Community Success Initiative v. Moore: What the Trial Court Got Wrong about Felons & Voting Rights

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On March 28, 2022, a majority of a three-judge panel declared unconstitutional a North Carolina 50-year-old law which provided limited restoration of voting rights for felons. As a result, roughly 55,000 felons still on probation, parole, or post-release supervision could become voters, unless an appeal by legislators is successful. The trial court's decision is at odds with the North Carolina Constitution and should be reversed.

Article VI, § 2(3) of the North Carolina Constitution provides:

> Disqualification of felon. No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

In short that means, a convicted felon may not vote unless his rights have been restored in the way the legislature establishes in a law. At least, that is what it *should mean*. Unfortunately, a trial court has decided that the "manner prescribed by law," specifically N.C. Gen. Stat § 13-1, is not constitutional because the law does not allow people on probation, parole, or post-release supervision to vote. The statute is pretty straightforward; when a person completes his sentence and is "unconditionally discharged," he gets back his right to vote. People on probation, parole, or post-release supervision who have various "conditions" on their release have simply not completed their sentences. Yet, a trial court has decided that they should be treated like those who have completed their sentences and get the chance to vote.

Some might argue those conditionally released on probation, parole, or post-release supervision should be treated like those who have been unconditionally released and fully discharged their sentence. That would be a policy argument by those seeking a change in the statute, but such a change is up to the General Assembly, not the courts. It is the General Assembly which enacts laws. When the Constitution states that something, like the restoration of voting rights, must be "in the manner prescribed by law," that is an unequivocal assignment of authority to the legislative branch to design the appropriate process and procedures.

I. History of the Litigation

The case attacking the felon voting law, *Community Success Initiative, et al., v. Moore, at al.* started in November 2019. The plaintiffs are Community Success Initiative ("CSI"), Justice Served NC, and the state chapter of the NAACP. In the lawsuit, CSI and Justice Served are both described as organizations that "work[] with people who find themselves entangled in the criminal justice system" (most folks would describe

such people simply as "criminals"). The NC NAACP is a well-known organization and frequent litigant. The Defendants are the Speaker of the House and the President Pro Temp of the Senate, in their official capacities, and the State Board of Elections and its members, in their official capacities.

In September 2020, the trial court ruled in favor of the plaintiffs on some issues and in favor of defendants on others. As a result of that decision, only three of the claims in the lawsuit remained for trial:

1) That N.C. Gen. Stat. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving all persons with felony convictions subject to probation, parole, or post-release supervision, who are not incarcerated, of the right to vote;
2) That N.C. Gen. Stat. § 13-1 violates the Equal Protection Clause of the North Carolina Constitution by depriving the African American community of substantially equal voting power; and
3) That N.C. Gen. Stat. § 13-1 violates the Free Elections Clause of the North Carolina Constitution.

The three-judge panel presided over a trial held in Wake County on August 16, 2021, through August 19, 2021. Various preliminary orders and injunctions evolved during the case, at both the trial and appellate levels. A final decision from the trial court came down on March 28, 2022. Two judges held the statute was unconstitutional; a third judge dissented, writing he would conclude the statute does not violate either the Equal Protection Clause or the Free Elections Clause.

An appeal by the legislative defendants is at the Court of Appeals and on April 4, 2022, the plaintiffs filed a Petition for Discretionary Review asking the North Carolina Supreme Court to hear the case prior to a determination from the Court of Appeals. As of the date of this memo, it is unknown whether the Supreme Court will take the case immediately or wait for a decision from the Court of Appeals. Regardless of which appellate court rules on the case, the merits of the appeal are strong when viewed through the correct constitutional framework as explained below.

II. Constitutional Framework for Voter Eligibility

The North Carolina Constitution provides that "[n]o person adjudged guilty of a felony ... shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." N.C. Const. art. VI, § 2(3). That manner is prescribed by N.C. Gen. Stat.§ 13-1, which provides in pertinent part that "[a]ny person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon . . . [t]he unconditional discharge of ... a probationer[] or of a parolee by the agency of the State having jurisdiction of that person."

On March 28, 2022, the very same day that absentee ballots were made available for the statewide primary, the trial court entered judgment in favor of Plaintiffs, concluding that N.C. Gen. Stat. § 13 1 violates the Equal Protection Clause, Article I, § 19, and the Free Elections Clause, Article I, § 10, of the North Carolina Constitution on the ground that it disenfranchises felons, particularly African American felons. Final Judgment and Order at 62, No. 19 CVS 15941 (Wake Cnty. Super. Ct. March 28, 2022).

The law that the plaintiffs challenged, and that the trial court permanently blocked, does not disenfranchise individuals convicted of felonies. The North Carolina Constitution—ratified by the people—does. It is the Constitution itself which bans felons from voting unless their rights have been restored "in the manner prescribed by law." N.C. Gen. Stat. § 13-1 is that "manner prescribed by law."

The defendants in the case have strong

arguments for their appeal. First, the defendants will likely raise the threshold issue of standing—whether the plaintiffs were even the right parties to bring this lawsuit. Second, the defendants may raise questions about the scope of the trial court's order and the separation of powers. Finally, part of the appeal will look at the correct standard of review for the court's analysis and whether the statute survives constitutional scrutiny. Below is a short discussion of three issues the public can expect to see in the appeal.

A. Plaintiffs Do Not Have Standing to Challenge N.C. Gen. Stat. § 13-1

The first is an issue which comes up often in litigation, especially public interest cases, and that is the question of standing. Standing is a doctrine which limits who can bring a lawsuit. The idea is that only those with a sufficient stake in the case can proceed. The North Carolina Supreme Court explained that "only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 29 (1973). Indeed, "[t]he gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* (internal quotations omitted).

Because the plaintiffs alleged injuries stemming from the disenfranchisement of felons who are serving a sentence outside of prison, but they have not challenged the validity of the constitutional provision that disenfranchises them, there is no connection between their injuries and the relief they requested (and that the trial court granted). Lacking a "direct injury" attributable to the functioning of the statue, *State ex rel. Summrell v. Carolina-Virginia Racing Ass'n,* 239 N.C. 591,594 (1954); *see also Comm. To Elect Dan Forest v. Emp's Pol. Action Comm.,* 376 N.C. 558, 608 (2021), Plaintiffs lack standing to challenge it, *see Marriott v. Chatham Cnty.,* 187 N.C. App. 491, 494 (2007) (standing requires "that the [alleged] injury will be redressed by a favorable decision").

B. The Scope of the Trial Court's Order is Misguided and Violated the Separation of Powers.

A second issue for appeal is something of a devil in in the details issue related to who has been ordered to do what. The trial court's order blocked the defendants "from preventing any person convicted of a felony from registering to vote *or voting* due to probation, parole, or post-release supervision." The is a significant difference between registering to vote and the act of actually voting. While Defendants State Board of Elections and its members oversee voter registration, they do not enforce the criminal prohibition on felons actually voting "'without having been restored to the right of citizenship in due course and by the method provided by law." N.C. Gen. Stat. § 163-275(5). The law controlling enforcement of the ban on voting (not registering to vote) by felons was not analyzed in the trial court's opinion, and the officials who are responsible for prosecuting violations of that statute are not included as defendants in the case, so the trial court lacked power to enjoin their enforcement of it. The trial court's order does not say anything at all about the officials who are responsible for enforcement of the prohibition of voting by felons whose rights have not been restored. The trial court's order just blocked N.C. Gen. Stat. § 13-1, the statute that restores the right to vote to felons after they discharge the conditions of their sentence and release. The order leaves no statute in place to restore felons' right to vote; there is no "manner prescribed by law" now that the trial court blocked the existing statute. The end result is that all felons serving sentences outside of prison remain disenfranchised under the North Carolina Constitution. N.C. CONST. art. VI, § 2,pt. 3. Thus, the practical effect

of the order may be to induce violations of N.C. Gen. Stat. § 163-275(5).

Obviously, though, what the trial court attempted to do was to rewrite N.C. Gen. Stat. § 13-1 to restore the rights of citizenship automatically upon "release from prison" instead of upon "unconditional discharge." But in doing so, the trial court exceeded its authority. *See, e.g., State v. Cobb*, 262 N.C. 262, 266 (1964) ("When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation, it destroys the separation of powers and thereby upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government."); *C. Invs. 2, LLC v. Auger*,) ___ N.C. App. ____, 860 S.E.2d 295, 302 (N.C. Ct. App. 2021) ("The role of the courts is to interpret statutes as they are written. We do not rewrite statutes to ensure they achieve what we, or the parties in a lawsuit, imagine are the legislature's policy goals."); *Davis v. Craven Cnty. ABC Bd,* 259 N,C. App. 45, 48, (2018) ("This court is an error-correcting body, not a policy-making or law-making one." (internal quotation marks omitted)).

C. <u>The Challenged Law Passes the Rational Basis Test and the Trial Court Erred by Using a Different Test.</u>

Setting aside the serious standing and scope issues discussed above, the trial court's order is flawed because the court used the wrong test to evaluate the plaintiffs' Equal Protection claims. Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. It is the most intense level of review court's use to evaluate constitutionality. To pass strict scrutiny, government action must be designed to further a "compelling governmental interest," meaning a critical interest. The government action must also be narrowly tailored to achieve that interest and use the least restrictive means. *Northampton Cnty*, 326 N.C. at 747. In short, strict scrutiny means that the government action places as few restrictions as possible to achieve the compelling government interest. Strict scrutiny is only appropriate where a government classification "impermissibly interferes with the exercise of a fundamental right" or "operates to the peculiar disadvantage of a suspect class." *Liebes v. Guilford Cnty. Dep't of Pub. Health,* 213 N.C. App. 426, 428 (2011) (citation omitted). Otherwise, courts apply "the lower tier or rational basis test." *Id.* The Court erred in applying strict scrutiny when analyzing the plaintiffs' Equal Protection challenge because N.C. Gen. Stat. § 13-1 does not interfere with any fundamental right and does not disadvantage any suspect class. The correct test is the rational basis test.

As to the first point, the trial court held that § 13-1 interferes with "[a) fundamental right to vote," but felons do not have such a right. Under the North Carolina Constitution, a felon may not legally vote "unless that person shall be *first* restored to the rights of citizenship in the manner prescribed by law." N.C. Const., art. VI, § 2(3)(emphasis added). Under that provision, if the legislature does not write a law re-enfranchising felons, they remain disenfranchised and so unable to vote. When the General Assembly does provide a path to re-enfranchisement of felons, as it did with N.C. Gen. Stat. § 13-1, the right to vote is restored only when the conditions for restoration have been met.

The trial court baldly concluded that felons who are not currently in prison are "similarly situated" to "North Carolina residents who have not been convicted of a felony" because they "share in the State's public burdens and feel an interest in its welfare." FinalOrder at 57 (quotations omitted). That felons and non-felons may all care about how they are governed does not make them similarly situated when the constitution expressly treats them differently. *See State v. Grady,*

372 N.C. 509,567,831 S.E.2d 542, 582 (2019) ("[F]elons do not enjoy the same measure of constitutional protections ...as docitizens who have not been convicted of a felony.").

Strict scrutiny is also inappropriate because the restoration statute does not operate to disadvantage a suspect class of people. On its face, N.C. Gen. Stat. § 13-1 does not distinguish on the basis of race or any other suspect class. The *only* distinction it draws is between felons who have completed their sentences and felons who have not. "It is fundamental that once a right or privilege is granted it must be applied equally and indiscriminately, but when a law applies uniformly to all members of the class affected -- and the classification is based on a reasonable distinction -- equal protection of the laws has not been denied. The constitution does not require that the same rules apply to incompatible classes. *See State v. Stafford,* 274 N.C. 519, 535 (1968) (citing *Check v. City of Charlotte*, 273 N.C. 293 (1966)).

The trial court erred when it found that N.C. Gen. Stat. §§ 13-1 impacts black and white North Carolinians differently. The law functions the same way for everyone. The plaintiffs did not even try to show that as a practical matter the statute effects people differently by re-enfranchising felons of different races at a different rate, which would be a necessary component of any finding of race discrimination. *See Irby v. Virginia State Bd. of Elections,* 889 F.2d 1352, 1355 (4th Cir. 1989).

The trial court also erred when it considered the history of N.C. Gen. Stat. § 13-1. The trial court concluded that the law was motivated by racially discriminatory intent even though, as the trial judges noted, the NC NAACP and three black members of the General Assembly pushed for the law in 1973. To make matters worse, the trial court misread legislative history, which shows that changes to the law in 1971 and 1973 were focused on making restoration of voting rights *automatic* upon completion of a felon's sentence. Prior to those changes, restoration required waiting periods and satisfaction of other procedural and administrative requirements. Statutory changes from the 1970's furthered the primary goals of "substantially relax[ing] the requirements necessary for a convicted felon to have his citizenship restored." *State v. Currie,* 284 N.C. 562, 565 (1974). The trial court was flatly wrong to conclude "the goal of these African American legislators and the NC NAACP was to eliminate section 13-1's denial of the franchise to persons released from incarceration." Final Order at 19. The goal was to make restoration even easier by creating an automatic process.

The Court also erred using the strict scrutiny test to consider plaintiffs' claim under the Free Elections Clause. Again, N.C. Gen. Stat. § 13-1 does not deprive anyone of the right to vote—a felony conviction and the North Carolina Constitution do that. And, "a constitution cannot be in violation of itself." *Stephenson v. Bartlett,* 355 N.C. 354, 374 (2002). It cannot be, as the trial court held, that North Carolina's elections are not free within the meaning of its constitution merely because some people are *constitutionally* precluded from participating in them. Not only does N.C. Gen. Stat. § 13-1 not deprive anyone of the right to vote, but it also actually extends the ability to felons who otherwise would be disenfranchised. Therefore, "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable," because the distinction being challenged is only "a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise." *Katzenbach v. Morgan,* 384 U.S. 641,657 (1966).

Without any reason to apply strict scrutiny, the Court should have applied rational-basis review, which N.C. Gen. Stat.§ 13-1 would survive. Rational-basis review merely requires that a statute "bear *some* rational relationship to a conceivable legitimate interest. *Rhyne v. K-Mart Corp.,* 358 N.C.

160, 180 (2004) (emphasis in original). Section 13-1 fulfills a valid government interest in offering felons a method to regain their rights, and moreover, streamlines the process by making it automatic, a significant change from previous versions of the law. *See Currie,* 284 N.C. at 56,. In doing so, it reasonably draws a line between the rights of felons who have paid their debt to society and those who have not. These are sensible policy choices that the General Assembly was well within its authority to make, *see Jones v. Gov. of Fla.,* 975 F.3d 1016, 1029-30 (11th Cir. 2020) (en banc), and which are solely within the province of the General Assembly, not the courts, to change, *Davis,* 259 N.C. App. at 48.

III. Conclusion

All eligible voters stand to have their votes diluted by felons who are still ineligible to vote under the North Carolina Constitution. The trial court itself recognized in its injunction that its decision could swing the results of dozens of elections where the margin of victory was appreciable smaller than the 55,000 felons the court has now ordered the Board of elections to allow on the voter rolls. That decision cannot stand. Defendants have appealed. They have the constitution on their side.

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Constitution of 197, art. I, §35
Constitution of 1868, art. I, § 29
Constitution of 1176, Declaration of Rights, § 21