Movers, VIN 10675065 and 01022962, are alleged to have moved from Long County more than 30 days prior to the election. VIN 01022962’s eligibility was challenged prior to the election and the Board deemed him qualified to vote in the election. VIN 10675065 had never resided in Long County.

The Blanks consists of eight recorded ballots. Six recorded absentee ballots were issued from flawed absentee ballot applications,⁹ one absentee ballot was recorded without an executed oath of elector,¹⁰ and one absentee ballot was recorded

⁵ References to specific voters herein will be by their Voter Identification Number (“VIN”) as identified in Respondent Long County Board of Elections and Registration’s Exhibits 1-29 and 30-31 and acknowledged by Petitioner.

⁶ VIN 21466504 is active duty military and was unavailable to testify. Her mother, Fredericka Jones testified that she personally observed her daughter vote in the Election on her absentee ballot.

⁷ VIN 0103844, 04183473, 11727536, 05284993, 12239052, 05380280, and 01020951.

⁸ The Board designated Trynina Harris, Long County Board of Elections and Registration Superintendent, to testify on its behalf.

⁹ VIN 01022043, 07506819, 07279380, 12311866, 01020995, 01021952. The technical flaws were not brought to these voters’ attention prior to their absentee ballot being issued. There was no evidence that these voters would not have otherwise voted in the election had the absentee ballot not issued from their flawed application.

¹⁰ VIN 11630775. The voter did print her name and the date beneath the oath of elector on the outer envelope. The voter identified her printed signature and it was evident from her testimony that Spanish is her primary language. The signature issue was not brought to the voter’s attention prior to being recorded.

with a signature on the oath of elector that did not match the signature on the voter registration card.¹¹

The Unverifieds are eight recorded votes that lack an indication by the poll worker on the Application for In Person Absentee Ballot as to the type of identification produced by the voter.¹² All eight of these voters testified that they produced, and the poll worker checked, a government issued identification card prior to receiving an in person absentee ballot.

The Outsiders are five recorded votes for voters with an address in Hinesville, Georgia, the county seat of neighboring Liberty County.¹³ The evidence reflected the voters' believed their property to be located in rural Long County, they paid property taxes in Long County, they held themselves out to be Long County residents for years preceding the election, and their Hinesville address was for mail purposes.

There was no evidence that in the absence of these alleged flaws the voters would not have otherwise been qualified to vote in the election. There was no evidence that the ballots in question were the result of undue influence or otherwise did not reflect the will of the voter. With the exception of VIN 0103844, there was no evidence that any of the voters or election officials knowingly acted with possible fraudulent or malicious intent. Moreover, there was absolutely no evidence of disenfranchisement.

In addition, the Court finds Long County conducted this election under several abnormal circumstances: (1) new election ballot counting machines were being used for

¹¹ VIN 12466504. The Board sent a corrective affidavit to the voter, which the voter did not return.

¹² VIN 04265918, 04526310, 07693450, 08196527, 01021446, 01020823, 12043433, 10108833.

¹³ VIN 06171425, 06045886, 11932582, 06036780, 06074147.

the first time; (2) the Presidential Election Primary was combined with local primary elections increasing normal turnout; (3) the election yielded the highest number of absentee ballots casts in memory; and (4) Long County, as well as the State of Georgia, conducted elections in the midst of a global pandemic that had taken nearly nine thousand (9000) lives in Georgia alone.

II. Legal Analysis

“Elections are critical to our democratic republic ... and because we place so much value on that exercise of democracy, we afford great weight to election results.” *Martin v. Fulton County Board of Registration and Elections*, 307 Ga. 193; 835 S.E.2d 245 (2019). In *Martin*, the Court thoroughly identifies the framework within which an election may be contested:

an election may be contested on the grounds of “[m]isconduct, fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result,” OCGA § 21-2-522 (1), or “[w]hen illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result,” *id.* § 21-2-522 (3). But because—as the trial court recognized—**“[t]he setting aside of an election in which the people have chosen their representative is a drastic remedy,”** it **“should not be undertaken lightly, but instead should be reserved for cases in which a person challenging an election has clearly established a violation of election procedures and has demonstrated that the violation has placed the result of the election in doubt.”** *Hunt*, 270 Ga. at 10, 507 S.E.2d 723. For these reasons, we “ ‘presume[] that election returns are valid, and the party contesting the election has the burden of showing an irregularity or illegality sufficient to change or place in doubt the result of the election.’ ” *Meade*, 293 Ga. at 143, 745 S.E.2d 279 (quoting *Banker v. Cole*, 278 Ga. 532, 535, 604 S.E.2d 165 (2004)).

But that is not all. We have explained that “[i]t is not sufficient to show irregularities which simply erode confidence in the outcome of the election,” and that “[e]lections cannot be overturned on the basis of mere

speculation.” *Meade*, 293 Ga. at 149, 745 S.E.2d 279 (punctuation and citation omitted); see also *Hunt*, 270 Ga. at 9, 507 S.E.2d 723 (election outcome cannot “be nullified based merely upon speculation”). Moreover, a “trial court’s findings in an election contest will not be disturbed unless clearly erroneous.” *Banker*, 278 Ga. at 533, 604 S.E.2d 165 (citation and punctuation omitted).

Historically, we have recognized two election-contest paradigms in our case law. See *Meade*, 293 Ga. at 143, 745 S.E.2d 279 (noting that “[t]his Court has set aside elections under two different circumstances”). The first paradigm—which includes the vast majority of election contest cases—pertains to allegations of illegal votes, irregularly recorded votes, and illegal or irregular ballots. In those cases, which involve the types of allegations that may be proven or disproven by examining or counting a specific number of ballots, “we have required the evidence to ‘show that a sufficient number of electors voted illegally or were irregularly recorded in the contest being challenged to change or cast doubt on the election.’” *Id.* (quoting *McCranie v. Mullis*, 267 Ga. 416, 416, 478 S.E.2d 377 (1996), and citing *McIntosh County Bd. of Elections v. Deverger*, 282 Ga. 566, 651 S.E.2d 671 (2007); *Whittington v. Mathis*, 253 Ga. 653, 324 S.E.2d 727 (1985); and *Bell v. Cronin*, 248 Ga. 457, 283 S.E.2d 476 (1981)).

Within that context, the party contesting an election generally must “show a specific number of illegal or irregular ballots,” *Middleton v. Smith*, 273 Ga. 202, 203, 539 S.E.2d 163 (2000), or a specific number of “voters [who] voted illegally or were irregularly recorded [or rejected],” *Howell v. Fears*, 275 Ga. 627, 627-628, 571 S.E.2d 392 (2002). See also *Deverger*, 282 Ga. at 566, 651 S.E.2d 671 (in an election contest based on allegations of illegally cast or wrongfully rejected votes in a race for county commissioner, petitioner was required to “establish that sufficient legal votes were rejected to change or place in doubt the result”). That number, in turn, must be “sufficient to place the result” of the contested election in doubt. *Taggart*, 242 Ga. at 486, 249 S.E.2d 268. The party contesting the election is not, however, required to show how votes would have been cast had the ballots been regular or had the votes not been rejected wrongfully. See *Mead*, 278 Ga. at 271, 601 S.E.2d 99; *Deverger*, 282 Ga. at 566, 651 S.E.2d 671.”

“The second paradigm involves cases where a party alleges systemic irregularities in the election process that may not be measurable in the same discrete manner that is used in cases falling within the first paradigm. Under this second set of circumstances—which we have identified in far fewer cases—we have “recognized that the result of an

election may be voided where systemic irregularities in the process of the election are sufficiently egregious to cast doubt on the result.” *Meade*, 293 Ga. at 143, 745 S.E.2d 279 (citing *Stiles v. Earnest*, 252 Ga. 260, 312 S.E.2d 337 (1984)). Implicit in this line of cases is that the alleged systemic irregularities *caused* the election result to be placed in doubt. See *Meade*, 293 Ga. at 143, 745 S.E.2d 279.27. ... **However, we are aware of only one case in which we have applied this legal standard to order a new election.** See *Meade*, 293 Ga. at 148-149, 745 S.E.2d 279.

Id. 222-224 (emphasis added). Under both paradigms, the margin of victory is

relevant in evaluating whether a contestant has cast doubt on an election, even when a party alleges systemic irregularities. That is because a party contesting an election under OCGA § 21-2-522 (1) or (3) must always offer evidence “sufficient to change or place in doubt the result” of the election to prevail, whether the allegations at issue fit into the first paradigm (discrete and measurable votes or ballots) or second paradigm (systemic irregularities) of historical election contest cases. Whether evidence of alleged systemic irregularities “place[s] in doubt the result” of the contested election depends, at least as an initial matter, on the margin of victory in the relevant election. In short, under both election case paradigms, the margin of victory serves as a kind of materiality threshold for evaluating whether a party has “place[d] in doubt the result” of an election. If—in light of the particular facts of a given election contest—a party offers evidence of voting irregularities that could be sufficient to overcome the margin of victory, then it may have met its burden by casting doubt on the result of the election. By contrast, if a party has not offered evidence of voting irregularities, or if it has offered evidence of voting irregularities that (however real and disturbing) are not prolific enough to overcome the margin of victory in an election, then the party has not cast doubt on the election and has not met its burden under OCGA § 21-2-522.

Id. n.32.

In a contest following an election, in which it is alleged an election official failed to strictly comply with a provision of the election laws, the law

should be held directory only, in support of the result, unless of a character to obstruct the free and intelligent casting of the vote, or the ascertainment of the result, or unless the provisions affect an essential

element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void.

Delegal v. Burch, 273 Ga. App. 825, 829 (2005) quoting *Robinson v. State*, 82 Ga.App. 584, 588(1) 61 S.E.2d 773 (1950); see also *Meade v. Williamson*, 293 Ga. 142 (2013).

Petitioner alleges claims under both paradigms identified in *Martin, supra*. He points to specific votes alleged to be illegally cast and/or irregularly recorded and to the totality of these votes along with circumstances of an “unusual” recount to demonstrate a systemic failure of the election. Initially, the Court notes the mathematical formula set out in *Fuller v. Thomas*, 284 Ga. 397; 667 S.E.2d 587 (2008) and used in legal analysis in election cases of the first paradigm has been questioned by the Georgia Supreme Court. *Martin, supra*, fn 33. In contrast, the Court has looked at the margin of victory in this case to establish a threshold of materiality the Petitioner must cross to cast sufficient doubt on this election based on allegations of illegal or irregular votes or ballots in the first paradigm. Secondly, the Court notes the margin of victory is still relevant in evaluating whether the Petitioner has cast doubt on this election, even when alleging systemic irregularities.

III. Conclusion

As to each of Petitioner’s “buckets”/categories, the Court concludes the evidence offered is insufficient to cast doubt on this election in order to invalidate it. With respect to the “Doubles,” the Board concedes six voters cast two ballots in the election without their absentee ballot being properly cancelled or other curative action taken by the Board. The Court finds no others, and of these six only one may have had nefarious intent.

The Court concludes one of the “Movers” is troubling from a credibility standpoint. As aforementioned, VIN 01022962’s eligibility was challenged prior to the election and the Board deemed him qualified to vote in the election, which he did. The evidence demonstrated this voter voted in the election and is a relative of Petitioner. The Court concludes for Petitioner to contend this vote should be credible evidence of an illegal or irregular cast vote is quite disingenuous.¹⁴

As to the “Blanks,” the Court concludes the record sufficiently demonstrates each of these voters testified their ballots reflected their will, and they wanted their votes counted. The Court finds no intentional behavior of the Board as to these voters and concludes the Board substantially complied with election procedures to assist the voters to cast their ballots. As to the procedures complained of by Petitioner, to hold these procedures strictly mandatory, and essential to a vital election, is to subordinate substance to form, the end to the means. Compare, *Gwinnett County v. Bolin*, 262 Ga, 67; 414 S.E.2d 225 (1992).

The Court concludes the record adequately demonstrates the “Unverified” voters produced compliant government issued identification prior to receiving an in person ballot. In combination with evidence presented by the Board on this issue, the Court concludes the voters’ testimony was credible.

Lastly, as to the “Outsiders,” the Petitioner produced a witness allowed to give expert testimony as to these voters being located outside of the county and ineligible to vote in Long County. The expert primarily used census data to support his conclusions,

¹⁴ VIN 04526310 Is another voting relative of Petitioner sought to be used as evidence of illegal or irregular voting.

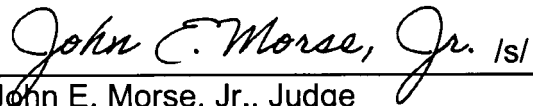
but testified that a properly recorded survey and/or plat of a particular area would be definitive on the location of a residence. The Court concludes the Board produced sufficient evidence of a certified survey and plat of the subdivision where these “Outsiders” lived, establishing them as residents of Long County.

One component of Petitioner’s claim of systemic irregularity was the recount, which he broadly categorizes as “unusual.” Other than the 30 recorded votes he challenges, Petitioner’s criticisms fail to identify an outcome determinative error or irregularity made by an election official during the recount. The margin of victory remained the same as to each certification. Hence, the Court concludes Petitioner has produced insufficient evidence to cast doubt on the election.

None of the “buckets”/categories offered overcome the margin of victory in this election standing alone under paradigm 1. Therefore, Petitioner tends to fuse them with a systemic irregularity as a catch all claim to urge the Court to invalidate this election. The Court concludes, on this record, none of the alleged irregularities is proven sufficiently to cast doubt on the results of the election. Overall, the evidence offered of voting irregularities (however alleged to be real and disturbingly perceived) are not prolific enough or sufficiently proven to cast doubt on the election and does meet the burden under OCGA § 21-2-522.

For the reasons stated herein, the First Amended Petition to Contest Election Results and Request for New Election of June 9, 2020 Long County, Georgia Probate Judge Election is hereby **DENIED**.

SO ORDERED, this 1st day of December, 2020.



John E. Morse, Jr., Judge
Superior Court

cc: Jake Evans, Esq.
Luke R. Moses, Esq.
C. Joel O'Steen, Esq.
James B. Smith, Esq.