

10/21

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILEY L. BOLDEN, REV. R. L.
HOPE, CHARLES JOHNSON, JANET
O. LeFLORE, JOHN L. LeFLORE,
CHARLES MAXWELL, OSSIE B.
PURIFOY, RAYMOND SCOTT,
SHERMAN SMITH, OLLIE LEE
TAYLOR, RODNEY O. TURNER,
REV. ED WILLIAMS, SYLVESTER
WILLIAMS AND MRS. F. C. WILSON,

Plaintiffs,

V.

CITY OF MOBILE, ALABAMA: GARY
A. GREENOUGH, ROBERT B. DOYLE, JR.,
and LAMBERT C. MIMS, individually
and in their official capacities
as Mobile City Commissioners,

Defendants.

CIVIL ACTION

No. 75-297-P

OPINION AND ORDER

This action is brought by Wiley L. Bolden and other black plaintiffs representing all Mobile, Alabama, blacks as a class, claiming the present at-large system of electing city commissioners abridges the rights of the city's black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States; under the Civil Rights Act of 1871, 42 U.S.C. §1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, et seq.

Plaintiffs alleged that the existing commission form of government elected at-large ". . . discriminates against black residents of Mobile in that their concen-

trated voting strength is diluted and canceled out by the white majority in the City as a whole" with a consequent violation of their rights under the above Amendments to the Constitution. It is also claimed that their statutory rights under 42 U.S.C. §§ 1973, et seq. [Voting Rights Act of 1965] and 1983 [Civil Rights Act of 1871] were violated. Jurisdiction is premised upon 28 U.S.C. §1343(3) and (4).

This court has jurisdiction over the claims based on 42 U.S.C. §1983 against the City Commissioners and over the claims grounded on 42 U.S.C. §1973 against all defendants under 28 U.S.C. §1343(3)-(4) and §2201.

This cause was certified as a class action under Rule 23(b)(2), F.R.C.P., the plaintiff class being all black persons who are now citizens of the City of Mobile, Alabama.

A claim originally asserted under 42 U.S.C. §1985(3) was dismissed for failure to state a claim upon which relief can be granted.

Defendants are the three Mobile City Commissioners, sued in both their individual and official capacities.

The prayed-for relief consists of, (1) a declaration that the present at-large election system is unconstitutional, (2) an injunction preventing the present commissioners from holding, supervising, or certifying any future city commission elections, (3) the formation of a government whose legislative members are elected from single member districts, and (4) costs and attorney

fees.

Plaintiffs claim that to prevail they must prove to this court's satisfaction the existence of the elements probative of voter dilution as set forth by White v. Regester, 412 U. S. 755, 93 S. Ct. 2342, 37 L.Ed.2d 314 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd. sub nom. East Carroll Parish School Board v. Marshall, ____ U.S. ____, 96 S. Ct. 1083, 47 L.Ed.2d 296 (1976), contending Zimmer is only the adoption of specified criteria by the Fifth Circuit of the White dilution requirements.

The defendants stoutly contest the claim of unconstitutionality of the city government as measured by White and Zimmer. They contend Washington v. Davis, ____ U.S. ____, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976), erects a barrier since the 1911 legislative act forming the multi-member, at-large election of the commissioners was without racial intent or purpose. They assert Washington, supra, 96 S. Ct. at 2047-49, which was an action alleging due process and equal protection violations, held that in these constitutional actions, in order to obtain relief, proof of intent or purpose to discriminate by the defendants must be shown. Defendants state, therefore, that since the statute under which the Mobile Commission government operates was passed in 1911, with essentially all blacks disenfranchised from the electorate by the Alabama 1901 convention, there could be no intent or purpose to discriminate at the time the statute was passed. Alterna-

tively, however, defendants contend that if Washington does not preclude consideration of the dilution factors of White and Zimmer, they should still prevail because plaintiffs have not sustained their burden of proof under these and subsequent cases.

Plaintiffs' reply is to the effect that Washington did not establish any new constitutional purpose principle and that White and Zimmer still are applicable. If, however, this court finds Washington to require a showing of racial motivation at the time of passage, or merely in the retention of the statute, plaintiffs contend they should still prevail, claiming the at-large election system was designed and is utilized with the motive or purpose of diluting the black vote. Plaintiffs claim that the discriminatory intent can be shown under the traditional tort standard.

FINDINGS OF FACT

Mobile, Alabama, is the second largest city in Alabama located at the confluence of the Mobile River and Mobile Bay in the southwestern part of the state. Mobile's 1970 population was 190,026 with approximately 35.4% of the residents black.^{1/}

^{1/} Defendants' Exhibit No. 12. According to the 1970 Federal Census, the City of Mobile had a total population of 190,026 of whom 35.4%, or 67,356, were non-white. The evidence is clear that there are few non-whites other than blacks.

1973 Mobile County voters statistics estimate that 89.6% of the voting age white population is registered to vote, 63.4% of the blacks are registered. (Plaintiffs' Exhibit No. 7).

Mobile geographically encompasses 142 square miles. Most of the white residents live in the southern and western parts of the city, while most blacks live in the central and northern sectors (Plaintiffs' Exhibit No. 58). Housing patterns have been, and remain, highly segregated. Certain areas of the city are almost totally devoid of black residents while other areas are virtually all black. In a recent study by the Council on Municipal Performance, using 1970 block census data, Mobile was found to be the 95th most residentially segregated of the 109 municipalities surveyed (Plaintiffs' Exhibit No. 59). According to a study performed by the University of South Alabama Computer Center for the defendants, the housing patterns in the city are so segregated it is impossible to divide the city into three contiguous zones of equal population without having at least one predominantly black district (Plaintiffs' Exhibit No. 60). Segregated housing patterns have resulted in concentration of black voting power.

Mobile presently operates under a three person commission-type municipal government adopted in 1911. (Ala. Act No. 281 (1911) p. 330). The commissioners are elected to direct one of the following three municipal departments: Public Works and Services, Public Safety,

and Department of Finance.^{2/}

2/ When adopted in 1911, Mobile's commission government did not specify that a candidate must choose the particular commission position for which he was running. Alabama Act No. 823 (1965), p. 1539, however, inter alia, required candidates to run for a particular numbered position with specific duties. Each commissioner holds that position during the four years tenure with the mayoralty rotating between commissioners every sixteen months.

The commissioners run on a place-type ballot and are elected at-large by the voters of Mobile. While the commission candidates must be residents of Mobile, there is not now, or has there ever been, a requirement that each commissioner reside in a particular part of the city. The evidence clearly indicates that district residence requirements with district elections would be improvident and unsound for the commission form of government.

In addition to the specific position for which a commissioner runs, each is also responsible for numerous appointments to the 46 committees operating under the auspices of the city. Some appointments are completely discretionary with the commissioner whereas committees, such as the plumbing and air conditioning boards which require members with a certain amount of expertise, are filled with a nominee suggested by the local trade association. Often, the appointing commissioner makes his appointment from the slate of nominees presented by the particular association. This means that if the nominating association does not propose a black as a committee member, the commissioner will not

appoint one. It is, however, within the commission's power to modify or change the ground rules under which appointments are made.

In Zimmer, supra, aff'd. sub nom. East Carroll Parish School Board, supra, (" . . . but without approval of the constitutional views expressed by the court of appeals."), the Fifth Circuit synthesized the White opinion with the Supreme Court's earlier Whitcomb v. Chavis, 403 U. S. 124, 91 S. Ct. 1858, 29 L.Ed.2d 363 (1971), decision, together with its own opinion in Lipscombe v. Jonsson, 459 F.2d 335 (5th Cir. 1972) and set out certain factors to be considered.

Based on these factors as set out in Zimmer, supra, at 1305, the court makes the following findings with reference to each of the primary and enhancing factors:

LACK OF OPENNESS IN THE SLATING PROCESS
OR CANDIDATE SELECTION PROCESS TO BLACKS.

Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965. It has only been since that time that significant diminution of these discriminatory practices has been made. The overt forms of many of the rights now exercised by all Mobile citizens were secured through federal court orders together with a moral commitment of many of its dedicated white and black citizens plus the

power generated by the restoration of the right to vote which substantially increased the voting power of the blacks. Public facilities are open to all persons. Job opportunities are being opened, but the highly visible job placements in the private sector appear to lead job placements in the city government sector. The pervasive effects of past discrimination still substantially affects political black participation.

There are no formal prohibitions against blacks seeking office in Mobile.^{3/} Since the Voting Rights

^{3/} The qualifying fee for candidates for the city commission was found unconstitutional in Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970). See also U. S. v. State of Ala., 252 F. Supp. 95 (M.D. Ala. 1966) (three judge District Court panel) (poll tax declared unconstitutional).

Act of 1965, blacks register and vote without hindrance. The election of the city commissioners is non-partisan, i.e., there is no preceding party primary and the candidates do not ordinarily run under party labels. However, the court has a duty to look deeper rather than rely on surface appearance to determine if there is true openness in the process and determine whether the processes "leading to nomination and election [are] . . . equally open to participation by the group in question. . . ." White, 412 U. S. at 766. One indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large city commission

office. This is true although the black population level is in excess of one-third.

In the 1960's and 1970's, there has been general polarization in the white and black voting. The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs. When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.

Since 1962, four black candidates have sought election in the at-large county school board election. Dr. Goode in 1962, Dr. Russell in 1966, Ms. Jacobs in 1970, and Ms. Gill in 1974. All of these black candidates were well educated and highly respected members of the black community. They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in run-off elections.

Three black candidates entered the race of the Mobile City Commission in 1973. Ollie Lee Taylor, Alfonso Smith, and Lula Albert. They received modest support from the black community and virtually no support from the white community. They were young, inexperienced, and mounted extremely limited campaigns.

Two black candidates sought election to the Alabama State Legislature in an at-large election in 1969. They

were Clarence Montgomery and T. C. Bell. Both were well supported from the black community and both lost to white opponents.

Following a three-judge federal court order in 1972^{4/} in which single-member districts were estab-

4/ Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972).

lished and the house and senate seats reapportioned, one senatorial district in Mobile County had an almost equal division between the black and white population. A black and white were in the run-off. The white won by 300 votes. There was no overt acts of racism. Both candidates testified or asserted each appealed to both races. It is interesting to note that the white winner published a simulated newspaper with both candidate's photographs appearing on the front page, one under the other, one white, one black.

One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from the black support and his identification with attempting to meet the particularized needs of the black people of the city. He was again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.