



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable E. L. Duncan
County Attorney
Nolan County
Sweetwater, Texas

Dear Sir:

Opinion No. O-2712

Re: Eligibility of write-in candidate for sheriff in Democratic primary to have his name printed as an independent candidate for sheriff on the ballot for the general election.

We have your letter of September 4th wherein you request our opinion on whether a man who was a write-in candidate for sheriff in the Democratic primary may have his name printed on the ballot for the general election as a candidate for sheriff as an independent, or non-partisan candidate. Article 3182, Revised Civil Statutes, 1925, prescribing the procedure for independent candidates to have their names printed upon the official ballot for general election provides:

"Independent candidates for office at a county, city or town election may have their names printed upon the official ballot on application to the county judge, if for a county office, or to the mayor, if for a city or town office, such application being in the same form and subject to the same requirements herein prescribed for applications to be made to the Secretary of State in case of State or district independent nomination; provided, that a petition of five per cent of the entire vote cast in such county, city or town at the last general election shall be required for such nomination."

Honorable E. L. Duncan, Page 2

The above quoted statute in providing "such application being in the same form and subject to the same requirements herein prescribed for applications to be made to the Secretary of State in case of State or district independent nomination" incorporates by reference the following clause contained in Article 3159, which reads:

" . . . and provided, also, that no person who has voted at a primary election shall sign an application in favor of anyone for an office for which a nomination was made at such primary election."

In order to meet the requisites prescribed by the foregoing statute, it is necessary that the independent candidate for sheriff present to the county judge a petition signed by a sufficient number of qualified voters of the county to equal five per cent of the entire vote cast in said county at the last general election, and that all of such signatories have not voted in the last Democratic primary election.

Assuming that the candidate has met these requirements, we come now to a consideration of the question of whether he is entitled to have his name printed on the ballot at the general election as an independent candidate, even though he participated as a candidate, and presumably also as a voter, in the Democratic primary at which the Democratic nominee for the office of sheriff was selected.

Article 3110, Revised Civil Statutes, 1925, provides for the party pledge to be printed on ballots on primary election and reads as follows:

"No official ballot for primary election shall have on it any symbol or device or any printed matter, except a uniform primary test, reading as follows: 'I am a _____ (inserting name of political party or organization of which the voter is a member) and pledge myself to support the nominee of this primary;' and any ballot which shall not contain such printed test above the names of the candidates thereon, shall be void and shall not be counted."

The Supreme Court of Texas has repeatedly held that the pledge "to support the nominee of this primary," contained on the primary ballot as provided by Article 3110, supra, imposes merely a moral and not a legal obligation on the voter.

Honorable E. L. Duncan, Page 3

See *Koy v. Schneider*, 110 Tex. 359, 218 S. W. 479, 221 S. W. 880; *Westerman v. Mims*, 111 Tex. 29, 227 S. W. 178; *Love v. Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515; *Love v. Buckner*, 121 Tex. 369, 49 S. W. (2d) 425.

In the case of *Westerman v. Mims*, supra, the Supreme Court of Texas had before it a question similar to the one here under consideration. In that case the requisite number of qualified voters of Galveston County who had not participated in the Democratic primary, petitioned that the name of Aubrey Fuller be printed as an independent candidate for district judge on the general election ballot. Aubrey Fuller had participated and voted in the Democratic primary of that year, at which the Democratic candidate for district judge was nominated. The suit was an original application to the Supreme Court for a writ of mandamus to compel the Secretary of State to issue his instructions to the County Clerk directing that the name of Fuller be printed in the independent column of the official ballot. The Supreme Court denied the mandamus. The entire court concurred in the result, but Mr. Chief Justice Phillips based his decision on the ground that the statute prescribing the party pledge to support the nominees of that party imposes a legal duty upon him. Said Judge Phillips, at page 48:

"In virtue of the statutes, the duty to perform the agreement became a legal duty; the right of Judge Street (the Democratic nominee for district judge) as a beneficiary of the duty became a legal right; and it would command the law's protection as any other legal right."

The majority of the court, however, as expressed in the opinion by Mr. Justice Greenwood, recognized the rule laid down in *Koy v. Schneider*, 110 Tex. 359, 218 S. W. 479, that the pledge to support the party candidate imposes merely a moral and not a legal obligation on the voter.

Mr. Justice Greenwood declared at page 38:

"In our opinion, a voter cannot take part in a primary or convention of a party, to name party nominees, without assuming an obligation binding on the voter's honor and conscience. Such obligation inheres in the very nature of his act, entirely re-

Honorable E. L. Dunca, Page 4

gardless of any express pledge, and entirely regardless of the requirements of any statute. The obligation, like the promise exacted by the statute, when treated as governing future conduct, is for cooperation in good faith to secure the success of the nominee. There is no reasonably certain measure of bona fide cooperation in matters of this sort. The voter's conduct must be determined largely by his own peculiar sense of propriety and of right. It is for such reasons that the courts do not undertake to compel performance of the obligation. Being unenforceable through the courts, the obligation is a moral obligation. . . .

"We do not say that circumstances might not arise under which one who had participated in a primary would be relieved of the moral obligation which is ordinarily incurred not to undertake the nominee's defeat. The present case does not call for the determination of the effect of extraordinary circumstances."

Mr. Justice Greenwood's opinion denied the mandamus on the grounds that the candidate having violated his party pledge by seeking to become an independent candidate at the general election did not come into a court of equity with "clean hands" and therefore his application for mandamus was denied. We continue to quote from the opinion:

"Having concluded that the petition of relators is grounded on conduct amounting to an invitation to, and hence participation in an act violative of good faith and of conscience, it follows that relators did not come into court with clean hands, as required to entitle them to the relief prayed for, and hence the mandamus is denied."

Under the opinion of the majority of the court in *Westerman v. Mims*, the Democratic nominee has no legally enforceable rights in the matter. Nor does the man who seeks to have his name placed on the ballot as an independent candidate. In neither case will a mandamus or an injunction action lie either to place the candidate's name on the ticket or prevent its being placed thereon.

Under the authority of *Westerman v. Mims*, therefore, we are compelled to advise you that whether the name of inde-

Honorable S. L. Duncan, Page 5

pendent candidate for sheriff should be placed on the general election ballot under these circumstances, is a question to be determined by the County Judge. His decision in the matter, in the absence of the exceptional circumstances referred to by Mr. Justice Greenwood in the last above quotation, will not be disturbed by the courts. He may base his decision upon a determination of the question of whether circumstances exist (in the words of Mr. Justice Greenwood) "under which one who had participated in a primary would be relieved of the moral obligation which is ordinarily incurred not to undertake the nominee's defeat."

Replying specifically to your question, we are of the opinion that it rests within the discretion of the county judge whether he will accept the application for the name of an independent candidate for sheriff to be printed on the ballot for the general election, where such candidate participated as a voter or candidate in the preceding Democratic primary election. We wish to point out again that such application, in order to meet the requirements of Articles 3159-3162, must be signed under oath by a sufficient number of qualified voters of the county who did not participate in the primary election to equal five per cent of the votes cast in the county at the last general election.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Walter R. Koch*
Walter R. Koch
Assistant

WRK:BBB

APPROVED SEP 13, 1940

Gerard B. Mann

ATTORNEY GENERAL OF TEXAS

