

IN THE SUPREME COURT OF THE STATE OF NEVADA

BOB REEVE,  
Appellant,

vs.

ESMERALDA COUNTY, BY AND  
THROUGH ITS AGENTS, ESMERALDA  
COUNTY BOARD OF  
COMMISSIONERS, BEN VILJOEN,  
GARY O'CONNOR AND HARRIET  
EALEY; ESMERALDA COUNTY  
CLERK, DE ANN SIRI; AND  
CANDIDATE-ELECT HARRY KUEHN,  
Respondents.

No. 35188

FILED

AUG 14 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *Richard*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for a writ of mandamus. Appellant, Bob Reeve, was appointed Esmeralda County District Attorney on December 1, 1997. Reeve was subsequently elected to the position in November 1998, but was the subject of a recall petition in 1999. The Esmeralda County Clerk scheduled the recall election for Friday, September 17, 1999, and advised voters to request absentee ballots by Friday,<sup>1</sup> September 10, 1999.

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<sup>1</sup>NRS 293.315(1), then in effect, provided in part: "A registered voter . . . may, at any time before 5 p.m. on the Tuesday preceding any election, make an application to that clerk for an absent voter's ballot." (Emphasis added.)

All registered voters in Esmeralda County, including Reeve, received a sample ballot prior to the election, which provided the reasons for the recall and Reeve's justification of his performance in office. However, the formal ballots presented at the polls on September 17, 1999, simply contained the names of Reeve and his opponent, but did not include the statements of Reeve or the recall proponents.<sup>2</sup> Reeve lost the recall election after a majority of voters chose Reeve's opponent.<sup>3</sup>

Reeve timely filed a petition to set aside the special election on September 27, 1999,<sup>4</sup> alleging that the County's failure to hold the election on Tuesday and to include the statements for and against the recall on the ballot contravened Nevada statutory and constitutional law. The district court denied Reeve's petition, finding that the County substantially complied with the Nevada Constitution and statutes. The court also found that, by failing to allege any specific violation of NRS 293.410,<sup>5</sup> there was

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<sup>2</sup>Nevada Constitution article 2, § 9, requires these statements to be printed on the ballot at recall elections: "On the ballot at said election shall be printed verbatim as set forth in the recall petition, the reasons for demanding the recall of said officer, and in not more than two hundred (200) words, the officer's justification of his course in office."

<sup>3</sup>Out of 707 registered voters, 428 cast ballots on September 17, 1999. Reeve received 203 votes, while his opponent received 225 votes.

<sup>4</sup>NRS 293.413(1) provides that an election contest must be brought within fourteen days after the election.

<sup>5</sup>NRS 293.410 provides:

**Dismissal of statement of contest; grounds for contest.**

1. A statement of contest shall not be dismissed by any court for want of form if the grounds of contest are alleged with sufficient

*continued on next page . . .*

no "error in the election procedure sufficient to justify a contest of the election."

Reeve then petitioned the district court for a writ of mandamus on October 18, 1999, alleging the same constitutional and statutory violations upon which he relied in the initial petition to set aside the election. On October 22, 1999, the district court summarily denied the writ petition. Reeve now appeals the district court's denial of the writ petition.

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*... continued*

certainty to inform the defendant of the charges he is required to meet.

2. An election may be contested upon any of the following grounds:

(a) That the election board or any member thereof was guilty of malfeasance.

(b) That a person who has been declared elected to an office was not at the time of election eligible to that office.

(c) That illegal votes were cast and counted for the defendant, which, if taken from him, will reduce the number of his legal votes below the number necessary to elect him.

(d) That the election board, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected.

(e) That the defendant has given, or offered to give, to any person a bribe for the purpose of procuring his election.

(f) That there was a possible malfunction of any voting or counting device.

This court reviews a district court's decision to grant or deny a writ petition under an abuse of discretion standard.<sup>6</sup> We conclude that the district court did not abuse its discretion in denying Reeve's subsequent writ petition.

Reeve alleged the same constitutional and statutory violations in his initial petition to set aside election and his subsequent writ petition. Although the enumerated grounds for an election contest set forth in NRS 293.410 do not explicitly include constitutional challenges to an election, we conclude that the district court had implied authority to reach the constitutional challenge in its resolution of the initial petition.

The district court, having jurisdiction to address Reeve's statutory and constitutional arguments, properly considered and ruled upon the merits of these arguments in denying Reeve's first petition to set aside the election. Each of the three elements of res judicata are present here, thereby barring consideration of Reeve's writ petition: (1) the issues decided in the initial action are identical to those raised by Reeve in the writ petition; (2) the initial ruling was final and on the merits; and (3) Esmeralda County was a party to the prior litigation.<sup>7</sup> Thus, Reeve should have directly appealed that decision, rather than raise the same arguments in the subsequent writ petition. We, therefore, conclude that

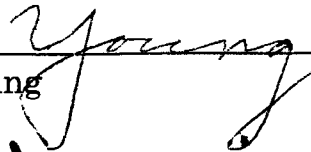
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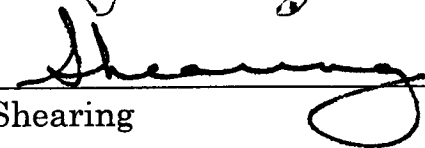
<sup>6</sup>See DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (citing County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998)).


<sup>7</sup>See Pulley v. Preferred Risk Mut. Ins. Co., 111 Nev. 856, 858, 897 P.2d 1101, 1102-03 (1995).

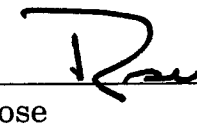
Reeve's subsequent petition for a writ of mandamus and appeal<sup>8</sup> from the denial of that petition was the improper procedural method to challenge the district court's rulings. Having carefully considered the parties' arguments, we


ORDER the district court's order AFFIRMED.


  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Becker

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<sup>8</sup>We note that it was initially unclear which district court order Reeve sought to appeal. Over two years elapsed from the filing of Reeve's imprecise notice of appeal on November 23, 1999, and this court's receipt of clarification from Reeve that he only intended to appeal the district court's denial of the petition for a writ of mandamus. We recognize, however, that Reeve's clarification was timely filed, pursuant to the thirty-day period for response allowed by this court on November 28, 2000.

cc: Hon. John P. Davis, District Judge  
Peter L. Flangas  
Bob Reeve  
Keith Loomis  
Esmeralda County Clerk

MAUPIN, C.J., dissenting:

The district court indisputably had the authority to hear any statutory election challenge brought pursuant to NRS 293.410, the Nevada election contest statute. However, in determining the merits of Reeve's initial petition to set aside election, the district court also ruled upon the constitutionality of the election, finding that the County had substantially complied with Nevada's constitutional election provisions. While the majority's conclusion that Reeve's constitutional challenges were properly raised in his initial petition is sensible, it was unclear prior to the decision in this case whether the district court had jurisdiction to reach the constitutional question in the context of a challenge brought pursuant to NRS 293.410. Absent jurisdiction to hear non-statutory challenges in the initial petition, Reeve would have been required to raise the constitutional challenges via extraordinary writ.

The Nevada election contest provision, NRS 293.410, is narrowly drawn:

**Dismissal of statement of contest; grounds for contest.**

1. A statement of contest shall not be dismissed by any court for want of form if the grounds of contest are alleged with sufficient certainty to inform the defendant of the charges he is required to meet.

2. An election may be contested upon any of the following grounds:

(a) That the election board or any member thereof was guilty of malfeasance.

(b) That a person who has been declared elected to an office was not at the time of election eligible to that office.

(c) That illegal votes were cast and counted for the defendant, which, if taken from him, will reduce the number of his legal votes below the number necessary to elect him.

(d) That the election board, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected.

(e) That the defendant has given, or offered to give, to any person a bribe for the purpose of procuring his election.

(f) That there was a possible malfunction of any voting or counting device.

Constitutional violations in the election process are not among the specific grounds for a timely election contest under NRS 293.410(2). Thus, Reeve argues that, while the district court reached his constitutional challenge, it was not at all clear as to whether the initial petition under NRS 293.410(2) properly implicated the jurisdiction of the court to hear that particular type of challenge.


The jurisdictional uncertainty in this matter raises an issue of first impression. As such, I believe that a petition for a writ of mandamus was a proper method to allow the district court to reach the constitutional issue.<sup>1</sup> This court should, therefore, address the merits of Reeve's appeal from the district court's denial of the writ petition. In my view, the County was required to strictly comply with the provisions of Nevada's Constitution. Thus, I believe that the district court erred in applying a

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<sup>1</sup>Reeve was not required to file his petition for writ of mandamus within the fourteen-day window provided by NRS 293.413(1) because the writ petition challenged the election on constitutional grounds, in addition to the enumerated statutory grounds.



substantial compliance analysis to the constitutional issue. The County clearly did not strictly comply with the provisions of the Nevada Constitution. I would, therefore, invalidate the recall election.

 , C.J.  
Maupin