Strickland v. Hill

H. Paul STRICKLAND v. Woodrow HILL.

116 S.E.2d 463 (1960)

Supreme Court of North Carolina.

October 19, 1960.

Levinson & Levinson, Smithfield, for petitioner, appellant.

W. A. Taylor, Dunn and J. W. Hoyle, Sanford, for respondent, appellee.

* * *

BOBBITT, Justice.

Presumably, the returns by the registrar and judges of each precinct to the County Board were made in the manner prescribed by statute (G.S. § 163-85; G.S. § 163-84, as amended by Chapter 891, Session Laws of 1955), and nothing on the face thereof indicated irregularity in the counting of ballots or in the tabulation of the votes cast for the respective candidates.

Petitioner, relying upon G.S. § 163-143 and Brown v. Costen, 176 N.C. 63, 96 S.E. 659, and on a rule promulgated by the State Board of Elections, contended the County Board should declare and certify petitioner as the Democratic nominee on the basis of the returns of the precinct officials. The County Board refused to declare the result of the election on the basis of these returns. Instead, over petitioner's protest, it ordered a recount of the ballots in each of the four boxes; and, upon such recount, it determined that 1,172 votes had been cast for Hill and 1,171 for Strickland and thereupon declared and certified Hill as the Democratic nominee.

No question is presented as to the manner in which the recount was conducted or as to the accuracy thereof. Petitioner's contention is that the County Board had no authority to order and conduct such recount; that the recount so ordered and conducted by the County Board has no legal significance; and that the County Board should be required to declare petitioner the successful candidate on the basis of the returns made by the precinct officials.

In view of the authority conferred upon the State Board of Elections by G.S. § 163-10, subd. 10 and G. S. § 163-183, petitioner appealed to the State Board. We pass, without decision, whether the State Board had authority, assuming petitioner was entitled thereto, to grant the relief sought, to wit, an order rescinding the decision and **[116 S.E.2d 468]** action of the County Board and directing the County Board to declare and certify petitioner as the Democratic nominee. Under the circumstances, we deem it appropriate to consider the merits of petitioner's alleged grievance.

In 1915, the General Assembly enacted a comprehensive statute providing for primary elections throughout the State. Public Laws of 1915, Chapter 101. The provisions of the 1915 Act, as amended, are now codified as G.S. § 163-117 through G.S. § 163-147, constituting Article 19, Subchapter II, of Chapter 163.

Section 27 of the 1915 Act (now codified as G.S. § 163-143) provided: "That when, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the State Board of Elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results which shall be done under such rules as the State Board of Elections shall establish to protect the integrity of the election and the rights of the voters."

Section 3 of the 1915 Act, now codified as G.S. § 163-118, in pertinent part, provided: "That said primary elections shall be conducted, as far as practicable, in all things and in all details in accordance with the general election laws of this State, unless otherwise provided by this act, * * *."

In Brown v. Costen, supra, the plaintiff, a candidate for the Democratic nomination for the office of sheriff, sought to restrain the county board of elections from certifying his opponent as the Democratic nominee on the basis of the returns of the precinct officials on the ground said officials "had wrongfully and willfully refused to receive the votes of a good number of qualified voters and whose purpose was to vote for plaintiff as the Democratic nominee." It is noted that the plaintiff alleged, inter alia, "that at the close of the election, the votes, having been correctly tabulated, were duly certified to the county board of elections,

etc." After pointing out the insufficiency of plaintiff's allegations and affidavits, Hoke, J. (later C. J.), proceeded to consider at length the provisions of the 1915 Act. With reference to the 1915 Act, the precise question was whether, assuming the sufficiency of plaintiff's allegations and affidavits, a court of equity would intervene to review the decision of the registrar and judges of election as to whether the applicants were properly rejected on account of failure to affiliate with the Democratic party in the manner prescribed by statute.

Near the end of the opinion in Brown v. Costen, supra, Hoke, J. (later C.J.), said:

"The ballots having been deposited in boxes prepared for the purpose, under the supervision and rulings of the registrar and judges at the different voting precincts, the law requires these officials, at the close of the primary, to count the same and certify a correct return of the vote to the county and state boards of elections respectively, this according to the nature of the offices, and these boards are directed to tabulate and publish the results, which results when published shall ascertain and determine the regular party candidate. The only provision of the law which authorizes or permits an examination or correction of these returns appears in section 27 of the act as follows:

"`That, when, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the state board of elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results which shall be done under such rules as the state board of elections shall establish to protect the integrity of the election and the rights of the voters.'

[116 S.E.2d 469] "A power, it will be noted, that arises to these boards only `when, on account of errors in tabulating returns or filling out blanks,' the result of the election cannot be accurately known, and confers no authority on the courts, assuredly, to investigate and pass upon the methods or manner in which the primary may have been conducted.

"The suggestion that the act incorporates certain provisions of the General Election Law which might affect the interpretation is without significance, for, in all cases where this occurs, the statute itself contains provision that the reference shall only prevail when not inconsistent with the terms of the primary law, the controlling provisions of which are as heretofore shown."

The first and second quoted paragraphs are stressed by petitioner.

It is noted that Brown v. Costen, supra, was decided at Fall Term, 1918.

Section 2694 of the Code of 1883, a provision of the general election laws, provided: "The board of county canvassers shall, at their said meeting, in the presence of the sheriff and of such electors as choose to attend, open and canvass and judicially determine the returns, and make abstracts, stating the number of legal ballots cast in each precinct for each office, the name of each person voted for, and the number of votes given to each person for each different office, and shall sign the same." Based thereon, it was held: "Power is thus conferred to `canvass and judicially determine the returns'—that is, to examine, scrutinize, and inquire about them; to ascertain and declare that what purports to be such returns are or are not such, whenever they are defective, if at all, and what their meaning is; and, from such as are accepted as true and proper ones, what number of votes were cast, for whom they were cast, and the result of the election in the county, as prescribed by the statute. Power, however, is not thus conferred to make, alter, or amend returns. The board must accept and act upon them, if they are sufficient, as they come from the judges of the election at the voting places. It is the province of this board to ascertain the results of the election in the county from the returns, and only from them, and to declare and proclaim that result." Gatling v. Boone, 1887, 98 N.C. 573, 3 S.E. 392, 393, citing decisions based on earlier provisions of the general election laws.

In 1901, the General Assembly enacted a comprehensive statute defining the general election laws. Public Laws of 1901, Chapter 89, Section 33 of the 1901 Act, codified as Section 4350 of the Revisal of 1905, and later as CS 5986, provided: "The Board of County Canvassers at their said meeting, in the

presence of such electors as choose to attend, shall open and canvass and judicially determine the returns, stating the number of legal ballots cast in each precinct for each officer, the name of each person voted for, and the number of votes given to each person for each different office, and shall sign the same. The said board shall have power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall also have power and authority to send for papers and persons and examine the same." (Our italics.)

Referring to Revisal, Section 4350, Allen, J., in Britt v. Board of Canvassers of Buncombe County, 172 N.C. 797, 90 S.E. 1005, 1009, states: "This section clearly vests the board with discretionary power and imposes the duty of exercising its judgment, * * *"

In Bell v. Board of Elections, 1924, 188 N.C. 311, 124 S.E. 311, 313, involving a primary election, Adams, J., called attention to the distinction between the statutes applicable to general elections and those applicable to primaries, stating: "In the primary there is no election to public office, the right to which may be put in issue and **[116 S.E.2d 470]** determined by quo warranto, and no provision for a board of canvassers clothed with power judicially to determine the precinct returns."

Thereafter, CS 5986 was amended by Section 8, Chapter 165, Public Laws of 1933, so as to read as follows: "The county board of elections at their said meeting required to be held on the second day after every primary or election, in the presence of such electors as choose to attend, shall open the returns and canvass and judicially determine the results of the voting in the respective counties, stating the number of legal ballots cast in each precinct for each candidate, the name of each person voted for and the political party with which he affiliated, and the number of votes given to each person for each different office, and shall sign the same. The said county board of elections shall have the power and authority to judically pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall have power and authority to send for papers and persons and examine the same, and to pass upon the legality of any disputed ballots transmitted to them by any precinct officer." (Our italics.) This provision of the 1933 Act, now codified as G.S. § 163-86, in express terms, applies to primaries as well as to general elections.

In a later case, Ledwell v. Proctor, 1942, 221 N.C. 161, 19 S.E.2d 234, 236, CS 5986, as amended by the 1933 Act, was considered with reference to a general municipal election. In opinion by Barnhill, J. (later C. J.), it is stated: "The returns made by the registrars and judges of election merely constitute a preliminary step and such returns alone do not entitle the apparently successful candidate to the office. While the declaration of the board of elections of the result of an election as judicially determined and the certificate issued thereon are not conclusive, they must be taken as prima facie correct." It is here noted that the Harnett County Board of Elections judicially determined and certified Hill as the Democratic nominee.

In view of the foregoing, we reach the conclusion that G.S. § 163-143, to the extent of conflict therewith, was repealed or superseded by the provision of the 1933 Act now codified as G.S. § 163-86. See Board of Education of Onslow County v. Board of County Com'rs of Onslow, 240 N.C. 118, 81 S.E.2d 256.

There remains for consideration whether the County Board acted within the authority conferred by this portion of G.S. § 163-86: "The said county board of elections shall have the power and authority to judicially pass upon all facts relative to the election, and judicially determine and declare the result of the same. And they shall have power and authority to send for papers and persons and examine the same, and to pass upon the legality of any disputed ballots transmitted to them by any precinct officer."

Petitioner asserts the affidavit of Hill, quoted in Finding of Fact No. 2, did not meet the requirements of the rule adopted by the State Board and quoted in Finding of Fact No. 6. As to this, the opinions of the State Board and of Judge McKinnon were in conflict. In our view, neither the validity of the rule nor the sufficiency of Hill's affidavit thereunder need be considered on this appeal.

Under the rule, when sufficient evidence is presented, in apt time, by affidavit "tending to show errors in the canvassing of said votes by the County Board of Elections, either because of an error in the tabulation thereof or because of the counting of alleged illegal ballots, in an amount alleged to be sufficient to change the results of the nomination or election," the county board "shall thereupon, within the time prescribed, meet to consider this demand for a recount." (Our italics.) The rule does not purport to provide that the county board may not meet and consider a demand for a recount in the absence of an affidavit in compliance therewith.

The gist of Hill's affidavit is that persons who were not legally qualified to do so acted **[116 S.E.2d 471]** as counters and tabulators in each of four precincts and that the returns made by precinct officials were based on the count and tabulation so made. The County Board, in the exercise of its judgment and discretion, "reached the conclusion that there might be errors in counting the ballots by precinct officials and therefore decided to recount." Petitioner expressly concedes the members of the County Board acted in good faith.

It is noted: If the said rule were interpreted so as to conflict with the powers conferred upon the County Board by G.S. § 163-86, to the extent of such conflict the rule would be invalid. States' Rights Democratic Party v. State Board of Elections, 229 N.C. 179, 186, 49 S.E.2d 379.

True, the fact that persons not legally qualified to do so acted as counters and tabulators as set forth in Hill's affidavit would not invalidate the vote of any qualified elector. Woodall v. Western Wake Highway Commission, 176 N.C. 377, 97 S.E. 226; McPherson v. City Council of City of Burlington, 249 N.C. 569, 107 S.E.2d 147, and cases cited. However, there is no contention here that any person voted who was not entitled to vote or that any qualified elector was prevented from voting. The question is whether the affidavit alleging irregularities in connection with the counting and tabulation of the votes constituted a sufficient basis for the County Board, in the exercise of its judgment and discretion, to order and conduct a recount of the ballots cast.

Under the circumstances here considered, we are of opinion, and so hold, that the County Board, under G. S. § 163-86, in the good faith exercise of its judgment and discretion, had authority to order and conduct a recount of the ballots and to declare and certify Hill as the Democratic nominee in accordance with such recount.

It is noted: It is the duty and responsibility of the precinct officials to put all ballots counted back into the box, to lock and seal the box; and thereafter the ballot box "shall remain in the safe custody of the registrar subject to any orders from the chairman of the county board of elections as to (its) disposition." Chapter 1203, Section 2, Session Laws of 1959. There is no suggestion that the precinct officials did not comply fully with their duties in these respects.

For the reasons stated, the judgment of Judge McKinnon is affirmed.

Affirmed.

RODMAN, Justice (concurring).

This case presents no question of a denial of the right to vote nor is there suggestion that illegal ballots were cast. The sole question for determination is the power of a County Board of Elections, upon suggestion of

error in tabulating the vote at a primary election, to order a recount of the ballots before the canvass has been completed.

I think this power expressly given by statute, G.S. § 163-143, which provides: "When, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the State Board of Elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results, which shall be done under such rules as the State Board of Elections shall establish to protect the integrity of the election and the rights of the voters." This was a part of the original Act providing for primary elections. I find no statute limiting the power given, nor have I found any decision which in my opinion limits the power expressly conferred. To the contrary, prior decisions, when interpreted in the light of the questions which the court was called upon to answer, seem to me to clearly recognize the right of a County Board to order a recount in primary elections to ascertain if an error was made **[116 S.E.2d 472]** in tabulating the vote. In Brown v. Costen, 176 N.C. 63, 96 S.E. 659, plaintiff, seeking to restrain the certification of his opponent, expressly alleged a correct tabulation of the ballots actually cast. He based his right to relief on the assertion that a number of qualified voters sufficient to affect the result had been denied the right to vote. Justice Hoke, in denying plaintiff's right to challenge and the power of the County Board to change the result because of an asserted denial of the right to vote, was careful to direct attention to the statute which gave to the County Boards the right to determine the accuracy of the tabulation. That is what the Harnett County Board did and all it did.

The conclusion reached in Burgin v. North Carolina State Board of Elections, 214 N.C. 140, 198 S.E. 592, with respect to the recount of the Union County ballots, I think supports the view here expressed. I do not think we are now called upon to determine what additional powers may have been given County Boards by subsequent legislation.

The right of County Boards to ascertain if error of tabulation exists must, by the terms of the statute, be exercised in conformity with rules promulgated by the State Board. The applicable rule reads:

"When any controversy shall arise with respect to the counting of the ballots, or the certification of the returns of the vote, in any primary or general election, in any precinct or precincts, any candidate or elector desiring to make any complaint or protest regarding same shall make such protest in writing to the County Board of Elections on or before the time fixed by the statutes for the canvassing of the votes for such primary or general election by the County Board of Elections, and said County Board of Elections may determine the controversy at said meeting or at any time hereinafter specified.

"If, after the canvass is completed by the County Board of Elections, any candidate or candidates, participating in such primary or election, demands a recount by the County Board of Elections in any one or more precincts in the county, and presents sufficient evidence by affidavit tending to show errors in the canvassing of said votes by the County Board of Elections, either because of an error in the tabulation thereof or because of the counting of alleged illegal ballots, in an amount alleged to be sufficient to change the results of the nomination or election of such candidate or candidates, then this demand for the recount must be made to the chairman or secretary of the County Board of Elections, in writing, by 6 o'clock p. m. on or before the second day following the completion of the original count by said County Board and the declaration by it of the results of said primary or election. The County Board of Elections shall thereupon, within the time prescribed, meet to consider this demand for a recount."

Hill asserted errors in tabulating ballots and filed a written request for a recount with the County Board before the time fixed for the Board to canvass the returns. And the County Board, before canvassing the vote, considered the affidavit asserting errors of tabulation and "reached the conclusion that there might be errors in counting the ballots by precinct officials and therefore decided to recount." This decision was announced by the chairman in the presence of both candidates.

The quoted rule draws an appropriate distinction between a recount which may be ordered before and after the canvass is completed. In acting before the canvass was completed, the County Board was, by the first paragraph of the rule, authorized to recount. In so acting it was complying with its statutory duty "to protect the integrity of the election and the rights of the voters."

For these reasons my vote is to affirm.

DENNY and PARKER, JJ., join in this concurring opinion.

[116 S.E.2d 473] MOORE, Justice (dissenting).

I do not agree that G.S. § 163-86 (P.L. 1933, c. 165, § 8) in any wise repealed or abrogated any of the provisions of G.S. § 163-143 (P.L.1915, c. 101, § 27). The 1933 enactment restated the existing law (P.L. 1901, c. 89, § 33) with only two material changes: (1) the county board of elections was substituted for the board of county canvassers, and (2) the board was given authority "to pass upon the legality of any disputed ballots transmitted to them by any precinct officer."

Ledwell v. Proctor, 221 N.C. 161, 19 S.E.2d 234, cited by the majority opinion in support of the proposition that G.S. § 163-143 has been repealed pro tanto by G. S. § 163-86, does not involve a recount. It stands for the proposition that the declaration of the board of elections "must be taken as prima facie correct." But it further states: "* * * the declaration of the result and the issuance of a certificate by a board of elections is prima facie correct, it is not conclusive. Resort, in proper instance, may be had to the courts and the courts may examine and pass upon the correctness and sufficiency of the return and to settle and determine the true and lawful result of the election as it affects the right of the parties before the court."

It is conceded that a county board of elections has judicial functions and may exercise broad discretion in canvassing election returns and declaring results of elections. This was just as true prior to our decision in Brown v. Costen, 1918, 176 N.C. 63, 96 S.E. 659, as it is today. Britt v. Board, 1916, 172 N.C. 797, 90 S.E. 1005. The 1933 enactment did not add one whit to the stature of the board as a judicial and discretionary body, save "to pass upon the legality of any disputed ballots transmitted to them by any precinct officer."

The minutes of the Harnett County Board of Elections show that, in ordering a recount, the Board acted solely upon the affidavit of Hill. This affidavit points out no "errors in tabulating returns and filling out blanks" such that the result of the election in any precinct could not be accurately known. It alleges no such errors. The existence of such errors must be alleged, or made to appear to the board, before a recount may be had. G.S. § 163-143. Brown v. Costen, supra, at page 67.

A county board of elections does not have unlimited discretion. Its discretion does not supersede the law. The law applicable to the case at hand is G.S. § 163-143, as interpreted by this Court in the Brown case. I am unwilling to recede from that interpretation.

The law amply provides for a correct, open and public count and tabulation of votes immediately upon the closing of the polls. G.S. §§ 163-84 and 85. Ordinarily the first count is the more reliable count. The legislature has seen fit to limit recounts to those cases

in which it is shown that errors have been made "in tabulating returns and filling out blanks."

The Harnett County Board of Elections was without authority to order a recount. In the absence of a proper showing to the Board by allegation and upon hearing that there were "errors in tabulating returns and filling out blanks," so that the result of the election in any one or more precincts could not be accurately known, Hill was not entitled to have the ballots recounted. The Board should have canvassed the votes without a recount and declared the results.

I vote to reverse the holding of the court below and remand the cause that an order be made directing the Election Board to canvas the returns and declare the results in accordance with the requirements of the pertinent rules and statutes as herein indicated.

WINBORNE, C. J., joins in dissenting opinion.