7-23-2022

Cegavske v. Hollowood, 138 Nev. Adv. Op. 46 (June 28, 2022)

Servando Martinez

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STATUTORY APPLICATION: APPLICABILITY OF NRS 295.026 IN BALLOT INITIATIVE MATTERS

Summary

In an opinion drafted by Justice Stiglich, the Court considered whether initiative sponsors may withdraw a petition or whether an initiative petition's signatories or the public acquire any rights in a petition. This appeal involves two verified initiative petitions to place questions on the ballot for the Nevada 2022 general election and the sponsors' withdrawal of the initiative petitions. Although Nevada law provides a procedure to withdraw an initiative petition and directs that "no further action may be taken on [a withdrawn] petition,"[2] Secretary of State Barbara Cegavske refused to honor the withdrawals of the two petitions at issue here. The sponsors then sought and obtained writs of mandamus and prohibition from the district court to compel her to recognize the withdrawals and thereby prevent the questions from appearing on the 2022 ballot. The Secretary of State appealed, arguing that the statute setting forth the withdrawal procedure, NRS 295.026, is unconstitutional. The Court concluded that NRS 295.026 is a permissible exercise of the Legislature's power to enact statutes to facilitate the people's initiative power and is thus not unconstitutional, finding that the district court abused its discretion in issuing a writ of prohibition.

Facts and Procedural History

This opinion comes from an appeal from an Eighth Judicial District Court order granting writs of mandamus and prohibition barring the Secretary of State from placing initiative petition questions on the ballot. Respondents Robert Hollowood, Kenneth Belknap, Nevadans for Fair

[1] By Servando Martinez.
[2] NEV. REV. STAT. § 295.026(2).

Gaming Taxes PAC, and Fund Our Schools PAC sponsored two initiative petitions for the purposes of funding education via an increase in Nevada sales tax and a tax on gaming. The Legislature did not act on the initiative petitions, but did reach an agreement to increase taxes to fund education. Thereafter, Hollowood and Belknap each filed a petition withdrawal form with the Secretary of State's office.

The Attorney General's subsequent opinion (1) framed the Secretary of State's role as ministerial, (2) found no constitutional provisions limiting withdrawal of an initiative petition such that there was no direct conflict between the constitution and the statute, (3) interpreted NRS 295.026 as imposing a procedural right permitting sponsors to withdraw a petition, and (4) concluded that the Secretary's duty to place a matter on the ballot was owed to the sponsors and would be waived by the sponsors' withdrawal of the petition.[3] The Secretary disagreed and concluded that she had a constitutional duty to place verified initiative petitions on the ballot, and thus refused to recognize the sponsors' withdrawal. Originally, the district court concluded that NRS 295.026 permissibly expands initiative sponsors' rights by providing a clear procedure and deadlines to withdraw a petition. The court held that the Secretary's duty to place a matter on the ballot presupposed a valid petition, further stating that a withdrawal consistent with NRS 295.026 makes the petition void and thus no longer valid.

Discussion

A writ of prohibition is not appropriate to bar the Secretary of State's ministerial action

The Court began by resolving the Secretary's challenge to the writ of prohibition. The Secretary argued that the order failed to identify any judicial or quasijudicial functions being

[3] 2021-04 Op. Att'y Gen.

carried out, making it deficient. The Court agreed, stating that "in addition to barring the extra-jurisdictional exercise of judicial power, a writ of prohibition may be issued to curtail the inappropriate exercise of quasi-judicial power,[4] but the writ does not serve to curtail the exercise of ministerial power."[5] Using this precedent, the Court determined that the district court erred in concluding that the Secretary of State was subject to a writ of prohibition in this context, thus reversing the district court's order to the extent that it issued a writ of prohibition.

Mandamus relief was warranted to compel the Secretary of State to take no action on the withdrawn initiative petitions.

The Secretary argued that the Nevada Constitution does not permit withdrawal of an initiative petition after the signatures have been verified and that she was obligated to place the initiative petitions' questions on the ballot after the Legislature did not act on them. The Court here, however, disagreed with this argument and affirmed the portion of the district court order granting a writ of mandamus. The Court acknowledged that the challenger must "overcome the presumption that a statute is constitutional with a clear showing of invalidity."[6] The Court then determined that the state constitution would need to be read as a whole, and "the interpretation of a statute or constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results."[7] The Court further conveyed that Article 19, Section 2 of the Nevada Constitution sets forth the people's power to propose or amend a statute, and to propose a constitutional amendment, providing that "the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution,

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[4] Mineral County v. State, Dep't of Conservation & Nat. Res., 117 Nev. 235, 243-44, 20 P.3d 800, 805-06 (2001).
[5] Gladys Baker Olsen Family Tr. ex rel. Olsen v. Eighth Judicial Dist. Court, 110 Nev. 548, 552, 874 P.2d 778, 781 (1994).
[6] Nevadans for Nev. v. Beers, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006).
[7] We the People Nev. ex rel. Angle v. Miller, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008).

and to enact or reject them at the polls."[8] The Court recognized that the Legislature has adopted a procedure to withdraw an initiative petition that would need to be followed here.[9]

The Secretary of State has not shown that Article 19 creates public rights that are violated by withdrawal of a verified initiative petition

Regarding this matter, the Secretary of State first argued that the initiative-petition process vests a right held by the individuals who signed the initiative petition or the voting public in general that precludes the withdrawal of a verified petition. The Court, however, immediately determined that the authorities the Secretary relied on to argue that NRS 295.026 infringes on public rights are unavailing.[10] The Secretary cited *Rea* for the proposition that the initiative process consists of the power to propose a law that must then proceed to a vote at the polls. The Court responded by distinguishing *Rea*, clarifying that *Rea* held that the initiative power reserved to the municipality's electors was the power to propose laws; and such proposed laws would not be enacted through the initiative petition process itself but only after approval by the voters.[11] Accordingly, the Court concluded that the Secretary of State had not shown that NRS 295.026 is unconstitutional on the premise that it violates the constitutional rights of initiative petition signatories or the public.

Withdrawal voids the initiative petitions such that there is no question for the Secretary of State to place on the ballot

The Secretary of State next argued that NRS 295.026 conflicts with the duty that she "shall" place a question on the ballot following the Legislature's inaction on the petition. However, the Court found her argument to be unpersuasive when considered in light of precedent establishing

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[8] Nev. Const. art. 19, § 2(1).
[9] NEV. REV. STAT. § 295.026(1).
[10] *See* Rea v. City of Reno, 76 Nev. 483, 357 P.2d 585 (1960); State v. Scott, 52 Nev. 216, 285 P. 511 (1930); and Wilson v. Koontz, 76 Nev. 33, 348 P.2d 231 (1960).
[11] *Id.* at 586.

that a withdrawn petition is void and the Secretary of State has no duty to act with respect to a void petition.[12] *Rogers* held that "an initiative (is?) void when it failed to comply with the constitutional requirement that a proposal making an appropriation must be offset by a sufficient tax."[13] The Secretary of State argued that this court has held that a petition must be placed on the ballot even if it may be unconstitutional and thus futile, citing *Greater Las Vegas Chamber of Commerce.*[14] However, the Court reiterated *Herbst,* concluding that "[w]here an initiative sponsor has filed a petition withdrawal form with the Secretary of State to render the initiative void, there is a procedural deficiency, not a substantive deficiency with the proposal."[15] Thus, the Court concluded that NRS 295.026(2)'s directive that "no further action may be taken on [a] petition, after it has been withdrawn renders a withdrawn initiative petition void."[16] The Court finalized its holding by stating that a void petition is excluded from the initiative process set forth in Article 19, which construes NRS 295.026 in a way that is constitutional and neither absurd nor unreasonable.

NRS 295.026 facilitates the provisions in Article 19 guaranteeing the initiative power to the people

The Secretary of State then contended that NRS 295.026 does not facilitate the provisions of Article 19 but instead infringes on rights reserved to the people. The Court countered this stance by reiterating that NRS 295.026 does not infringe on the reservation provision stated in Article 19, Section 2(1). Accordingly, the Court concluded that NRS 295.026 facilitates the operation of Article 19 and thus is a constitutional exercise of the Legislature's Article 19, Section 5 authority.

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[12] Rogers v. Heller, 117 Nev. 169, 171, 18 P.3d 1034, 1035 (2001).
[13] *Id.*
[14] Greater Las Vegas Chamber of Commerce v. Del Papa, 106 Nev. 910, 802 P.2d 1280 (1990).
[15] *See* Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 883, 141 P.3d 1224, 1228 (2006) (explaining the different types of challenges that may be levied against an initiative petition and providing that challenges "based on asserted procedural defects, are virtually always ripe for pre-election review, since the question to be resolved is whether a proposal has satisfied all constitutional and statutory requirements for placement on the ballot").
[16] NEV. REV. STAT. § 295.026 (2).

Mandamus is appropriate

The Court concluded by reemphasizing that NRS 295.026(2) provides that no action may be taken when a petition has been withdrawn pursuant to its terms and thus bars the Secretary of State from acting on the initiative petitions. The Court claimed that prior case law compels the Secretary not to place the initiatives' questions on the ballot, and the district court did not abuse its discretion in issuing a writ of mandamus.[17]

Conclusion

Relying on NRS 295.026, which provides that no action may be taken on a petition that has been timely withdrawn, the Court ruled that a withdrawn petition would be void. The Court used this rationale to emphasize that because the petitions in this matter are therefore void, the Secretary's duty to place them on the ballot has been nullified, consistent with their precedent barring placement of void initiative petitions on the ballot, regardless of whether they have been verified. Thereafter, the Court affirmed the district court's grant of mandamus relief but reversed the district court order to the extent that it granted a writ of prohibition.

Concurrence in part; dissent in part

The opinion is joined by a concurrence in part and dissent in part by Justice Hardesty, Silver and Pickering, who state that the plain language of Article 19, Section 2 provides the correct guidance and that there is no ambiguity in the relevant constitutional provisions here.

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[17] *See* DR Partners v. Bd. of Cty. Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (reviewing district court's decision on a writ petition for an abuse of discretion); Lundberg v. Koontz, 82 Nev. 360, 363, 418 P.2d 808, 809 (1966) ("Mandamus is appropriate to prevent improper action by the Secretary of State, as well as to compel him to perform an act which is his duty under the law.").