SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 9, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
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_____	303	KA 19 02168	PEOPLE V T. P.
_____	419	CAE 23 00703	SPENCER T. KOWAL V RALPH MOHR

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

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KA 19-02168

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

T. P., DEFENDANT-APPELLANT.

DAVIS POLK & WARDWELL LLP, NEW YORK CITY (NIKOLAUS J. WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. MATTLE OF COUNSEL), FOR RESPONDENT.

DUANE MORRIS LLP, NEW YORK CITY (ERIC R. BRESLIN OF COUNSEL), FOR SEVENTEEN LEGISLATORS, AMICI CURIAE.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered September 5, 2019. The judgment convicted defendant upon a jury verdict of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and as a matter of discretion in the interest of justice by reducing the sentence imposed to a determinate term of incarceration of four years and a period of postrelease supervision of 2½ years and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant contends that Supreme Court erred in its charge on justification by failing to include the "reputation evidence" addendum to the CJI charge for Justification: Use of Deadly Force in Defense of a Person (*see* Penal Law § 35.15 [2]). Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v McWilliams*, 48 AD3d 1266, 1267 [4th Dept 2008], *lv denied* 10 NY3d 961 [2008]) and, in any event, we conclude that it lacks merit. "In evaluating a challenged jury instruction, we view the charge as a whole in order to determine whether a claimed deficiency in the jury charge requires reversal" (*People v Medina*, 18 NY3d 98, 104 [2011]). Here, although the court did not read the addendum, the jurors were appropriately instructed that they "should assess the reasonableness of defendant's belief that [s]he was in deadly peril by judging the situation from the point of view of defendant as though they were actually in [her] place" (*People v Wesley*, 76 NY2d 555, 559-560 [1990]). Further, nothing in the CJI reputation evidence

addendum alters or negates the court's instruction that defendant "would not be justified if she was the initial aggressor of deadly physical force" (*see* CJI2d[NY] Justification: Use of Deadly Physical Force in Defense of a Person, https://www.nycourts.gov/judges/cji/1-General/Defenses/CJI2d.Justification.Person.Deadly_Force.pdf). Inasmuch as the trial evidence regarding the victim's capacity for violence consisted almost entirely of direct evidence of his acts of violence toward defendant specifically, a charge addressing reputation evidence was unwarranted and, contrary to defendant's further contention, counsel was not ineffective for failing to request it (*see People v Daggett*, 150 AD3d 1680, 1682 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *see e.g. People v Johnson*, 136 AD3d 1338, 1339 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]).

Defendant's contention that she was denied a fair trial by prosecutorial misconduct during summation is unpreserved (*see* CPL 470.05 [2]; *People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]) and, in any event, without merit. In light of defendant's acknowledgment at trial that she lied to the police, the prosecutor's remarks highlighting defendant's untruthfulness and disagreeing with defense counsel's assertion that defendant was now telling the truth were fair comment on the evidence (*see People v Russo*, 201 AD2d 512, 513 [2d Dept 1994], *affd* 85 NY2d 872 [1995]; *People v Mastowski*, 155 AD3d 1624, 1625 [4th Dept 2017], *lv denied* 30 NY3d 1117 [2018]; *People v Sinclair*, 231 AD2d 926, 926 [4th Dept 1996]). Further, even if certain other comments made by the prosecutor were improper, they were not so egregious as to deny defendant a fair trial (*see People v Burton*, 175 AD3d 1847, 1847-1848 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]; *People v Sweney*, 55 AD3d 1350, 1351 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]), especially given the court's instructions to the jurors that their recollection of testimony would control and that the attorneys' summations were merely argument, not evidence (*see People v Burke*, 197 AD3d 967, 968 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *People v Warmley*, 179 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *People v Morgan*, 148 AD3d 1590, 1591 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *see generally People v Ashwal*, 39 NY2d 105, 109-111 [1976]).

However, we agree with defendant that a reduction in her sentence is warranted pursuant to the Domestic Violence Survivors Justice Act ([DVSJA] L 2019, ch 31; L 2019, ch 55, § 1, part WW), which amended Penal Law § 60.12. As noted in the amicus brief filed by members of the New York State Senate and Assembly who sponsored or supported its passage, the DVSJA resulted from the legislature's second attempt "to provide a more compassionate sentencing scheme for survivors of domestic violence who committed offenses related to that abuse," even where a jury has rejected a justification defense (*see generally People v Addimando*, 197 AD3d 106, 109-110 [2d Dept 2021]). As noted during the bill's enactment, "all too often in our court system when women are defending themselves from domestic violence, instead of being met with . . . compassion and assistance and help," they are met with punishment (NY Senate Debate on 2019 NY Senate Bill S1077, March 12, 2019 at 1572 [statement of Senator Carlucci]). Penal Law § 60.12 (1) thus provides an alternative

sentencing scheme that the sentencing court may apply where it determines that "(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in [CPL 530.11 (1)]; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh."

Here, we conclude that a preponderance of the evidence supports both a finding that defendant was a victim of domestic violence during her relationship with the victim and was subjected to "substantial physical, sexual or psychological abuse" and a finding that "such abuse was a significant contributing factor to the defendant's criminal behavior" (Penal Law § 60.12 [1] [a], [b]; *see Addimando*, 197 AD3d at 111-112). We further conclude that sentencing defendant pursuant to the normal sentencing guidelines would be "unduly harsh" in light of the "nature and circumstances of the crime and the history, character and condition of the defendant" (§ 60.12 [1] [c]). We therefore modify the judgment on the facts and as a matter of discretion in the interest of justice (*see* CPL 470.15 [5], [6] [b]; *Addimando*, 197 AD3d at 118; *see generally People v Nicholas G.*, 181 AD3d 1273, 1274 [4th Dept 2020]) by reducing defendant's sentence to a determinate term of incarceration of four years to be followed by 2½ years of postrelease supervision (*see* Penal Law §§ 60.12 [2] [a]; 70.45 [2] [f]).

Entered: May 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CAE 23-00703

PRESENT: SMITH, J.P., LINDLEY, BANNISTER, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF SPENCER KOWAL, AMANDA ADAMS, DONALD HANAVAN AND PATRICIA HANAVAN, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

RALPH MOHR AND JEREMY ZELLNER, COMMISSIONERS OF ERIE COUNTY BOARD OF ELECTIONS, RESPONDENTS, AND LETITIA JAMES, ATTORNEY GENERAL OF STATE OF NEW YORK, INTERVENOR-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR INTERVENOR-APPELLANT.

LAW OFFICE OF JOSEPH T. BURNS, PLLC, WILLIAMSVILLE (JOSEPH T. BURNS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered April 10, 2023, in a proceeding pursuant to Election Law article 16. The order and judgment, inter alia, declared that Chapter 480 of the Laws of 2021 is unconstitutional.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the petition, vacating the second decretal paragraph and the three ordering paragraphs, granting the counterclaim and granting judgment in favor of Intervenor-Appellant as follows:

> It is ADJUDGED and DECLARED that Chapter 480 of the Laws of 2021 is constitutional,

and as modified the order and judgment is affirmed without costs.

Memorandum: In this proceeding pursuant to Election Law article 16, petitioners seek a declaration that Chapter 480 of the Laws of 2021 (statute) is unconstitutional and an order directing respondents Ralph Mohr and Jeremy Zellner, Commissioners of the Erie County Board of Elections (commissioners), to count all write-in votes cast in primary elections regardless of the party affiliation of the named candidates. Supreme Court granted the petition, declared the statute unconstitutional, ordered the commissioners to count all write-in votes, and effectively denied the counterclaim of intervenor, Letitia James, Attorney General of the State of New York (intervenor), seeking

a declaration that the statute is constitutional. Although the court stated in its brief oral decision that it was applying the strict scrutiny test to determine the statute's constitutionality, it gave no reasons for finding the statute unconstitutional. Intervenor appeals, and we modify the order and judgment by denying the petition, vacating the second decretal paragraph and the three ordering paragraphs, granting the counterclaim, and declaring that the statute is constitutional.

The statute, which became effective on October 8, 2021, amended three sections of the Election Law to limit the universe of permissible write-in primary votes to enrolled members of the relevant party. Election Law § 6-164 was amended to specify that the opportunity to ballot process could be carried out on behalf of only candidates enrolled in the relevant party (*see* L 2021, ch 480, § 1). Section 6-166 (2) was amended to change the language required on the opportunity to ballot petition correspondingly (*see* L 2021, ch 480, § 2). Finally, section 8-308 was amended to state: "A write-in ballot cast in a party primary for a candidate not enrolled in such party shall be void and not counted" (Election Law § 8-308 [4]; *see* L 2021, ch 480, § 3).

Initially, we agree with petitioners that they have standing to challenge the statute insofar as they allege a "threatened injury to a protected interest by reason of the operation of the unconstitutional feature of the statute" (*Cherry v Koch*, 126 AD2d 346, 351 [2d Dept 1987], *lv denied* 70 NY2d 603 [1987]; *see Matter of Donohue v Cornelius*, 17 NY2d 390, 397 [1966]; *Forward v Webster Cent. Sch. Dist.*, 136 AD2d 277, 280 [4th Dept 1988], *appeal dismissed* 72 NY2d 908 [1988], *reconsideration denied* 73 NY2d 740 [1988]).

In their petition, petitioners asserted that the statute violates their rights to freedom of speech, freedom of association, and suffrage (*see* NY Const, art I, §§ 8, 9; art II), equal protection of the laws (*see* NY Const, art I, § 11), and due process of law (*see* NY Const, art I, § 6). A statute "enjoy[s] a strong presumption of constitutionality," and the party attempting to establish its facial unconstitutionality "bears the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the Constitution" (*People v Viviani*, 36 NY3d 564, 576 [2021] [internal quotation marks omitted]). "[C]ourts strike [a statute] down only as a last unavoidable result . . . after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible" (*White v Cuomo*, 38 NY3d 209, 216 [2022] [internal quotation marks omitted]).

When we consider a constitutional challenge to a state election law, we "must weigh the character and magnitude of the asserted injury to the [constitutional] rights . . . that [petitioners] seek[] to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden [petitioners'] rights" (*Matter of Walsh v Katz*, 17 NY3d 336, 344 [2011] [internal quotation marks omitted]; *see Burdick v Takushi*,

504 US 428, 434 [1992]; *Tashjian v Republican Party of Connecticut*, 479 US 208, 213-214 [1986]; *Anderson v Celebrezze*, 460 US 780, 788-789 [1983]). Where such constitutional rights are subjected to "severe restrictions," a state election law "must be narrowly drawn to advance a state interest of compelling importance"; where a state election law "imposes only reasonable, nondiscriminatory restrictions" on voters' constitutional rights, those restrictions will generally be justified by the state's "important regulatory interests" (*Burdick*, 504 US at 434 [internal quotation marks omitted]; *see Walsh*, 17 NY3d at 346). "Although laws that affect candidates always have at least some theoretical, correlative effect on voters . . . , not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review . . . That is, the mere fact that a state election law creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny" (*Walsh*, 17 NY3d at 344 [internal quotation marks omitted]). In reviewing such barriers to candidacy, we must "examine in a realistic light the extent and nature of their impact on voters" (*Bullock v Carter*, 405 US 134, 143 [1972]; *see Anderson*, 460 US at 786-788).

Here, the intended effect of the statute is to limit the universe of permissible write-in candidates in a party primary election to individuals who are members of that party. Political parties have protected associational rights, which include the right to identify their own members and to select candidates who best represent their ideals and preferences (*see Eu v San Francisco County Democratic Central Comm.*, 489 US 214, 224 [1989]; *Golden v Clark*, 76 NY2d 618, 627-628 [1990]) and the "right to exclude non-members from their candidate nomination process" (*Maslow v Board of Elections in the City of N.Y.*, 658 F3d 291, 296 [2d Cir 2011], *cert denied* 565 US 1275 [2012]; *see Clingman v Beaver*, 544 US 581, 587-591 [2005]). We conclude that the restrictions imposed by the statute were intended to protect those rights, and that petitioners have no associational right to involve non-members in the nomination process of their parties (*see Maslow*, 658 F3d at 297-298).

We note that the statute does not preclude nonparty candidates from participating in the general election, which they may do by circulating an independent nominating petition pursuant to Election Law § 6-138, accepting designation by a party committee pursuant to section 6-120, or conducting a general election write-in campaign (*see* § 8-308). Moreover, nonparty candidates may access a party primary ballot by obtaining a certificate of authorization from that party committee (*see* § 6-120 [3]) or by changing their party enrollment prior to the statutory deadline (*see* § 5-304 [3]). Because "adequate ballot access" is afforded under the Election Law, we conclude that the statute "imposes only a limited burden on voters' rights" (*Burdick*, 504 US at 438-439), one fairly described as "incidental and remote" (*Walsh*, 17 NY3d at 346).

Moreover, petitioners have not been denied the right to vote; instead, the choices available to them in the primary election have

been constrained pursuant to a legislative determination that candidates in a party primary should be members of that party, unless otherwise authorized by a party committee (*see generally Matter of Moody v New York State Bd. of Elections*, 165 AD3d 479, 480 [1st Dept 2018]). What petitioners characterize as an equal protection issue—some voters' votes are counted while others' votes are not—is more accurately identified as a reasonable restriction on what *candidates* may seek office in the context of a party primary. The distinction between valid and invalid votes in this context is not based on any characteristic of a voter, but rather on whether the candidate is qualified, i.e., a member of the party holding the primary. We conclude that the statute imposes only reasonable, nondiscriminatory restrictions upon petitioners' constitutional rights.

We agree with intervenor that the legislature's stated justification for the statute—the prevention of party raiding, or the takeover of a party primary by nonaffiliated or hostile voters (*see Matter of Master v Pohanka*, 10 NY3d 620, 626 [2008])—constitutes a legitimate interest supporting the legislation (*see Burdick*, 504 US at 440; *Maslow*, 658 F3d at 298). In this context, "[w]hile courts may look to the record relied on by the legislature, even in the absence of such a record, factual support for the legislation [may] be assumed by the courts to exist" (*White*, 38 NY3d at 217 [internal quotation marks omitted]).

Finally, we note that the court did not engage in the sort of meaningful analysis required by relevant United States Supreme Court and New York Court of Appeals case law in this area (*see generally Anderson*, 460 US at 789; *Walsh*, 17 NY3d at 344). The brief bench decision containing no reasoning does not constitute the sort of weighing and balancing required to invalidate a provision of the Election Law.

Entered: May 9, 2023

Ann Dillon Flynn
Clerk of the Court