Burgin v. North Carolina State Board of Elections
W. O. BURGIN v. NORTH CAROLINA STATE BOARD OF ELECTIONS et al. W. O. BURGIN v. NORTH CAROLINA STATE BOARD OF ELECTIONS et al.

214 N.C. 140
Supreme Court of North Carolina
Decided September 21 1938

214 N.C. 144W. F. Brinlcley, H. B. Kyser, and J. G. B. Ehringhaus for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Wettach for defendants, appellants.

L. P. McLendon, amicus curiae.

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¶1 It is provided by O. S., 5923, as amended by ch. 165, .Public Laws 1933, that the State Board of Elections shall have "general supervision over the primaries and elections in the State," with authority to promulgate legally consistent rules and regulations for their conduct ; and further: "It shall be the duty of the State Board of Elections : . . . To compel the observance, by election officers in the counties, of the requirements of the election laws, and the State Board of Elections shall have the right to act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws pertaining to their duties thereunder."

¶2 The fact that after the returns are in, the State Board of Elections is to canvass the returns and "determine whom they ascertain and declare by the count" (1933, eh. 165, sec. 9) to be nominated or elected is not to 214 N.C. 145 be construed as a denial or negation of its supervisory powers, wbicb perforce are to be exercised prior to the final acceptance of the several returns. Nor will the courts undertake to control the State Board in the exercise of its duty of general supervision so long as such supervision conforms to the rudiments of fair play and the statutes on the subject. Brown v. Costen, 176 N. C., 63, 96 S. E., 659.

¶3 In the instant case, there is no charge of arbitrariness on the part of the State Board of Elections, only its authority is questioned. Indeed, it is found as a fact "that the State Board conducted said hearings and investigations in absolute good faith and with high purpose and that this has not been questioned by either the plaintiff or his attorneys."

¶4 What was said in Rowland v. Board of Elections, 184 N. C., 78, 113 S. E., 629, is not presently applicable, for there we were dealing with alleged disqualifications of electors on the ground of party affiliation, a matter at that time, and perhaps now, properly determinable by the local registrars and judges of election. 0. S., 6031. At any rate, the original finding of the trial court that Eepublican electors participated in the primary in Bichmond County is beside the point or dehors the inquiry. So, also, are his initial findings that a number of unregistered persons voted

therein and that certain absentee ballots were erroneously counted. These matters were not properly before him. Furthermore, it will be observed that the authority of the State Board was not involved in the Rowland case, sufra, and that the decision was rendered prior to the amendatory act of 1933.

¶5 With the power of general supervision residing in the State Board of Elections, here admittedly exercised in good faith, we fail to perceive wherein the amended returns from Union County can be declared void as a matter of law. Bell v. Board of Elections, 188 N. C., 311, 124 S. E., 311. They appear regular on their face, and they are impeached only by the affidavit of the chairman of the board who participated in the meeting, duly called and held for the purpose of passing upon the amended returns, and who certified to their correctness. As bearing upon this circumstance, it is recalled that jurors are not allowed to impeach their verdict, Coxe v. Singleton, 139 N. C., 361, 51 S. E., 1019, and the official return of a sheriff may not be overthrown by the oath of a single witness. Comrs. v. Spencer, 174 N. C., 36, 93 S. E., 435; McIntosh, N. C. Prac. & Proc., 851. There is error in the court's ruling in respect of these returns.

¶6 The amended returns from Montgomery County are not challenged, as they were favorable to the plaintiff.

¶7 Upon the facts appearing of record, to which no exception is taken, we agree with the trial court that the purported amendments to the returns from Eichmond and Davidson counties are void as a matter of 214 N.C. 146 law. They are not the result of action by the respective boards duly assembled for the purpose. Britt v. Board of Canvassers, 172 N. C., 797, 90 S. E., 1005. The decisions are generally to the effect that a governing body, e.g., municipal council (19 R. C. L., 884) or board of county commissioners (7 R. C. L., 941), can only act as a body and when in legal session as such. O'Neal v. Wake County, 196 N. C., 184, 145 S. E., 28; London v. Comrs., 193 N. C., 100, 136 S. E., 356; Cotton Mills v. Comrs., 108 N. C., 678, 13 S. E., 271; Rockingham County v. Luten Bridge Co., 35 F. (2d), 301. The same rule applies to an administrative agency when acting in a quasi-judicial capacity. Leastwise, a county board of elections may not change or amend its returns to the State Board without some official action on its part. Bell v. Board of Elections, supra.

¶8 Moreover, some of the challenges affecting the vote in Davidson County have not been presented to or heard by the Davidson County Board of Elections. This, likewise, might avoid the attempted amendment of the returns from that county, if due process is to be observed in such matters. Morgan v. U. S., 82 Law Ed., 757; Harrell v. Welstead, 206 N. C., 817, 175 S. E., 283; Markham v. Carver, 188 N. C., 615, 125 S. E., 409.

¶9 Plaintiff is entitled to a stay until final returns have been received by the State Board of Elections from the county boards of Richmond and Davidson counties and to await the result of these returns. Johnston v. Board of Elections, 172 N. C., 162, 90 S. E., 143; Swaringen v. Poplin, 211 N. C., 700, 191 S. E., 746.

¶10 Error and remanded.