

Tulop v. Palau Election Comm'n, 12 ROP 100 (2005)
ELIA TULOP and HERMINO OLKERIIL,
Appellants,

v.

PALAU ELECTION COMMISSION, SANTOS BORJA, NOAH T. IDECHONG,
VERONICA TECHEBOET, MARCHAU BOISEK, and KIMIKO RENGUUL,
Appellees.

CIVIL APPEAL NO. 05-002
Civil Action No. 04-398

Supreme Court, Appellate Division
Republic of Palau

Argued: February 25, 2005
Decided: March 18, 2005

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Counsel for Appellants: Salvador Remoket

Counsel for Appellees: Jeffrey Beattie and C. Quay Polloi

BEFORE: KATHLEEN M. SALII, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem; LOURDES F. MATERNE, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

PER CURIAM:

In the last general election, the race for the Ngiwal State Delegate position was very close and hotly contested. After the initial results were announced, a total of four lawsuits were filed concerning various aspects of that election. This appeal is brought by Elia Tulop, currently the losing candidate, and registered voter Hermino Olkeriil against the Palau Election Commission and its Chairman; Noah T. Idechong, currently the prevailing candidate of the race; and three voters who cast their ballots under the statutory provisions for confined voters. Tulop challenges the propriety of counting these three confined votes—all in Idechong's favor. For the reasons set forth below, we affirm the judgment of the trial court.

BACKGROUND

Palau held its general election on November 2, 2004. One week later on November 9, it was reported that Idechong won the Ngiwal State Delegate race, beating Tulop by one vote, 246

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to 245. Tulop petitioned the Commission for a recount, but his request was denied. He appealed that denial to the Trial Division (Civil Action No. 04-372), and the parties thereafter stipulated to a manual recount. The results of the manual recount were certified and Tulop was declared the new winner by one vote.

Idechong filed a lawsuit (Civil Action No. 04-396) challenging the manual recount. Additionally, three registered voters -- Veronica Techeboet, Marchau Boisek, and Kimiko Renguul -- initiated a lawsuit (Civil Action No. 04-387) claiming that their votes had not been counted. In a scheduling conference with the trial judge, however, the Commission announced its decision to count those three votes. All three votes were cast in **L102** favor of Idechong, putting him ahead of Tulop, 248 to 246, and prompting another lawsuit from Tulop (Civil Action No. 04-398). The trial judge denied Tulop's challenges to the three votes the Commission opted to count, and he appealed that decision.

Although the trial court's opinion resolving all four pending civil lawsuits addresses several issues, only the facts surrounding the votes of Techeboet, Boisek, and Renguul are relevant to this appeal. According to the stipulated facts, all three women timely filed Confined Request Forms, asking to be allowed to vote in the general election as a confined voter and listing their places of residence. At 7:00 p.m. on the evening before the election, a request was made for all three of them to vote at a location other than the residence they listed on their form. The Commission granted the requests, and on election day, a Commission representative collected the votes of Techeboet, Boisek, and Renguul at 5:45 p.m., 9:15 p.m., and 8:45 p.m. respectively.

Before the trial court, Tulop advanced three reasons why these confined voters' ballots should not have been counted. First, he argued that the confined voters' requests to change their locations should be considered new requests to vote from a different place of confinement and, as such, the requests were untimely. Second, he asserted that the relevant statute only allows confined voters to vote from their home or the hospital. And third he claimed that the two votes received after 7:00 p.m. were invalid because the polls had already closed. The trial court rejected all three contentions and found that the Commission could properly count the votes from the three confined women. Tulop appeals.

ANALYSIS

This Court employs the *de novo* standard in evaluating the lower court's conclusions of law. *Temaungil v. Ulechong*, 9 ROP 31, 33 (2001). Factual findings are reviewed using the clearly erroneous standard, *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002), although the parties stipulated to most of the relevant facts.

1. Jurisdiction to hear appeal

In a short paragraph on page eight of its opening brief, the Commission considers whether this Court has jurisdiction to decide this appeal because the House of Delegates seated

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Idechong as the official Delegate from Ngiwal State. Citing to *Ngerul v. Chin*, 8 ROP Intrm. 263, 266 (2001), the Commission notes that the issue of which candidate is to be seated is a political issue to be resolved solely by the House of Delegates itself.

The *Ngerul* case involved a dispute about the qualifications of a candidate for Senate. Notwithstanding the Sole Judge Clause in the Constitution,¹ the *Ngerul* Court held that it retained jurisdiction to decide issues relating to tabulation of election results or qualification of candidates because the Senate had not yet officially seated any candidate. *Ngerul*, 8 ROP Intrm. at 265. It did not decide, however, whether it would retain such jurisdiction after the legislative body reached a final decision on who to seat. *Id.* at 266.

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The *Ngerul* case cites to a United States case, *Roudebush v. Hartke*, 92 S. Ct. 804 (1972), that addressed the same issue. The United States Supreme Court, interpreting the similarly-worded sole judge clause in the United States Constitution,² held that a lawsuit regarding a recount could go forward even though the Senate seated one of the candidates, but only because the Senate did so “without prejudice to the outcome” of the pending court proceeding. *Roudebush*, 92 S. Ct. at 807. The *Roudebush* Court concluded, however, that once the Senate makes an unconditional and final judgment, the controversy becomes moot and the courts cannot hear it.

In supplemental briefing, the Commission provided this Court with a copy of House Resolution 7-1-I, which “[c]onfirm[s] the results of the November 02, 2004 national election and judg[es] the election and qualifications of the winning candidates to the House of Delegates and [seats] the same as members of the House of Delegates.” In that resolution, the House seated Idechong as the Delegate from Ngiwal State.

According to the Journal of the proceedings leading up to the adoption of Resolution 7-1-I, however, Idechong’s position as Delegate remains contingent on the outcome of this appeal. In discussing the recommendation to adopt the resolution, Delegate-elect and Acting Floor Leader Sabino Anastacio expressed his support for the resolution, including certification of Idechong as the Ngiwal State Delegate, but noted “if former Delegate Elia Tulop wins in court than I would like to assure him that . . . he would be seated on this floor.” Anastacio reiterated this point by saying that “if the court decides that [Tulop is] the rightful winner than we would be ready to receive his petition.” Delegate-elect Kerai Mariur agreed that “if the Court decides differently from what is taking place here today at a later time then there’s a process to go through by law to correct the situation based on the decision of the other branch of government.” Idechong himself assured the House that “[i]f the court later changes the results then it would not be necessary to make me leave I know and so I will take my belongings and go home.” With those comments made, the House adopted the Credentials Committee report. Although the resolution is not, on its face, contingent on this Court’s decision, the transcript of proceedings leading up to adopting the resolution makes clear the House’s intent to conform its actions to the

¹Article IX, Section 10 of the Palau Constitution provides that “[e]ach house of the Olbiil Era Kelulau shall be the sole judge of the election and qualification of its members.”

²Article 1, Section 5 of the United States Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own members.”

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outcome of on this appeal. Accordingly, as with *Roudebush*, we have jurisdiction to decide this case without infringing on the House's power as sole judge of its members' qualifications.

2. Statutory requirements for confined voters

Any registered voter qualified to vote at any election who is confined to his home or hospital by reason of such illness or physical disability as will prevent him from attending the polls, shall be entitled to vote in such manner as may be prescribed by rules and regulations which shall be promulgated by the Election Commission.

23 PNC § 1522. As relevant here, the **L104** Revised Rules and Regulations for General Election of 2004 (hereinafter Rules) provide that a voter may request an absentee ballot if they are "confined to home or hospital in the Republic because of illness or physical disability, and [are] prevented from attending the polls." Rules § 5(b)(1). The Rules require confined voters in Koror to request an absentee ballot no later than three days prior to the election. Rules § 6(c). Additionally, the Rules instruct polling places to close at 7:00 p.m., though they specify that the polling places shall accept ballots from any voters waiting in line at the polling place at that time. Rules § 11.

Tulop suggests, as he did before the trial court, that the ballots cast by the three confined voters involved in this appeal did not comply with the statutory and regulatory requirements. In reviewing Tulop's claims of error, the trial court employed a two-part analytical framework, inquiring first if there was a violation of the election rules and second considering whether any violation mandated throwing out the ballots in question. In each instance, the court found that a violation of the rules was questionable at best, and that any such violation would not require the invalidation of the three votes because none of the alleged errors called into question the qualifications of the voters or the accuracy of the votes cast and because any error was the result of actions by Commission members rather than the individual voters.

On appeal, Tulop first contends that because the voters were not at their homes or at the hospital, they did not meet the statutory requirements for a confined ballot. Although the statute implies that confined people will vote from their homes or the hospital, it does not explicitly require that. Instead, it seems plausible that the requirement that people be confined to their home or the hospital is merely meant to describe in more detail the effect of a person's incapacitation. The Confined Request Form supports that reading insofar as it states that the voter has "an illness or physical disability that will *prevent me from attending the designated polling place*" (emphasis added). The second clause of the statutory provision is consistent with this reading as well, providing that once a voter has met the confinement requirements, then the manner of casting a vote can be as prescribed by the Commission.

Relatedly, Tulop seems to argue that because the voters moved around from hamlet to hamlet, they were not truly "confined." Tulop's argument is disingenuous at best. That a person can relocate across town does not mean that they are not confined or that they are physically able to vote at a polling place, which, as the trial court noted, can include "waiting in line, signing in,

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entering the voting booth, marking the ballot and then depositing it.”

Tulop also maintains that the night-before attempt to change their location should have been treated as a new request for a confined ballot, which would not have satisfied the requirement that such requests come at least three days prior to the election. Regardless of whether the night-before phone call was a new request or an amendment to the old one, the Commission agreed that the voters could cast their ballots from locations other than their homes. The trial court found no authority, and Tulop has not cited any, to restrict how flexible the Commission can be in implementing their own regulations (as opposed to in enforcing the statutory requirements). Presumably the regulations are enacted to ensure orderly voting procedures, and if the Commission opts to be more lenient and make things arguably more difficult for itself, it is counterintuitive that **L105** the Court should restrict that effort to the detriment of a voter who relied on the Commissions actions.

Finally, Tulop claims that the two votes that were collected after 7:00 p.m. were untimely insofar as they were cast after the polls closed for the day. It is unclear, however, that the 7:00 p.m. deadline applies to ballots from confined voters, who are treated in the statute as a breed of absentee voters, whose votes must be “postmarked no later than the date of the election.” 23 PNC § 1521(a)(1). Moreover, the Commission asserts that confined voters waiting for their ballots to be collected are analogous to persons standing in line at the polling place, and as such, may cast their ballots after the 7:00 p.m. deadline. Additionally, it again seems inherently unfair to discount the ballots of the confined voters because Commission representatives were delayed in collecting them. Tulop asserts that the voters are partially responsible for the tardy collection of their ballots because they changed the place of their confinement, causing unnecessary difficulties for the Commission. The record, however, contains no suggestion that the new location contributed to the Commission picking up the ballots after 7:00 p.m.

Tulop’s four arguments are framed in terms of the Commission having no authority or exceeding the scope of the statute—no authority to allow persons to vote from places other than their home or the hospital; no authority to allow persons to change the location of their confinement the night before the election; no authority to accept ballots that its representatives collected past the time that the polls closed. This position ignores the difference between statutory requirements promulgated by the Legislature and the regulations passed by the Commission to facilitate voting. If the Commission agrees to a request for leniency in applying the regulations, it is unclear why this Court should limit that power. And given this country’s commitment to voting rights,³ and the reliance of the voters on the official actions of the Commission, it seems entirely inappropriate to disenfranchise them. *Olikong v. Salii*, 1 ROP Intrm. 406, 416 (1987) (noting with disapproval that granting plaintiffs’ requested relief would penalize voters for “relying on the rules and regulations promulgated by the Referendum Commissioner”). In the absence of any allegations of bad faith (i.e., that the Commission was

³No person acting under color of law shall . . . deny the right of any person to vote in any election because of error or omission on any record or paper relating to any application, registration, or any act requisite to voting, if such error is not material in determining whether such individual is qualified.

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being lenient only to supporters of one candidate or that it was otherwise abusing its flexibility), we can see no reason why the alleged irregularities should require the Commission to discard the three votes in question.

3. Other issues

Tulop argues that the Commission erred by knowing and revealing the identity of the three confined voters, contrary to statutory provisions requiring secret ballots. He also addresses issues that appear to be collateral attacks on the lawsuit brought by Techeboet, Boisek, and Renguul. He maintains that (1) voters do not have the right to challenge the Commission for refusing to count their ballots; (2) if the voters can challenge the Commission, then the Attorney General **L106** should have initiated a lawsuit; and (3) individual voters do not have standing to challenge an election result.

From our review of the record, it appears that none of these issues were addressed before the trial court and none relate directly to the decision of the trial court that has been appealed. Tulop intimated that the issue of the secrecy of ballots was raised in his complaint, though not briefed before the trial court. Merely mentioning a claim in a complaint, but failing to advance any argument on that claim, does not preserve that issue. *Badureang Clan v. Ngirchorachel*, 6 ROP Intrm. 225, 226 n.1 (1997). And the arguments not mentioned at all before the trial court are waived and may not be raised on appeal. *Fanna Mun. Gov't v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 10 (1999); *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998).

CONCLUSION

We affirm the judgment of the trial court.