

Milwaukee Branch of the NAACP, et al.,

PLAINTIFFS,

vs.

Case No. 11 CV 5492

Scott Walker, et al.,

DEFENDANTS

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ORDER DENYING MOTION FOR STAY OF TEMPORARY INJUNCTION

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This is an action seeking declaratory and injunctive relief seeking to preclude enforcement of that portion of 2011 Wisconsin Act 23 which requires Wisconsin voters to produce photo identification in order to receive an election ballot. This case is set for trial commencing April 16, 2012. The court has ordered that the defendants not enforce the photo identification requirements of Act 23, pending trial of the case, Revised Order, March 12, 2012. The defendants have moved the court to stay that injunctive order pending interlocutory appeal. In support of that motion, the defendants have submitted legal argument together with the affidavits of Dennis Miller and David Buerger, both dated March 9, 2012. The plaintiffs have submitted legal argument in response.

Mr. Miller states that the Wisconsin Department of Transportation (WisDOT) has issued 49,914 new driver's licenses and 7,257 new identification cards to persons age 18 or older between January 1 and March 8, 2012. Mr. Buerger describes the on-going efforts of the defendant Government Accountability Board (GAB) to comply with the court's order to cease enforcing the photo identification requirement of Act 23.

The court should stay the injunction if the defendants demonstrate: (1) a strong showing that they are likely to succeed on the merits in the interlocutory appeal; (2) a showing that, in the absence of a stay, the defendants will sustain irreparable injury; (3) a showing that a stay will cause no substantial harm to the plaintiffs; and (4) a showing that a stay will do no harm to the public interest, In re Marriage of Leggett, 134 Wis. 2d 385, 396 787 (Ct. App. 1986); Scullion v. Wisconsin Power & Light Co., 237 Wis. 2d 498, 502, 614 N.W.2d 565 (2000).

As to likelihood of success upon appeal, the defendants argue that the ruling of this court is in conflict with that of the U. S. Supreme Court In Crawford v. Marion County Election Board, 553 U.S. 181 (2008). That is not correct. The U. S. Supreme Court, in that decision, considered a challenge based upon the U. S. Constitution, not the Wisconsin Constitution. By contrast, the order now in effect, began with the observation that this case is founded “exclusively upon the guarantees set forth in the Wisconsin Constitution,” Revised Order, p. 2. The Wisconsin Constitution declares, in remarkably broad language, that the right to vote is to be available to virtually all citizens, Article III, Section 1. A review of past rulings of the Wisconsin Supreme Court demonstrates that Wisconsin courts are to examine closely any legislation that has the effect of limiting the voting opportunities of Wisconsin citizens. Based upon that careful scrutiny, this court concluded that Act 23, “steps beyond the proper authority of the Legislature and is in violation of the Wisconsin Constitution, Article III, Section 1”, Revised Order, p. 9. The Crawford decision does not consider what is permitted or what is protected by the Wisconsin Constitution and thus it has little or no useful application in this matter.

The defendants suggest that the court, without cause, turned from an initial decision declining to order a temporary injunction. That characterization appears to have left out part of the process. The court did initially decline to order a temporary injunction, noting that the defense had not had the opportunity to contest a supplemental report provided by UW Professor Kenneth R. Mayer, order, February 8, 2012. Soon thereafter, in a scheduling conference conducted February 13, 2012, the court expressed the hope that a full trial could quickly be scheduled. In that scheduling conference, however, the defendants advised the court that it would not be possible to set the trial before the April 3, 2012 election. At that point, the court did elect to reconsider the request for a temporary injunction. In the course of doing so, the court scheduled an evidentiary hearing to give both parties the opportunity to present evidence and to cross-examine witnesses called. That hearing was conducted March 1, 2012, and only after that hearing did the court conclude that a proper showing for temporary relief had been made.

The affidavit of Dennis Miller recounts WisDOT driver’s licenses and photo identification documents issued from January 1 to March 8, 2012. This new information, unlike the evidence upon which the court relied, has not been subject to cross-examination. This new information does not appear to contradict or to undercut the evidence already in the record nor has there been any suggestion that substantially equivalent information could not have been offered by the defendants at the March 1, 2012 evidentiary hearing.

The court concludes the defendants have not shown a reasonable possibility of success on the merits, let alone the strong showing required to justify a stay.

Turning to the question of possible irreparable injury to the defendants if the stay is not lifted, the defendants have offered the affidavit of Mr. Buerger describing the difficulties that will likely be caused by GAB's compliance with the temporary order. The court did consider that possibility in the decision to grant an injunction, Revised Order, pp. 10-11. The Buerger affidavit does not enhance or modify the significance of that fact. This is a description of administrative inconvenience, possibly beyond trivial, but certainly not irreparable harm.

The third element to be shown is a lack of harm to the plaintiffs. Here, the defendants presume the injunction will be reversed on appeal before the April 3, 2012 election. The defendants assert that when this occurs there will be less time to advise voters of their need to obtain photo identification. This is speculative, particularly in light of the court's determination that the defendants have not shown a likelihood of success on appeal. Suffice it to say that it is not sufficiently persuasive to justify a stay of the order.

The fourth factor that this court must consider is potential harm to the public interest. It is the obligation of the defendants to show that a stay will do no harm to the public interest and here it is perhaps most clear that no basis has been shown to stay the order. This court has concluded, based upon the only competent evidence offered, that Act 23 will impair needlessly, the opportunity to vote as to a significant proportion of Wisconsin citizens who, under our constitution, are guaranteed the right to vote. It is the essence of what has been persuasively shown thus far in this case that a vital interest of the public will be harmed if the injunction is not maintained. The public interest is served by the temporary injunction, not harmed. The defendants have not demonstrated the fourth factor.

For the reasons set forth above, the court denies the motion to stay the injunctive order of March 12, 2012.

By the court this 15<sup>th</sup> day of March, 2012.

Judge David Flanagan