

SUPREME COURT OF LOUISIANA

No. 99-C-3605

DAVID G. ADKINS

Versus

LESTER SHIELDS "BUDDY" HUCKABAY, III, SHERIFF;
W. FOX MCKEITHEN, HONORABLE SECRETARY OF STATE;
THE HONORABLE JERRY FOWLER, COMMISSIONER OF ELECTIONS

LEMMON, J., Concurring

I agree with the majority that challenges to absentee votes should be judged on the basis of standard of substantial compliance with the statutes. I also agree that the majority properly disqualified the mail-in ballot of Josie Mae Fowler.¹ However, I do not entirely agree with the majority's reasoning as to the four ballots that were hand-delivered by the registrar and disagree as to disqualifying two of those votes.

La. Rev. Stat. 18:1307 requires a person, who is qualified to vote by mail and desires to do so, to make application to the registrar of voters by a letter, over the voter's signatures, that may be delivered to the registrar by any means. Such an application must set forth certain information and must be received by the registrar not later than ninety-six hours before the close of the polls for the election (in this case, not later than 8:00 p.m. on Tuesday, November 16, 1999).

I disagree with the theory of the trial court, apparently adopted by the majority

¹Donald Browne (plaintiff's representative) timely (during the counting of the absentee ballots) challenged all ballots that were not properly notarized or witnessed by two persons. The Board of Election Supervisors invalidated forty-three mail-in ballots that were not properly executed, but denied Browne's request to see the other mail-in ballots. Therefore, Browne did not waive his objection to Fowler's ballot, because he was not allowed to inspect that ballot during the counting, as the trial judge at least implicitly found. The court of appeal agreed, concluding that Browne's objections were sufficient to encompass Fowler's mail-in ballot.

of this court, that the registrar, after mailing a ballot to a voter in response to a timely and otherwise proper application to vote by mail and after being notified that the voter has not received the ballot,² cannot validly hand-deliver the ballot to the voter. At least when the registrar simply leaves the ballot with the voter or someone in the voter's household and the voter thereafter casts his or her vote and returns the ballot or causes the ballot to be returned to the registrar just as if the ballot had been received by the voter by mail, hand-delivery of the ballot by the registrar should not automatically invalidate the ballot.³ Instead, each case of hand-delivered ballots should be analyzed separately. Of the four hand-delivered ballots here at issue, only those of Claude Pate and Elvie Robinson should be disqualified.

Claude Pate

Claude Pate requested a ballot to vote by mail in the primary election only; she never made a written request to vote by mail in the general election. Therefore, even though Pate's relative made a telephone request of the registrar for a general election ballot, the ballot that she received and voted cannot be counted, not because the registrar hand-delivered the ballot, but because the voter did not make a written request that included the information required by La. Rev. Stat. 18:1307A.⁴

²In my view, it is irrelevant whether the notice to the registrar is provided by a candidate or by the voter who did not receive the ballot or by a third person. I see no difference between a candidate's notifying the registrar and the voter's doing so at the request of a candidate whom the voter supports.

³Hand-delivery of mail-in ballots is fraught with potential for abuse. However, the disadvantage of hand-delivery under the circumstances of this case must be balanced against the problems created by the non-delivery of the ballot to the voter who properly and timely requested a ballot.

⁴The court of appeal pretermitted a decision on Pate's ballot as unnecessary after determining that all of the ballots, except the two on which decision was pretermitted, were valid.

Elvie Robinson

Elvie Robinson, who was homebound, requested a ballot to vote by mail in the primary election only; although the Code permits a voter to request a mail-in ballot for the general election at the same time that the voter requests a primary election ballot, Robinson did not do so. Nevertheless, the registrar also mailed her a ballot on November 9 for the November 20 general election, but the ballot contained the wrong police jury district, and Robinson's son returned the incorrect ballot. Because there was insufficient time to mail Robinson a correct ballot, the registrar hand-delivered the correct ballot to Robinson on November 18. After the registrar left, Robinson voted the ballot and had her relative return the ballot to the registrar's office.

The court of appeal reasoned that Robinson's vote was valid because Robinson likely would have requested a general election ballot if the registrar had not already sent her one by mistake. The court of appeal bolstered that conclusion by noting that "Ms. Robinson's return of the improper ballots may be viewed a request for an absentee ballot for the general election, and any untimeliness of that request is minimized by the fact that the whole situation was the fault of the registrar and not of Ms. Robinson." 33,593 at p. 13 (La. App. 2d Cir. 12/23/99), ____ So. 2d ____.

I would agree with the court of appeal that Robinson's return of the improper ballot might be viewed under appropriate circumstances as a request for a general election ballot. However, there were several deficiencies.

First, the Code requires a written request, and an unwritten, implied request is not sufficient. This record contains no evidence of a writing over Robinson's signature, as required by La. Rev. Stat. 18:1307A, that can be construed as an application to vote by mail. Moreover, the implied "application," based on the return of the improper ballot, does not contain any of the other information required by Section 1307A, and

Section 1307E prohibits the registrar from “send[ing] an absentee ballot to an applicant whose application for an absentee ballot does not meet the requirements of Subsection A of this Section.” Finally, it does not appear that the implied “application” was received by the registrar before 8:00 p.m. on November 16, the deadline for making a request to vote by mail.

In addition to these deficiencies, I distinguish Pate’s and Robinson’s votes from those of Jocille Kellogg⁵ and Marvin Green.⁶ Kellogg and Green did everything necessary to validly vote by mail, and the mistake of the registrar or the mailman or someone else caused the last minute situation that the registrar attempted to rectify. However, it was Pate, and not the registrar, who caused her last minute situation by not taking the proper steps to request a mail-in ballot for the general election.

As to Robinson, the dissenters and I disagree because, as I understand their

⁵Jocille Kellogg filed a proper written application to vote by mail in the general election, and the application was received timely by the registrar. Upon receiving notice that Kellogg had not received the ballot, the registrar hand-delivered a ballot to Kellogg on November 18. After the registrar left, Kellogg voted the ballot and had her relative deliver the ballot to the registrar.

I agree with the court of appeal that the registrar’s action in hand-delivering a properly and timely requested ballot, under the circumstances, did not affect the sanctity of the ballot or the integrity of the election. As that court noted, the registrar was attempting to rectify a mistake attributable to someone other than Kellogg and to permit Kellogg to exercise her constitutional right to vote in accordance with her proper and timely request.

⁶Marvin Green properly delivered an application to vote by mail in the general election, and the registrar received the request timely. When the registrar was notified that Green had not received the requested ballot, she hand-delivered the ballot to Green on November 18. Green voted the ballot in the presence of the registrar. The registrar kept the ballots in her car overnight, and the next day the registrar executed the flap portion of the ballot and marked the ballot as voted on November 19 in the registrar’s presence.

While it was unwise for the registrar to remain at Green’s home while he voted and to take the ballot back to her office and mark it as voted the next day, the registrar acted in good faith, and her actions should not redound to the detriment of the voter who properly and timely requested a ballot and then voted it properly.

position, the registrar's gratuitously sending her a general election ballot misled her into not making a timely written application. I disagree because Robinson had every opportunity under the Code to request a general election ballot along with her request for a special election ballot. She did not request a general election ballot then and still had not done so when she received the improper ballot sometime (not shown in the record) after it was mailed on November 9. Because November 16 was the deadline for the registrar's receipt of a proper written request, I cannot conclude that the registrar's mailing of an unrequested ballot misled Robinson into not making a proper written request that she otherwise would have validly made.

In summary, Robinson's absentee ballot did not substantially comply with the Code and was properly disqualified because of her own inaction, which was not substantially affected by any action or inaction on the part of the registrar.

When the votes of Fowler, Pate and Robinson are disqualified, one cannot determine the result of the general election, and a new election must be held.