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Supreme Court of Kentucky

2015-SC-000572-DG

CHARLES HARDIN, M.D.

APPELLANT

ON REVIEW FROM COURT OF APPEALS
V. 2015-CA-000305-MR, 2015-CA-000328-MR AND 2015-CA-000332-MR
MAGOFFIN CIRCUIT COURT NO. 14-CI-00371

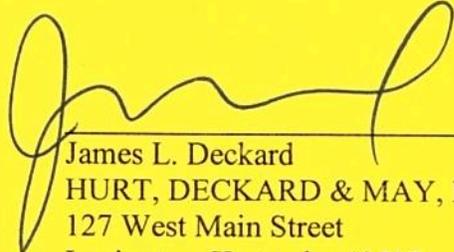
JOHN MONTGOMERY, ET AL.

APPELLEES

REPLY BRIEF FOR APPELLANT CHARLES HARDIN, M.D.

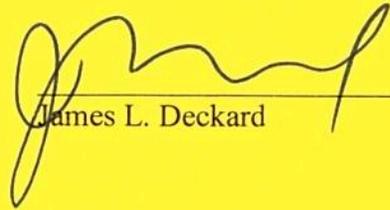
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this reply brief were served upon the following named individuals, via first-class U.S. Mail, postage prepaid, on this the 8th day of April, 2016: Hon. Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. John David Preston, Judge, Johnson County Judicial Center, 908 Third Street, Suite 217, Paintsville, Kentucky 41240; Hon. Gordon Long, 100 E. Maple St., Salyersville, Kentucky 41465; Jason Nemes, Fultz, Maddox & Dickens PLC, 101 South Fifth St., 27th Floor, Louisville, Kentucky 40202. It is further certified that neither Appellant, Charles Hardin M.D., nor his counsel have withdrawn the record on appeal.


James L. Deckard

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I. **THE REFERENCE TO A PENDING FEDERAL INDICTMENT AGAINST NON PARTIES TO THIS APPEAL IS INAPPROPRIATE**

It is inappropriate, both procedurally and substantively, for Appellee Montgomery to include as an exhibit to his Appellee's brief a pending federal indictment against individuals who are not parties to this appeal. Appellee is attempting to smear Appellant, Dr. Charles Hardin, and place before this Honorable Court irrelevant allegations that are not in the record. CR 76.12(4)(c)(vii) plainly states "Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs."

KRE 201(e) provides:

Judicial notice of adjudicative facts.

(e) Opportunity to be heard. A party is entitled upon timely request an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

In this appeal no notice was given, Mr. Montgomery simply stapled it to his brief and argued about it. Neither KRE 201 nor CR 76.12(4)(c)(vii) permit a party to simply attach documents not otherwise in the record and argue about the same under the guise of "judicial notice."

Furthermore, as provided in LAWSON, The Kentucky Evidence Law Handbook, 5th Ed., § Sec. 1.00(4)(c):

In a variety of ways and places, courts have been urged to be cautious in the use of judicial notice on appeal. One of the leading authorities on the Federal Rules and 'notice should not be used as a device to correct on appeal a failure to present adequate evidence to the trial court' and a second has provided reasons for such caution:

There are two somewhat broader reasons why reviewing courts are reluctant to take judicial notice, despite the fact that they have the power and authority to do so. One is that reviewing courts play only limited factfinding roles, and

aggressively taking judicial notice would amount to an incursion into the central functions of trial courts. Hence, reviewing courts are understandably reluctant to use the device of judicial notice to expand the evidentiary record and their appellate function. Another is that taking judicial notice on appeal can have the effect of relieving or excusing litigants from discharging their obligation to present evidence and argument in timely fashion at trial.

Drafters of KRE 201 subtly suggested that the concept should be used sparingly on appeal (when no request for such had been made at trial), and more explicitly the Kentucky Supreme Court has recently said that ‘judicial notice may be taken at any stage of the proceeding . . . [but] it is to be used “cautiously” by appellate courts.’

And in *Rogers vs. Commonwealth*, 366 S.W.3d 446 (Ky. 2012), this Court held:

Under KRE 201, therefore, it may be appropriate to notice court records for the occurrence and timing of matters reflected in them – the holding of a hearing, say, or the filing of a pleading – **but it will generally not be appropriate to notice the truth of allegations or findings made in another matter, since such allegations or findings generally will not pass the ‘indisputability’ test.** See *Meece v. Commonwealth*, 348 S.W.3d 627, 629-93 (Ky.2011) (upholding trial court’s decision to take notice that a criminal charge had been dismissed, but not to take notice of the purported reason for the dismissal).

Rogers, 366 S.W.3d at 451-52 (emphasis added).

This latest act follows a pattern of using unproven allegations and “smoke” regarding the acts of third parties to try to justify a wholly unjustifiable finding of violations of the Corrupt Practices Act by Dr. Hardin. When Appellee Montgomery saw at trial that he had no evidence of wrongdoing by or at the direction of Dr. Hardin, he switched to procedural arguments that the absentee applications were not in proper form down to every jot and tittle.

Appellant Montgomery overlooks the fact that the conclusion to be reached from including this document is that neither could any investigative authorities find any

credible evidence of wrongdoing as to any party to this appeal. Appellant has succeeded in continuing his efforts of trial by innuendo, suspicion, and gossip.

II. THERE IS NO EVIDENCE THAT THE CORRUPT PRACTICES ACT WAS VIOLATED BY OR AT THE DIRECTION OF DR. HARDIN

In Appellee Montgomery's brief, he asserts that:

The Court found at least four (4) voters cast ballots in exchange for payment or the expectation of payment, and other violations of the *Corrupt Practices Act* (hereinafter referred to as CPA) occurred when gravel was placed illegally on private property by county employees under Movant, Charles Hardin's supervision (p. 47 & 48 Judgment).

Appellee John Montgomery Brief, p. 3.

But again, Judge Thompson in his dissenting opinion in the Court of Appeals correctly recognized that:

Here, as indicated by the majority, there was not even a scintilla of evidence Hardin violated the Corrupt Practices Act or the Act was violated with his knowledge, consent or procurement. Moreover, the only voter who tangentially testified he received money for his vote later contradicted his own testimony and testimony he received money for reason unrelated to voting.

Hardin v. Montgomery, et al., 2015-CA-000305-MR, at 28 (Ky. Ct. App. 2015) (Thompson, J., dissenting).

Over the course of several weeks, including a multi-day deposition of Appellee Montgomery and through the entire course of trial, Dr. Hardin tried in vain to determine how he allegedly violated the Corrupt Practices Act – with nothing ever having been revealed.

Mr. Montgomery's counsel trumpets the testimony of Maxie Arnett who was not permitted to testify by the trial court about conversations she had with Doug and Bryan Marshall – gentlemen who were never called as witnesses. Appellee John Montgomery Brief, p. 3 (“[w]hile the hearsay rule prevented Maxie Arnett from stating exactly what

these two men said to her . . .”). Consequently, there is **no** evidence on these points in the record, and Appellee Montgomery’s **speculation** should be disregarded. Likewise, the testimony of Jerry Adams [VR No. 2: 2/3/15: 11:26:08] is so confused and contradictory as to be of no value at all.¹

Nathaniel Risner testified he received a load of gravel delivered in a *private* vehicle and was told by Scotty McCarty that “Doc and Rooster are good people” – with no proof that the gravel was from the county, and certainly no proof that the same was done at the direction or even with the knowledge of Dr. Hardin. Consistent with their trial strategy of innuendo without evidence, Scott McCarty was never called as a witness and therefore never subject to cross-examination on the matter.

Contrary to Appellee Montgomery’s assertions, there is no evidence to support the trial court finding of illegally graveling driveways on the Howes property/Dodson Branch Road. The sole evidence to support this allegation was the unsubstantiated speculation – later totally impeached – of Michael Helton, a convicted felon and staunch Montgomery supporter. Kermit Howes testified and presented cancelled checks to show that the work on his septic system was done by a private contractor. Any work otherwise done on his property was incidental to the work being done on Dodson Branch Road so that county equipment could be parked. There was and is no evidence to the contrary. Again, not one of the landowners who supposedly got illegal gravel was called to testify – nor were any identified by the trial court.

¹ With no intentions to be unkind to Mr. Adams’, his limitations can only be fully appreciated by a review of his testimony on the video record.

As a matter of law this evidence is insufficient to prove wrongdoing by or at the direction of Dr. Hardin. Even before examining the complete failure of proof against or about Dr. Hardin, this Court should reverse as Appellee Montgomery failed to present any evidence 1) that any of the road work was inappropriate; and 2) that any of the road work for the purpose of buying votes. *See Dyche vs. Scoville*, 270 Ky. 196 (1937); *Wheeler vs. Marshall*, 132 S.W.2d 519 (1939).

III. THE ABSENCE OF A REPUBLICAN BOARD MEMBER DURING A PORTION OF THE TIME ABSENTEE VOTING WAS CONDUCTED

Appellee Montgomery's brief complains about the absence of a Republican Board Member during a portion of the time absentee voting was conducted in the Clerk's Office. Appellee John Montgomery Brief, p. 17. However, this issue was resolved against Appellee by the Court of Appeals and no cross motion for discretionary review was filed by Appellee Montgomery on that question. *Hardin v. Montgomery, et al.*, 2015-CA-000305-MR, at 15 (Ky. Ct. App. 2015). As a result, the issue is not properly before this Court.

IV. THE ABSENTEE BALLOT PROCESS

A. ABSENCE OF SOCIAL SECURITY NUMBERS ON ABSENTEE APPLICATIONS

Appellee Montgomery complains about the absence of social security numbers on the applications. Appellee John Montgomery Brief, p. 15. The record is undisputed, however, that Kentucky statutes do not place any requirement to include telephone numbers and social security numbers on these applications. The Magoffin County Clerk testified that during training sessions for the 2014 election they were told that in the forms produced by the State Board of Elections that the use of social security numbers was being phased out because of privacy concerns. This argument is without merit.

B. OMISSION ON SOME APPLICATIONS AS TO WHERE THE VOTERS WOULD BE ON ELECTION DAY

Some voters completed the State Board of Election's one page absentee application form stating that they would be unable to vote in the county because of illness or infirmity (including those that listed a nursing home address) or be out of the county because of their employment. Appellee Montgomery seeks to disenfranchise these voters, however, because they didn't also complete Box 9 on the form stating where the voter would physically be on Election Day (other than out of county working or to old, ill and infirmed to go to a precinct poll). The State Board of Elections intranet site, accessible only to Kentucky's County Clerk's offices, nevertheless accepted the information on the application issued the ballot to the applicant. If Appellee's desires are to be the law, then there are serious implications for every election in all 120 counties of the Commonwealth.

In addition, Appellee Montgomery fails to address the legal impact of whether the failure to fill in Box 9 is *mandatory* or *directory*. Fortunately, the answer is found in the decision of *Skaggs v. Fyffe*, 266 Ky. 337 (1936). *Skaggs* involved a petition to hold a wet/dry election in Lawrence County, Kentucky. The statute provided:

Section 3 of the act (Ky. St. Section 2554c-3) provided, in part:

Said petition, in addition to the subscription of the name of the voter, shall state his post office address and the correct date upon which same was signed.

We are called upon to decide whether this provision is mandatory or directory.

Skaggs, 266 Ky. at 338.

The wet/dry petition was challenged because a number of signers did not show the actual date they signed the petition nor did they list their residential address next to their signature. However, it was undisputed before the trial court that all signers of the petition were, in fact, registered voters in Lawrence County, Kentucky. Although deciding that the statute was mandatory, this Court's predecessor held that these particular provisions were directory - upholding the petition:

The provisions of the local option law in the particular under examination can be, as to the address, only for the purpose of readily or conveniently identifying the petitioners as being of the class having the right to apply for the holding of the election, and, as to the date on which signed, only to show that it was done when they were so qualified, or, perhaps, to disclose that it was signed before the filing of the petition. That would seem to be merely to afford convenience in ascertaining the real or substantial thing, to wit, the qualification. This is of the essence, hence mandatory. A statement of the particular place of residence in the territory is not. The statute does not say subscriber himself shall write in his address or the date of signing, but merely that the petition shall state those things. If an erroneous address be given, it would be equivalent, for the purpose of the act, to no address. What difference would it make in accomplishing the purpose of the statute if the application gave a petitioner's wrong street address so long as he was a qualified voter in the territory affected? Often in the country the name of one's voting precinct is not that of his post office address. It is said in brief before us that some citizens of Lawrence county receive mail on a rural delivery out of a West Virginia post office.

...

Therefore, the provisions of the statute that the post office address and date of signature of the petitioners shall be stated are interpreted as being directory, although their qualification as voters of the territory involved is, of course, mandatory because jurisdictional.

Skaggs, 266 Ky. at 341, 352.

The point of the absentee voting statutes is being lost here – the legal outcome cannot be to disenfranchise those voters who desire to cast their ballots and exercise their rights to vote but who are ill and infirmed, or who have to work outside of the county on election day. To strike these votes without *any* one of

those voters called to testify at trial is truly a triumph for blind bureaucracy – these voters, many of whom are in assisted living, completed a government issued application form that then caused a government issued computer to print out a government issued absentee ballot that is now being struck.

C. COUNTING OF THE ABSENTEE BALLOTS

According to the testimony at trial, the procedure for counting absentee ballots in Magoffin County has been followed without objection since at least 1994. By law, Appellee Montgomery had a right to either attend the counting of the absentee ballots on election day or send a representative, but did neither. Remarkably, and with no evidence in the record, Appellee Montgomery invites this Court to speculate that this procedure “could have allowed for the insertion of illegal ballots” and relies on the testimony of a discredited handwriting expert, Mr. Thomas Vastrick. Aside from the fact that Vastrick’s testimony was impeached by the Board of Election’s expert and *not a single witness* testified their signature was a forgery, Vastrick even suggested issues with the signatures of Donna Caudill and Stacy Russell - two witnesses for and supporters of Appellee Montgomery. The trial court appears to have given little or no weight to Vastrick. [Judgment, paragraph 52, page 46] Most importantly, not a single witness testified that there were any irregularities. *Not one*. In contrast, every member of both parties of the Magoffin Board of Elections members, including Republican crusader for clean elections, Rev. Justin Williams, testified that the counting was handling appropriately.

D. ABSENTEE VOTING IN THE CLERK’S OFFICE

Like most other rural Kentucky county clerk’s offices, the Magoffin County Court Clerk’s Office is small. In accord with the testimony throughout the trial, and using the

space available and assigned to them, the Magoffin Board of Elections did everything possible to insure votes were cast in secret. Nevertheless, because of the extremely limited space there was testimony that a limited number of voters could be overheard talking about their votes. However, such a circumstance doesn't justify vitiating the results of that balloting or of an entire election.

In *Jones vs. Steele*, 275 S.W. 790 (Ky. 1925), primary election voting in the Newcomb Precinct for the Republican Party nomination for the office of Sheriff of Laurel County was conducted in a schoolhouse with dimensions of “practically twenty by thirty feet”. *Id.* at 791. The statute in effect at that time provided that the voting should be conducted in voting booths. However, the incumbent Laurel County Sheriff failed to deliver voting booths with doors or curtains to the Newcomb Precinct, and instead, voters were required to mark their ballots on school desks in the schoolhouse. There was some testimony that it was possible to see how individuals had marked their ballots. However, all agreed that the election was conducted in an orderly manner and there was nothing indicating fraud or other corrupt practice. Though recognizing that the secrecy of the ballot was a mandatory provision, the former Court of Appeals held that the election should not be set aside where the irregularities do not affect the merits of the contest. “[T]he provision with reference to booths has for its purpose the providing for a secret place where the ballot might be secretly stamped. If, therefore, secrecy is observed in each instance, the fundamental purpose of the law is complied with.” *Id.* at 793.

E. **DISPARITY BETWEEN VOTING PERCENTAGES AT THE PRECINCTS VERSUS THE ABSENTEE VOTE COUNT**

Appellee Montgomery cites *Arnett vs. Hensley*, 425 S.W.2d 546 (Ky. 1968), to suggest that the egregious violations underpinning the *Arnett* decision should support

throwing out the election in the present case. *Arnett* had a complete disregard for process or security of the ballots – correctly noting that “[t]he determinative question is whether the record supports the finding that there were such gross irregularities in the conduct of the absentee voting as to render void all of the absentee ballots.” *Id.* at 550. In *Arnett*, in addition to other failures, a deputy clerk collected “approximately seventy-five [new] absentee ballots” on election day and a second absentee ballot box was built that very day, secured by only one lock. *Id.* at 552. “When the votes were tabulated from the second box, the first seventy-five of the seventy-six were found to have been voted Democratic. . . . The law of probabilities is strained by this circumstance.” *Id.* at 552.

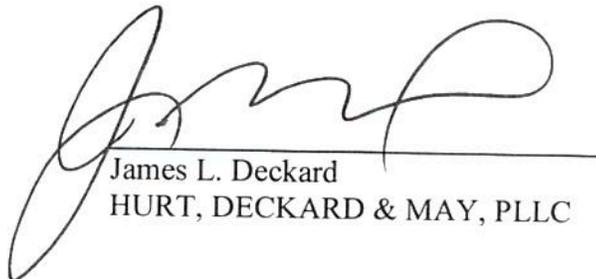
Similarly, in *Warren vs. Rayburn*, 267 S.W.2d 720 (Ky. 1954), a “pasteboard box was used for the absentee ballots and placed in the “vault” where it was otherwise wholly “accessible to the public generally” and kept “back about half way the vault on the side setting on some books, back kinda under a shelf like.” *Id.* at 723. Additionally, the Clerk had been going through the ballot box and there was testimony of failures of having a sufficient number of outer envelopes printed, and ballots were marked outside the presence of the notary who took the acknowledgement.

CONCLUSION

As Judge Thompson quite correctly pointed out in the Court of Appeals, this case was decided on the historical reputation of Magoffin County and not on the facts of this case. For the foregoing reasons, the Judgment should be reversed with directions to the trial court to dismiss the Petition.

Respectfully submitted,

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