SID 10-5-84

IN THE SUPREME COURT OF FLORIDA

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, a State agency, and ROBERT M. SMITH, Director of the Division of Pari-Mutuel Wagering, and GARY RUTLEDGE, Secretary of the Department of Business Regulation,

Appellants,

vs. CASE NO. 65,820

FLORIDA HORSE COUNCIL, INC., CALDER RACE COURSE, INC., TROPICAL PARK, INC., GULFSTREAM PARK RACING ASSOCIATION, INC., HIALEAH, INC., TAMPA BAY DOWNS, INC., and TOURIST ATTRACTIONS, INC.,

Appellees.

BRIEF OF APPELLANTS

On Certification from the District Court of Appeal
Third District, State of Florida

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STATEMENT OF THE CASE AND FACTS

The plaintiffs, racetrack permit holders who conduct horseracing at various tracks in Florida, filed their complaint in this action in the Circuit Court, Dade County, Florida, in December, 1983. Together they sought to have declared unconstitutional those provisions in Chapter 550, Florida Statutes, that prohibit horseracing and pari-mutuel gambling on Sunday.

On July 26, 1984, the circuit court entered summary judgment in favor of plaintiffs ruling that the "provisions of Chapter 550 which ban the conduct of pari-mutuel wagering on Sundays are declared void and of no effect . . . ." [A 3] Although the body of the opinion addresses horseracing activities, the language of the concluding paragraph apparently, and probably inadvertently, embraces all pari-mutuel activities regulated in Chapter 550, and thus includes those applicable to dogracing as well.[1] On the basis of the pleadings, however, only the proscriptions against horseracing and its associated pari-mutuel gambling were at issue. Chapter 551, Florida Statutes, regulating jai alai, also prohibits that activity and associated

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[1] Those statutes affecting horseracing are: sections 550.04, 550.065(2), 550.081(1), 550.291(1), 550.33(3), 550.37(4), 550.39(1), 550.41(3), 550.43, 550.45. Those affecting dogracing are: sections 550.0831 and 550.291(1).

pari-mutuel wagering on Sunday. Those statutes were not addressed in this case.

The defendants, the Department of Business Regulation and its Secretary, and the Division of Pari-mutuel Wagering and its Director, timely filed a notice of appeal. On their motion, the District Court of Appeal, Third District, pursuant to Florida Appellate Rule 9.125, certified as a question of great public importance the decision of the circuit court. The Florida Supreme Court accepted jurisdiction of the case on September 10, 1984.

ARGUMENT

THE TRIAL COURT ERRED IN HOLDING UNCONSTITUTIONAL THOSE PROVISIONS OF CHAPTER 550, FLORIDA STATUTES, PROHIBITING HORSERACING AND PARI-MUTUEL GAMBLING ON SUNDAY.

The final summary judgment of the trial court held that the Sunday racing restrictions of Chapter 550, Florida Statutes, "serve no valid secular purpose rationally related to a legitimate state objective." [A 3] In so holding, the court apparently reasoned that any noxious activities associated with gambling or racing would be no more likely to occur on Sunday than any other day of the week, and therefore the Legislature could not single out that day as a day of rest from such activity. Furthermore, even though it is undisputed that the horseracing industry needs a day or two of rest per week, the court rejected the contention that it is within the power of the Legislature to decide which day shall be a day of rest. It is submitted that the trial court is wrong in its analysis of the law and of the arguments defendants made to the court.

Appellants agree that the constitutionality of the laws in question is to be determined on the basis of whether they are justified as an exercise of the state's inherent police power. Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952); Moore v. Thompson, 126 So.2d 543 (Fla. 1961). However, these statutes, as any other, carry a strong presumption of constitutionality,

including a "rebuttable presumption of the existence of necessary factual support in [their] provisions." State v. Bales, 343 So.2d 9 (Fla. 1977); Fulford v. Graham, 418 So.2d 1204 (Fla. 1st DCA 1982). The plaintiff racing interests submitted no evidence directly bearing on the statutes' effectiveness or appropriateness as police power measures. The trial court's opinion is little more than a hasty gloss on the statutes' facial unconstitutionality and a superficial rebuttal of the state's arguments. It is not entitled to any presumption of correctness. Spencer v. Hunt, 109 Fla. 248, 147 So. 282 (1933). The legal issue before this Court is whether there is any state of facts, known or to be assumed, that would justify the law; if so, the Court's power of inquiry ends and the statutes must be found constitutional. Bales and Fulford, supra.[2]

The Sunday prohibitions in Chapter 550 regulate two activities: gambling and horseracing. The first is a recognized social problem whose dimensions may extend from the individual affliction of "compulsive gambling" to the intrusion of organized

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[2] In paragraph 5 of the opinion [A 2], the trial court observed that Sunday racing will not cause administrative problems or increased costs to the state but would, in fact, increase state revenues. While not disputed below, such facts do not establish that the closing requirements serve no police power function.

crime into the activity.[3] The sport of racing itself, because of prize money, betting and other factors, also engenders problems.[4] No doubt because of such difficulties, the Florida Supreme Court long ago recognized the intrinsically problematic character of gambling and horseracing and the state's right to strictly control it:

> Authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises over which the exercise of the police power is not so essential for the public welfare. Hialeah Race Course, Inc. v. Gulf Stream Park Racing Ass'n, Inc., 37 So.2d 692 (Fla. 1952)

This language was reiterated a few years later in Rodriguez v. Jones, 64 So.2d 278 (Fla. 1953). Both Hialeah and Rodriguez observed that gambling is "inherently dangerous to society" and for that reason may be lawfully prohibited. As recently as 1978 this Court recognized once again that "it is within the police power of the state to enact legislation to suppress gambling." Schultz v. State, 361 So.2d 416 (Fla. 1978).

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[3] See, e.g., Beating the Odds: Compulsive Gambling as an Insanity Defense, 14 Conn.L.Rev. 341 (1982); Symposium, 12 Conn.L.Rev. 661, 676-679 (1980); Legalization and Control of Casino Gambling, 8 Fordham Urban L.J. 245 (1979-1980).

[4] In his deposition, the department secretary acknowledged that race fixing and bookmaking activities have been reported, as well as drug sales and sales of alcoholic beverages to minors at racetracks. (Dep. of Secretary Rutledge, p. 23)

The racing interests have not asserted that gambling is no longer a potentially serious social problem - at least they adduced no evidence to that effect. Nor have they contended that the various problems attendant to racing - those, for example, discussed by the department secretary - are matters which the Legislature could not have properly taken into account in prescribing Sunday as a day of surcease from racing and all forms of pari-mutuel gambling. Instead, they contend, and the trial court found, that whatever the noxious characteristics of gambling and racing may be, they are not more likely to occur on Sunday than any other day. [A 3] Thus, said the trial court, the Legislature is powerless to set aside Sunday as a day of inactivity.

The trial court is undone by its own logic. Carried to its conclusion, that logic says that the Legislature may not set aside any day as a day of rest because the noxious characteristics are as likely to occur on one day as another. But if the Legislature cannot set aside Sunday for that reason, why should it be able to set aside Monday or Tuesday or any other day as the trial court suggested? [A 3] The reasoning, moreover, ignores the case and facts the plaintiffs presented. The very reason they sought Sunday racing is because of the greater crowds and the greater amount of money ("handle") that will be bet on that day. Conceding this, it is certainly a fair assumption that the Legislature simply did not desire the populace to spend the

entire weekend at pari-mutuel gambling facilities and that it did desire to curtail gambling opportunities to the extent of foregoing Sunday racing. In Henderson v. Antonacci, supra, the Florida Supreme Court said Sunday closing laws were permissible because of the evils attendant to uninterrupted labor. The same rationale should apply to uninterrupted gambling.

Simply put, the trial court's analysis ignores both logic and law. As a matter of law, the legislature has the broadest discretion in regulating and controlling the subject activities under the police power, and, moreover, this control may be exercised "in a more arbitrary manner" than would be permissible for ordinary business enterprises. Hialeah, supra, at 694. Hence, it follows that the Legislature has the discretion to designate a day of rest and surcease and to specify the day. In McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961), the Supreme Court ruled that not only do states have the power to enact laws setting aside a uniform day of rest, but also they have the power and authority to fix the day, and that day may be Sunday.

The plaintiffs have argued that McGowan does not apply because the State of Florida has no uniform day of rest - i.e., no other laws requiring ordinary commercial, retail or service businesses to close on Sunday. However, the McGowan decision dealt precisely with this argument. The Maryland law under

review required numerous businesses to close on Sunday but also provided, as the Supreme Court acknowledged, a "myriad of exceptions." As to the argument this constituted unlawful discrimination, the Court said:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. 366 U.S. 425, 6 L.Ed.2d 399.

The Supreme Court did not require the existence of a pervasive scheme of Sunday closing in order to justify <u>any</u> closing requirement. Rather, the test is whether the law in its particular application "is wholly irrelevant to the achievement of the state's objective."

As noted, Chapters 550 and 551 uniformly require <u>all</u> sporting activities involving pari-mutuel gambling - thoroughbred racing, harness racing, quarterhorse racing, dogracing and jai alai - to cease operation on Sunday. The classification of these activities is reasonable, and plaintiffs have cited no authority for the proposition that gambling enterprises must be treated no differently than grocery stores or gasoline stations

or that the treatment accorded them in Chapters 550 and 551 constitutes invidious discrimination. See McGowan, 366 U.S. 426, 6 L.Ed.2d 399, footnote 3. This Court has itself held that classifications under the police power will not be judicially annulled unless wholly without a reasonable basis or purely arbitrary. Hamilton v. State, 366 So.2d 8 (Fla. 1978). In Rodriquez v. Jones, 64 So.2d 278 (Fla. 1953), this Court held that treating jai alai frontons as a distinct class was appropriate because the restriction at issue applied equally to all persons (frontons) "similarly circumstanced." Under the statutes in question, all pari-mutuel facilities are "similarly circumstanced."

The Legislature could find that the Sunday racing and betting restrictions serve these valid purposes: 1) they encourage people to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits; 2) that having gambling activites available on both days of the weekend is contrary to the public welfare and unhealthy in itself; 3) that closing such facilities on what might otherwise be the busiest day of the week could help curb the "compulsive gambler" syndrome; 4) that racing on less busy days means there is less opportunity for the mischief that sometimes attends these events, and therefore a lighter burden on law enforcement authority; 5) that, in the judgment of the legislature, it is more beneficial to the industry itself to close on Sunday than on Monday or

Tuesday. Not one of these conclusions has been rebutted by evidence.[5]

Because the foregoing facts could be assumed in support of the closing laws, the court's power of inquiry ends and the laws should be found constitutional. State v. Bales and Fulford v. Graham, supra. It is not the state's burden to prove the statutes constitutional; rather, it was plaintiff's burden to prove their invalidity beyond a reasonable doubt. ABA Industries v. Pinellas Park, 366 So.2d 761 (Fla. 1979); Biscayne Kennel Club v. Florida State Racing Comm., 165 So.2d 762 (Fla. 1964). That burden simply has not been met. The appellees can point to no evidence rebutting the justifications enumerated above. Even if there were some doubt about these justifications, it is to be resolved in favor of the constitutionality of the statutes. In re Estate of Caldwell, 247 So.2d 1 (Fla. 1971).

As a concluding point, it is worth noting that there is apparently not one judicial decision holding the proscription of Sunday gambling and racing activities unconstitutional.

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[5] As to 5), the evidence in the record consists only of depositions of the department secretary and former division director. Both stated unequivocally that the horseracing industry needed to close one or two days a week during racing season for its own benefit. There was no testimony from the industry or anyone else that Monday or Tuesday would be a better day to close than Sunday. It may therefore be inferred that Monday and Tuesday would be "better" closing days only because they are less lucrative.

Appellees have certainly failed to cite such a case at any time in these proceedings. This is significant because the appendix to Justice Frankfurter's concurring opinion in McGowan, supra, contains a comprehensive list of various state closing laws. That list indicated that 32 states had special prohibitions or regulations on Sunday racing at the time of the McGowan decision. Included in this list was section 550.04, Florida Statutes. There was no suggestion in the McGowan opinion that such regulation was suspect. Appellant's research indicates that currently, in addition to Florida, the states of Minnesota, New Jersey, Oklahoma, Arkansas and Mississippi do not allow horse-racing on Sunday. Maryland prohibits it in all counties but one. Illinois, Louisiana, Nebraska, New Hampshire, Vermont and West Virginia do not allow Sunday racing unless approved by local option.[6]

Appellees have argued that it is to the state's financial benefit to have Sunday pari-mutuel gambling because the state will derive significantly increased revenue from the greater attendance on that day. Virtually the same "easy money" argument was presented to this Court in Rodriguez v. Jones, 64 So.2d 278

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[6] Minn. Stat. §§ 624.01, 624.02; New Jersey Stat. 5:5047; Okla. Stat. Title 21 § 908; Ark. Stat. 84-2743; Miss. Stat. §97-23-79; Maryland Code Art. 78B, § 28; Illinois Stat. 8 ¶ 37-19; Louisiana R.S. 4:157; Nebraska Laws 2-1213; N. Hampshire RSA 284:17-b; 31 Vermont Stat. Ann. § 607; W. Va. Code § 19-23-8.

(Fla. 1953). The Court there said such an argument was no more than a quarrel with the wisdom or policy of a legislative act and therefore should be addressed to the Legislature. In fact, all of appellees' arguments thus far amount to no more than a quarrel with the Legislature's policy decision to impose limits on the extent and conduct of gambling in Florida. It is therefore submitted that appellees should present their arguments to the Legislature.

CONCLUSION

Constitutional principles do not require that a state have a comprehensive Sunday closing scheme broadly applicable to all types of businesses and commercial activities in order to require a distinct class - such as pari-mutuel gambling facilities - to cease activity on Sunday. Hence, the closing requirement in question does not unlawfully discriminate against the racing interests and the trial court properly did not so find.

The statutes in question do serve legitimate purposes under the police power. This being so, the trial court erred in holding those statutes unconstitutional as serving no valid, secular state objective.

The decision of the trial court should be reversed and summary judgment should be entered in favor of appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to WILBUR E. BREWTON, Taylor, Brion, Buker & Greene, 225 South Adams Street, Suite 250, Tallahassee, Florida 32301, and by United States Mail to DAVID MALONEY, Department of Business Regulation, The Johns Building, 725 South Bronough Street, Tallahassee, Florida 32301, this 19th day of September, 1984.

Louis F. Hubener

Louis F. Hubener