

[J-114-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

VIVIETTE APPLEWHITE; WILOLA : No. 71 MAP 2012
SHINHOLSTER LEE; GROVER :
FREELAND; GLORIA CUTTINO; NADINE : Appeal from the Order of the
MARSH; DOROTHY BARKSDALE; BEA : Commonwealth Court dated 8/15/12 at
BOOKLER; JOYCE BLOCK; HENRIETTA : No. 330 MD 2012, denying Appellant's
KAY DICKERSON; DEVRA MIREL : Application for Preliminary Injunction
("ASHER") SCHOR; THE LEAGUE OF :
WOMEN VOTERS OF PENNSYLVANIA; :
NATIONAL ASSOCIATION FOR THE : ARGUED: September 13, 2012
ADVANCEMENT OF COLORED :
PEOPLE; PENNSYLVANIA STATE :
CONFERENCE; HOMELESS ADVOCACY :
PROJECT :

v.

THE COMMONWEALTH OF :
PENNSYLVANIA; THOMAS W. :
CORBETT, IN HIS CAPACITY AS :
GOVERNOR; CAROLE AICHELE, IN HER :
CAPACITY AS SECRETARY OF THE :
COMMONWEALTH :

APPEAL OF: VIVIETTE APPLEWHITE; :
WILOLA SHINHOLSTER LEE; GLORIA :
CUTTINO; NADINE MARSH; BEA :
BOOKLER; JOYCE BLOCK; HENRIETTA :
KAY DICKERSON; DEVRA MIREL :
("ASHER") SCHOR; THE LEAGUE OF :
WOMEN VOTERS OF PENNSYLVANIA; :
NATIONAL ASSOCIATION FOR THE :
ADVANCEMENT OF COLORED :
PEOPLE, PENNSYLVANIA STATE :
CONFERENCE; HOMELESS ADVOCACY :
PROJECT :

ORDER

PER CURIAM

DECIDED: September 18, 2012

Before this Court is a direct appeal from a single-judge order of the Commonwealth Court denying preliminary injunctive relief to various individuals and organizations who filed a Petition for Review challenging the constitutional validity of Act 18 of 2012, also known as the Voter ID Law. Appellate courts review an order granting or denying a preliminary injunction for an abuse of discretion. See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1000 (Pa. 2003).

The Declaration of Rights set forth in the Pennsylvania Constitution prescribes that elections must be free and equal and “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. 1, § 5. The parties to this litigation have agreed that the right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one.

The Voter ID Law was signed into law by the Governor of Pennsylvania in March of this year. For the General Election this November, and for succeeding elections, the legislation generally requires presentation of a photo identification card as a prerequisite to the casting of ballots by most registered voters.

In this regard, the Law contemplates that the primary form of photo identification to be used by voters is a Department of Transportation (PennDOT) driver’s license or the non-driver equivalent provided under Section 1510(b) of the Vehicle Code, 75 Pa.C.S. § 1510(b). See N.T. at 770-71. Furthermore, the Law specifically requires that – notwithstanding provisions of Section 1510(b) relating to the issuance and content of the cards – PennDOT shall issue them at no cost:

to any registered elector who has made application therefor and has included with the completed application a statement signed by the elector

declaring under oath or affirmation that the elector does not possess proof of identification . . . and requires proof of identification for voting purposes.

Act of Mar. 14, 2012, P.L. 195, No. 18, § 2; see 25 P.S. § 2626(b). As such, the Law establishes a policy of liberal access to Section 1510(b) identification cards.

However, as implementation of the Law has proceeded, PennDOT – apparently for good reason – has refused to allow such liberal access. Instead, the Department continues to vet applicants for Section 1510(b) cards through an identification process that Commonwealth officials appear to acknowledge is a rigorous one. See N.T. at 690, 994. Generally, the process requires the applicant to present a birth certificate with a raised seal (or a document considered to be an equivalent), a social security card, and two forms of documentation showing current residency. See N.T. at 467, 690, 793.¹ The reason why PennDOT will not implement the Law as written is that the Section 1510(b) driver’s license equivalent is a secure form of identification, which may be used, for example, to board commercial aircraft. See N.T. at 699-700, 728-30, 780.

The Department of State has realized, and the Commonwealth parties have candidly conceded, that the Law is not being implemented according to its terms. See, e.g., N.T. at 1010 (testimony of the Secretary of the Commonwealth that “[t]he law does not require those kinds of – the kind of identification that is now required by PennDOT for PennDOT IDs, and it’s the Homeland Security issues”). Furthermore, both state agencies involved appreciate that some registered voters have been and will be unable to comply with the requirements maintained by PennDOT to obtain an identification card under Section 1510(b). See N.T. at 713 (testimony from a deputy secretary for PennDOT that “at the end of the day there will be people who will not be able to qualify for a driver’s license or a PennDOT ID card”), 749, 772, 810, 995. It is also clear to

¹ Applicants whose information is already in PennDOT’s database may be exempted from these requirements. See N.T. at 466.

state officials that, if the Law is enforced in a manner that prevents qualified and eligible electors from voting, the integrity of the upcoming General Election will be impaired. See, e.g., N.T. at 480.

Faced with the above circumstances and the present litigation asserting that the Law will impinge on the right of suffrage, representatives of the state agencies have testified under oath that they are in the process of implementing several remedial measures on an expedited basis. Of these, the primary avenue lies in the issuance of a new, non-secure Department of State identification card, which is to be made available at PennDOT driver license centers. However, preparations for the issuance of Department of State identification cards were still underway as of the time of the evidentiary hearing in the Commonwealth Court in this case, and the cards were not slated to be made available until approximately two months before the November election. N.T. at 534, 555, 706, 784, 993. Moreover, still contrary to the Law's liberal access requirement, applicants for a Department of State identification card may be initially vetted through the rigorous application process for a secure PennDOT identification card before being considered for a Department of State card, the latter of which is considered to be only a "safety net." N.T. at 709, 711, 791-95 (testimony from the Commissioner of the Bureau of Commissions, Elections and Legislation that applicants who are unable to procure a PennDOT identification card will be given a telephone number to contact the Department of State to begin the process of obtaining the alternative card); see also N.T. at 993.

In the above landscape, Appellants have asserted a facial constitutional challenge to the Law and seek to preliminarily enjoin its implementation. They contend, most particularly, that a number of qualified members of the Pennsylvania voting public will be disenfranchised in the upcoming General Election, because – given their

personal circumstances and the limitations associated with the infrastructure through which the Commonwealth is issuing identification cards – these voters will not have had an adequate opportunity to become educated about the Law’s requirements and obtain the necessary identification cards. While there is a debate over the number of affected voters, given the substantial overlap between voter rolls and PennDOT’s existing ID driver/cardholder database, it is readily understood that a minority of the population is affected by the access issue. Nevertheless, there is little disagreement with Appellants’ observation that the population involved includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged).

On its review, the Commonwealth Court has made a predictive judgment that the Commonwealth’s efforts to educate the voting public, coupled with the remedial efforts being made to compensate for the constraints on the issuance of a PennDOT identification card, will ultimately be sufficient to forestall the possibility of disenfranchisement. This judgment runs through the Commonwealth Court’s opinion, touching on all material elements of the legal analysis by which the court determined that Appellants are not entitled to the relief they seek.

As a final element of the background, at oral argument before this Court, counsel for Appellants acknowledged that there is no constitutional impediment to the Commonwealth’s implementation of a voter identification requirement, at least in the abstract. Given reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time allowed for implementation, the Appellants apparently would accept that the State may require the presentation of an identification card as a precondition to casting a ballot. The gravamen of their challenge at this juncture lies solely in the implementation.

Upon review, we find that the disconnect between what the Law prescribes and how it is being implemented has created a number of conceptual difficulties in addressing the legal issues raised. Initially, the focus on short-term implementation, which has become necessary given that critical terms of the statute have themselves become irrelevant, is in tension with the framing of Appellants' challenge to the Law as a facial one (or one contesting the Law's application across the widest range of circumstances). In this regard, however, we agree with Appellants' essential position that if a statute violates constitutional norms in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future. Indeed, the most judicious remedy, in such a circumstance, is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate.

Overall, we are confronted with an ambitious effort on the part of the General Assembly to bring the new identification procedure into effect within a relatively short timeframe and an implementation process which has by no means been seamless in light of the serious operational constraints faced by the executive branch. Given this state of affairs, we are not satisfied with a mere predictive judgment based primarily on the assurances of government officials, even though we have no doubt they are proceeding in good faith.

Thus, we will return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available. In this regard, the court is to consider whether the procedures being used for deployment of the cards comport with the requirement of liberal access which the General Assembly attached to the issuance of PennDOT identification cards. If they do not, or if the

Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement for purposes of the upcoming election, that court is obliged to enter a preliminary injunction.

Accordingly, the order of the Commonwealth Court is VACATED, and the matter is returned to the Commonwealth Court for further proceedings consistent with this Order. The Commonwealth Court is to file its supplemental opinion on or before October 2, 2012. Any further appeals will be administered on an expedited basis.

Jurisdiction is relinquished.

Madame Justice Todd files a Dissenting Statement which Mr. Justice McCaffery joins.

Mr. Justice McCaffery files a Dissenting Statement which Madame Justice Todd joins.