

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Mathis Kearse Wright Jr.,

Plaintiff-Appellee,

vs.

**Sumter County Board of
Elections and Registration,**

Defendant-Appellant.

Appeal No. 18-11510-H

**Plaintiff-Appellee's
Response to
Jurisdictional Question**

**Wright v. Sumter County Bd. of Elections and Registration
18-11510-H**

**Certificate of Interested Persons
and
Corporate Disclosure Statement**

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3,
counsel for the plaintiff-appellee certifies that the following persons and
entities have or may have an interest in the outcome of this case:

ACLU Foundation, Inc.

ACLU Foundation of Georgia, Inc.

Baker & Hostetler, LLP

Braden, E. Mark

Brady, Robert

Khondoker, Aklima

Lawson and Reid, LLC

McDonald, M. Laughlin

McKnight, Katherine L.

Raile, Richard R.

Reid, Kimberly

Sands, W. Louis

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**Certificate of Interested Persons
and
Corporate Disclosure Statement
(continued)**

Sells, Bryan L.

Stanley, Trevor

Sumter County Board of Elections and Registration

The Law Office of Bryan L. Sells, LLC

There is no nongovernmental corporate party to this proceeding.

/s/ Bryan L. Sells

Bryan L. Sells

Attorney for Mathis Kearse Wright, Jr.,

Plaintiff-Appellee

Dated: August 23, 2018

Plaintiff-Appellee Mathis Kearse Wright, Jr. respectfully submits this response to the Court's request for his position on a jurisdictional question that has arisen in this case. Stated succinctly, Wright's position is that this Court lacks jurisdiction over Sumter County's interlocutory appeal but not for the reason suggested by the Court's jurisdictional question.

Background

This is a Section 2 challenge to the method of electing members of the Board of Education in Sumter County, Georgia. The plaintiff-appellee, Mathis Kearse Wright, Jr., is an African-American resident and registered voter in Sumter County. The defendant-appellant is the Sumter County Board of Elections and Registration ("Sumter County" or the "County"), which is responsible for conducting elections for members of the Sumter County Board of Education. Act No. 87, 2001 Ga. Laws 3865.

Wright filed this action on March 7, 2014. (ECF 1.)¹ After one round-trip to this Court (Appeal No. 15-13628), the district court held a trial on remand in December 2017. On March 17, 2018, the Court

¹ All ECF citations refer to documents filed in the district court.

issued a 38-page order finding, “based on the totality of the circumstances, that the at-large districts of the Sumter County Board of Education dilute African-American voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301.” (ECF 198 at 37.) The district court did not enjoin the County from using the challenged plan or adopt a remedy in its order but noted instead that this case “now moves to a remedial stage.” (*Id.*)

On March 30, the district court granted Wright’s emergency motion for an order enjoining the May 22 school-board election, which was about to be held using the plan that the Court found to be discriminatory. (ECF 204.) In its order, the court indicated that it would enter a further order by July 23 setting forth an interim remedial plan for future school-board elections. (*Id.* at 7.)

The County appealed that injunction. (ECF 207.)

Wright moved to dismiss the County’s appeal for lack of jurisdiction, arguing that the appeal was moot because the terms of the district court’s injunction had been fully satisfied. This Court denied that motion without explanation on May 9.

Then on June 21, the district court issued an order modifying the March 30 injunction from which the County had appealed. (ECF 214.) The new order modified the prior order by removing the self-imposed July 23 deadline for issuing an order regarding new boundaries for the board of education election districts. The court concluded that it lacked jurisdiction to do so because of the pendency of this appeal. The order also clarified that the March 30 order from which the County appealed “requires only that the Sumter County Board of Education elections previously scheduled for May 22, 2018 be held on November 6, 2018.” (*Id.* at 5-6.) The net effect of the June 21 order was thus to allow the County to hold the next school board election on November 6 using the election plan that the district court had found to violate the Voting Rights Act.

Wright promptly filed a motion asking the district court to reconsider its June 21 order. Wright also renewed his motion in this Court to dismiss the appeal on mootness grounds.

On July 23, the district court denied Wright’s motion for reconsideration after again concluding that it lacked jurisdiction to issue new boundaries. (ECF 217.) The court also denied without

prejudice Wright's request for an order enjoining the November election but stated that it would "... entertain the request [to enjoin the November election] upon Wright's motion on a date closer to the election." (*Id.* at 7). Wright filed a motion making that request eight days later, and the district court expedited the briefing schedule.

On August 9, while the parties were briefing Wright's motion for an injunction in the district court, this Court issued an order denying Wright's renewed motion to dismiss (again, without explanation) and remanding the appeal to the district court with instructions to issue new boundaries for the November election if it was still feasible to do so. Otherwise, the district court was instructed to resolve any motions regarding the November election and return the case to this Court.

On Friday, August 17, the district court entered an order concluding that it was not still feasible to issue new boundaries for the November election and that the election should not be allowed to proceed under the boundaries that it had found to be discriminatory. (ECF 237.) The order only enjoins the County from holding the school-board election in November 2018 and does not permanently enjoin the County from using the challenged plan in future elections. The court

then issued a longer order explaining its injunction on the following Monday. (ECF 238.)

Later that same day, the County filed an emergency motion asking this Court to stay the district court's August 17 injunction and to allow the school-board election to proceed in November under the unlawful boundaries.

The next day, on August 21, the Clerk of this Court notified the parties that a jurisdictional question had arisen and invited the parties to advise the Court of their position on it. The question was as follows:

Sumter County has filed a motion to stay or vacate the district court's August 20, 2018 order – entered pursuant to a limited remand from this Court – that stayed the County's School Board elections. Does the County need a new or amended notice of appeal to seek relief from that order?

Within a few hours thereafter, the County filed a second notice of appeal in the district court, this time appealing the court's August 17 injunction (ECF 237) “and all orders forming the basis of or relating to that injunction.” (ECF 240.) The County also filed a motion in this Court to consolidate its new appeal with this one.

Argument

I. The County's new notice of appeal brings the August 17 injunction under this Court's jurisdiction.

To answer the question: yes. Sumter County needed a new or amended notice of appeal to seek relief from the August 17 order.

“The general rule in this circuit is that an appellate court has jurisdiction to review only those judgments, orders or portions thereof which are specified in an appellant's notice of appeal.” *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1528 (11th Cir., 1987); accord *Nichols v. Ala. State Bar*, 815 F.3d 726, 730 (11th Cir., 2016); see Fed. R. App. P. 3(c)(1)(B) (requiring that a notice of appeal “designate the judgment, order, or part thereof being appealed”). Although the Court generally construes a notice of appeal liberally, “we will not expand it to include judgments and orders not specified unless the overriding intent to appeal these orders is readily apparent on the face of the notice.” *Osterneck*, 825 F.2d at 1528.

Because the August 17 injunction was not identified in Sumter County's original notice of appeal, filed in April, that injunction was not within this Court's jurisdiction on Monday when the County filed its motion for a stay. But the County filed a new notice of appeal on

Tuesday which *does* identify the August 17 injunction as the order being appealed, and that is sufficient under Rule 3(c) to bring the August 17 injunction within this Court’s jurisdiction. (The Court should also construe the County’s second notice of appeal as an amendment to its first one or grant the County’s motion to consolidate, as the new appeal does not present any new issues.)

II. This Court lacks jurisdiction anyway because the appeal is, or will soon be, moot.

Although the County has cured the technical defects in this Court’s jurisdiction, it cannot cure the fundamental defect of mootness through the passage of time. As Wright has argued in two previous motions to dismiss, this Court lacks jurisdiction over the County’s interlocutory appeal—or will lose it soon—because of the limited nature of the district court’s injunctions. *See, e.g., RES–GA Cobblestone, LLC v. Blake Constr. & Dev., LLC*, 718 F.3d 1308, 1314 (11th Cir. 2013) (dismissing an interlocutory appeal that had become moot).

In the case of an interlocutory appeal taken from the grant of an injunction, the appeal is moot “where the effective time period of the injunction has passed.” *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1119 (11th Cir. 1995). It is quite common for interlocutory appeals

to become moot in election cases due to the ordinary passage of time. *See, e.g., Fleming v. Gutierrez*, 785 F.3d 442, 445-47 (10th Cir. 2015) (collecting cases).

Here, the district court has not permanently enjoined the County from using its discriminatory plan in future elections, as is the usual practice in Section 2 cases. Instead, it has steadfastly avoided entering such an injunction and has merely issued injunctions expressly limited to one election at a time. As a result, this interlocutory appeal will become moot once the Court's ability to effect relief for the November election has passed (which date, according to the district court, was August 17).

Finally, the absence of jurisdiction over this particular appeal does not mean, of course, that the Court of Appeals will never have the opportunity to review the merits of the district court's order on liability. (That order is the real focus of the County's arguments in this appeal anyway.) That order may well come before the Court in due course if one of the parties appeals a permanent remedial plan or a yet-to-be issued final judgment. Until that happens, however, this Court lacks

jurisdiction to reach that order, and any ruling on it would constitute an advisory opinion.

Dated: August 23, 2018

/s/ Bryan L. Sells

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Certificate of Compliance

This document complies with the type-volume limit of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because, excluding the cover page, tables, certificates, and signature blocks, this document contains 1610 words. This document complies with the typeface and type-style requirements of Local Rule 27-1(a)(10) because this document has been prepared in a proportionally spaced typeface using version 16.12 of Microsoft Word for Mac in 14-point Century Schoolbook font.

/s/ Bryan L. Sells

Bryan L. Sells

Attorney for Mathis Kearse Wright, Jr.,

Plaintiff-Appellee

Dated: August 23, 2018

Certificate of Service

I hereby certify that on August 23, 2018, I electronically filed the foregoing **Plaintiff-Appellee's Response to Jurisdictional Question** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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