SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 15, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 11-00575

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCISCO TIRADO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCISCO TIRADO, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered March 9, 2011. The judgment convicted defendant, upon a nonjury verdict, of course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the periods of postrelease supervision shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]). We reject defendant’s contention that Supreme Court erred in denying his request for access to the mental health counseling records of one of the two victims in this case. Mental health records are discoverable “where a defendant can demonstrate a good faith basis for believing that the records contain ‘data relevant and material to the determination of guilt or innocence,’ a decision which will rest ‘largely on the exercise of a sound discretion by the trial court’ ” (*People v McCray*, 102 AD3d 1000, 1005, quoting *People v Gissendanner*, 48 NY2d 543, 548). It is well settled that “[c]onfidential psychiatric records should be disclosed only when their confidentiality is significantly outweighed by the interests of justice” (*People v Felong*, 283 AD2d 951, 952, *lv denied* 96 NY2d 862 [internal quotation marks omitted]). Here, the court reviewed the records in camera before ruling that defendant was not entitled to any portion of that victim’s mental health counseling records, and the

court did not abuse its discretion in reaching that conclusion.

We reject defendant's further contention that the court abused its discretion by precluding cross-examination of the same victim regarding her psychiatric history. "A defendant has a constitutional right to confront the witnesses against him through cross-examination. With respect to the psychiatric condition of a witness, 'the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition' " (*People v Middlebrooks*, 300 AD2d 1142, 1143, *lv denied* 99 NY2d 630, quoting *People v Baranek*, 287 AD2d 74, 78). Here, defendant was permitted to question that victim about any medications that she was presently taking and whether those medications impaired her memory or affected her testimony. However, defendant failed to show that her psychiatric history "would bear upon her credibility or otherwise be relevant" (*People v Byers*, 254 AD2d 494, 494, *lv denied* 93 NY2d 1043; *see People v Beckett*, 186 AD2d 209, 210, *lv denied* 81 NY2d 760). Therefore, the court did not abuse its discretion in limiting the cross-examination of that victim (*see People v Corby*, 6 NY3d 231, 234-235).

Defendant's contentions that the court erred in denying his motion for full disclosure of the journals of both his ex-wife and one of the victims and that he has been deprived of appellate review because the People returned those journals to their respective owners following trial are without merit. The court reviewed the journals in camera and concluded that the People had properly disclosed all portions constituting *Rosario* material. As to defendant's contention that he has been deprived of appellate review, we note that the journals were not received in evidence and there was no request by defense counsel that they be preserved, and thus defendant's contention is not properly before us (*see* CPL 470.05 [2]).

Defendant was not prejudiced as a result of the adjournment of the trial, which was necessitated because an expert witness for the prosecution was not available during the week in which the trial was scheduled to begin. Generally, " 'requests for brief adjournments to secure witnesses should be granted where the witness is identified, is within the court's jurisdiction and there is a showing of some diligence and good faith' " (*People v Hernandez*, 146 AD2d 646, 647). Here, the court offered to move the trial ahead by one week, and the People agreed to that change in scheduling. However, defense counsel was busy that week and, as a result, the court moved the trial to the next available date, which was almost six months later. Defendant's contention, raised in his pro se supplemental brief, that the adjournment deprived him of his right to a speedy trial is unpreserved for our review (*see People v Diefenbacher*, 21 AD3d 1293, 1294, *lv denied* 6 NY3d 775), and is without merit inasmuch as the delay was the result of court congestion (*see* CPL 30.30; *see also People v Johnson*, 209 AD2d 986, 986, *lv denied* 84 NY2d 1033; *see generally People v Anderson*, 66 NY2d 529, 534-536).

As the People correctly concede, the court erred in imposing consecutive periods of postrelease supervision. "Penal Law § 70.45 (5) (c) mandates that the periods of postrelease supervision merge and

are satisfied by the service of the longest unexpired term" (*People v Kennedy*, 78 AD3d 1477, 1479, *lv denied* 16 NY3d 798). We therefore modify the judgment accordingly. However, we reject defendant's further contention that the sentence is unduly harsh or severe, particularly with respect to the imposition of consecutive terms of incarceration. We have considered defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants reversal or further modification of the judgment.

Entered: August 15, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAE 13-01365
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF ROBERT K. BANKOSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NORMAN P. GREEN AND BRIAN ABRAM, CONSTITUTING
CHAUTAUQUA COUNTY BOARD OF ELECTIONS, LARRY J.
BARMORE, VINCENT W. HORRIGAN AND ANNA M. WILCOX,
AS PRESIDING OFFICER OF AUTHORIZATION MEETING,
RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.

JEFFREY A. SHEVLIN, JR., STOCKTON, FOR PETITIONER-APPELLANT.

LAW OFFICES OF MICHAEL ROBERT CERRIE, DUNKIRK (MICHAEL ROBERT CERRIE OF COUNSEL), FOR RESPONDENT-RESPONDENT NORMAN P. GREEN.

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR RESPONDENT-RESPONDENT BRIAN ABRAM.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR RESPONDENTS-RESPONDENTS LARRY J. BARMORE AND VINCENT W. HORRIGAN.

MICHAEL J. SULLIVAN, FREDONIA, FOR RESPONDENT-RESPONDENT ANNA M. WILCOX, AS PRESIDING OFFICER OF AUTHORIZATION MEETING.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered August 5, 2013 in a proceeding pursuant to the Election Law. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to Election Law § 16-102 to invalidate certificates (Wilson-Pakula certificates) authorizing respondents Vincent W. Horrigan and Larry J. Barmore (Unenrolled Candidates) to be designated as candidates on the ballot in the next primary election of the Chautauqua County Conservative Party (Conservative Party). We note as background that, earlier this year, the Unenrolled Candidates filed designating petitions seeking the Conservative Party's nomination in the upcoming election for Chautauqua County Executive and Chautauqua County Clerk, respectively. Because the Unenrolled Candidates were registered

Republicans, they could not be designated as candidates on the Conservative Party's primary ballot without authorization from the "party committee representing the political subdivision of the office for which a designation or nomination is to be made, unless the rules of the party provide for another committee, in which case the members of such other committee . . . may . . . authorize the designation or nomination of a person as a candidate" (§ 6-120 [3]; *see generally Matter of Master v Pohanka*, 10 NY3d 620, 623-625).

Following the Conservative Party's longstanding local practice, the County Committee's Executive Committee (Executive Committee), rather than the full County Committee, authorized the Unenrolled Candidates to be designated as candidates on the party's primary ballot. Petitioner, a registered Conservative in Chautauqua County, objected to the legality of those authorizations and commenced this proceeding against, inter alia, the Unenrolled Candidates and respondents Anna M. Wilcox, the Chairwoman of the Conservative Party, and Brian Abram, the Republican Commissioner of the Chautauqua County Board of Elections (collectively, respondents). Supreme Court properly dismissed the petition.

It is undisputed that, pursuant to the Election Law, the County Committee is the default "party committee" empowered to issue Wilson-Pakula certificates for the county offices at issue (Election Law § 6-120 [3]; *cf. Matter of Rowles v Orsini*, 309 AD2d 1307, 1309). Petitioner, however, contends that the rules and regulations of the County Committee of the Conservative Party (County Committee rules) did not effectively delegate that authority to the Executive Committee and thus that the Executive Committee lacked the power to issue the Wilson-Pakula certificates. We reject that contention and conclude that, under these circumstances, the County Committee rules delegated to the Executive Committee the power to authorize the designation of the Unenrolled Candidates as candidates for the relevant county offices in the upcoming Conservative Party primary election (*see generally Master*, 10 NY3d at 625-626; *Matter of New York State Comm. of Independence Party v New York State Bd. of Elections*, 87 AD3d 806, 811-812, *lv denied* 17 NY3d 706; *Matter of Peluso v Erie County Independence Party*, 66 AD3d 1329, 1330-1331; *Matter of Koppell v Garcia*, 275 AD2d 587, 588).

Article III, § 3 (A) of the County Committee rules states in relevant part that, "[a]t all times when the County Committee is not actually in session, the Executive Committee shall have, possess, and exercise *all* the rights, powers, privileges, and duties which the County Committee may have, possess, and exercise" (emphasis added). That provision clearly and unambiguously delegates to the Executive Committee the power of the County Committee to authorize the designation of the Unenrolled Candidates, provided that the County Committee was "not actually in session" when the authorizations were issued (*see Matter of Gresser v Cohen*, 275 NY 440, 444-445; *see also Master*, 10 NY3d at 625-626). The court did not make a factual finding with respect to whether the County Committee was in session at the time the relevant Wilson-Pakula certificates were issued but, on an appeal following a bench trial such as was conducted here, we may

"render the judgment [we] find[] warranted by the facts" (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499). That standard of review is equally applicable to special proceedings commenced pursuant to the Election Law (*see Matter of Wong v Cooke*, 87 AD3d 659, 661, *lv denied* 17 NY3d 706; *Matter of Stavisky v Koo*, 54 AD3d 432, 434). Here, petitioner made no showing that the County Committee was "actually in session" at the relevant time. Indeed, the fact that Wilcox—the presiding officer of both the Executive Committee and the County Committee (*see* Rules and Regulations of the Chautauqua County Committee of the Conservative Party of New York State, art III, § 2)—presided over the meeting at which the Executive Committee issued the contested authorizations supports the conclusion that the County Committee did not simultaneously meet without its presiding officer. Moreover, Wilcox testified that she had "never known a county wide [meeting] to be called in that June time period," i.e., when the contested authorizations were issued by the Executive Committee. We therefore conclude that petitioner failed to meet his burden of establishing that the full County Committee was "actually in session" when the Executive Committee authorized the challenged designations (*see generally Matter of Goldstein v Carlsen*, 59 AD2d 642, 643, *affd* 42 NY2d 993; *Matter of Naples v Swiatek*, 286 AD2d 567, 568, *lv denied* 96 NY2d 718). Consequently, petitioner failed to prove that the challenged Wilson-Pakula authorizations were not validly issued by the Executive Committee under the County Committee rules.

Entered: August 15, 2013 Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAE 13-01369
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF NEW YORK STATE COMMITTEE OF THE INDEPENDENCE PARTY, EXECUTIVE COMMITTEE OF THE NEW YORK STATE COMMITTEE OF THE INDEPENDENCE PARTY, FRANK M. MACKAY, CHAIRMAN, NEW YORK STATE COMMITTEE OF THE INDEPENDENCE PARTY, WILLIAM BOGARDT, SECRETARY, NEW YORK STATE COMMITTEE OF THE INDEPENDENCE PARTY AND PATRICK J. KEEM, A CANDIDATE AGGRIEVED,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RALPH M. MOHR AND DENNIS E. WARD, COMMISSIONERS OF AND CONSTITUTING ERIE COUNTY BOARD OF ELECTIONS, MARY ROSE GAUGHAN, KENNETH R. WALSH, JANIS A. COLARUSSO, LYNMARIE PHILLIPS AND RONALD R. FRASER, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO COLAIACOVO OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT JANIS A. COLARUSSO.

SHAWN P. MARTIN, WEST SENECA, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS LYNMARIE PHILLIPS AND RONALD R. FRASER.

Appeal from a judgment (denominated decision) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 12, 2013 in a proceeding pursuant to the Election Law and CPLR article 78 and declaratory judgment action. The judgment denied and dismissed the petition/complaint.

It is hereby ORDERED that said appeal insofar as taken by petitioners-plaintiffs New York State Committee of the Independence Party, Executive Committee of the New York State Committee of the Independence Party, Frank M. MacKay, Chairman, New York State Committee of the Independence Party, William Bogardt, Secretary, New York State Committee of the Independence Party and Patrick J. Keem, a Candidate Aggrieved, to the extent he challenges the certificates of authorization for respondents-defendants Lynmarie Phillips and Ronald R. Fraser is unanimously dismissed and the judgment is modified on the law by reinstating the petition/complaint with respect to petitioner-

plaintiff Patrick J. Keem insofar as he challenges the certificate of authorization for respondent-defendant Janis A. Colarusso and granting judgment in his favor as follows:

> It is ADJUDGED AND DECLARED that the certificate of authorization for respondent-defendant Janis A. Colarusso is invalid,

and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs commenced this proceeding/action pursuant to CPLR article 78, CPLR 3001 and Election Law article 16 seeking, inter alia, a judgment declaring invalid three certificates of authorization issued by the Interim County Organization (ICO) of the Erie County Independence Party and filed in the Erie County Board of Elections. The certificates of authorization designated respondents-defendants Janis A. Colarusso, Lynmarie Phillips, and Ronald R. Fraser as candidates for public office at the Independence Party primary election to be held on September 10, 2013.

We note at the outset that the appeal insofar as taken by petitioners-plaintiffs New York State Committee of the Independence Party (State Committee), Executive Committee of the New York State Committee of the Independence Party (Executive Committee), Frank M. MacKay, Chairman, New York State Committee of the Independence Party, William Bogardt, Secretary, New York State Committee of the Independence Party and Patrick J. Keem, to the extent he challenges the certificates of authorization for respondents-defendants Lynmarie Phillips and Ronald R. Fraser, must be dismissed. Those parties, including Keem to the extent indicated, are not aggrieved and thus are not proper parties to the appeal (*see generally* CPLR 5511; *Matter of Terranova v Fudoli*, 66 AD3d 1530, 1531). Petitioners-plaintiffs do not contend on appeal that Supreme Court erred in determining that only Keem has standing, and only to the extent that he challenges the certificate of authorization designating Colarusso as a candidate for the office of Supervisor of the Town of Orchard Park (*see* Election Law § 16-102 [1]; *Matter of New York State Comm. of the Independence Party v New York State Bd. of Elections*, 87 AD3d 806, 809-810, *lv denied* 17 NY3d 706). In the absence of standing and the absence of a challenge on appeal to the determination that there was no standing, it cannot be said that those parties, including Keem to that extent, are aggrieved by the judgment on appeal (*see generally* CPLR 5511; *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9).

Turning to the merits, we conclude that the court erred in determining that the ICO possessed the authority to issue authorizations in Erie County, notwithstanding the fact that the State Committee, in September 2012, adopted a resolution delegating to the Executive Committee the authority to issue authorizations in Erie County. Election Law § 6-120 permits a county committee to exercise the powers of nomination and designation “unless the rules of the party provide for another committee” (§ 6-120 [3]; *see Matter of Master v Pohanka*, 10 NY3d 620, 625). Here, inasmuch as the Executive

Committee is vested "with the authority to issue authorizations in Erie County," we agree with Keem that the ICO is "thereby stripp[ed] . . . of that authority" (*Matter of Peluso v Erie County Independence Party*, 66 AD3d 1329, 1330). Consequently, we modify the judgment by reinstating the petition/complaint with respect to Keem in part and by granting judgment in his favor declaring invalid the certificate of authorization for respondent-defendant Janis A. Colarusso.

Entered: August 15, 2013

Frances E. Cafarell
Clerk of the Court