IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE



GERTRUDE WILKS, et al.,

Plaintiffs and Appellants,

v.

BARBARA MOUTON, et al.,

Defendants and Respondents.

AO 24878
(S. Ct. No. C-275654)

On June 7, 1983, an election was held on the question whether the unincorporated area known as East Palo Alto should become an incorporated city.1/

1/ This was the second election in the low-income area lying at the southerly tip of respondent county inhabited by approximately 18,000 predominantly minority residents. An earlier election, though reflecting a popular vote favoring incorporation, failed to obtain concomitant approval of the dissolution of a sanitary district by a margin of 21 votes. (See Horwath v. Local Agency Formation Com. (1983) 143 Cal.App.3d 177, 180.)

On June 14, 1983, the Board of Supervisors of respondent county officially declared that the incorporation measure (Proposition A) was adopted by a vote of 1,782 in favor and 1,767 in opposition, a plurality of 15 votes. Two hundred seventy-two votes of the official tally were cast by absentee ballots which favored the incorporation measure by a ratio of nearly two to one. Appellant Wilks and respondents Mouton, Abrica, Satterwhite and Blakey received the highest number of votes and were declared duly elected to the newly created five-member city council. [The two unsuccessful candidates received 1,302 votes each, a result 159 votes less than the lowest successful candidate.] That same day appellants Wilks and Cenedella filed statements of contest challenging the election results on the grounds of election officials' malconduct and illegal voting. (Elec. Code, § 20021.)2/

On July 1, 1983, the City of East Palo Alto began operations as an incorporated city governed by the newly elected city council. Thereafter, following the filing of other statements of contest, appellants submitted a list of 324 challenged voters, ultimately reduced to 191 at trial. Respondent county submitted its own list challenging three voters.

The testimony of over 100 witnesses and some 200 marked exhibits were considered during the hotly contested three-week court trial. Following submission, the trial court adopted extensive findings of fact and conclusions of law in support of

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2/ Unless otherwise indicated, all statutory references are to

its judgment confirming passage of the incorporation measure by a margin of 13 votes[3/] and the election of the four challenged respondent city council members.

On appeal, appellants assert that at least 94 of the absentee ballots cast with the assistance of EPACCI members were illegal and void due to voter fraud and malconduct of election officials.[4/] The illegality is claimed to consist of the loss of secrecy during balloting, improper procedures used in obtaining and returning the ballots, and the alleged non-residency of certain voters. Appellants' principal contentions center upon the pre-election activities of Mrs. Carmeleit Oakes, Joseph Goodwill, Brad Davis and respondents Satterwhite and Blakey, leaders of the East Palo Alto Citizens Committee on Incorporation (EPACCI), a local group of citizens favoring incorporation and a slate of four candidates.

We discuss the several contentions and related findings in light of established principles on review.

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3/ The 15 vote margin as originally canvassed was reduced to 13 by reason of the invalidation of 8 ballots: three favoring incorporation and five opposed, as stipulated. Notably, one of the ballots found invalid was cast by appellant Breckenridge.

4/ As respondents correctly point out, no appeal lies with reference to 17 of the challenged ballots. The challenges to the following 15 voters were abandoned below: Nathaniel Bland, Henry Crum, Izola Crum, John Crum, Azer Davis, James Fields, Gloria Franklin, Ronald Franklin, Callie Haynes, Catherine Haynes, Sam Haynes, Mary Hall, James Howard, Willie D. Nichols and Juanita Todd. Additionally, challenges to the ballots of Joseph Minter and Aron Strong were sustained and deducted from the tally favoring incorporation; since no cross-appeal was taken from that decision, that issue is moot.

Preliminarily, we briefly discuss the general rules governing an election contest involving findings supporting the challenged election. "It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. (People v. Prewett, 124 Cal. 7, [56 Pac. 619]; State v. Board of Supervisors, 35 N. J. L. 269, 277.) Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation. (Russell v. McDowell, 83 Cal. 70, [23 Pac. 183]; Tebbe v. Smith, 108 Cal. 101, [49 Am. St. Rep. 68, 29 L.R.A. 673, 41 Pac. 454].)" (Rideout v. City of Los Angeles (1921) 185 Cal. 426, 430; accord Scott v. Kenyon (1940) 16 Cal.2d 197, 202.) "Courts are reluctant to defeat the fair expression of popular will in elections and will not do so unless required by the plain mandate of the law." (Simpson v. City of Los Angeles (1953) 40 Cal.2d 271, 277, appeal dism., 346 U.S. 802.) An election will be set aside only where the voting irregularities complained of have actually prevented a full and fair expression of the popular will. (See, e.g., Canales v. City of Alviso (1970) 3 Cal.3d

118 [non-resident voters]; Garrison v. Rourke (1948) 32 Cal.2d 430 [same] overruled on another point in Keane v. Smith (1971) 4 Cal.3d 932; Scott v. Kenyon, supra, 16 Cal.2d 197 [actual tampering with absentee ballots].) But the mere possibility of harm as distinguished from actual harm will not justify voiding an otherwise fairly conducted election. (See, e.g., Huston v. Anderson (1904) 145 Cal. 320 [failure of clerk to administer oath]; Packwood v. Brownell (1898) 121 Cal. 478 [brief delay in opening polls]; Shinn v. Heusner (1949) 91 Cal.App.2d 248 [candidate delivered absentee ballots and returned completed ballots to clerk].) And where the election is undertaken pursuant to the District Reorganization Act of 1965, as here (Horwath v. Local Agency Formation Com., supra, 143 Cal.App.3d at pp. 180-182), informalities in the conduct of such election will not invalidate the election "if fairly conducted." (§ 23558; County of San Mateo v. Belmont County Water Dist. (1978) 83 Cal.App.3d 485.) The burden of proof rests upon the contestants to establish the claimed illegality or malconduct by clear and convincing evidence. (Willburn v. Wixson (1974) 37 Cal.App.3d 730, 737; Hawkins v. Sanguinetti (1950) 98 Cal.App.2d 278, 283.)

Finally, the findings supporting a judgment validating a contested election may not be disturbed on appeal where the entire record discloses substantial evidence supporting such factual determination, it being "of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (Bowers v. Bernards (1984) 150 Cal.App.3d 870,

We begin our analysis of the issues presented with a consideration of the issue of the propriety of the ballots -- 46 in number -- which were hand carried to the County Clerk, not by the absentee voters themselves, but in each instance by third parties connected with the pro-incorporation campaign committee.

On its face, such conduct is violative of section 1013 of the Elections Code, which in relevant part provides that, "after marking the ballot, the absent voter may return it to the official from whom it came by mail or in person."

The trial court, in its conclusions of law, declined to apply the literal terms of the statute, for several reasons. First, it found that the clerk had no duty to police the hand delivery of the ballots, and committed no misconduct in failing to do so. It further found that in the absence of actual fraud or tampering, contravention of the terms of the statute was, in effect, harmless; and it concluded that to invalidate a vote otherwise freely arrived at because it was not hand delivered by the voter as required by section 1013 -- being violative of equal protection of laws -- unconstitutionally deprived the voter of the right to vote.

Section 1013 has been interpreted as permitting an absentee voter to mail personally or to cause to be mailed his absentee ballot. In Beatie v. Davila (1982) 132 Cal.App.3d 424, while approving the statutory requirement of personal hand delivery, the court found that a third party mailing was justified. The court reasoned as follows:

> (2a) We construe section 1013 to permit the absent voter to utilize a third party to mail his marked ballot to the elections official. The second clause of the first sentence of section 1013 expressly authorizes alternative methods of returning the ballot to the elections official, i.e., either (1) by mail, *or* (2) in person. Engrafting the words "in person" onto the first alternative ignores the disjunctive word "or" and imposes on the phrase "by mail" a meaning not indicated by the explicit language of the statute.
>
> One may logically ask: Why would the Legislature require the voter to deliver his absentee ballot personally to the elections official and yet allow him to utilize a third party for mailing it to the official? We think the answer to the question is clear. The Legislature recognized the impossibility of policing the act of mailing by the absentee voter, i.e., the elections official would be unable to determine who in fact mailed the ballot—the voter or someone else. Recognizing the realities of absentee voting—that voters often entrust their ballots to family members or friends for mailing if it is convenient for them to do so—the Legislature realistically refused to impose a requirement that the absentee voter personally go to the mailbox.

(132 Cal.App.3d 424, 429.)

More recently, however, the personal delivery section of the statute was directly challenged, and the procedure at issue here squarely rejected.

In Fair v. Hernandez (1982) 138 Cal.App.3d 578, eleven absentee ballots were delivered to the county clerk by campaign workers rather than by the absentee voters themselves. And while no actual fraud was shown, the invalidation of the tainted ballots and consequent reversal of the election result was justified in the following terms: "Reason and authority both support the judgment of the trial court that delivery by a third party to the city clerk was improper under the statute. The rule requiring personal delivery clearly serves the

paramount purpose of preserving the secrecy, uniformity, and integrity of the voting process." (Id., at p. 583.)

The trial court here declined to follow Fair v. Hernandez, supra, apparently principally because it found no fraud or tampering with respect to the 46 challenged votes at issue. Impliedly, the court read Fair v. Hernandez as involving actual fraud, but we are able to discern no such conduct in that case, and find it precisely factually analogous to the case at bench.

We are also unable to agree with the trial court that initial approval by the county clerk of the third party method of delivery somehow validated an otherwise ostensibly invalid procedure. As appellants contend, the clerk's sanction[5] adds nothing to the debated propriety of the method of delivery employed since local preference and procedures can hardly supercede state election laws. As said in the earlier Fair v. Hernandez ((1981) 116 Cal.App.3d 868, 880, cert. den. 454 U.S. 941) decision, where the improper procedure was not merely permitted, but actually mandated: "[n]either the registrar nor the court has authority to change the law. It is most unfortunate that the voter is deprived of her franchise through the fault of an official, but no exception exists to cover the circumstance." (116 Cal.App.3d 868, 878, cert. den. 454 U.S. 941.)

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5/ Later reconsidered and revoked. After May 24th the clerk declined to accept 32 absentee votes hand delivered by third parties.

As previously noted, one explanation of the logical basis for the disparate treatment of third party mailing and third party delivery is given in Beatie v. Davila, supra, 132 Cal.App.3d 424, 429.)

Irrespective of the correctness of that distinction, however, we consider ourselves bound by the plain terms of section 1013 insofar as they prohibit a third party's manual delivery of absentee ballots to the county clerk. Accordingly, for all of the reasons discussed, we conclude that the 46 ballots so delivered[6] are tainted and cannot be counted in computing the results of the election.

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6/ Nothing in our Supreme Court's recent decision in Peterson v. City of San Diego (1983) 34 Cal.3d 225, cited by respondent, persuades us that Fair v. Hernandez, supra, 138 Cal.App.3d 578, was erroneously decided. Indeed, the court in Peterson cites the procedure outlined in section 1013 with apparent approval. (See Peterson v. City of San Diego, supra, 34 Cal.3d 225, at 228.

Appellants also sought in the trial court to invalidate some 45 absentee ballots, on the basis that voting in the presence of third parties, who in some cases actually punched the ballot card for the voter, violated the mandate of Article II, section 7 of the California Constitution that "voting shall be secret." (See also Elec. Code, § 29645.[7]

While much of the testimony presented during the lengthy and at times volatile trial was sharply conflicting, the undisputed evidence reveals that an aggressive campaign was conducted by EPACCI in support of the incorporation measure. EPACCI leaders not only provided voters with absentee ballot application forms, but also actively assisted many voters -- some of whom were admittedly elderly, physically disabled, illiterate or unfamiliar with ballot forms and accompanying instructions -- during the actual voting process. In some instances, the EPACCI campaign worker actually punched the ballot card for the voter.

In light of the serious challenge to a cherished right inherent in our national political heritage, we must carefully scrutinize the claimed improprieties, as our high court recently noted in Peterson v. City of San Diego, supra, 34 Cal.3d 225, 229-230:

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7/ Elections Code section 26945 provides:

> Any person who, before or during an election, tampers with any voting machine, interferes or attempts to interfere with the correct operation of a voting machine or the secrecy of voting, or willfully injures a voting machine to prevent its use, and any unauthorized person who makes or has in his possession a key to a voting machine that has been adopted and will be used in elections in this state, is guilty of a felony, punishable by imprisonment in a state prison for two, three, or four years.

> The right to vote is, of course, fundamental (e.g., *Thompson* v. *Mellon* (1973) 9 Cal.3d 96, 99 [107 Cal.Rptr. 20, 507 P.2d 628]; *Zeilenga* v. *Nelson* (1971) 4 Cal.3d 716, 721 [94 Cal.Rptr. 602, 484 P.2d 578]), and restrictions on exercise of the franchise will be strictly scrutinized and invalidated unless promotive of a compelling governmental interest (*Dunn* v. *Blumstein* (1972) 405 U.S. 330, 337 [31 L.Ed.2d 274, 281, 92 S.Ct. 995]; *Young* v. *Gnoss* (1972) 7 Cal.3d 18, 22 [101 Cal.Rptr. 533, 496 P.2d 445]). As pointed out in *Otsuka* v. *Hite* (1966) 64 Cal.2d 596 [51 Cal.Rptr. 284, 414 P.2d 412], the United States Supreme Court "'has stressed on numerous occasions "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 555 [84 S.Ct. 1362, 1378, 12 L.Ed.2d 506, 523]. The right is fundamental "because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 [6 S.Ct. 1064, 1071, 30 L.Ed. 220, 226].' (*Harman* v. *Forssenius* (1965) 380 U.S. 528, 537 [85 S.Ct. 1177, 14 L.Ed.2d 50].) Such matters are 'close to the core of our constitutional system' (*Carrington* v. *Rash* (1965) *supra* 380 U.S. 89, 96 [13 L.Ed.2d 675, 680, 85 S.Ct. 775]) and 'vital to the maintenance of democratic institutions' (*id.* at p. 94, quoting from *Schneider* v. *New Jersey*, 308 U.S. 147, 161 [60 S.Ct. 146, 84 L.Ed. 155]).

Having these precepts in mind, we are unable to escape the conclusion that, on the facts of the present record, indisputably the secrecy of some ballots was compromised. Thus, campaign workers systematically visited the residences of voters, often after having supplied them with absentee ballots, and either personally instructed the voter in the use of the computer ballot during the voting process or actually punched the ballot card for the voter. Seventeen ballots were punched by campaign workers for EPACCI rather than the voter; indeed, some of these voters apparently never actually either perused or even received their ballot cards, although they did sign a ballot envelope for an EPACCI representative. Twenty-eight ballots were cast with the assistance of and in the presence of EPACCI representatives.[8]

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8/ The 17 are specifically identified in the record. As to the 28 "assisted" ballots, reference may be made to the record as identified in appellant's opening brief, appendix "B."

In our view, such active participation in the voting process by EPACCI campaign workers, one of whom was also a candidate on the ballot, constituted an unlawful intrusion upon the secret ballot guarantee. Unlike the trial court, we can find no justification in the fact that some of such voters may have requested the assistance of campaign workers: many others did not, but were nevertheless in effect forced to a decision under intimidating circumstances, in the presence of campaign officials. Nor are we inclined to validate an otherwise improper procedure because of the absence of harassment of voters, or actual tampering with the ballots. The secret ballot requirements seek to protect not only the rights of the absentee voter to privacy and personal independence (Peterson v. City of San Diego, supra, 34 Cal.3d 225, 231), but the integrity of the election process as well (Scott v. Kenyon, supra, 16 Cal.2d 197, 204; Fair v. Hernandez, supra, 138 Cal.App.3d 578, 582-583). As the court declared in Fair v. Hernandez, supra, 138 Cal.App.3d 578, at p. 582: "'[P]reservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election.'"

Again, in Scott v. Kenyon, supra, 16 Cal.2d 197, our high court condemned the procedure employed to count absentee ballots which permitted the opening of ballot envelopes "so that election officers, canvassing boards, and even outsiders and spectators may see how the individual voted . . . ." (Id., at pp. 203-204.) While, as here, no actual tampering occurred in that case, an opportunity for tampering was presented and

this was considered sufficient to taint the process. (Id., at p. 199.) Observing that the secret ballot provisions "are designed to carefully protect the absent voter in his right to a secret ballot, which is the very foundation of our election system" (id., at p. 201), the court concluded:

> If the absent voters' law is to achieve its purpose it is of the utmost importance that its terms be substantially complied with. In the long run this is important to all voters, including any who might lose their votes in a particular case. With respect to the votes of absentee voters, it is not only important to be able to tell how they actually voted, but it is of equal importance that the provisions of law be so carried out that it cannot be told how a particular individual voted. The law permitting absent voting is carefully drawn to protect the voter in the secrecy of his ballot, and it would be largely useless if such secrecy is not maintained.

(Id., at p. 203.) The court then proceeded to hold that the absentee ballots "Should not be counted for anyone" despite the lack of proof that votes had been changed. (Id., at p. 204.)

Likewise, in Fair v. Hernandez, supra, 138 Cal.App.3d 578, 11 votes were discounted upon proof that ballots had been unlawfully hand-delivered by a campaign worker, and the court specifically noted: "[T]he integrity and secrecy of the process are such important interests that ballots may be voided even though it is not shown that the ballots were actually tampered with. (See Garrison v. Rourke, supra, 32 Cal.2d 430, 443 [196 P.2d 884], overruled on another point in Keane v. Smith, supra, 4 Cal.3d 932, 939 [95 Cal.Rptr. 197, 485 P.2d 261].)" (Id., at p. 583.)

We also reject respondent's contention that the procedure used by EPACCI campaign workers is justified because of the disability and unsophistication of some of the absentee voters. Indeed, it seems to us arguable that voters lacking in educational or political expertise are most in need of the protection afforded by the secret ballot system in order to guard against undue influence or other abuses. Disabled voters obviously often require assistance in voting, and at times such assistance will necessarily appear to and may actually compromise the secret ballot process; assistance to such persons must be limited as much as practicable to those mechanical operations which the voter is unable to perform, and the assisting party has an obligation to faithfully carry out the voter's direction when casting the ballot. (See 56 Ops.Cal.Atty.Gen. 173, 175-176 (1958).) Moreover, statutory procedures for aid to disabled voters (Elec. Code, §§ 14234 et seq.) will be rigidly enforced. (Patterson v. Hanley (1902) 136 Cal. 265, 275-276.)

In the case at bench, however, while it appears that some "assisted" voters were disabled, many others were not, but nevertheless received heavy-handed and we think improperly suggestive if not outrightly coercive assistance,[9] all in derogation of constitutional guarantees of secrecy and privacy in voting.

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9/ We note the silence of the record. All of such ballots concerning compliance with statutory requirements for assistance to disabled voters shall be discounted.

The area of our deep concern with the present process was articulated by Justice Grodin in his concurrence in Peterson v. City of San Diego, supra, 34 Cal.3d 225, 232: we consider it equally apposite here: "The problem is not simply one of purchasing votes, though a market in that commodity is far more likely if the buyer can see what he is getting. The problem includes the potential for more subtle forms of coercion. To the extent that important elections are conducted by means which permit persons other than the voter to observe the ballot as it is cast, it is inevitable that political and special interest groups will be tempted to 'assist' voters in casting their ballots . . . ."

Since we have concluded that the "assistance" provided by EPACCI campaign workers, which in some case virtually -- and in rarer instances actually -- resulted in voting by proxy, in its totality constituted a serious breach of the constitutional right to secrecy of voting, we reluctantly decide that all ballots in which EPACCI campaign workers participated in the voting process either by actually punching the ballot form or, in the voter's presence, assisting a voter in doing so, must be voided (Scott v. Kenyon, supra, 16 Cal.2d 197, 204). Our perusal of the record discloses that such ballots are 45 in number, but, as shall hereinafter appear, we leave to the trial court the task of identifying such ballots.

Appellants also challenge 15 ballots, mailed to Mr. Goodwill and delivered by him to the voters, on the grounds of noncompliance with the statutory requirement that the ballot be

delivered by the election official to the voter by mail (c.f. § 1007, emphasis added).

While the wisdom of such a law -- which appears to have its origins in the legislative concern over the principle of secrecy in elections -- may be arguable, its provisions are not.

As said by the Attorney General (62 Ops. Cal.Atty. Gen. 439 (1979), "the words of section 1007 are clear.

> The Legislature has specified the elections official shall deliver the ballot to the voter personally or shall deliver it by mail to the voter. The language of section 1007 does not evidence any intent to include delivery of the ballot to the voter by any other method than those specified. It is significant to compare the language of section 1007 with that of section 1017. Had the Legislature intended to include delivery by a voter's authorized representative in section 1007, it is reasonable to conclude it would have expressly included such a provision. (Cf. Sater v. Superior Court (1975) 15 Cal.3d 230, 237-238; Estate of Tkachuk (1977) 73 Cal.App.3d 14, 18.)

While we find all of such 15 ballots to be tainted and illegally cast, we particularly emphasize that there is no warrant whatever in law for permitting such a practice where -- as in some instances on the present record -- the request for mailing to an address different from the voter's address was initiated, not by the voter, but by EPACCI officials.

We arrive at our conclusion fully recognizing that, as found by the trial court, these 15 ballots reached the intended

voters. Nevertheless, a procedure whereby a campaign worker designates himself the initial recipient of the ballot, thus also appointing himself as the person who will deliver it to the voter, is in our view fraught with unacceptable possibilities for abuse, as well as being literally violative of the statutes and decisional law. (Elections Code, § 1007; Scott v. Kenyon, supra, 16 Cal.2d 197, 201; Cal. Const., art II, § 7.)

Reluctant though we are to nullify the decision of any voter, we have concluded that the integrity of the electoral process has been so severely compromised in the present circumstances as to require a declaration that certain of the challenged absentee ballots are void. (Scott v. Kenyon, supra, 16 Cal.2d 197, 204; Fair v. Hernandez (1981) 116 Cal.App.3d 868, 880.)

We turn briefly to respondent county's essentially protective cross-appeal contesting the invalidation of ballots cast by Frenchia Gibsen and Robert Long by reason of their removal beyond the geographical limits of the proposed city within 38 days of the election. We conclude that the removal of the two voters from their registered residences did not deprive them of their entitlement to vote in the former precinct (see Elec. Code, § 217), and that the trial court upon remand shall count these two votes in computing the election result.

Finally, for the benefit of the trial court upon remand, we recapitulate the categories of such tainted ballots:

(a) All those ballots -- 46 in number -- hand

delivered by third parties to the County Clerk in violation of Elections Code section 1013;

(b) All ballots cast by or with the assistance and in the presence of EPACCI campaign workers;

(c) The 15 ballots mailed to Joseph Goodwill and delivered by him to voters in contravention of the terms of Elections Code section 1007.[10]

While all of such ballots must be invalidated, we are unable to discern with certainty from the record whether such tainted ballots were cast for or against incorporation, and we note that some ballots are tainted by more than one violation of our election laws. We thus reverse the judgment of the trial court (Canales v. City of Alviso, supra, 3 Cal.3d 118, 128) and remand the case to the trial court for the purpose of identifying and determining which ballots shall be voided, followed by a declaration of the results of the election discounting such ballots, all in accordance with the views expressed herein.

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10/ We find no merit in appellant's remaining challenges, centering upon non-residency and different addresses on the ballot envelope.

CERTIFIED FOR PUBLICATION.

Newsom, J.

Wilks v. Mouton -- A024878

I fully concur in the reasoning and conclusion of the lead opinion. That opinion appropriately recognizes that certain absentee ballots in the present case should be voided even in the absence of proof of actual fraud or tampering, inasmuch as the record establishes that substantial opportunity for tampering was presented. Precedents such as Scott v. Kenyon (1940) 16 Cal.2d 197 and Fair v. Hernandez (1982) 138 Cal.App.3d 578 reached similar results under similar circumstances.

I view the present statutory plan for absentee voter registration and voting as so broadly written that it is permeated with opportunities for abuse. The plan presents an open and easy invitation for fraud or tampering with the vote of the individual absentee voter. It also invites any determined but unscrupulous person or small group of persons literally to swing his or their way any relatively close election, contrary to the true intent of the majority of the electorate.

And, just as none of the reported decisions interpreting Elections Code section 1013 and related provisions have found actual fraud or tampering, it is likely no court

will ever make such a detemination. Either may well have occurred in many challenged elections or in only a few or in none. The statutory scheme, however, is such that proof of fraud or tampering is virtually impossible to produce. The open invitation is so open that only the most clumsy manipulator is likely to stumble and fail in his effort to control the result of a close election.

Virtually everything we fault certain candidates and the campaign committee in the present case as having done without proof of actual fraud or tampering, could have been done by them (or others) in slightly different ways and without detection. Had they done so, even in a manner constituting actual fraud or tampering, appellants would have been unaware of the abuse and this case would not be before us.

Very likely worse has been done in past elections without detection or challenge. Very likely worse will be done in future elections without detection or challenge.

I consider portions of Elections Code sections 1006 and 1013 so subject to abuse as to be potentially unconstitutional as inherently violative of the requirement that "[v]oting shall be secret." (Cal. Const., art. II, § 6.) Protection for the individual absentee voter and the election process merits a legislative review and statutory modification to harmonize better with the worthy goal of encouragement of greater voter participation. Statutory revisions should reduce the frequency of successive lawsuits leading to appellate

decisions voiding absentee ballots under circumstances such as those in the present case. More importantly, such changes should reduce the potential for the commission of abusive acts which go undetected and unchallenged, leading to dishonest election results.

Holmdahl, J.

WILKS v. MOUTON
AO 24878

Dissenting Opinion

I dissent.

Following a dutiful recital of settled principles governing review of a challenged election contest, the lead opinion then, with mechanical precision, manifests an insouciant disregard of those fundamental precepts designed to uphold rather than vitiate a fairly, though imperfectly, conducted election. While expressing commendable concern for the sanctity of the cherished right of suffrage, the lead opinion, through its unbending demand for strict compliance with the technical niceties which literally permeate the absentee ballot law, then proceeds to disenfranchise the very voters that law was designed to benefit. By slavish insistence on absolute obedience to otherwise imprecise and unclear procedural requirements, it conveniently ignores long-accepted practices deeply rooted in the existing absentee ballot law. In so doing, free election is once again denied to thousands of citizens of an economically distressed and isolated area who wish only to form their own community and to have a voice in shaping their own destiny.

Why should this court, in the face of legally supported findings upholding the electoral will, nullify that popular expression under a banner of election purity? Our duty is to validate, not invalidate, a contested election whenever

possible (Rideout v. City of Los Angeles (1921) 185 Cal. 426, 430) in the absence of manifest illegality preventing a fair expression of the popular will (Canales v. City of Alviso (1970) 3 Cal.3d 118, 127.) In discharging that mandate, our function is limited to review, not retrial of conflicting evidence upon which the challenged judgment is based. It is of little comfort to the needy absentee voter that in order to preserve the ballot right, the help provided in exercising that right strips the ballot cast of any authenticity, a truly ironic application of the Catch 22 riddle. Thoughtful concern for the free ballot properly condemns any act of "heavy-handed" or manipulative conduct; but whether such odious events occurred was for the trial judge to determine and not this court. So long as substantial compliance with the election laws is demonstrated and the election otherwise fairly conducted, as shown, we should not shirk our responsibility to validate the popular expression simply because of the happenstance of some irregularities under the special circumstances which existed.

A close inspection of the record impels me to cast my vote in favor of the absentee voter. My reasons follow.

I

Appellants challenged some 45 absentee ballots because the constitutional guarantee of secrecy (Cal. Const., art. II, § 7) was compromised through the presence of a third party who actually punched the ballot card or otherwise aided the voter in punching the ballot card. This deliberate intrusion into

the secrecy of the absentee ballot by East Palo Alto Citizens Committee on Incorporation (EPACCI) leaders, it is argued, constituted a wrongful interference with the secrecy of voting. (See Elec. Code, § 29645.)[1/]

As the lead opinion acknowledges, much of the testimony presented during the lengthy and bitterly contested trial was sharply conflicting, revealing faulty recollections, inconsistencies, some factual misstatements and even attempts to intimidate witnesses. (The trial court determined that actual harassment by incorporation opponents, which prompted officially registered complaints, and consternation over the polarizing litigation proceedings adversely affected several of the subpoened witnesses.) The evidence indicated that EPACCI conducted an aggressive campaign in support of the incorporation measure: it provided voters with absentee ballot application forms and collected completed forms at its headquarters for delivery to the county election officials. The EPACCI leaders actively aided many voters who required assistance during the balloting process conducted in the privacy of their homes and residences: some of them were either elderly, physically disabled, illiterate or unfamiliar with the ballot form and instructions.[2/] For the most part,

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1/ Unless otherwise indicated, all statutory references are to the Elections Code.

2/ The computerized ballot card, containing approximately 228 perforated selection markings, reflected neither the ballot measure itself nor names of the candidates. Use of the ballot card in voting on the incorporation measure and the candidates for office required the voter to compare the sample ballot card with the official ballot card in order to punch out his or her choices.

the assistance given related to the use of the computer ballot card and accompanying instructions; in some instances the campaign worker actually punched the ballot card at the request and direction of the voter.

Joseph Goodwill, a respected community leader, distributed approximately 79 of the absentee ballot applications to friends and relatives followed by visits to their homes to inquire whether the ballot had been received and completed. In some cases, Mr. Goodwill assisted in completing the ballot at the request and in the presence of the voter. He delivered 30 of the completed ballots to EPACCI headquarters which were thereafter delivered to the county clerk by another member, Onyango Bashir, a deputized county clerk for purposes of registration and assistance in the conduct of the elections.

Mrs. Carmaleit Oakes, the 77-year-old chairperson of EPACCI, performed similar followup visits to 5 voters. Her offer to assist in the completion of the unfamiliar ballot card was accepted by at least 4 of the voters. Mrs. Oakes, also a deputized county clerk, then delivered the completed ballots to EPACCI headquarters.

Respondent Satterwhite assisted 6 voters who resided in Runnymede Gardens, a subsidized residential facility for the elderly. At the request of its resident manager, Mr. Bradley Davis, Mr. Satterwhite met with those residents who requested help in completing the ballot forms. Mr. Satterwhite punched the ballot cards at the request of 4 of the voters who were

physically unable to do so; the cards were punched in the presence of the voters and in accordance with their directions. Mr. Davis provided similar assistance at the request of 2 other disabled residents. All of the completed ballots were mailed to the county clerk by Mr. Davis.

Based upon such evidence, the trial court found that the assistance provided in completing the ballots in the voters' presence was made with the voters' understanding and consent and correctly reflected the voters' decision on the incorporation measure and choice of candidates. The trial court further found that in each instance the completed ballot was placed in the ballot envelope which was thereafter signed by the voter and that no one had tampered with any of these ballots. In accordance with the detailed findings made, the trial court concluded that each of the challenged voters who obtained assistance during the balloting process voluntarily waived the constitutional right to a secret ballot.

Relying chiefly on Scott v. Kenyon (1940) 16 Cal.2d 197, appellants make the argument - to which the plurality submits - that the intrusion into the secrecy of the balloting process requires the ballots to be voided even in the absence of actual tampering. (Cf. Fair v. Hernandez (1982) 138 Cal.App.3d 578, 583 [Fair II].) Moreover, it is asserted, the conduct of the EPACCI leaders in visiting the voters' residences and providing assistance in casting the absentee ballots was tantamount to criminal interference. (See § 29645.) I disagree on both counts.

In Scott, actual misconduct occurred in the counting of the absentee ballots and actual tampering with the ballot box was shown, leading the court to conclude that "practically every applicable provision of the law, including every provision designed to preserve the secrecy of the ballot was broken." (Scott v. Kenyon, supra, 16 Cal.2d at p. 201.) In contrast, the intrusion upon the voter's secrecy consisted of the campaign workers' presence in assisting the voter at the latter's consensual request. In each case the trial court found upon substantial evidence that the voters consented to the presence of such third parties in completing the ballot, that no tampering occurred and ultimately determined that the right of secrecy was waived.3/ Under such circumstances it cannot be said that the campaign workers' conduct resulted in wrongful interference with the voter's exercise of his or her franchise.

Cases involving analogous factual settings have rejected a similar secrecy argument. In Beatie v. Davila (1982) 132 Cal.App.3d 424 [mailing of an absentee ballot by a third party], the court sustained the validity of some 300

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3/ I reject appellants' contention that the burden of proof of waiver in an election contest rests upon the contestees. (See generally City of Ukiah v. Fones (1966) 64 Cal.2d 104.) The burden of producing evidence as to a particular fact, in this case, illegal voting, rested initially on appellants. (See Evid. Code, § 550.) But assuming, arguendo, that some showing was required on the part of respondents as contestees, ample evidence of waiver existed to support the trial court's finding.

absentee ballots mailed by campaign workers to election officials against a claim of secrecy intrusion grounded upon the statutory requirement that the absent voter return the marked ballot "by mail or in person." (§ 1013.) The court reasoned, in part, that "The problem with appellant's secrecy argument in the present case is two-fold: First, unlike Scott v. Kenyon, supra, 16 Cal.2d 197, there is no proof that the secrecy of any absentee voter's ballot was intruded upon after the ballot was taken from the voter. The only time it could be said that the voter's right to secrecy was compromised was when the voter marked his ballot in the presence of the campaign representative before placing it in the identification envelope. However, if a voter wishes to disclose his marked ballot to someone else, be it a family member, friend or a candidate's representative, he should be permitted to do so. To hold otherwise would cast a pall on absentee voting. We suspect that many absentee voters disclose their marked ballots to other persons before placing them in the identification envelope for return to the elections official or the polling place. Such a voluntary disclosure cannot be deemed to violate the constitutional mandate." (Id., 132 Cal.App.3d at pp. 430-431, italics added.)

In Fair v. Hernandez (1981) 116 Cal.App.3d 868, cert. den., 454 U.S. 941 [Fair I], the court similarly upheld two ballots cast with the assistance of the voter's relative "in the privacy of their common home," and only in the presence of

each other, when the voter was partially physically disabled," resolving any conflict in the evidence in favor of the trial court's findings. (Id., 116 Cal.App.3d at pp. 878-879.)

To reach any contrary conclusion would effectively result in the arbitrary nullification of the fundamental right to vote exercised through the office of an absentee ballot. (Cf. Shinn v. Heusner (1949) 91 Cal.App.2d 248, 252.) The recent decision of Peterson v. City of San Diego (1983) 34 Cal.3d 225 [upholding a special local election conducted by mail ballot] is instructive. In sustaining the provisions permitting mail balloting as consonant with the constitutional requirement for secrecy, the court emphasized the widespread use of absentee ballots and mail ballot elections in securing active citizen participation in the maintenance of representative government. (Id., at pp. 229-231.) In the context of the challenged procedure, the court declared, "We are satisfied that the secrecy provision of our Constitution was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting" while simultaneously underscoring other statutory enactments protecting the integrity of elections and the right to a secret ballot. (Id., at pp. 230-231).

Although I share the concerns expressed in the concurring opinion relating to the predictable role of special interest groups where "important" elections are conducted by

means which permit persons other than the voter to observe the ballot as it is cast" (id., 34 Cal.3d at p. 232, conc. opn. of Grodin, J.), the statutory scheme authorizing absentee balloting must nevertheless be "liberally construed in favor of the absent voter" (§ 1001) in order to assure the precious right of suffrage. Since the Legislature has provided no guidance concerning the absent voter's need for assistance during the balloting process within the privacy of the voter's home, I cannot conclude as a matter of law that the use of assistance in the manner shown herein should automatically nullify the voter's expression of choice.[4/] Where the record demonstrates neither intimidation, coercion nor actual tampering with the voting process, as found herein, no justification exists to disenfranchise needy voters who requested and received assistance in casting their ballots. Although I confess to a similar degree of uneasiness due to the potential for mischief (see Beatie v. Davila, supra, 132 Cal.App.3d 424 at p. 433), especially where the assistance is provided by a candidate for elective office, the mere possibility of wrongdoing in connection with the consensual intrusion into the secrecy of absentee voting - without more - cannot suffice to void either the ballot or the election. (Id., 132 Cal.App.3d 424 at p. 432; Shinn v. Heusner, supra, 91 Cal.App.2d 248, 252.)

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4/ Compare sections 14234 through 14236 providing for assistance of the disabled voter at the polling place.

To repeat, in recognition of the primacy of the right to vote in a free society, it is our duty to validate the election, if possible, in the absence of manifest illegality. (Scott v. Kenyon, supra, 16 Cal.2d at p. 202; Rideout v. City of Los Angeles, supra, 185 Cal. at p. 430.) Since the findings made upholding the challenged ballots and election are supported by substantial though conflicting evidence, they may not be disturbed on appeal. (Keane v. Smith (1971) 4 Cal.3d 932, 939; Bowers v. Bernards (1984) 150 Cal.App.3d 870.)

II

Appellants' challenge to 15 ballots mailed to Mr. Goodwill and delivered by him to the voters (on the grounds of noncompliance with section 1007) fails to withstand a fair analysis of the relevant statutes as applied by the election officials.

The absentee ballot available to any registered voter (§ 1003) is initiated by a written application "signed by the applicant [showing] his place of residence" (§ 1002). Under section 1006 the printed application must contain spaces for prescribed information including, inter alia, "(a) The printed name and residence address of the voter as it appears on the affidavit of registration. [¶] (b) The address to which the ballot is to be mailed. [and] [¶] (c) The voter's signature." Upon timely receipt of the signed application, "the elections official should determine if the signature and residence address on the ballot application appear to be the

same as that on the original affidavit of registration. The official may make this signature check upon receiving the voted ballot, but the signature must be compared before the absent voter ballot is canvassed. . . ." (§ 1007, subd. (a).) The statute further provides that in determining the similarity between the signature and residence address shown on the application with that on the original affidavit of registration, the official "may use the duplicate file of affidavits . . . or the facsimiles of voter's signatures" consistent with legal requirements. (§ 1007, final unnumbered paragraph.)[5/]

The interrelated statutory provisions distinguishing a voter's residence and mailing addresses evidence a legislative intention that the voter is free to elect to receive the ballot materials at an address other than his actual residence. The practice followed by the election officials in mailing the applications to Mr. Goodwill is not prohibited by the statutory mandate that the ballot be delivered by the official "by mail or in person." (§ 1007.) Indeed, the practice of soliciting absentee ballots is of such long standing (in this state and elsewhere) as to be a matter of judicial notice. As noted by

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5/ Section 1015 provides a similar method for comparing the voter's signature on the returned absentee ballot envelope before deposit into the ballot box utilizing either the original or duplicate affidavit of registration, a facsimile of the voter's signature or the previously compared signature on the ballot application in making the "signature check."

the Beatie court (quoting Bolinger, Cal. Election Law During the Sixties and Seventies: Liberalization and Centralization, 28C West's Ann. Elec. Code (1977 ed.) pp. 121-122): "'This practice began at least as early as 1958 with mass mailings containing absentee ballot applications (or requests for applications) being sent by candidates to voters of their party. Sometimes the campaign would arrange to have absentee ballot applications mailed to the campaign headquarters rather than directly to the election officials in order to obtain information on who would be voting by absentee ballot. This could result in serious delays in transmitting the applications to the election officials. In addition, there were charges that some campaign-generated applications were deliberately not delivered to the election officials in the case of voters who were apparently supporting the political opposition. [¶] 'The Legislature did little to regulate these practices.'" (Beatie v. Davila, supra, 132 Cal.App.3d at pp. 432-433.)

In the absence of remedial legislation restricting such widespread practice,[6/] there is no basis in law or in logic to invalidate an otherwise authenticated completed ballot simply because of the established solicitation technique

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6/ The June 11, 1984, issue of the respected Los Angeles Daily Journal provides a current appraisal of the popular use of absentee ballots in California elections and opposing views on needed reform. (Cox, Absentee Ballot Popularity Sparks Calls for Reform, Los Angeles Daily Journal (June 11, 1984) page 1, column 1.)

employed by the campaign worker.[7/] Since the trial court expressly found that the challenged voters were entitled to receive the absentee ballots and that the ballots reached the voters to whom they were addressed, the directory mode of delivery in

no wise affected the validity of the ballot which was cast or the election result. Those findings are adequately supported by the evidence.

III

Appellants also questioned the validity of some 46 completed ballots which were hand delivered by Mr. Goodwill, Mr. Davis and Mrs. Oakes to EPACCI campaign headquarters. The trial court found that these completed ballots were thereafter delivered by Mr. Bashir to election officials between the period May 9, 1983 through May 24, 1983, by placing said ballots in the ballot box provided by the election officials. On May 24, 1983, an election official (for the first time) informed Mr. Bashir that absentee ballots could only be delivered by the voter personally or by mail; Mr. Bashir then

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7/ I remain unpersuaded by the single authority upon which appellants apparently rely. (62 Ops.Atty.Gen. 439 (1979).) The legislative exemption providing for ballot delivery to "any authorized representative" (§ 1017) is peculiarly tailored to accomodate late absentee voting by hospitalized or physically handicapped voters and bears little relationship, if any, to the normal mailing process during the prescribed time. While arguably a ballot personally delivered by the official must be handed directly to the voter, no similar requirement exists where, as shown herein, the absentee ballot was mailed to the address provided in the ballot application and the completed ballot thereafter authenticated as required.

stamped several sealed ballot envelopes and placed them in the United States mail, a practice he consistently followed thereafter. Appellants additionally challenge the ballot cast by Lanette Cody which had been delivered to an election official by the voter's sister.

It bears emphasis that appellants did not challenge the factual findings as made but instead attacked the related conclusions of law that no legally recognizable distinction exists between ballots mailed and those delivered by a third party in accordance with previously accepted practices of the election officials. Basing their argument on language contained in both Fair decisions, it is appellants' thesis - to which the plurality subscribes - that the ballots must be delivered to election officials only by the voter "in person" (§ 1013; Fair v. Hernandez, supra, 138 Cal.App.3d 578, at pp. 582-583); that in light of such statutory interpretation, the election officials acted improperly in accepting the delivered ballots. Again, I disagree.

First, it is noteworthy that the bulk of the challenged ballots were actually delivered by a deputized registrar. Although Mr. Bashir was neither expressly authorized nor instructed by election officials to physically return the completed ballots, once informed by election officials that he could no longer deliver ballots by hand, Mr. Bashir

In view of such substantial compliance with the statutory requirements, the ballots were properly accepted and tallied by the election officials.

In conclusion, I would follow settled principles governing appeals in general and election contests in particular and uphold the judgment based upon findings adequately supported by substantial evidence. Appellants' burden as contestant to show by clear and convincing evidence that the election was conducted unfairly has simply not been met, as the trial court expressly determined. To rest a decision on the technical distinctions urged by appellants effectively subverts the finality of a fairly conducted election and substitutes the courtroom for the ballot box. The erosion of the fundamental right to vote and the resulting chaos in local government are too high a price to pay for intransigent adherence to the largely directory provisions of the absentee ballot law. The perceived defects in the existing absentee ballot process should be remedied by the Legislature, not by judicial fiat. Since the record before us clearly demonstrates that the election was fairly conducted in substantial compliance with the essential requirements of the absentee voters' law as it now exists, I would affirm the judgment validating the election.

Racanelli, P. J.