

OPINION OF THE COURT

UNIVERSITY OF KENTUCKY STUDENT GOVERNMENT ASSOCIATION

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SUPREME COURT

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STAPLES/WIMBERLY, PETITIONER V. BILAS/KINGTON

[April 7, 2012]

CHIEF JUSTICE WRIGHT delivered the opinion of the Court.

Staples/Wimberly timely filed three complaints with Molly Smith, Madam Election Investigator arising from the 2012 University of Kentucky Student Government Association (UKSGA) Presidential Elections. The claims are as follows: first (I), Bilas/Kington violated Expenditure Act section E(2)(a)-(b) by not including in their expenditure forms the monetary value of tweets from John Wall, Patrick Patterson, Josh Harrelson, Randall Cobb, and Dave Baker; second (II), Bilas/Kington posted campaign material at Newtown Crossing apartment complex, thus violating Election Act section IX(D)(a) which, according to Staples/Wimberly, requires candidates to post campaign material on campus property only; third (III), Bilas/Kington failed to remove campaign material within 48 hours of end of the election, violating Election Act section IX(F)(2).

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In claim one Staples/Wimberly ask the Court to perform an action it is not well equipped for. Valuation of the free public exchange of ideas across social media such as Twitter or Facebook has evaded many people who are more knowledgeable and capable than the Court in such an area. As a result, the Court declines to find a violation under claim one and the particular set of facts presented.

The legislation at issue in this claim is section E of the Expenditure Act, which states: “All commercial or individual services or tangible materials donated by *non-students* to a candidate or candidates shall be attributed as expenditures of the receiving candidate or candidates at a *reasonable retail price*.” (emphasis added). Donated services by students are outside the scope of this statute and this decision. The issues thus presented are whether a tweet is an individual service and if so, how to effectively determine its reasonable retail value.

The Court does not dispute that a tweet on behalf of a candidate *could* indeed be an individual service donated. This is not the crucial element of this case.

However, the Court does not hold that the tweets in dispute in this case have a reasonable retail value and as a result, they cannot be expensed. Staples/Wimberly presented evidence to the Court of a marketing agency by the name of Izea that values tweets. While this was concrete evidence of prices paid for tweets (e.g. \$1,430 for a tweet by Desean Jackson), the Court is not convinced it is on all fours with the circumstances present

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in this dispute. If Bilas/Kington had went through Izea (or a similar marketing agency) and obtained these tweets for free, the Court would hold that they must be expensed at the reasonable retail price as dictated by the contract. In that situation, the service would arise out of a contractual agreement or transaction in the ordinary course of business (i.e. John Wall would be a client of Izea and in order to get him to tweet on your behalf, you must speak with Izea – Izea would then donate the “service” of John Wall tweeting for you. Izea would have a contract with John Wall, which would state the price of a tweet on his account). The reasonable retail price would not be hard to determine if that situation was before the Court as a retail value in its truest sense is simply what an individual is willing to pay. If the contract between a marketing agency and a twitter account held by an individual states a price that someone is willing to pay as an interested consumer, that is the reasonable retail price.

The circumstances before the Court are materially different. Bilas/Kington stated they did not go through any such agency and further, a search on the marketing agency’s website shows that none of the disputed twitter accounts are clients. Instead, Bilas/Kington utilized a friendship and a past relationship with the twitter users at issue. The Court is not in the business of valuing friendship.

Additionally, the Court is very concerned about the long-term effects of a ruling that all tweets by non-students must be expensed at their reasonable retail price. There is no family member exception or recent graduate exception within the language of the statute. As a result, several hypotheticals give the Court reason to pause before handing down a long-reaching rule as requested by Staples/Wimberly. How would the Court value a tweet or facebook post by a candidate’s mother, father, grandparent, or similar familial relationship all of which are non-students and subject to the statute? How would the Court value a tweet, facebook post, or any other digital communication (e.g. blog post) by a recently graduated student? It could even be argued that a recently graduated fraternity/sorority president (i.e. graduates in December with the election occurring in May) may have more impact on an election as a larger percentage of their twitter followers or facebook friends may still be students at UK and as such, members of the electorate. This is the slipperiest of slippery slopes and one the Court is not prepared to go down at this time.

Additionally, the administration of Staples/Wimberly’s request, if granted, would be nearly impossible. If the Court required all digital “campaign material” (that is, material meant to induce voting for a candidate) to be expensed, the Election Board would have to be constantly monitoring the internet in order to make sure that all comments, “likes,” tweets, facebook posts, blog posts, memes, and any future technological communication were expensed at some unknown “reasonable retail price.” What is a tweet by a 22-year-old recent graduate worth? How do we accurately determine this? The Court refuses to shove the Election Board into this wormhole of valuation.

The Election Board would not be the only group affected in a negative manner by a broad ruling. The candidates themselves would suffer greatly as well. The Court strives to issue rulings that provide candidates with a reliable zone of action to avoid violation and promote integrity in elections. It would be absurd to ask a candidate to craft a method of valuing tweets by all non-students.

Staples/Wimberly wish to focus only on the tweets at issue because well-known individuals with a great deal of followers made them. But this Court cannot simply state that tweets by “celebrities” or individuals with X amount of followers/friends should be

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expensed. First, who defines a “celebrity”? Celebrity to whom? If it is in respect to UK basketball fans, then sure John Wall is definitely a celebrity. However, if it is in respect to the classic “reasonable man” then John Wall may be relatively unknown and unimportant. Second, what is the cutoff? How many friends/followers do we require? How do we determine how much influence one would have on the election? Do we look at the percentage of students that are followers/friends of the individual at issue? This subjective decision-making, more akin to throwing darts than judicial reasoning, is something the Court refuses to engage in.

Finally, it is important to note that the Court is hesitant to issue a ruling that allows the free exchange of ideas over the Internet to be policed. If the Court adopts the view desired by Staples/Wimberly, the Election Board would have to closely monitor all Internet activities and somehow come up with a value for something that is inherently free.

The Court does not hold that the reasonable retail price of any donation by a non-student would be impossible to value. If, for example, a candidate went to a balloon store and the owner (a non-student) decided to give the helium to the candidate for free, the value of the helium would need to be expensed. There is an ascertainable value for the helium. This value can easily be determined through contract or ordinary course of dealings with other consumers the respective business deals or has dealt with. The facts before the Court do not provide a similar situation. The inherent nature of social media, as dictated by the facts in this case, does not provide any reliable method of determining the reasonable retail value.

As a result of the concerns stated above, the Court holds that the tweets at issue in this case cannot be expensed at a reasonable retail price because it is impossible to determine what that price is. However, the Court does emphasize that if a candidate goes through a third party contractual arrangement to obtain the tweets, they must be expensed at the reasonable retail price (the contract price).