

Remanding to State Court an Emergency Election Case After the Federal Claim Is Withdrawn

Oliver v. Lewis (Lee H. Rosenthal, S.D. Tex. 4:12-cv-2568)

Defendants removed a state-court challenge to the disqualification of a primary-election victor for party disloyalty. Upon the plaintiffs' agreement to dismissal of a federal constitutional claim by nonsuiting the voter plaintiffs, the district court remanded the case because of the early withdrawal of the federal claim and the complexity of the state claims.

Subject: Getting on the ballot. *Topics:* Matters for state courts; getting on the ballot; primary election.

On August 26, 2012, county party officials removed an action to the U.S. District Court for the Southern District of Texas that challenged the party's removal of a district-attorney primary-election victor from the general-election ballot.¹ On the following day, the removed candidate and the other plaintiffs—two voters—filed an emergency motion for remand alleging that removal of the case to federal court occurred one day in advance of a scheduled state-court hearing on the case and that mailing of general-election ballots was to begin on August 30.²

Judge Lee H. Rosenthal heard from the plaintiffs on August 27 and from both sides on August 28.³ At the second hearing, it was established that the deadline for finalizing the November 6 ballot was September 6.⁴ Also at the second hearing, the voters withdrew as plaintiffs, removing from the case their federal constitutional claim.⁵

1. Notice of Removal, *Oliver v. Lewis*, No. 4:12-cv-2568 (S.D. Tex. Aug. 27, 2012), D.E. 2; *Oliver v. Lewis*, 891 F. Supp. 2d 839, 841 (S.D. Tex. 2012); see Mike Glenn, *Candidate to Fight Party to Stay in Race*, Hous. Chron., Aug. 25, 2012, at 2; see also Brian Rogers, *Dems Prefer No DA Candidate at All Over Oliver*, Hous. Chron., Aug. 23, 2012, at 1 (“Oliver has been a controversial candidate because he has been indicted three times, but never convicted. He has said he continues to run in elections because getting his name on the ballot helps his legal practice.”); Brian Rogers & James Pinkerton, *Anderson Defeats Lykos in Bitter Battle*, Hous. Chron., May 30, 2012, at 1 (“Perennial candidate Lloyd Oliver shocked courthouse insiders by beating defense attorney Zack Fertitta.”).

Officials of the Harris County Democratic Party have notified Oliver that they will not place his name on the general-election ballot as the Party's nominee on the basis that public statements he made, including praising his primary opponent as well as the incumbent (Republican) district attorney, violated Texas Democratic Party rules.

Oliver, 891 F. Supp. 2d at 840.

2. Motion, *Oliver*, No. 4:12-cv-2568 (S.D. Tex. Aug. 27, 2012), D.E. 2; *Oliver*, 891 F. Supp. 2d at 841.

3. Docket Sheet, *Oliver*, No. 4:12-cv-2568 (S.D. Tex. Aug. 26, 2012) (D.E. 3, 5); *Oliver*, 891 F. Supp. 2d at 841.

4. Docket Sheet, *supra* note 3 (D.E. 5).

5. *Oliver*, 891 F. Supp. 2d at 843.

On August 31, Judge Rosenthal remanded the case, finding it appropriate to do so when “the only federal law claims are abandoned very early in the litigation and the remaining claims raise novel or unsettled state-law issues.”⁶

The state court ordered the candidate’s name to remain on the general-election ballot.⁷ He lost the election.⁸

6. *Id.* at 849.

7. See Joe Holley, *Oliver Won’t Be Booted off Ballot*, Hous. Chron., Sept. 6, 2012, at 1 (reporting that the state judge agreed that the candidate had a First Amendment right to compliment the defeated incumbent of the other party after her primary-election defeat).

8. See Brian Rogers, *Anderson Rolls in DA’s Race*, Hous. Chron., Nov. 7, 2012, at 1.