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1. BALLOT—NAME WRITTEN ON BALLOT AT GENERAL ELECTION—MAY BE COUNTED AS VOTE FOR PERSON WHOSE NAME IS SO WRITTEN FOR OFFICE INDICATED ON BALLOT.
2. SECTION 4785-69 G. C. PROHIBITS A PERSON WHO SEEKS A PARTY NOMINATION FOR OFFICE OR POSITION AT PRIMARY ELECTION TO BECOME CANDIDATE AT FOLLOWING ELECTION FOR SAME OFFICE BY PETITION—SUCH PERSON NOT PROHIBITED FROM BECOMING A "WRITE-IN" CANDIDATE.
3. BOARD OF ELECTIONS—MAY CONSIDER ONLY ONE FACTOR AS TO THE COUNT OF A "WRITE-IN" VOTE—IS IT POSSIBLE TO DETERMINE THE VOTER'S CHOICE?

SYLLABUS:

1. A name written on a ballot at a general election may be counted as a vote for the person whose name is so written for the office indicated on the ballot.

2. Section 4785-69, General Code, prohibits a person who seeks party nomination for an office or position at a primary election to become a candidate at the following election for the same office by petition. It does not prohibit such person from becoming a "write-in" candidate.

3. In deciding whether a particular "write-in" vote may be counted, the board of elections may consider only one factor, i.e., is it possible to determine the voter's choice?

Columbus, Ohio, December 15, 1949

Hon. Leo J. Scanlon, Prosecuting Attorney
Crawford County, Bucyrus, Ohio

Dear Sir:

Your request for my opinion is as follows:

"The Board of Elections of Crawford County, Ohio has requested me to obtain your opinion on the following matter:

"In the Village of Crestline, in the May, 1949 primary, they had no Republican primary, due to the fact that no candidates filed; but on the Democratic ticket they had a contest for Mayor, one candidate being A.P.S., and the other candidate being G.W. Mr. S. won the nomination.

"At the general election on November 8, 1949, in the official

party column ballot three tickets were submitted to the voters; one the Democratic ticket, one the Republican ticket, and an Independent ticket. The Democratic ticket contained a full list of candidates, except there were only five candidates for council instead of six, the number to be elected. The Republican ticket contained the names of no candidates whatsoever. The Independent ticket contained the names of two candidates for members of council, both of whom had qualified by filing petitions. It also set forth the designation of the various offices to be filled at the election.

"I am reliably informed that a few weeks prior to the election, the Board of Elections of Crawford County, Ohio, was advised by the Secretary of State's office to block out all of the Independent ticket except that portion which was filled in with the names of the two candidates for council. The Board of Elections, instead of blacking the ballot, merely shaded all of the sections of the ballot except that portion wherein the names of the two Independent candidates for council were contained. I am also informed the board was further advised by the Secretary of State's office that no write-ins could be counted on the Independent ticket.

"A week before the election, the candidacy of G. W. as a write-in candidate as Mayor of Crestline on the Republican ticket was announced, and at the general election on Tuesday, November 8, 1949, the voters of the Village of Crestline wrote in G. W.'s name in the following manner: On the Republican ticket for mayor he received 769 votes, on the Independent ticket for mayor he received 68 votes, and on the Democratic ticket 9 voters crossed out the name of A. P. S. and wrote in its place G. W. Mr. S. received 799 votes on the Democratic ticket, but none on either other tickets.

"For your benefit, I am enclosing two copies of the ballot which was submitted to the voters of the Village of Crestline on November 8, 1949.

"The questions which we desire to have answered are as follows:

"1. May G.W., a candidate, who was defeated at the primary election for the Democratic nomination for mayor, become a write-in candidate for the same office at the general election on some ticket other than the one on which he was defeated?

"2. May the votes which G.W. received for mayor as an independent candidate be added to the total of the votes that he received on the Republican ticket?

"3. May the votes which G.W. received on the Democratic ticket where A.P.S.'s name was crossed out in lead pencil be counted for Mr. W.?

"4. May the votes which G.W. received on the Republican ticket, the Independent ticket and the Democratic ticket be grouped together and totaled in determining the total vote for G.W. for mayor?"

In order to answer the questions you present, it is first necessary to determine whether a "write-in" vote may be counted as a vote for a candidate at a general election. The latest decision of the Supreme Court concerning this question is the case of Wilson v. Kennedy, 151 O. S. 485. In that case the Supreme Court held that a name written in a blank space provided therefor should be counted as a vote for the person whose name is so written for election to the office indicated on the ballot. Two judges dissented to this decision.

In the Kennedy case it was the contention of the appellee that under the election laws, as amended and effective January 2, 1948, a person can only become a candidate for the office to be filled at the general election by the method set out in the statutes and that the so-called "write-in" campaigns are no longer recognized at a general election. This contention was based on the amendment of former Section 4785-131, General Code (122 O. L. 103 (125), effective January 1, 1948), which amendment deleted a former provision authorizing the substitution of a name by writing another in black pencil and making a cross in the blank space at the left of the name so written. Appellant countered with the argument that such vote (write-in) was specifically recognized by Section 4785-144, General Code.

The Court, per Turner J., two justices dissenting, on page 493, held as follows:

"In view of the language contained in Sections 4785-144 and 4785-161c, paragraph 6, General Code, and in view of the constitutional right to vote, we are of the opinion that the name of a person written upon a ballot in the blank space provided therefor under the designation of the office to be filled (in this case, prosecuting attorney) should be counted as a vote for the person whose name is so written at the November 2, 1948, election."

The Court, in the majority opinion, also made several other significant statements. Thus, on page 491:

"While it is true as claimed by the appellee that the question of intention has been deleted from Section 4785-144, General

Code, *yet the ascertainment of the intention of the voter is still implicit as a duty to be observed by the board of elections in the canvass of the vote. * * *"* (Emphasis added.)

On page 492, the following appears:

"In 8 Ohio Jurisprudence, 160, Section 61, it is said:

'The presumption in favor of the constitutionality of statutes leads to the conclusion that where the validity of an act is assailed, and there are two possible interpretations, one of which would render it valid, and the other invalid, the court should adopt the former, so as to bring the act into harmony with the Constitution.'

"In 8 Ohio Jurisprudence, 154, Section 58, it is said:

'It is a well-established canon of construction that every reasonable presumption be indulged in favor of the constitutionality of a statute.'

"Under Section 1, Article V of the Ohio Constitution, every qualified elector is entitled to vote at all elections.

"It was held in the second paragraph of the syllabus in the case of *Monroe* v. *Collins,* 17 Ohio St., 665:

'The legislature have no power, directly or indirectly, to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; and laws passed professedly to regulate its exercise or prevent its abuse must be reasonable, uniform and impartial.'

"It was said by Judge Stewart in the case of *State, ex rel. Beck* v. *Hummel, Secy. of State and Chief Election Officer,* 150 Ohio St., 127, 139, 80 N. E. (2d), 899.

'All election statutes should be liberally interpreted in favor of the right to vote according to one's belief or free choice, for that right is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state.'"

Section 4785-144, General Code, as it existed at the time the decision of the Kennedy case was rendered, read in part as follows:

"No ballot shall be counted which bears any marks other than 'X' marks placed thereon *or a name written therein by the voter in a blank space provided therefor, * * *.*"
(Emphasis added.)

Section 4785-144, General Code, was amended by the recent session of the General Assembly. That amendment, contained in Amended Senate Bill No. 206, 98th General Assembly, and effective November 1, 1949, reads in part as follows:

> "No ballot shall be counted which is marked contrary to law except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice. * * *"

The question that must now be answered is whether the amendment of Section 4785-144, General Code, by the recent session of the General Assembly, has any effect on the decision rendered in the Kennedy case? I am of the opinion that it does not and that the Kennedy case is still the law of Ohio today.

My reasons for the above opinion are: (1) the definite statements made by the court in said case; (2) the new amendment is merely a re-enactment of the law as it existed prior to said case; (3) the new amendment does away with the two requirements formerly set out in Section 4785-144, General Code, i.e., that only ballots containing 'X' marks or a name written in a blank space provided therefor shall be counted and now provides for only one requirement, i.e., "no ballot shall be rejected * * * unless it is impossible to determine the voter's choice." (4) the failure of the Legislature to change Section 4785-161c, paragraph 6, General Code.

The statements referred to in my first reason are set out above. They are to the effect that the Legislature has no power under the Constitution to abolish the "write-in" method of voting.

The second reason is evident if one examines the laws of Ohio prior to the 1948 amendment. Thus, Section 4785-144, as contained in 113 O. L. 307 (374), read in part as follows:

> "No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice. * * *"

This section existed from 1929 to 1948 and there are numerous decisions by the courts of this state that are to the effect that this language permits "write-in" votes. This is even admitted by the dissent to the Kennedy case, wherein Judges Matthias and Taft, in discussing the 1948 amendment to Section 4785-144, on page 494 of the reported opinion, state as follows:

> "It seems obvious that the General Assembly, by this amendment (122 Ohio Laws 325, 353), intended to take away the right which a voter previously had to write in the name of a candidate on the party-column ballot. * * *" (Parenthetical matter added.)

The third reason is self evident.

The fourth reason pertains to the language contained in Section 4785-161c, paragraph 6, General Code, which relates to voting machines and provides that such voting machine shall permit each elector "to vote for persons whose names are not on any ballot." The Court, in the Kennedy case, relied on this language in reaching its decision and since that section is still effective, the Legislature must not have intended to abolish the "write-in" method of voting.

In view of the above, it is my opinion that a "write-in" vote may be counted as a vote for the person whose name is so written for election to the office indicated on the ballot.

Having decided that a "write-in" vote is permitted, I shall now proceed to answer the questions you present.

Your first question presents a situation which, so far as I am able to determine, has never been passed upon in this state. Having examined the various provisions of the Constitution and the statutes, I am able to find but one provision that might prevent G. W. from being a candidate. That is Section 4785-69, General Code, which reads as follows:

> "Candidates for party nominations to state, district, county and municipal offices or positions, for which party nominations are provided by law, and for election as delegates or alternates to national or state party conventions, and for election as members of party controlling committees, shall have their names printed on the official primary ballot by filing a declaration of candidacy and paying the filing fee as required by law. *No person who seeks party nomination for an office or position at a primary shall be permitted to become a candidate at the following election for the same office by petition.*" (Emphasis added.)

It will be noted that the last sentence of Section 4785-69, supra, seems to forbid a person who seeks party nomination from becoming a candidate at the following election. But it must be noted that this is limited by the words "by petition." Nothing is said as to "a write-in" candidate.

In the case of State, ex rel. Anderson v. Hyde, et al., Board of Elections of Trumbull County, 140 O. S. 339, the court had this section under consideration. In that case relator brought an action in mandamus to compel the respondents, the board of elections, to place his name on the ballot as a candidate. It seems that, at the primary election, relator's name was written in for the Republican nomination but that the number of votes he received was insufficient for nomination. Later relator filed a petition for nomination as an Independent candidate. A protest was filed

against such candidacy on the ground that relator had sought the same office at the primary election. The court, although it denied the writ, said, regarding Section 4785-69, supra, as follows:

> "Reading the statutes referred to in pari materia it would seem plain that one who unsuccessfully seeks nomination for political office at a party primary election, either by filing a declaration of candidacy or by conducting a write in campaign may not become an independent candidate at the ensuing election by filing a petition."

However, it must be noted that the Hyde case and other cases that might be cited limit their decisions to prohibiting a later nomination to nomination by petition.

This precise question is the subject of an annotation in 143 A. L. R. 603, wherein the various forms of statutes and constitutional provisions on this subject are discussed.

In that annotation there are seven different types of statutes set forth which declare a defeated candidate for nomination is ineligible as a candidate at a general election, or prohibits printing his name on the official ballot.

Thus, the first type of statute declared that a candidate defeated for nomination shall not be eligible or permitted to run for the same office for which he was a candidate. This statute was held to be unconstitutional since it was broad enough to prevent such defeated candidate from holding the office, notwithstanding a sufficient number of voters to elect him may have voted for him by writing his name on the blank line in the ballot.

The second type of statute was, in all respects, the same as the Ohio statute. The Nebraska court held that this type of statute did not prevent one from being a candidate or from receiving a write-in vote, but merely prevented him from being nominated by petition and having his name printed on the official ballot for the general election and, therefore, was not open to constitutional objection.

The third type of statute provided that no names of candidates which were printed upon the primary election ballot shall be placed on the official ballot unless such candidate had been chosen in accordance with the act. The court held that while this statute prohibited printing the defeated candidate's name on the official ballot, since he is still eligible and may

aspire to the office, he may invite his fellow citizens to vote for him in the blank space provided for and he may secure the office if he can obtain the requisite support.

The fourth type of statute prohibited the printing of the candidate's name on the ballot after he had been defeated. The court held this did not prevent write-in.

The fifth, sixth and seventh types of statutes are essentially the same as those reported herein and the result was the same in all cases.

In light of the above, it would seem that Section 4785-69, General Code, merely forbids a person who was defeated at a primary election to become a candidate for the same office by petition and it does not prohibit him from becoming a "write-in" candidate.

The answers to your second, third and fourth questions depend on whether it is possible to determine the voter's choice. Certainly, in all three situations presented by the questions, it is possible to determine who the voter intended to vote for and it is, therefore, my opinion that all of such votes may be counted in determining the total vote G. W. received. There are numerous decisions which sustain this position. See, for example: Orewiler v. Fisher, 133 O. S. 608; Thompson v. Redington, 92 O. S. 101; Board of Elections v. Henry, 25 O. App. 278; State, ex rel. Figley v. Conser, 5 O. C. C. (N. S.) 119; Skeels v. Paulus, 44 O. L. A. 529; 15 O. Jur. 386, et seq.; 18 Am. Jur., 311, et seq.

In conclusion, and in summary, it is my opinion that:

1. A name written on a ballot at a general election may be counted as a vote for the person whose name is so written for the office indicated on the ballot.

2. Section 4785-69, General Code, prohibits a person who seeks party nomination for an office or position at a primary election to become a candidate at the following election for the same office by petition. It does not prohibit such person from becoming a "write-in" candidate.

3. In deciding whether a particular write-in vote may be counted, the board of elections may consider only one factor, i.e., is it possible to determine the voter's choice?

Respectfully,

HERBERT S. DUFFY,
Attorney General.