

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2007-CA-000189-MR

PAULINE BENTLEY; JAMMIE  
KINZER; JEROME KINZER

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 06-CI-01178

CITY OF ALLEN; FLOYD COUNTY BOARD  
OF ELECTIONS; JUDY PARSONS; ERNESTINE  
BURCHETT HALL; CINDY BENTLEY PARSONS;  
RAYMOND PARSONS; TERRY PARSONS; AND  
CHRIS WAUGH

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; GRAVES,<sup>1</sup> SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Pauline Bentley, Jammie Kinzer, and Jerome Kinzer

appeal from an order of the Floyd Circuit Court denying their petitions seeking to void

the November 7, 2006, elections for Mayor of the City of Allen, for City Commissioner

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

for the City of Allen, and to dissolve the City of Allen. For the reasons stated below, we affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

The ballot for the November 7, 2006, general election in Allen, Kentucky, contained measures for votes for the mayor of the City, for City Commissioner, and for dissolving the City of Allen as a corporation.

Residents of the City voted at the Mouth of Beaver precinct along with nonresidents of the City. Only residents of the City were eligible to vote in the three elections at issue. Thus it was necessary for poll workers to distinguish between the eligible city residents and the ineligible non-city residents who voted at the precinct.

Appellants Pauline Bentley and Jerome Kinzer and appellee Terry Parsons were among the seven candidates for City Commissioner. Terry Parsons was one of the four candidates elected as City Commissioner. Parsons received 27 votes (including his own) and Bentley and Jerome Kinzer each had 26. Appellant Jammie Kinzer was one of the two candidates for mayor. Kinzer lost the mayoral election by a vote of 55 to 22. The vote to dissolve the City failed by a vote of 59 to 22.

While Terry Parsons maintained, and the trial court found, that he had been a resident of Allen on election day, shortly after the election Terry Parsons concluded that he was no longer a resident of Allen, and thus declined to accept the City Commissioner seat to which he had been elected.

On November 22, 2006, Pauline Bentley and Jerome Kinzer filed a petition seeking to have the elections for City Commissioner and the dissolution declared void pursuant to Kentucky Revised Statutes (KRS) 121.155. Their principal allegations were

(1) that election officials at the Mouth of Beaver precinct allowed numerous voters to cast votes in the city elections who were ineligible to do so based on residency restrictions, and (2) that the City Clerk of Allen had failed to comply with KRS 116.200 by failing to provide the Floyd County Clerk with a roster of voters who were eligible to vote in the city elections. The petition also alleged that there were only 69 voters eligible to have voted in the 2006 city elections, whereas at least 81 (representing the number of votes cast in the dissolution election) votes were cast. On November 29, 2006, Jammie Kinzer filed a similar petition making similar allegations seeking to have the mayoral election declared void.

The two petitions were consolidated and an evidentiary hearing was held on December 11, 2006. At the conclusion of the appellants' case, the trial court granted what was referred to as a "directed verdict"<sup>2</sup> against the appellants upon the issue of whether there were only 69 eligible city voters registered at the Mouth of Beaver precinct and upon the issue of whether Terry Parsons was a resident of the City on November 7, 2006. At the conclusion of the appellees' case, the trial court held that KRS 116.200 had been satisfied.

On January 2, 2007, the trial court entered an order denying the petitions to void the three elections. The order determined that the petitioners had failed to prove that any ineligible voters voted in the election; that Terry Parsons was a resident of the City of Allen on November 7, 2006, and was, therefore, an eligible voter; that the roster of voters contained codes to assist precinct election officers in determining the eligibility of voters

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<sup>2</sup> We note that, as a general proposition, in a bench trial "directed verdicts" are not rendered midtrial as they are pursuant to CR 50.01 in a jury trial; rather, the case is involuntarily dismissed pursuant to CR 41.02(2). See *Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky.App. 2004).

to vote in the city elections; and that the roster of voters complied with the dictates of KRS 116.200. This appeal followed.

### DISCUSSION

We construe the appellants' brief as raising three principal arguments: (1) that only 69 voters were eligible to vote in the November 2006 city elections, and since more ballots than that were cast, it necessarily follows that ineligible voters voted in the elections; (2) that Terry Parsons was not a resident of the City of Allen on November 7, 2006, and, therefore, was an ineligible voter; and (3) that the City Clerk of Allen failed to comply with KRS 116.200(1) by providing the Floyd County Clerk with a roster of voters eligible to vote in the city elections and, further, that KRS 116.200(2) was not complied with because the voter list the precinct officials used in the November 2006 was not coded to identify voters eligible to vote in the city elections.

### STANDARD OF REVIEW

We begin our discussion by noting that this case was tried by the circuit court sitting without a jury. It is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982). Substantial evidence is defined as that which, "when taken alone or in light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men." *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). The trial court's

application of law, however, is reviewed de novo. *Monin v. Monin*, 156 S.W.3d 309 (Ky.App. 2004).

### REGISTERED ELIGIBLE VOTERS

A crucial presupposition of the appellants' challenge to the validity of the November 2006 vote is that there were only 69 voters registered at the Mouth of Beaver precinct eligible to vote in the city elections. The appellants' primary support for this claim is based upon their interpretation of 1998 city election information. Because there were 81 votes cast in the dissolution action and 77 in the mayorial race, if the appellants' claim concerning the number of eligible voters is correct, it necessarily follows that ineligible voters cast votes in the election.

However, the City Clerk of Allen, Bill Parsons, and the Floyd County Clerk, Chris Waugh, both testified at the evidentiary that there were 123 voters registered at the Mouth of Beaver precinct who were eligible to vote in the city election. Thus, according to the two clerks, there were substantially more eligible voters than claimed by the appellants and substantially less than the total number of eligible voters voted in the November 2006 election. This testimony undercuts a central premise of the appellants' argument in support of voiding the election.

The number of eligible voters – be it 69 or 123 - was a factual dispute, the resolution of which is reserved to the fact-finder; that is, the trial court. The trial court's finding that "there were substantially more eligible voters in the City of Allen than the actual number of votes cast" is supported by substantial evidence – the testimony of Parsons and Waugh – and thus the finding is not clearly erroneous. CR 52.01. As such,

we find no reversible error upon the appellants' allegation that more votes were cast in the November 2006 city elections than there were eligible voters.

### TERRY PARSONS' ELIGIBILITY

The only specific voter identified by the appellants as an ineligible voter was Terry Parsons. The appellants contend that Terry Parsons rented a trailer in Banner, Kentucky, outside of the city limits of Allen, in April 2006, and thus established his residence there at that time. They argue that because Terry Parsons was not a resident of the City of Allen on November 7, 2006, he was ineligible to vote in the city elections.

KRS 116.035 provides as follows:

The following rules, so far as applicable, shall be observed in determining the residence of a person offering to vote:

- (1) A voter's residence shall be deemed to be at the place where his or her habitation is, and to which, when absent, he or she has the intention of returning;
- (2) A voter shall not lose his or her residence by absence for temporary purposes merely; nor shall he or she obtain a residence by being in a county or precinct for such temporary purposes, without the intention of making that county or precinct his or her home;
- (3) A voter shall lose his or her residence by removal to another state or county with intention to make his or her permanent residence there, or by removal to and residence in another state, with intention to reside there an indefinite time, or by voting there, even though he or she may have had the intention to return to this state at some future period;
- (4) The place where the family of a married person resides shall generally be considered his or her residence, unless the family so resides for a temporary purpose. If his family is permanently in one (1) place, and he or she transacts business in another, the former shall be the residence.

“[A] citizen cannot select for himself a voting place other than the place the law constitutes his legal home and habitation.” *Everman v. Thomas*, 303 Ky. 156, 197 S.W.2d 58, 62 (Ky. 1946) (citing *Penny v. McRoberts*, 163 Ky. 313, 173 S.W. 786 (1915)). “If he actually lives in one district, he cannot vote in another, unless he resides in the former merely for a temporary purpose.” *Id.* A citizen changes his residence when he “takes up an actual residence elsewhere with the intention of remaining there indefinitely[.]” *Id.*

The issue of Terry Parsons residence on November 7, 2006, was extensively addressed at the evidentiary hearing. The evidence discloses that Parsons had indeed rented a trailer in Banner, Kentucky, in April 2006; that his girlfriend had taken up residence in the trailer at that time; and that Terry Parsons stayed there with her off and on during the subsequent months.

However, Parsons further testified to the effect that it was not his intention prior to November 7, 2006, to have taken up actual residence in Banner with the intention of remaining there, and that he continued during this time to consider Allen his place of residence. Parsons further testified that during the relevant period he lived with his sister in Allen, received his mail in Allen, and that his driver’s license continued to list Allen as his address. He further testified that it was not until November 15, 2007, that he concluded that his intention was to remain in Banner and thereby relinquish his residency in Allen. As previously noted, because he reached this conclusion, Terry Parsons declined to accept the City Commissioner seat to which he had been elected.

In connection with the Terry Parsons issue, the trial court made the following finding: “the Petitioners failed to prove that Mr. Terry Parsons was ineligible

to vote in the November 7, 2006, elections for the Mayor of the City of Allen, counsel [sic] members for the City of Allen and the public issue question pertaining to the dissolving of the City of Allen; more specifically, the Court finds that said Terry Parsons was a resident of the City of Allen and an eligible voter as of election day.”

The trial court’s finding upon this issue is supported by substantial evidence and was not clearly erroneous. CR 52.01. Terry Parsons unequivocally testified that even though he had rented a trailer in Banner in April 2006, he had not, as of November 7, 2006, taken up residence there with the intention of remaining, and there were corroborating indicia, as described above, that he had not relinquished his status as a resident of Allen as of election day. As such, we will not disturb the trial court’s finding that Terry Parsons was an eligible voter in the November 2006 city elections.

#### COMPLIANCE WITH KRS 116.200

The appellants contend that the City Clerk of Allen failed to comply with KRS 116.200(1) by failing to provide the Floyd County Clerk with the information necessary for him to compile a roster of voters eligible to vote in the November 2006 city elections, and that the Floyd County Clerk failed to comply with KRS 116.200(2) by failing to code the election roster in a manner which would provide Mouth of Beaver precinct election officers with a means of determining a citizen’s eligibility to vote in the city elections.

KRS 116.200 provides as follows:

(1) Each city and school district board shall provide the clerk of the county in which the city or school district is located with whatever information the county clerk requires to maintain a roster of voters who are eligible to vote in city and school board elections. This information shall be provided to the county clerk not later than sixty (60) days preceding the

date of a primary election in each year in which an election for city officers or school board members shall be held in that county.

(2) Each county clerk shall code all registered voters in that county in such a manner that precinct election officers may determine their eligibility to vote in city and school board elections.

In its January 2, 2007, order, the trial court determined that “the roster of voters from the Mouth of Beaver Precinct did contain codes designed to assist precinct election officers in determining the eligibility of each voter to vote in the Allen City elections”; that “[t]he Allen City Clerk and the Floyd County Clerk complied with all applicable statutory law”; and that “[t]he roster of voters complied with the dictates of KRS 116.200(2), in that it contained codes to assist precinct election officers to determine those individuals eligible to vote in the Allen City election[.]”

At the evidentiary hearing the City Clerk, Bill Parsons, and County Clerk, Chris Waugh, testified that they had met in February 2006 to discuss the ballot measure to dissolve the City at which time discussions concerning voter eligibility occurred. Because a certain threshold percentage of eligible voters was required to sign the petition to dissolve the City before it could be placed on the ballot, Bill Parsons and Waugh, according to their testimony, went over the voter list for the specific purpose of determining the number of eligible city voters and, necessarily, who they were. While no specific written lists or other documents were provided by Bill Parsons to Waugh, given the vagueness of KRS 116.200(1) (the City Clerk shall provide “whatever information the county clerk requires”), we believe the trial court’s finding that this section of the statute was satisfied is supported by substantial evidence. The information was provided “not later than 60 days preceding the date of the [May 2006] primary election,” and

Waugh testified to the effect that his going over the lists with Parsons was all the information he needed. Based upon the testimony of the two clerks, we will not disturb the trial court's finding that KRS 116.200(1) was complied with. CR 52.01.

KRS 116.200(2) requires that the precinct roster be coded "in such a manner that precinct election officers may determine [all registered voters'] eligibility to vote in city . . . elections[.]" The testimony at the evidentiary hearing concerning coding was vague and ambiguous. No witness was able to definitively identify a code on the November 2006 precinct roster which definitively identified a voter as a resident of the City and which reconciled to the 123 eligible voters as determined by Bill Parsons and Waugh. There was testimony suggesting that the code "Y" contained in the "Town" block of the precinct roster was intended to identify City of Allen residents; however, only 32 voters are so coded - far short of the 123 eligible voters otherwise identified by Bill Parsons and Waugh. Nor are we able to identify any code on the roster which reconciles to the 123 number. Further, we note that the statute uses the mandatory "shall" terminology, and, hence, the coding requirement contained in KRS 116.200(2) is not optional. "Shall means shall." *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 795-796 (Ky.2003). Thus "all" voters eligible to vote in the city election should have been coded as such.

In light of the foregoing, we believe the trial court clearly erred in its determination that KRS 116.200(2) was complied with. Based upon our review of the November 2006 precinct roster for the Mouth of Beaver, it is apparent that the voters eligible to vote in the city election were by and large not coded onto the roster. Hence, we conclude that the coding requirements of KRS 116.200(2) were not fulfilled.

Notwithstanding our conclusion that KRS 116.200(2) was not satisfied, we do not believe that the remedy sought by the appellants – the voiding of the elections – is available under the facts of this case. As discussed above, the trial court found that the appellants had not met their burden of establishing that any ineligible voter cast a ballot in the November 2006 city elections.<sup>3</sup> This finding is borne out by the evidence presented at the evidentiary hearing. Aside from their erroneous allegation concerning Terry Parsons' eligibility, the appellants were unable to identify any ineligible voter who cast a ballot in the city elections.

In addition, there was testimony presented at the hearing indicating that, under the circumstances of this election, proper coding was not crucial to ensuring that only city residents voted in the city elections. According to the testimony, at least three alternative methods were used to identify eligible city voters. First, the precinct roster contained the address of each voter, and that generally provided the precinct workers with the information necessary to determine city residency. Second, the precinct workers generally were personally acquainted with the voters and their residence. Finally, absent the failure of any of the foregoing means of identifying a city voter, the precinct workers simply asked the voter where his or her residence was located, and determined from the voter's response whether he or she was a resident of the City. Thus, the evidence discloses that despite a lack of proper coding, the precinct workers were diligent in identifying city residents and ensuring that only city residents voted in the city elections.

“[E]lections cannot be lightly set aside.” *Robinson v. Spradlin*, 303 Ky. 451, 454, 197 S.W.2d 919, 920 (1946). “The general rule is that an election will not be

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<sup>3</sup> Moreover, there is no allegation that any citizen eligible to vote in the city elections was denied his or her right to do so.

invalidated or voters deprived of their right of suffrage by mere irregularities which do not affect the fairness and equality of the election.” *Hodges v. Hodges*, 314 S.W.2d 208, 212 (Ky. 1958). “If it can reasonably be done, a court should uphold the validity of an election, and not set it aside for light and trivial causes, and where there has been fraud, intimidations, bribery, illegalities, and irregularities, and the results of such sinister influences can be eliminated, and the result clearly ascertained between the legal voters, it is the duty of the court to do so, and to sustain the election[.]” *Hendrickson v. Coign*, 304 Ky. 383, 200 S.W.2d 905, 907 (Ky. 1947).<sup>4</sup>

In summary, an election will not be set aside in the absence of some demonstrable unfairness or irregularity which affects the final outcome of the vote. For the reasons discussed above, we are not persuaded that the mere failure to properly code the precinct roster, under the circumstances of this case, affected the final outcome of the vote. As such, we do not believe that the voiding of the November 2006 elections results is a proper remedy for the deficient coding.

#### CONCLUSION

For the foregoing reasons the judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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<sup>4</sup> We have reviewed the cases cited by the appellants to the effect that “strict compliance” with election statutes is required. However, those cases are distinguishable from the case at bar. *Thomas v. Lyons*, 586 S.W.2d 711 (1979), and *Barnard v. Stone*, 933 S.W.2d 394 (1996) involved compliance with the validity of nominating petitions to appear on the ballot, and *Ellis v. Meeks*, 957 S.W.2d 213 (1998) involved improper electioneering (providing free food to voters at voting stations). Those cases, unlike the present, involved situations implicating the fundamental qualifications of a candidate to even appear on the ballot (*Thomas* and *Barnard*), and bribery of voters (*Ellis*). We believe the standards as stated above are applicable under the facts at bar, and not the “strict compliance” cases cited by the appellants.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Keith Bartley  
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