

# THE SUPREME COURT OF WASHINGTON

WASHINGTON STATE REPUBLICAN PARTY, an unincorporated association; CHRISTOPHER VANCE, a citizen of Washington State; and JANE MILHANS, a citizen of Pierce County,

Respondents,

v.

KING COUNTY DIVISION OF RECORDS, ELECTIONS AND LICENSING SERVICES; and KING COUNTY CANVASSING BOARD,

Petitioners,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,

Intervenor-Petitioner,

SECRETARY OF STATE SAM REED,

Intervenor-Petitioner.

NO. 76399-2

OPINION

ALEXANDER, C.J.—During the hand recount in the 2004 Washington State election for Governor, the King County Canvassing Board discovered that some 573 ballots had been coded by election workers as having “no signature on file” after the workers found no signatures of the voters casting those ballots in the County’s electronic elections database. But the workers had failed to check for signatures elsewhere, such as the voters’ original registration forms, the archive of images from

the County's old electronic registration system, and the registration records maintained by the Secretary of State. At its December 15, 2004, meeting, the canvassing board decided to recanvass these ballots pursuant to RCW 29A.60.210 to determine whether the failure to count the ballots in the Governor's race was erroneous. The next day, the Washington State Republican Party, Christopher Vance, and Jane Milhans filed in Pierce County Superior Court this action for declaratory and injunctive relief against the canvassing board and the King County Division of Records, Elections and Licensing Services, and sought a temporary restraining order prohibiting recanvassing of the 573 ballots. On December 17, 2004, after a hearing on the request for a restraining order, the Pierce County Superior Court issued the requested order. The court concluded that "RCW 29A.60.210 does not apply in this context."

Now, the Washington State Democratic Central Committee, an intervenor below, seeks direct review of the superior court's order, arguing that the King County Canvassing Board properly concluded that RCW 29A.60.210 permits recanvassing of the 573 ballots.<sup>1</sup> The canvassing board joins in that request, as does the Secretary of State, who is the chief elections officer of the State and who also intervened below. We grant review and reverse the superior court.

This hand recount of ballots came before the court very recently in a case involving whether a recount necessarily involves a recanvassing of previously-rejected ballots. In our decision in that case, issued December 14, 2004, we held that under Washington's recount statute, "ballots are to be 'retabulated' only if they have been previously counted or tallied, *subject to the provisions of RCW 29A.60.210.*"

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<sup>1</sup> The Washington State Democratic Central Committee initiated this review by filing a notice of appeal directed to this court, a statement of grounds for direct review, and a motion for accelerated review. Because the superior court's decision is not a final judgment or other decision subject to appeal under RAP 2.2(a), we redesignate the Democratic Central Committee's notice as a notice for discretionary review. RAP 5.1(c). Thus, the superior court's decision is subject to review under the criteria of RAP 2.3(b).

(Emphasis added.) The quoted language, referencing the “re-canvassing” statute, RCW 29A.60.210, acknowledges that under proper circumstances a canvassing board may decide that ballots should be re-canvassed before certification of a recount. Indeed, the Secretary of State’s Director of Elections, Nick Handy, has provided this court with a detailed declaration explaining how other counties have already employed RCW 29A.60.210 to count votes from ballots not counted in the original returns for this election. Our prior opinion did not hold that the re-canvassing statute may not be employed by canvassing boards during a recount.<sup>2</sup>

The question here is thus whether RCW 29A.60.210 authorized the King County Canvassing Board to re-canvass the 573 ballots in question. RCW 29A.60.210 provides in part:

Whenever the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may re-canvass the ballots or voting devices in any precincts of the county.

Since this statute permits re-canvassing, the statutory definition of “canvassing” is also pertinent. RCW 29A.04.013 provides:

“Canvassing” means the process of examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns of a primary or general election and includes the tabulation of any votes that were not tabulated at the precinct or in a counting center on the day of the primary or election.

And although our election statutes do not define “returns,” RCW 29A.60.120(3) provides that the “official returns” are “[t]he returns produced by the vote tallying system, to which have been added the counts of questioned ballots, write-in votes, and absentee votes.”

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<sup>2</sup> While RCW 29A.60.210 requires re-canvassing prior to certification of an election, and RCW 29A.60.190 speaks of certification occurring on the fifteenth day following a general election, it is clear to us that whenever a recount occurs, amended abstracts are certified that supersede any prior abstract of the results. RCW 29A.64.061. The statute does not define “certification,” but the regulations promulgated by the Secretary of State make clear that certification involves the preparation and transmission of abstracts of votes to the Secretary of State. *See* WAC 434-262-010, -020, and -080.

As noted, the King County Canvassing Board says that these 573 ballots were previously coded by election employees as having “no signature on file.” The board has now concluded that this designation may have been in error, since election workers failed to check the signatures against voter records on file, as required by RCW 29A.40.110(3) and King County rules for this election. The board has therefore decided to recanvass the ballots and correct any such errors that it finds. Respondents suggest that there may have been some impropriety involved in this decision, or that the ballots involved might have been tampered with, but point to no facts supporting such a conclusion.<sup>3</sup> The question becomes whether the type of error thus identified amounts to “an apparent discrepancy or an inconsistency in the returns” of the election, as contemplated in RCW 29A.60.210.

This court has issued but one opinion construing the recanvassing statute. *See State ex rel. Doyle v. Superior Court of King County*, 138 Wash. 488, 244 Pac. 702 (1926). The version of the statute then in effect permitted the opening of voting machines to recanvass the vote “whenever it shall appear that there is a discrepancy in the returns of any election district ....” In *Doyle* all votes tallied, but some returns were not made in both words and figures and in ink, as required by statute.

Given these facts, this court found it “quite evident that there is no disagreement or discordance upon the returns made by the precinct officers.” Informed by a dictionary definition of the word “discrepancy,” it concluded that “[a] discrepancy referred to by the statute would be something to indicate that an error or a mistake has been made; that the total as shown is not a true one.” *Doyle*, 138 Wash. at 492. By way of example of such discrepancies, the court said that

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<sup>3</sup> The King County Canvassing Board has stated that these ballots should be kept separate and secure, and we agree that this shall occur.

[t]here is no claim that there is any difference between the number of persons who voted and the number of votes cast. Neither is it claimed that any total shown on any return is incorrect.... Nor is there any claim that if the counter compartment were opened it would show details different from those contained upon the returns. Nor is there any claim that the returns as made are actually incorrect.

*Id.*

Here, by contrast, the canvassing board has concluded that the returns as made may indeed be “actually incorrect.” The board also says that further examination of the ballots under question may well show details “different from those contained upon the returns.” When election workers found no matching signatures for these ballots in the county’s electronic voter files, the ballots were apparently set aside to check for signatures elsewhere, including original paper registration forms. But this was never done. Instead, the ballots were described to the canvassing board and not counted in the returns as votes.

Respondents would have us narrowly construe “an apparent discrepancy or an inconsistency in the returns” to mean only an arithmetic error disclosed on the face of the returns. But this is contrary to *Doyle*, which speaks in terms of “incorrect” returns and returns at odds with other evidence. Moreover, since the statute permits recanvassing, it is instructive to remember that canvassing involves “examining ballots or groups of ballots, subtotals, and cumulative totals in order to determine the official returns,” RCW 29A.04.013. Here, certain ballots were coded as having “no signature on file” without having been fully examined to properly place them in that category. In that sense they were never fully canvassed, and the seeming error in placing them in any category has become evident to the King County Canvassing

Board. Under *Doyle* this is just the sort of apparent discrepancy or inconsistency that the board can correct through recanvassing.<sup>4</sup>

It thus follows that the superior court erred in granting a temporary restraining order, and that the King County Canvassing Board properly concluded that it had authority to recanvass the subject ballots pursuant to RCW 29A.60.210. Based on the law as declared in this opinion, respondents are not entitled to injunctive relief. Therefore, the superior court’s “Temporary Restraining Order and Order to Show Cause” is reversed and vacated, and the cause is remanded to the superior court for entry of an order of dismissal forthwith.

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CHIEF JUSTICE

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<sup>4</sup> Our decision accords with the only analogous out-of-state authority cited to us, *Comley ex rel. Harrison v. Wilson*, 116 Conn. 36, 163 A. 465 (1932). The court there held that in using the phrase “discrepancy in the returns” the legislature “could hardly have intended only a discrepancy apparent by comparison of the respective votes cast for the different offices or officers as they appear in the moderator’s return.” *Comley*, at 42. Rather, the legislature must have intended reference to the figures giving the total number who have voted, “for only in this way could there be any definite information indicating the failure of the machine to register votes for the candidates as a whole or for those of any one party.” *Id.*