

**IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA**

CASE NO. 5D17-1737

JONATHAN KINNEY,

L.T. No.:2016-CA-425

Appellant,

v.

PUTNAM COUNTY CANVASSING

BOARD, by and through its members

Nancy Harris, Elizabeth Ann Morris, and

Charles L. Overturf, III; **and HOMER D.**

DELOACH, III,

Appellees.

**ON APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL
CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA**

REPLY BRIEF OF APPELLANT

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REBUTTAL ARGUMENTS¹

A. Constitutional Issues

I. Supremacy of the Florida Constitution to The Florida Statutes

The fact that opposing counsel requires further cases and explanation to understand the argument that votes, cast by individuals prohibited from voting by the Constitution, are illegal is perplexing. Alas, Appellant endeavors herein, with even more specific citations to binding authority, to explain what is constitutionally plain to understand.

Appellees have no valid response to the fact that the Constitution specifically removes the voting rights of convicted felons in their answer briefs; yet, one appellee claims that the Constitution is the “bedrock” document which must be followed. AB.D.30. Appellee, DeLoach, submits that, “[t]he Legislature determines how the executive branch will monitor and enforce these laws found in our constitution.” AB.D.30. The Florida Constitution does not authorize or empower any legislative changes or enforcement latitude for the specific disqualifications contained in Article VI, Section 4(a) when the constitution states “No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be

¹ Citations to the Record shall be in the format R.(Page#). For example R.23 would refer to page 23 of the record. References to the Answer Brief of the Canvassing Board shall be in the format AB.C. (Page#). Similarly, references to the Answer Brief of DeLoach shall be in the format AB.D. (Page#). References to the Initial Brief shall be in the format IB. (Page#).

qualified to vote or hold office until restoration of civil rights or removal of disability.” Fla. Const. Art. VI, 4(a). Similarly, the Florida Constitution specifically requires that an elector be a *permanent resident of the state*. Fla. Const. Art. VI, 2 (Emphasis Added).

The regulating of the qualifications for those who can be elected, and those who are qualified to vote, has been strictly a constitutional provisions since the founding of our great nation. As Alexander Hamilton once argued in a parallel argument with respect to the Federal Constitution, “The qualifications of persons who may choose or be chosen, as had been remarked upon another occasion, are defined and fixed in the Constitution and are unalterable by the legislature.” *The Federalist, LX*. Similarly, James Madison stated, “The qualifications of electors and elected were fundamental articles in a republican government, and ought to be fixed by the Constitution. If the legislature could regulate those of either, it can by degrees subvert the Constitution.” *5 Elliot’s Debates* 404.

The Florida Supreme Court in *Thomas v. State*, stated, “The Constitution is the charter of our liberties. It cannot be changed, modified or amended by legislative or judicial fiat. It provides within itself the only method for its amendment.” 58 So.2d 173, 174 (Fla. 1952). The Supreme Court in *Thomas v. State*, continued to state, “The Legislature is powerless to enact legislation modifying qualifications for suffrage prescribed in the Constitution.” *Id.* at 175. The Florida Supreme Court gave

further guidance on the supremacy of the Florida Constitution to Florida Statutes in *Holley v. Adams*, where the Court stated, “to the extent [...] that such an act violated expressly or clearly implied mandates of the Constitution, the act must fall, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary.” 238 So.2d 401,405 (Fla. 1970) citing *Amos v. Mathews*, 126 So. 308 (Fla. 1930).

Appellee, Canvassing Board, incorrectly claims that the trial court in this case “correctly harmonized [Fla. Stat. §98.075(7)] with the remainder of the Florida Election Code and is constitutional.” AB.C. 21. Florida Statutes Section 98.075(7) is in direct conflict with Florida Statutes Section 944.292 and, as applied by the trial court, Article VI, Section 4(a) of the Florida Constitution. There is nothing inherently unconstitutional with the provisions of Florida Statutes Section 98.075(7) for the process of removing individuals from the voter registration rolls; however, as applied in this case, where the trial court conflated the issue of vote legality with ones status of being on the voter registration role, the trial court interpreted Florida Statute Section 98.075(7) in a method unconstitutional: in direct conflict with Florida Constitution Article VI Section 4(a). Similarly, Florida Statutes Section 101.045(1) regarding a person “temporarily residing outside” of the state does not supersede the Florida Constitutions that requires “permanent” residency in order to be eligible to vote. Fla. Const. Art. VI, 2.

II. Constitutional Qualifications Not Subject to Legislative Erosion

Appellees cite to various cases for the premise that all issues of suffrage must be construed in favor of the voter. AB.C.42 (Internal Citations Omitted). This is an inappropriate broadening of the case law. The cases cited hold that all “*qualified citizens*” cannot be deprived of the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964) see also *Boardman v. Esteva*, 323 So.2d 259, 267 (Fla. 1975). The Legislature has further clarified their intention that the election code only protects the rights of those qualified to vote in Florida Statutes Section 97.021(15) that specifically defines “elector” as synonymous with the terms “voter” or “qualified voter”, except where the word is used to describe presidential electors. Thus, regardless of registration status, *an individual is not a voter if they are disqualified*.

In that the Florida Constitution specifically disqualified those individuals identified at the trial level based on felony conviction, adjudicated mental incapacity, and lack of permanent residency, each of the 42 identified votes were not legal and not entitled to be counted. Fla. Const. Art. VI, 4(a) and Fla. Const. Art. VI, 2. The Florida Supreme Court has previously stated with respect to an election contest, “Whether or not [a] vote was *legal and entitled to be counted* depended upon prescribed *qualifications of the voter*[...]”*Ex Parte Senior*, 19 So. 652, 657 (Fla. 1896) (emphasis added)(addressing whether a felon, who testified in an election contest that he voted but then asserted the privilege against self-incrimination when

asked on cross examination questions related to his qualifications to vote, the court held that where the party had opened the door by voluntarily taking the stand no privilege existed and the inquiry was relevant to the legality of the vote.)

Further evidence of the legislative intent, against allowing disqualified voters to cast legal votes, is contained in Florida Statute Section 98.075(8)(b), wherein the Legislature seeks to specifically set out that the failure of Supervisors of Elections to maintain the voter rolls, and the proper certifications to that effect, may constitute criminal neglect of duty as set forth in Florida Statutes Section 104.051. Stated simply, the Legislature would not enact a statute for the removal of individuals from the voter registry with criminal enforcement against a Supervisor of Elections who doesn't comply, merely to find that votes prohibited by the Constitution (and sought for exclusion on Florida Statutes Section 98.075) should be deemed legal votes. The Federal National Voter Registration Act incorporated into the Florida Election Code by Florida Statutes Section 97.023 allows the removal of those from the voter rolls at any time, by reason of criminal conviction, mental incapacity, death of the registrant, or a change in residence of the registrant. 42 U.S.C. § 1973gg-6(a) see also *Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1345 (11th Cir. 2014). The due process for the removal of a convicted felon, or mentally incapacitated person, occurs at the time of the adjudication by a court of law in this state or another.

B. Issues Of Fraud And The Constitution Were Not Waived At Trial Level

The Appellees devote a substantial number of pages in the answer briefs attempting to evade the issues of Fraud and Constitutionality by misrepresenting that the issues were abandoned at the trial level. The Complaint properly framed the election contest under Florida Statutes Section 102.168(3)(c), “[r]eceipt of a number of illegal votes or rejection of legal votes sufficient to change or place in doubt the result of the election.” There exists no statutory ground for alleging election fraud in an election contest. The issues of election fraud were framed in the Complaint under the heading *Receipt of Illegal Votes Sufficient to Change or Place in Doubt the Result of the Election* in compliance with Florida Statutes Section 102.168(3)(c). R.32-33.

Fraud was specifically alleged in the Complaint only under the heading of the *Receipt of Illegal Votes Sufficient to Change or Place in Doubt the Result of the Election* when Appellant claimed “[t]he individuals living in North Carolina were reported to Supervisor of Elections Overturf on allegations of potential *voter fraud* following the 2016 Primary Election. Rather than investigating the *voter fraud* [...] Supervisor Overturf knowingly allowed the residents of North Carolina to register using the Supervisor of Elections office [...] as their address. On information and belief, the certification of election includes the *tabulation of ballots cast by other ineligible voters* to be more specifically identified through discovery.” R.32-33

(Emphasis Added). All of Appellees claims that Appellant abandoned the issue of voter fraud is misguided as the topic of voter fraud was contained entirely within the allegations regarding illegal votes in the Complaint, paragraphs 53-60, under the heading *Receipt of Illegal Votes Sufficient to Change or Place in Doubt the Result of the Election*. R.23-34.²

Furthermore, the Appellant's Post-Trial Memorandum of law addressed both fraudulent votes and the Florida Constitution. R.393-4, R.407-08 R.415-19. Further yet, the Motion for Rehearing addressed fraudulent votes and constitutional qualifications. R.1636-43. The First District Court of Appeals in *Pensacola Beach Pier, Inc. v. King*, stated:

In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.

66 So.3d 321, 325 (Fla. 1st DCA 2011) quoting *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So.2d 925, 928 (Fla. 2005). See Also *R.J. Reynolds Tobacco Co. v. Townsend*, 118 So.3d 844 (Fla. 1st DCA 2013).

Not only were the issues of Fraud and Constitutionality not waived or abandoned, Appellant provided the trial court with the opportunity to address the

² Appellee Canvassing Board admits based on the “remaining alleged ground” in AB.C 2 and Appellee DeLoach effectively admits that only those allegations contained in paragraphs 18-52 were abandoned related to “misconduct.” AB.D 2-3.

arguments at the trial court prior to bringing this appeal and thus the issues of fraud and constitutionality are properly raised on appeal. Further yet, issues of Fundamental Error are fit to be raised for the first time on appeal. The Supreme Court of Florida in *Sanford v. Rubin*, stated:

“Fundamental error,” which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action.

237 So.2d 134, 137 (Fla. 1970). Questions of great public importance directly related to the Constitutional protections of qualified voters and the integrity of elections are issues of fundamental error. Issues of fundamental error, such as a denial of due process, can be considered on appeal without objection in the lower court. It is fundamental error for the trial court to avoid the strictures of the Florida Constitution. Whether the 42 votes were “illegal” or “fraudulent,” the 42 voters identified were not “electors” as that term is defined by the Florida Election Code, Florida Statutes Section 97.021(15) because they were not qualified at the time of casting their vote pursuant to the Florida Constitution. Art. VI §§2 and 4(a). As stated in the original complaint “the certification of election includes the tabulation of ballots cast by other *ineligible* voters to be more specifically identified through discovery.” R.33

The Order on Appellant’s Motion for Rehearing stated,

While fraudulent activity is most likely illegal, illegal activity is certainly not necessarily fraudulent [...] mere illegal voting is not

criminal if not fraudulent [...] [t]hus, a convicted felon knowingly voting has not necessarily committed a crime under Section 104.15, and his vote may be legal if he or she is *validly registered on voting day.*”

R.1788 (Emphasis Added). A convicted felon cannot be validly registered on voting day when they are disqualified by the Florida Constitution and their voting rights were stricken by Florida Statutes Section 944.292 upon their criminal conviction. Further the Florida Supreme Court has addressed this issue when it concluded, “If [a felon who voted] was not a qualified person to vote at the city election, the crime of illegal voting was consummated in the act of casting his ballot [...]”*Ex Parte Senior*, 19 So. 652, 657 (Fla. 1896). Thus, the present case is substantially and factually different from *Beckstrom v. Volusia County Canvassing Bd.* because unlike the present case, in the *Beckstrom* decision the Court found “although there was an opportunity for fraud, no fraud was proven.” 707 So.2d 720, 723 (Fla. 1998). The election fraud was completed when a disqualified person cast his ballot. See again the discussion of Daniel J. Pierce outlined in the Initial Brief. IB. 25-26.

Appellees imply the unfounded proposition that there is a requisite *mens rea* for a finding of election fraud. AB.D. 13 and AB.C. 26. Appellees further imply that they should have the opportunity to disprove the elements of fraud to defend the election as certified. AB.D. 13. Appellees attempt to evade the issue of election fraud by quoting a Bankruptcy case addressing federal bankruptcy fraud. AB.C. 27. However, as stated in the initial brief, *Black’s Law Dictionary* more specifically

defines “election fraud” as “illegal conduct committed in an election, usu. in the form of fraudulent voting. Examples include voting twice, voting under another person’s name (usu. a deceased person), or **voting while ineligible.**” *Election fraud, Black’s Law Dictionary* (10th ed. 2014)(Emphasis added).

The Florida Supreme Court in *Ex Parte Senior* was addressing a statute that parallels the legislative intent of the current Florida Statute 104.15. The Florida Supreme Court dispelled any notion of a required *mens rea* to find voter fraud when the Court stated, “If petitioner [a felon who voted] was not a qualified person to vote at the city election, the crime of illegal voting **was consummated in the act of casting his ballot** [...]”*Ex Parte Senior*, 19 So. 652, 657 (Fla. 1896) (Emphasis Added).³

There is no requirement in an election contest to prove that a disqualified voter knew they were disqualified at the time of their voting. It is a felony for any person to perpetrate or attempting to perpetrate or aid in the perpetration of any fraud in connection with any vote cast, to be cast, or attempted to be cast. Fla. Stat. §104.041. It is a felony for any person to falsely swear or affirm any oath or affirmation in connection with or arising out of voting. Fla. Stat. §104.011(1). It is a felony for any

³ See also R.1642 and R.1646-47 where as of May 22, 2017, twenty individuals had been confirmed as disqualified and removed from the rolls. Four votes more than the margin of victory were confirmed to be cast by unqualified individuals. Twenty illegal votes have been confirmed to be illegal at the time they were cast; thus, the election results necessarily have been placed in doubt.

person to willfully submit any false voter registration information. Fla. Stat. §104.011(2). It is a felony for an unqualified elector to willfully vote in an election. Fla. Stat. §104.15. Despite all of these criminal provisions of the Florida Election Code, a challenger to an election -nor any citizen- has control over which cases, if any, a State Attorney chooses to prosecute. Consider the potentially nefarious hypothetical that may arise where a prosecutor of the State Attorney's Office could avoid prosecuting fraudulent voters to then take a general counsel position under a Sheriff's Agency, where the Sheriff was elected based on those fraudulent votes. In this hypothetical, what redress could a citizen have to correct this injustice? As stated in *Ex Parte Senior*, a person who has voted at an election is always considered a party when the result of the election is in controversy. 19 So. 652, 657 (Fla. 1896).

Inescapably the Florida Constitution and the Florida Election Code must be employed to preserve the will of the people. As applied in this case, Appellees request this Court to abandon common sense and the plain language of the Florida Constitution to find that votes by specifically disqualified voters are "legal." Defending a particular outcome, for whichever candidate, is inappropriate; especially where those tasked with counting the votes impartially abandon constitutional law to protect felons who voted rather than the will of those actually qualified to vote.

C. Points Of Clarification

While Appellant does not find it necessary to dive into the minutia of the errors contained in the Answer Briefs, Appellant does wish to provide these points of clarification to assist the Court to not be inadvertently misled by Appellees various misstatements and over exaggerations.

I. Why Depositions were Abandoned

Counsel for Appellee, DeLoach, feigns ignorance about why the Depositions were abandoned regarding for whom the unqualified individuals voted. AB.D 45. As evidenced by the record the deposition testimony of individual voters was abandoned because the counsel for Appellees, while not representing the deponents, counseled the deponents in the depositions against answering based on the Florida Constitutional right to a secret ballot.⁴

Appellee, Canvassing Board, attorney Ron Labasky counseled deponent Susan Ivey of her constitutional privilege to a secret ballot. R. 1481. Each of the attorneys for Appellees⁵, counseled deponent Christopher Faunce of the “Constitutional and statutory” right not to disclose who they voted for. R. 1526.

⁴ One wonders if a party specifically disqualified from voting by the Constitution has the Constitutional right to a secret ballot? Likely, the correct Constitutional right of a disqualified voter from testifying would be the Constitutional right against self-incrimination rather than the Constitutional right to a secret ballot. See *Ex Parte Senior*, 19 So. 652 (Fla. 1896).

⁵ Excepting Counsel for DeLoach, Christopher Lobianco, Esq.

Specifically, counsel for Appellee, DeLoach, stated: “Excuse me. This is Charlie Douglas on behalf of Gator DeLoach. I want to object because the witness has an absolute right in Florida not to disclose who they have voted for in an election.” R.1526. Counsel for both Appellees counseled deponents against answering the questions. Yet, Counsel for DeLoach now attempts to argue that Appellant has failed to meet a burden by securing deponents voluntary waiver a privilege he counseled at the depositions. The demonstration that disqualified voters cast ballots is sufficient to cast in doubt the results of the election. See *Ex Parte Senior*, 19 So. 652, 657 (Fla. 1896).

II. Late and Deceased Voters

Both the Ballots received after the deadline and the Deceased Voters both suffer the same statutory defect: they were late. The deceased voters⁶ were mailed late: after death. The ballots time stamped as 7:02 p.m. and 7:06 p.m. were time stamped that they were received late: after 7:00 p.m. The Fourth District Court of Appeals in *Goldsmith v. McDonald*, stated:

The delivery deadline is not subject to interpretation by dissecting conceivable applications and variations on *Boardman’s* descriptive term *substantial*. The statute’s condition for counting the ballot is plain and unqualified: it must reach the supervisor *before* the voting period lapses. It is not a condition capable of being met closely afterwards. If it arrives before

⁶ There was never any stipulation that the ballots received by the Deceased voters were actually signed by the voters. Further, the copies produced in discovery were redacted to prevent such verification. R.1643.

closing, it may be counted if it doesn't, it will not be counted. The statutes and the obligation they impose on the absentee voter could not be more obviously beyond such cavil. Late but close is not compliance of any kind.

32 So.3d 713,715-6 (Fla. 4th DCA 2010) (Emphasis in original).

III. The Canvassing Board Receives Votes

Appellee, DeLoach claims, “The Canvassing Board ‘receives’ no votes; they simply count the votes that are received by the candidates.” AB.D 37 Appellee’s Counsel attempts extreme legal gymnastics to convince this Court of the semantic argument that the Canvassing Board “receives” no votes. Yet, the time stamp on multiple vote-by-mail ballots states “Received- Putnam County Supervisor of Elections.” R.318, R. 326, R.369, R.473, R.1629, R.1320, R.1321.

Certainly Appellee would not have this Court believe that the Putnam County Supervisor of Elections “received” not only votes but entire ballots for the race: Supervisor of Elections for Putnam County, Florida. It would be absurd to interpret Florida Statute Section 102.168(3)(c) in such a manner. The clear legislative intent is evident by the positive and negative construction of the same ideal: improperly influencing an election by the counting of illegal votes or the rejection of legal votes sufficient to change or place in doubt the result of the election is a valid ground for asserting an election contest. Fla. Stat. §102.168(3)(c). The Receipt language and the rejection language necessarily refers to the canvassing board. No candidate has the authority, or opportunity, to reject legal votes. Legal votes are only legal votes

once cast by qualified voters: returned to the appropriate precinct or supervisor of elections office.

CONCLUSION

This Court should not be persuaded to allow the integrity of elections, the bedrock of our democracy, to be eroded by State Legislators and overworked State Attorneys when the Constitution has such clear directives on who is, and who is not, qualified to vote. The felonies associated with fraudulent voting, false swearing in connection to voting, and voting while unqualified render the Constitutional provisions meaningless if, as applied here, the only remedies are criminal charges at a prosecutor's discretion -after being discovered in an election contest where the number of disqualified votes has impacted the outcome of the election- while those who were not qualified to vote enjoy the fruit of their illegal act of casting a ballot because the votes are deemed legal by the trial court, in part based on the violators potential ignorance of their disqualification.

The more elegant interpretation is that a qualified voter casts a legal vote and a disqualified voter casts an illegal vote. Further, it is a dangerous precedent that the trial court sets that those faced with criminal violations of the Florida Election Code can claim ignorance of the law as a defense to evade prosecution and the negative consequence of having their vote invalidated upon demonstration of uncontroverted evidence that the individuals were both not qualified and cast a ballot.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been furnished to those parties listed below by electronic mail on this 22nd day of December, 2017.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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