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RE: 2020AP164-LV James Sullivan v. Wisconsin Elections
Commission (L.C. # 2020CV573)



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January 27, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2020AP164-LV

James Sullivan v. Wisconsin Elections Commission
(L.C. # 2020CV573)

Before Kessler, Dugan, and Donald, JJ.

Jim Sullivan and Bryan Kennedy, by counsel, petition for leave to appeal a nonfinal order entered by the circuit court on January 24, 2020, that: (1) denied their request for a temporary injunction; (2) ordered that Sullivan's and Kennedy's names would not appear on the 2020

Spring Primary Ballot for Milwaukee County Executive; and (3) directed the Clerk of the Circuit Courts for Milwaukee County to submit the 2020 Spring Primary Ballots to the printer by 4:00 p.m. on Monday January 27, 2020, and deliver the same to local municipalities as soon as practicable thereafter absent action by this court. Sullivan and Kennedy also seek temporary relief in the form of a stay of the circuit court's order or a requirement that alternate ballots be printed. The Wisconsin Elections Commission ("WEC") opposes the petition and the request for alternative relief.

The court has considered the petition and the response of the WEC, as well as the substantial appendices submitted by the parties. Assuming without deciding that the statutory criteria for granting leave to appeal are met, *see* WIS. STAT. § 808.03(2) (2017-18),¹ we will nonetheless deny the petition. For the reasons set forth in the WEC's response, we are persuaded that the petitioners wholly fail to show a substantial likelihood of success on the merits. *See State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991).

Specifically, it is undisputed that the nomination papers for Sullivan and Kennedy were circulated by individuals who previously circulated papers on behalf of another candidate for the same office. WISCONSIN STAT. § 8.04, which directly addresses this situation, provides:

Nomination paper signatures. If any person signs nomination papers for 2 candidates for the same office in the same election at different times, the earlier signature is valid and the later signature is invalid. **If any person circulates a nomination paper for 2 candidates for the same office in the same election at different times, the earlier paper is valid and the later paper is invalid.**

(Emphasis added.)

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Under this plain statutory language, the second sets of papers circulated are invalid. Further inquiry is not required. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (“[S]tatutory interpretation ‘begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.’”) (citation omitted).

The petitioners have cited several cases for the proposition that the plain language of WIS. STAT. § 8.04 should not be considered mandatory because of WIS. STAT. § 5.01(1), which states:

CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

In response, the WEC directs our attention to numerous cases, including *State ex rel. Oaks v. Brown*, 211 Wis. 571, 579, 249 N.W.2d 50 (1933) (“It is manifest that sec. 5.01(6) [the predecessor to current WIS. STAT. § 5.01(1)] applies only after the holding of the election and the will of the electors has been manifested.”); and *City of Chippewa Falls v. Town of Hallie*, 231 Wis. 2d 85, 92, 604 N.W.2d 300 (Ct. App. 1999) (“[Section] 5.01(1) is inapplicable to the instant case, as there was no election from which the will of the electors had manifested.”). Upon reviewing the authorities, we are not convinced that the petitioners have shown a likelihood of success on the merits concerning their interpretation of the applicable statutes and cases. *See Webb*, 160 Wis. 2d at 632.

As to the claim that Sullivan and Kennedy were denied due process, we are again unpersuaded that the petitioners show a likelihood of success. The materials reflect that the

petitioners had an opportunity to appear before the Milwaukee County Elections Commission and to brief and argue their position in circuit court.

IT IS ORDERED that the petition for leave to appeal is denied, without costs to any party.

IT IS FURTHER ORDERED that the motion for temporary relief is denied as moot.

IT IS FURTHER ORDERED that this opinion and order shall be served only by email and facsimile.

Sheila T. Reiff
Clerk of Court of Appeals