

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIM FASANO, INDEPENDENT
AMERICAN PARTY CANDIDATE FOR
U.S. SENATOR FROM NEVADA,
Appellant,
vs.
SCOTT ASHJIAN, SELF-DECLARED
TEA PARTY CANDIDATE FOR U.S.
SENATOR FROM NEVADA,
Respondent.

No. 56040

FILED

OCT 28 2010

TRACIE E. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order denying a petition, under NRS 293.174, seeking to remove respondent's name from the general election ballot. First Judicial District Court, Carson City; James Todd Russell, Judge.

This appeal was docketed in this court on May 17, 2010. No request for an expedited briefing schedule was made at that time. See NRAP 26(d) (providing that parties may stipulate to shorten a deadline provided by the rules of appellate procedure); NRAP 31(a) (allowing this court to adjust a briefing schedule for a particular case). It was not until approximately four months later, on September 9, 2010, after appellant had filed his opening brief, that he filed a motion requesting that this court expedite its resolution of this appeal. Even then, appellant's motion only requested that the appeal be expedited once the normal briefing schedule was completed. On September 17, 2010, we entered an order granting appellant the relief that he requested, noting that "once briefing [was] completed, we [would] expedite our resolution of this appeal to the

extent this court's docket allows." Respondent's answering brief was filed on September 13, 2010, and briefing was tentatively completed on October 1, 2010, when appellant filed a notice that he would not be filing a reply brief. Appellant, however, filed a "notice of withdrawal" of his notice that he would not be filing a reply brief five days later on October 6, 2010. Appellant concurrently submitted a proposed reply brief, but failed to file a motion for leave to file that document.

Because appellant waited until September 9 to seek expedited treatment of this appeal and specifically requested that this court wait until the normal briefing process was completed to expedite its consideration of this matter, it appeared that, in the meantime, this appeal had become moot. Specifically, appellant's delay in prosecuting this appeal potentially rendered this court unable to afford him the relief that he sought, to have respondent's name removed from the general election ballot as a qualified candidate for the office of United States Senator from Nevada, since absentee ballots, which include respondent as a qualified candidate for that office, had been printed, mailed, and in some cases cast. Therefore, on October 6, 2010, this court entered an order directing the parties and amicus curiae, the Secretary of State, to show cause why this appeal should not be dismissed as moot.

The parties and the Secretary of State timely responded to our show cause order. Appellant contends that this matter is not moot primarily because this court could still declare respondent unqualified for office regardless of whether his name can be removed from the ballot. See NRS 293.184(2) (providing that, if elected, a person who knowingly and willfully filed a declaration of candidacy containing a false statement "is

disqualified from entering upon the duties of the office for which he was a candidate”). In this way, appellant asserts, voters will be aware before casting their votes that respondent is not a viable candidate or, if respondent is nevertheless elected, he will be prevented from taking office. Appellant argues that, at any rate, general election ballots could still be altered to remove respondent’s name. See NRS 293.184(1) (stating that the name of a person who knowingly and willfully files a declaration of candidacy containing a false statement “must not appear on any ballot for the election”). Appellant fails to address, however, how the general election ballots could be changed at this point.

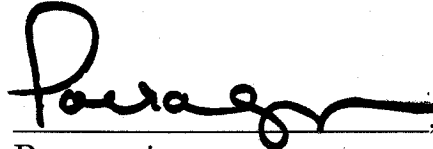
Respondent and the Secretary of State argue that this matter has become moot. In their responses, they assert that the appeal is moot because (1) absentee ballots for overseas voters have been distributed as required by state and federal law, see NRS 293.309(2)(b); 42 U.S.C. § 1973ff-1(a)(8) (2009); (2) NRS 293.165(4)’s June 15, 2010, deadline for altering the general election ballot has passed; (3) under NRS 293.309(3), any action that would prevent absentee ballots from issuing is moot and of no effect; (4) this matter is not ripe for a determination as to whether respondent is qualified to take office unless and until respondent is elected to office, see NRS 293.184(2); (5) if respondent is elected, this court loses jurisdiction to consider whether he is qualified to take the office of United States Senator from Nevada, under NRS 293.407(1) and the United States Constitution, Article 1, Section 5, see also Laxalt v. Cannon, 80 Nev. 588, 397 P.2d 466 (1964); (6) appellant’s unexplained delay in prosecuting this appeal militates against disrupting the election process, which is already underway, see Beebe v. Koontz, 72 Nev. 247, 252-53, 302 P.2d 486, 489


(1956); and (7) declaring respondent unqualified for office at this point effectively disenfranchises absentee (and now early) voters who already voted for him. See id. at 253, 302 P.2d at 490 (“The rights of absentee voters . . . are of sufficient substance to warrant our refusal to sanction their destruction by the delays inherent in orderly judicial procedure where such destruction would have been avoided by timely action on the part of the [challenger].”)


Having reviewed the parties’ responses, we conclude that this matter has become moot. This court has a duty “to decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.” University Sys. v. Nevadans for Sound Gov’t, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004). Appellant is seeking to have respondent’s name removed from the general election ballot. But absentee (and now early voting) ballots, which include respondent as a qualified candidate for United States Senator from Nevada, have been cast. As appellant can no longer obtain the relief that he seeks, this matter is moot. And with respect to appellant’s contention pursuant to NRS 293.184(2) that, regardless of whether general election ballots are printed, this court could declare respondent unqualified to take office as United States Senator from Nevada, appellant failed to make that argument in the district court, and thus, we will not consider it, as “[a] point not urged in the [district] court . . . is deemed to have been waived and will not be considered on appeal.” See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Moreover, it is appellant’s delay in prosecuting this appeal that

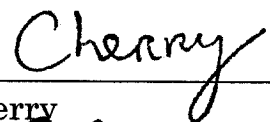
has prevented this court from meaningfully considering the issues that were properly raised without disrupting the election process. Consequently, appellant's failure to show good cause for his delay severely militates against this court interfering with the people's electoral franchise. See Beebe, 72 Nev. at 252-53, 302 P.2d at 489-90. Accordingly, we

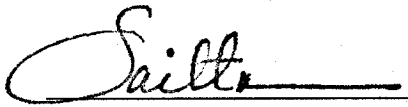
ORDER this appeal DISMISSED.¹

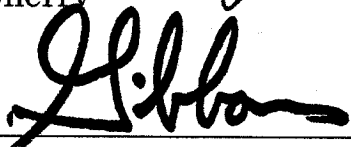

_____, C.J.
Parraguire



_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons


_____, J.
Pickering

¹In light of this order, we direct the clerk of this court to return, unfiled, appellant's reply brief, provisionally received in this court on October 6, 2010.

cc: Hon. James Todd Russell, District Judge
Hansen Rasmussen, LLC
Allen Lichtenstein
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk