

**IN THE SUPREME COURT
STATE OF ARIZONA**

XENIA ORONA,

Plaintiff-Appellee,

v.

MICHAEL D. BUTTS, et al. ;

Defendants-Appellants.

Arizona Supreme Court
No. CV-24-0088-AP/EL

Maricopa County
Superior Court
No.: CV CV2024-008652

(Expedited Election Matter)

ANSWERING BRIEF

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INTRODUCTION

Candidate Michael Butts, by his own admission and as supported by substantial evidence at trial, signed as the circulator for signatures that he did not collect. This act of deception first has a legal consequence: “signatures are invalid under *Brousseau* because they appear on petitions that [the candidate] improperly signed as the circulator.” *Moreno v. Jones*, 213 Ariz. 94, 101 n.4 (2006). It also has a practical consequence of obscuring precisely which petition sheets contained the 283 signatures for which Michael Butts falsely signed as the circulator. The Trial Court, based on witness testimony, trial exhibits provided by the candidate and the challenger, and the sheer number of signatures allegedly collected during a particular weekend, made a find of fact that Butts turned 283 signatures for which Butts signed as the circulator, but for which he was in fact, not the circulator. Thus, the Trial Court held Butts turned in too few valid signatures to qualify for the ballot when considered in light of the signatures that were otherwise disqualified by the County Recorder’s review. The Trial Court’s judgment should be affirmed.

STATEMENT OF FACTS

On March 13, 2024, Candidate Michael Butts filed his Statement of Interest to run for State Representative of Legislative District 11.¹ On April 1, 2024, he filed

¹ Michael Butts, *Candidate Statement of Interest*, available at <https://apps.arizona.vote/electioninfo/assets/46/0/StatementsOfInterest/butts-michael-21822-24519.pdf> (last visited 5/5/24); App’x 0035.

795 signatures in support of his candidacy for State Representative from Legislative District 11.² Thus, Mr. Butts had less than three weeks to collect the 452 signatures necessary to secure his position on the ballot.³ Mr. Butts hired Mr. Keith Mitchell who provided circulators that collected 283 signatures for Mr. Butts between March 23 and March 26.⁴ Mr. Butts directed Mr. Mitchell to have his crew leave the certification blank on the back of the sheets that they collected.⁵

On April 15, 2024, qualified elector Xenia Orona filed her Verified Complaint based on the above facts and research revealing other deficiencies in Mr. Butts' signatures.⁶ The County Recorder determined that 239 of the individual signatures challenged by Ms. Orona were invalid, leaving the candidate with 556 valid signatures, or 104 more than required.⁷ In addition to individual signature

² Ariz. Sec'y of State, *Candidate Filings for 2024 Primary and General Elections*, available at https://azsos.gov/sites/default/files/docs/2024_CandidatesFiled_web_list_20240405.pdf (last visited 5/5/24); App'x 0035.

³ Ruling Re Election Case/Candidate Challenge (the "Ruling"), CV 2024-008652, (Ariz. Sup. Ct. filed 4/24/2024) App'x 0001 (noting 452 signature requirement); County Recorder's Report, App'x 0007 (same)

⁴ Ruling at 3, App'x 0003.

⁵ *Id.*

⁶ App'x 0034 – 0045.

⁷ App'x 0007.

challenges, Count 6 of the Verified Complaint alleged the fraudulent signature certification made by Mr. Butts as described above.⁸

On April 19, 2024, Mr. Butts attempted to have the Verified Complaint dismissed as to the fraudulent certification because, in light of Mr. Butts signing the petitions containing the 283 signatures gathered by Mr. Mitchell’s crew, Ms. Orona could not identify which sheets Mr. Butts had actually circulated and which specific sheets he had fraudulently certified.⁹ On April 23, 2024, the Trial Court denied Mr. Butts’ motion, along with another motion alleging insufficient and misleading summons.¹⁰

The Trial Court took testimony from Mr. Butts, Mr. Mitchell and Ms. Ebo’nyi Lawson, one of the paid circulators.¹¹ Mr. Butts admitted that he did not circulate all of the signature sheets for which he signed as circulator.¹² The Trial Court found Mr. Mitchell’s testimony that he provided Mr. Butts with 283 signatures to be credible, noting that his testimony “is supported by text messages between Mitchell and Butts

⁸ Ruling at App’x 0002 (“Count 6 challenges the legal validity of 667 signatures under A.R.S. § 16-321(D) on the grounds that Butts certified these signatures as circulator but did not, in fact, circulate the petitions bearing those signatures.”)

⁹ Defendant’s Motion to Dismiss Relative to ARS Section 16-351, App’x 0022-0025.

¹⁰ Ruling Re Motions to Dismiss, CV 2024-008652, (“MTD Ruling”) (filed 04/23/2024), App’x 0046.

¹¹ Ruling at App’x 0003.

¹² *Id.*

documenting Butts' refusal to pay Mitchell for 283 signatures. (Trial Exh. 7)".¹³ The Trial Court also found that the number of signatures was consistent with what would be expected to be collected over 3-4 days by a crew of paid circulators, and thus, it supported Mr. Mitchell's testimony.¹⁴ And, of course, the Trial Court's decision was based on Butts' admission that he signed petition sheets that he did not circulate.¹⁵

On April 24, 2024, the Trial Court found that 283 signatures on petition sheets Candidate Butts falsely certified to be invalid, which left "only 273 valid signatures (556 minus 283) and, therefore, is not qualified for the Democratic Party primary ballot."¹⁶

On April 28, the Candidate Butts filed a notice of appeal in the Superior Court on the fourth calendar day after the order was entered, April 24, 2024.¹⁷ Attached to the notice of appeal is the April 24, 2024, Ruling, enjoining Candidate from the ballot.

Candidate Butts' Opening Brief challenges the findings of fact made by the Trial Court and for the first time mentions the April 23, 2024, ruling on the motions to dismiss. [Opening Brief ("OB") at 1-8.]

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ App'x 0001-04.

¹⁷ App'x 0005-06.

ARGUMENT

I. Like Russell Jones and John Fitzgerald, Candidate Michael Butts Falsified His Circulator Certifications

A. Candidate Butts fails to meet the standard to overturn findings of fact.

1. Ample evidence supports the Trial Court's findings of fact.

A trial court's findings of fact will not be disturbed unless they are "clearly erroneous as not either supported by reasonable evidence or based on a reasonable conflict of evidence." *Stanwitz v. Regan*, 245 Ariz. 344, 348 ¶ 13 (2018) (citing *Moreno v. Jones*, 213 Ariz. 94, 98 ¶ 20 (2006)). Facts on appeal from a bench trial are viewed in the light most favorable to upholding the judgment. *Nace v. Nace*, 104 Ariz. 20, 23 (1968); see also *Town of Florence v. Florence Copper Inc.*, 251 Ariz. 464, 468 ¶ 20 (App. 2021) (same).

While Appellant Butts suggests that the Court's ruling "reflects that mere testimony was used as evidence," that testimony includes Mr. Butts' admissions under oath. [OB at 5.] "Butts admits that he signed sheets circulated by paid circulator Keith Mitchell." [Ruling at App'x 0002-0003.] The Appellant's own admission is reasonable evidence. Furthermore, the Trial Court heard testimony from Mr. Mitchell and Ms. Lawson. The Trial Court accepted into evidence exhibits submitted by Candidate Butts that corroborated Mr. Mitchell's claim that Mr. Butts

owed him for collecting 283 signatures. [Ruling at App’x 0003 (citing to Trial Exh. 7).]

The Trial Court’s findings of fact are supported by the evidence.

2. The Trial Court’s credibility determination should not be disturbed.

Ultimately, this case came down to a credibility determination made by the trial court judge. This Court has noted “the many holdings of this court that conflicts of evidence are within the sole province of the trier of facts for determination and that the trial court, sitting without a jury, is judge of the credibility of witnesses, the weight of the evidence, and reasonable inferences to be drawn therefrom.” *Todaro v. Gardner*, 72 Ariz. 87, 91 (1951); *see also Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51-52, ¶ 11 (App. 2009) (courts give “due regard to the opportunity of the court to judge the credibility of the witnesses.”).

Here, the judge heard both the testimony of Mr. Butts and Mr. Mitchell regarding the amount of signatures collected. Mr. Butts testified that Mr. Mitchell only collected 100 signatures, while Mr. Mitchell testified that he collected 283 signatures. [Ruling at App’x 0002-03.] Ultimately, “[t]he Court [found] Mr. Mitchell’s testimony as to the 283 figure to be credible.” [*Id.* at App’x 0003.] This was supported by witness testimony from Ebo’nyi Lawson and text messages between Mr. Butts and Mr. Mitchell that Mr. Butts submitted and had entered as Trial Exhibit 7. [*Id.*] In particular, the Trial Court relied on Appellee’s witnesses,

Mitchell and Lawson, to establish that “Butts was not present the entire time that the paid circulators were working,” finding that they were both credible due to “[h]aving the opportunity to observe the witness’ demeanor while testifying.” [*Id.*]

In the Opening Brief, Mr. Butts refers to several specific petition sheets described in witness testimony. [OB at 6-7.] First, these arguments are evidently premised on the trial transcript which has not been provided by Appellant Butts. “Although a transcript of the proceedings below is not essential to maintain an appeal, where there is no transcript provided the court will presume the evidence was sufficient to sustain the lower court’s evidentiary findings.” *Brousseau*, 138 Ariz. at 457. Furthermore, nothing in the Trial Court’s ruling suggests that it was relying on this testimony related to specific sheets to support its conclusion regarding the number of unlawfully gathered signatures. This testimony would provide corroboration that the signatures gathered by Mr. Mitchell’s crew were actually submitted by Mr. Butts; however, it is not before this Court, and it certainly was not the basis for calculating the number of signatures gathered by Mr. Mitchell’s crew.

B. Mr. Butts admitted to disqualifying conduct.

Mr. Butts admitted to falsifying petition certifications. Mr. Butts testified that he was at the South Mountain/Laveen Fry’s parking lot on March 23-26 and that he “observed each signer who signed a petition for a paid circulator,” while also “actively meeting voters” and “talking to them about his candidacy.” [Ruling at

App'x 0003.] The Trial Court held that “[i]t is not reasonable to believe that he could have observed all 283 signers while simultaneously campaigning and collecting signatures himself.” [Id.] Even if he had, “his mere presence in the parking lot is not sufficient to certify those signatures.” [Id.] “Butts does not dispute Mitchell’s testimony that he instructed Mitchell to leave the certification blank on the sheets circulated by Mitchell’s team.” [Id.] This evidence, supported by text messages submitted by Butts, and witness testimony, are the basis for what the trial court found “established that Butts signed as circulator the petition sheets bearing 283 signatures that he knew he had not obtained.” [Id.]

Permitting others to carry the petitions that the candidate would later sign is precisely the conduct that this Court affirmed as disqualifying Russell Jones from the ballot. *Moreno v. Jones*, 213 Ariz. 94, 96–97, ¶¶ 10-12 (2006). It is also precisely this situation in *Brousseau v. Fitzgerald*, wherein the Court explained that to allow “certification of the petitions by persons other than the actual circulators without any sanction other than the inconvenience of showing that the signatures were in fact authentic would render the circulation requirement meaningless and possibly lead to additional falsehood and fraud by others.” 138 Ariz. 453, 456 (1984).

Even assuming Mr. Butts’ story that he watched others gather the 283 signatures at issue, those signatures were disqualified by the Trial Court in accordance with Arizona law.

II. Arizona Law Supported the Trial Court Denying the Motions to Dismiss.

Mr. Butts renews the complaints raised in his motion to dismiss the complaint for failing to identify the sheet numbers of sheets Mr. Butts circulated but did not sign. [See OB at 2-4, 7.] This argument should be rejected here for the same reasons it was rejected below: (1) the Verified Complaint identified the sheets challenged in Count 6, (2) the numeric specificity on which Mr. Butts rests his object is not required when alleging fraud, and (3) it is Mr. Butts' deception itself that made further specificity impossible.

A. The petitions challenged in Count 6 were identified.

In its Ruling, the Trial Court wrote, "Count 6 challenges the legal validity of 667 signatures under A.R.S. § 16-321(D) on the grounds that Butts certified these signatures as circulator but did not, in fact, circulate the petitions bearing those signatures." [Ruling at App'x 0002.] Mr. Butts acknowledges that Ms. Orona "was absolutely diligent in her specificity in the first five of six causes of actions." [Motion to Dismiss at App'x 0023.] Those are the five counts that require numeric specificity for the candidate to be on notice about precisely which signatures were being challenged. [See Ver. Compl. at App'x 0036 – 0041.] Similarly, Count 6 specifically alleges fraud under *Brousseau v. Fitzgerald*. [Id. at App'x 0041- 0042.] Mr. Butts had complete notice that the allegation was that he accepted signatures on sheets with the circulator information blank. He had the ability and opportunity to rebut

those allegations. The Verified Complaint identifies the fraud perpetrated by the candidate. The Verified Complaint was not deficient in this regard.

B. Section 16-351 does not require fraud allegations to name the sheet number and line number as it does for individual signature challenges.

The law requires certain types of challenges to include the sheet and line number challenged. Specifically, “The elector shall specify in the action the petition number, line number and basis for the challenge *for each signature being challenged.*” A.R.S. § 16-351(A) (emphasis added). This is required of individual signature challenges because following the filing of the complaint, the County Recorder must process line-by-line challenges alleged by a challenger.

This purpose of A.R.S. § 16-351(A)’s requirement was examined in *Lubin v. Thomas*, 213 Ariz. 496, 498–99, 144 P.3d 510, 512–13 (2006). There the Court explained that “the legislative history of A.R.S. § 16–351(A) is instructive on the purposes behind the requirement that a challenger specify the petition number, line number, and basis for each signature challenge. The primary purpose is to ‘allow the Elections office to more efficiently do preliminary work to deal with candidate challenges, and ... eliminate the need to go to court in some cases.’” *Id.* (quoting *Ariz. State Senate Fact Sheet for H.B. 2101*, 44th Leg., 1st Reg. Sess. (Ariz.1999)).

Helen Purcell, Recorder, Maricopa County, testified that the Recorders [sic] Office is in support of H.B. 2101. She said this legislation gives her office a better idea of what to look for in the challenge process. It is extremely

difficult for her office if it does not know what the challenges are. This legislation will make it easier for the Recorder's Office to locate the information.

Minutes of House Comm. on Judiciary, 44th Leg., 1st Reg. Sess. (Ariz. Jan. 27, 1999) (“House Minutes”) as cited in *Lubin v. Thomas*.

In other words, the specific sheet and line number were necessary for those portions of the challenge that required the County Recorder to review the record. For other challenges it is also necessary to provide the defendant with notice—as was done here—of the precise nature of the challenge so that the candidate can prepare his defense. *McClung v. Bennett*, 225 Ariz. 154, 157, 235 P.3d 1037, 1040 (2010) (“Under A.R.S. § 16–351(A), the challenger must specify the reasons for challenging particular signatures.”) The requirement was satisfied, and the County Recorder was able to perform its checks of individual signatures. [County Recorder’s Report at App’x 0007 – 0021.]

As for the challenge that signatures were collected by someone other than the person who actually circulated the petitions—a fraud for which disqualification is necessary to protect the integrity of the election system—the specific sheet and line numbers are not necessary for Mr. Butts to defend himself. *Brousseau v. Fitzgerald*, 138 Ariz. at 454, 675 P.2d at 714. And in any case, the specific sheets were identified because they are the sheets Mr. Butts took from the individual coordinating his paid circulation effort and by extension every sheet circulated by Mr. Butts.

Count 6 is not challenging any specific signature to be reviewed by the County Recorder's Office but is instead challenging the entire petition sheets on the basis that they were falsely certified by the candidate, not the actual person circulating the petition sheet, in violation of A.R.S. § 16-321(D).

C. Mr. Butts cannot benefit from the product of his deception.

Appellant Butts claims that “[t]he complaint failed to specify which 29 sheets contained the 286 signatures in question, which is a direct violation of A.R.S. § 16-351(A).” [OB at 4.] However, it is his act of deception, to which he admitted, that made it impossible to know which sheets he had actually circulated, and which sheets he falsely signed as a circulator.

Mr. Butts' signature is on 71 out of 78 petition sheets circulated and turned in. [App'x 0047 – 0202.] With the vast majority of the petition sheets circulated and to identify which of those 71 petition sheets Mr. Butts falsely signed is an impossible task that could not be done in the complaint, precisely because all 71 sheets contain his signature as the circulator. Due to his deception, the only way to identify the petition sheets was as Appellee's did in Count 6.

The role of those who certify petition signatures is essential to the integrity of elections. If perpetrators were able to avoid accountability for such action by taking advantage of an information gap created by their own deception, Russell Jones and John Fitzgerald would have remained on the ballot. *Brousseau v. Fitzgerald*, 138

Ariz. 453 (1984); *Moreno v. Jones*, 213 Ariz. 94 (2006). Indeed, the instant case is remarkably similar to these earlier examples of fraud wherein the fraud was uncovered, including the magnitude of the fraud, during trial with witness testimony and related evidence.

It would be impractical to the point of permitting fraud to go unchecked to require challengers to provide information obscured by the Candidate's willful deceit .

III. Appeal of the Motion to Dismiss Is Not Before This Court.

Mr. Butts did not appeal the July 23, 2024, Ruling of the Trial Court regarding either motion to dismiss, but the July 24, 2024, Ruling. After a decision is rendered in a candidate challenge, a party has to file a notice of appeal within 5 days. A.R.S. § 16-351. Parties are required to file a notice of appeal in superior court, which includes designating the judgment or portion of the judgment that a party is appealing. ARCAP Rule 8(c),10. An appellate court's jurisdiction is limited to the issue in the notice of appeal. *Brionna v. Department of Child Safety*, 533 P.3d 202, 211 (2023).

In most civil cases, the requirements of Rule 8 (c) do not require that the notice of appeal designates intermediate orders which are to be raised as issues on appeal. *Rourk v. State*, 170 Ariz. 6, 13 (App. 1991). However, in the context of an election case, there is a burden to act with celerity and failing to obtain a decision within the

statutory period makes it impossible for the appellate court to exercise appellate review in a timely fashion. *Klebba v. Carpenter*, 213 Ariz. 91, 93 (2006). In that case, on July 10, 2006, the appellee was provided only an unsigned minute entry of the decision on which he based his July 13, 2006, notice of appeal. *Id.* at 92, ¶ 3. This Court perhaps recognized the harsh nature of dismissing an appeal where the appellant had relied on what the trial court provided, but nonetheless, held that “where no signed order has ever been entered, the notice of appeal is simply ineffective to confer jurisdiction on an appellate court.” *Id.* at 93, ¶ 9. The Court concluded:

In the usual case, we would suspend the appeal in order to allow the entry of the requisite signed order in the superior court. *Id.* But such an approach here would be wholly inconsistent with the expedited timeframes of the elections statutes. Section 16–351(A) directs that the decision be made by the superior court within ten days of the filing of the action and requires that an appeal be filed within five days thereafter. The statute thus places the burden to act with celerity not only on the superior court, but also on the party challenging nomination petitions. By failing to obtain a written and signed decision within the statutory period, Klebba has made it impossible for us to exercise appellate review in a timely fashion. We therefore decline to suspend the appeal and remand, and instead dismiss the appeal for lack of jurisdiction.

Id. ¶ 10.

Mr. Butts did not appeal the July 23, 2024, order. His notice of appeal, filed on April 28, 2024, solely made mention of and attached the April 24, 2024, Ruling.

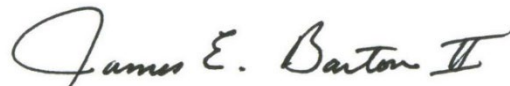
[App'x 0005-06.] Mr. Butts' failure to specify the April 23, 2024, Ruling regarding his motions to dismiss makes timely appellate review impossible. The first mention to the motions to dismiss was in his Opening Brief filed on May 2, 2024, three (3) days after the appeal deadline. Thus, Appellee and this Court have not been put on notice as to the motions to dismiss.

CONCLUSION

For the above stated reasons, Appellee urges the Court to affirm the trial court's order enjoining Candidate Butts' name from being printed on the 2024 August Primary Election Ballot.

DATED this 6th day of May 2024.

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