

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

TIMOTHY BORDERS, et al.,)

Petitioners,)

No. 05-2-00027-3

vs.)

KING COUNTY and DEAN LOGAN,)

its Director of Records,)

Elections and Licensing)

Services, et al.,)

Respondents,)

and)

WASHINGTON STATE DEMOCRATIC)

CENTRAL COMMITTEE,)

Intervenor-Respondent,)

and)

LIBERTARIAN PARTY OF)

WASHINGTON STATE, et al.,)

Intervenor-Respondent.)

VERBATIM REPORT OF PROCEEDINGS
Court's Oral Decision

BE IT REMEMBERED that on the 2nd day of MAY, 2005, the above-entitled and numbered cause came on for hearing before the HONORABLE JOHN E. BRIDGES at the Chelan County Law & Justice Building, Wenatchee, Washington.

APPEARANCES

FOR THE PETITIONERS: Mr. Robert Maguire
Mr. Mark Braden
Mr. Dale Foreman



1 FOR THE DEMOCRATIC
CENTRAL COMMITTEE: Ms. Jenny Durkan
2 Mr. David Burman
Mr. Russell Speidel
3 FOR SECRETARY OF STATE: Mr. Tom Ahearne
4 Mr. Jeffrey Even
Mr. Nick Handy
5 FOR KLICKITAT COUNTY: Mr. Tim O'Neill
6 FOR SNOHOMISH COUNTY: Mr. Gordon Sivley

7 * * *

8 (Oral Argument by Counsel)

9 THE COURT: All right, counsel, I'm going to give a
10 ruling on this motion and my ruling is going to be pretty
11 brief, not as long as some have been in the past. In this
12 particular instance the Washington State Democratic Central
13 Committee have filed a motion in limine to exclude the
14 petitioners' attribution of illegal votes, and I understand
15 after reading these materials, because it was not necessarily
16 a term that was familiar to me, that this attribution argument
17 has various names. It can be attribution. It's also called
18 proportional analysis, proportionate deduction. It's called
19 statistical analysis, and I think as one of the petitioners'
20 experts has referred to it as perhaps even ecological
21 inference.

22 At its most basic, the Court understands, the use of
23 this methodology would purportedly show that if the illegal
24 votes are apportioned between Mr. Rossi and Ms. Gregoire and
25 deducted from their totals, the result would show that Mr.

1 Rossi received more legal votes than Ms. Gregoire. The
2 intervenors in this case ask the Court, by motion in limine,
3 to exclude this evidence of statistical analysis and, in
4 essence, reject the theory. I'm not going to summarize the
5 arguments that have been made in support of and opposition to
6 this motion because we've heard those this morning. I will
7 say that the intervenors assert that such evidence is
8 inconsistent with the standard of proof required to invalidate
9 an election.

10 The Court concludes that neither specifically has our
11 state legislature, nor our courts established any guidelines
12 in this particular area. Decisions of courts from other
13 states to include, I would note, California and Idaho have
14 resulted in mixed opinions. Some favor the admission of such
15 evidence and some reject such evidence. Based on the review
16 of the statutes, the out-of-state cases, including Hill v.
17 Howell in our state, and the arguments that have been made
18 both orally and in writing to the Court, the Court's going to
19 deny the intervenor's motion in limine in this case to exclude
20 this evidence subject, of course, to a Frye hearing, if one is
21 requested.

22 However -- and this is an important however. The
23 denial of this motion should not be interpreted as a pretrial
24 ruling adopting the statistical analysis methodology, so
25 everyone understands that, and that's the ruling of the Court.

1 Any questions? The next motion the Court would like to take
2 up is whether crediting files are admissible.

3 (Oral Argument by Counsel)

4 THE COURT: This motion before the Court has been
5 brought by the intervenors and it is a motion in limine to
6 exclude evidence of what's called voter crediting and to
7 require the petitioners to introduce the so-called best
8 evidence of voting. And as we've heard and as I've read, the
9 intervenors here allege that the petitioners intend to rely on
10 so-called voter registration files to prove that the
11 individual illegal voters actually voted. One of our election
12 contest statutes is RCW 29A.68.110 dealing with illegal votes
13 and that statute provides that no election may be set aside on
14 account of illegal votes unless it appears that an amount of
15 illegal votes has been given to the person whose right is
16 being contested that, if taken from that person, would reduce
17 the number of the person's legal votes below the number of
18 votes given to some other person for the same office after
19 deducting therefrom the illegal votes that may be -- that may
20 be shown to have been given to the other person.

21 In response, the Court understands the petitioners here
22 to say that there are in excess, I think, of at least a
23 thousand votes cast by persons who were disqualified either
24 because they were felons who had not been re-enfranchised, by
25 persons who cast more than one vote or because ballots were

1 cast in the names of deceased persons. And I also understand
2 there is an argument that there are hundreds of provisional
3 ballots improperly put in tabulating machines without
4 verifying that the ballots were from lawfully registered
5 voters who had not already voted. Counsel have talked about
6 the statute and the statute actually is 29A.08.125 and the
7 petitioners argue that the voter crediting records are indeed
8 competent evidence of the fact that a person voted because
9 those records are required to be maintained by the auditor
10 pursuant to this particular statute and, indeed, that statute
11 does require the auditors to maintain these particular
12 records.

13 But although these records, I think, are certainly
14 admissible under our rules of evidence, the process of
15 crediting voters with having voted is a post-election
16 administrative exercise that this Court determines does not
17 bear upon the authenticity of election results and because of
18 that, the Court grants the intervenor's motion and, therefore,
19 the Court will require that any party, whether it be the
20 petitioners or the intervenors, who allege that there have
21 been illegal votes, they're going to be required to use the
22 poll book page signed by the voter or a provisional ballot
23 envelope signed by the voter which was submitted presumably at
24 the time or an absentee ballot envelope. Any questions,
25 counsel? Folks, let's take the morning recess for about 15

1 minutes and then we'll take up. I think we can finish these
2 motions this morning.

3 (Recess taken)

4 (Oral Argument by Counsel)

5 THE COURT: All right. There are actually two motions
6 before the Court. They are, if I can use the word, companion
7 motions. The first is the petitioners' motion to clarify the
8 burden of proof with respect to illegal votes, and the counter
9 motion brought by the intervenors is a motion in limine to
10 exclude evidence of petitioners' illegal convicted felon
11 voters. The Court understands, first, that the petitioners
12 intend to offer evidence of votes which were cast by felons
13 who were disqualified from voting under the Washington State
14 Constitution and that the argument is that upon a prima facie
15 showing by the petitioners that a voter is a felon and that
16 court records do not reflect any restoration of civil rights
17 that the respondents should be -- should bear the burden of
18 showing that the felon's civil rights have been restored
19 through either a certificate of discharge issued by the
20 felon's sentencing court or some other paperwork and that
21 absent such a showing by the respondents here, the
22 intervenors, that the Court should deem the felon's vote
23 illegal and invalid.

24 The companion motion filed by the intervenors is this,
25 that the intervenors assert in their motion in limine that the

1 Court should exclude all evidence of illegal felon voters
2 unless the petitioners can prove six elements. One, that the
3 -- that the vote was -- that the voter was convicted as an
4 adult, that the voter was convicted of a felony, that the
5 voter had not been given a deferred sentence, that the voter
6 had not been discharged pursuant to RCW 9.94A.637, that is,
7 not had their civil rights restored. Fifth, that the voter
8 cast a ballot in the 2004 general election and finally, number
9 six, that the voter marked the ballot to indicate a vote for a
10 gubernatorial candidate.

11 This, the Court recognizes, is an important decision,
12 as are all of these decisions we're dealing with today and as
13 well as those that have preceded today's hearing. And as the
14 Court was going through these motions and as I was lying in
15 bed last night, I had one of the fears that I think attorneys
16 have had often, I'm sure, did I miss something. Am I going to
17 get in court and realize that there is an issue that I just
18 completely overlooked. Mr. Foreman started out his
19 presentation a few minutes ago with the burden of proof
20 argument, that is, is it by a preponderance of the evidence or
21 is it clear, cogent and convincing evidence. And in
22 actuality, I hadn't anticipated specifically that that
23 argument was before the Court, based on the written materials
24 that the Court had been presented. I'll make a ruling. If
25 counsel wish, however, to readdress the issue, I invite

1 counsel to do that.

2 First with respect to the petitioners' motion here, the
3 Court's going to deny petitioners' motion and I do so for the
4 following reasons: Evidence of a felony conviction, coupled
5 with the absence of a certificate of discharge in a court
6 file, in this Court's mind does not establish a prima facie
7 case of illegal felon voting, and the Court concludes that
8 really based upon the reasoning provided by the Secretary of
9 State in their written materials.

10 Secondly, the burden of proof, this Court concludes,
11 rests with the party contesting the election and that burden
12 of proof does not shift. The reasons the burden of proof does
13 not shift is grounded in both our case law as well as our
14 statutes, and the Court, of course, as are counsel, we're all
15 mindful that the courts of this state presume the certified
16 results of an election to be valid unless the contrary is
17 clearly established. And unless an election is clearly
18 invalid, when the people have spoken their verdict should not
19 be disturbed by the courts.

20 Pursuant to RCW 29A.08.810, the registration of a
21 person as a voter is presumptive evidence of his or her right
22 to vote. And pursuant to RCW 29A.08.820, when a voter's
23 registration is challenged before an election, the burden of
24 proving that he or she is improperly registered rests with the
25 challenger and must be proved by clear and convincing

1 evidence. The same standard should apply when election
2 results are contested under 29A.68.020. Inasmuch as voting is
3 a constitutional right, no vote should be held illegal and
4 discounted absent clear proof that the voter was legally
5 disenfranchised.

6 Now as to the intervenor's motion in limine to exclude
7 evidence of petitioners' erroneously listed illegal convicted
8 felon voters, specifically the Washington State Democratic
9 Central Committee argues that the petitioners must show
10 evidence of the six elements that I've referenced to prove
11 that an illegal felon actually voted. The Court's decision
12 with respect to this motion in limine to exclude this evidence
13 is this. The Court's going to deny that motion and the Court
14 does so for the following reasons: First, our law instructs
15 that the Court should only grant a motion in limine if the
16 Court is able to determine that the evidence is clearly
17 inadmissible based on the issues. And here, the evidence
18 discussed in the intervenor's motion may be insufficient but
19 it is not clearly inadmissible.

20 Now, counsel, I recognize that you're asking for some
21 guidance from the Court so I'll offer the following to you.
22 To the extent that both the petitioners as well as the
23 intervenors seek clarification as to the evidence which must
24 be established to demonstrate that an illegal felon voted, the
25 Court instructs that the following elements should be

1 established to the extent that these elements can be
2 established. One, that the individual was convicted as an
3 adult and was not adjudicated as a juvenile. Number two, that
4 the individual was convicted of a felony, not a misdemeanor or
5 a gross misdemeanor. Number three, that the individual was
6 not given a deferred sentence. Number four, that the
7 individual has not had his or her civil rights restored in one
8 of the five ways described by the Secretary of State. Number
9 five, that the individual cast a ballot in the 2004 general
10 election and, number six, that they marked the ballot to
11 indicate a vote for a gubernatorial candidate.

12 Now, based on this Court's ruling with respect to voter
13 crediting, evidence that a particular person voted should be
14 based upon the poll books and the ballot envelopes. And with
15 respect to this last element, element number six, that there
16 should be evidence that an individual marked a ballot for a
17 gubernatorial candidate, the Court is mindful that it has not
18 precluded petitioners from introducing evidence of attribution
19 conditioned on a Frye hearing. And although these
20 determinations are obviously inconsistent and ultimately may
21 be mutually exclusive, whichever party intends to convince the
22 Court that illegal felons voted should present all of the
23 evidence available, if any, as to element number six.

24 One of the cases that we have talked about for quite a
25 while now the last several months is Foulkes v. Hayes and in

1 that case our Supreme Court talks about the inability to come
2 up with the smoking gun. I recognize that and it just may be
3 simply impossible to come up with all of these elements I've
4 referred to and particularly element number six. I'm simply
5 indicating you folks should come up with all that you have.

6 With respect to and responding to Mr. Foreman as to
7 simply what is the burden of proof, I'm going to say it's
8 clear and convincing. And I understand the Secretary of
9 State's argument. I'm mindful of the cases. I've read the
10 statutes and I think that is the appropriate burden but, Mr.
11 Foreman, if your folks disagree with that, I mean, I would
12 encourage specific briefing just as to that issue, but at this
13 time that's the Court's ruling.

14 Now, I want to go one step further, counsel, and this
15 is not by invitation necessarily but I think by necessity, and
16 I certainly don't intend to mischaracterize anybody's argument
17 here and specifically the petitioners' argument, but there is
18 a theme that I sometimes see as I read these materials and the
19 theme is this -- or the issue is this. May an election be
20 invalidated where the number of illegal votes exceed the
21 margin of victory, and I don't know if the petitioners intend
22 to pursue that simple issue because it's simple to state. But
23 I want to address it now so we can get it out of the way. And
24 so because it's the Court's impression that petitioners may
25 continue to argue that they do not have to prove which party

1 was credited with an illegal vote, under some of our case law,
2 particularly Foulkes v. Hayes and Hill v. Howell, this is the
3 Court's reasoning.

4 While petitioners' arguments in this regard may be
5 persuasive, Washington's election contest statutes clearly
6 require the contestant to show illegal votes or misconduct
7 changed the election result based on RCW 29A.68.110 and .070.
8 And neither the Hill case nor the Foulkes case mentioned these
9 specific statutes and in both of those cases where fraud was
10 shown, the Court may set aside the election without requiring
11 proof that the result was changed. The contestants in Foulkes
12 did not allege illegal votes had been counted but, rather,
13 that properly cast ballots had been fraudulently altered. And
14 under these facts, our Supreme Court held the trial court had
15 correctly overturned the election without proof the result had
16 been affected.

17 Similarly, in Hill the Court required proof illegal
18 votes changed the result, but in doing so remarked in somewhat
19 contradictory dicta that such a showing might not be required
20 where fraud, intimidation or a fundamental disregard of the
21 law had occurred. Also, there is an out-of-state case, the
22 Gooch case from Florida where the California court -- I'm
23 sorry, Florida. Out of California. The California court
24 interpreted a statute almost identical to our 29A.68.110 to
25 not require proof the result was changed where a candidate's

