O/a 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.

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.

FILED
SID J. WHITE
SEP 28 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

CASE NO. 65,820

REPLY BRIEF OF APPELLANTS

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

JIM SMITH
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL

MITCHELL D. FRANKS
CHIEF TRIAL COUNSEL

ATTORNEYS FOR APPELLANTS

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

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

In their answer brief, appellees begin their argument with a lengthy and unnecessary discussion of the history of Blue Laws in an effort to taint the racing and gambling restrictions with asserted religious origins. While it may be interesting to know such laws had their genesis in Exodus, so to speak, the United States Supreme Court, in four scholarly opinions, has dealt with just such an attack on Sunday closing laws and has held that those laws, even though having religious origins, are not unconstitutional for that reason if they serve a valid state objective. McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 6 L.Ed.2d 536, 81 S.Ct. 1122 (1961); Two Guys from Harrison - Allentown v. McGinley, 366 U.S. 582, 6 L.Ed.2d 551, 81 S.Ct. 1135 (1961); Braunfeld v. Brown, 366 U.S. 599, 6 L.Ed.2d 563, 81 S.Ct. 1144 (1961). It is precisely this point, the state objectives served by the restrictions of Chapters 550 and 551, that appellees seek to avoid by contending the laws are merely anachronisms serving prohibited religious purposes.

McGowan did not require a general and pervasive statutory scheme in order to justify a particular closing requirement if

that requiremnt served a valid state objective. Hence the question here is whether such objectives exist. Appellees insist, nevertheless, that Florida's lack of a pervasive statutory closing scheme alone renders unconstitutional the closing requirements of Chapters 550 and 551. This argument misreads or fails to read McGowan and turns a blind eye to reality.

Sunday, as a day of recreation, tranquility and repose, may exist as well by "tradition and custom" as by legislative fiat. See, McGowan, supra at 426. Under section 683.01, Florida Statutes, Sunday is recognized as a legal and public holiday. Government offices, including courts, are not open on Sunday. See Section 34.131, Florida Statutes. The Legislature does not meet on Sunday, nor is mail collected or delivered. Banks, insurance businesses and virtually all professional offices are closed. To assert there is not "relative quiet and disassociation from the everyday intensity of commercial activities" is to ignore the way we live.[1]

Regardless of how one may characterize Sunday in Florida, appellants have failed to show that pari-mutuel gambling facil-

---

[1] By law, some activities are not permitted on Sunday such as service of process. Section 48.20, Florida Statutes. Corporate offices are not required to be open. Section 48.091(2), Florida Statutes. Fishing for shad or dead shrimp is not allowed on Sunday. Sections 370.11(3)(a) and 370.153(8)(a), Florida Statutes.

ities have been improperly classified or that the Sunday closing requirement serves no objective. Their heavy reliance on Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952), Kelly v. Blackburn, 95 So.2d 260 (Fla. 1957), and Moore v. Thompson, 126 So.2d 543 (Fla. 1961), is misplaced. In those cases this Court simply found no basis for discriminating between automobile dealers and many other commercial businesses, the former of whom were required to close on Sunday, the latter not. Likewise, in State v. Greenwood, 187 S.E.2d 8 (N.C. 1972), also cited by appellees, the Supreme Court of North Carolina struck down an ordinance forbidding billiard playing in pool halls on Sunday because it had no application to similar recreational activities just as likely to "attract idlers and troublemakers." These decisions were clearly justified because of the discriminatory treatment afforded businesses within the same classification.

Appellees present no authority holding that pari-mutuel gambling facilities - whether associated with horseracing, dogracing or jai-alai - are now considered categorically the same as any retail or commercial activity which may do business on Sunday. If anything, the authority cited suggests the contrary. On page 16 of their brief, appellees cite a portion of a paragraph from Volusia County Kennel Club v. Haggard, 73 So.2d 884 (Fla. 1954), omitting the crucial first sentence:

> This Court has held that race track gambling establishments are now legal and that those in a like situation

> should be treated fairly and impartially. [E.S.] State ex rel. West Flagler Amusement Co. v. Rose, 122 Fla. 227, 165 So. 60; Hialeah Race Course Inc., v. Gulfstream Park Racing Association, Fla., 37 So.2d 692, and Simmons v. Hanton, Fla., 65 So.2d 42.

A reading of this case and the authority referenced in the quotation makes it clear that those "in a like situation" are simply other racetrack gambling establishments. Appellants have no quarrel with the principle that all pari-mutuel gambling facilities should be accorded equal treatment. Indeed, Chapters 550 and 551 require that all close on Sunday.

For the same reasons, appellees' attempt to compare pari-mutuel events with sporting activities such as baseball or football that may legally operate on Sunday is unpersuasive. While, roughly speaking, they are all sports, football, baseball and the like are family oriented events and do not involve gambling. By contrast, minors are not even allowed to attend pari-mutuel racing events. See section 550.04, Florida Statutes. Thus, while pari-mutuel racing may be, as appellees argue, a substantial business, the legislature, at least as to dogracing, has found it "an operation which requires strict supervision and regulation in the best interests of the state." Section 550.162, Florida Statutes. This being so, the fact that other dissimilar sporting events may occur on Sunday is hardly indicative of a constitutional infirmity.

On page 18 of their brief, appellees have accused the appellants of raising for the first time on appeal a "factual issue" concerning the "noxious qualities" long recognized as attendant to gambling. Unfortunately for appellees, this is not an issue of fact because the undisputed facts of record show these qualities exist. On pages 22-24 of his deposition, Secretary Rutledge acknowledged reported occurrences of game fixing, greyhound race fixing, horse race fixing, bookmaking, and illegal sales of drugs and alcoholic beverages at tracks. [A 5, 6] The appellants pointed out to the trial court legal precedent acknowledging the existence of the "noxious" aspects of gambling in two memoranda of law [R 16, 64] and as well as in oral argument at the summary judgment hearing. [R 98-102] There was never any objection to this argument, and, contrary to what appellees now argue, the trial court did not reject these occurrences as established facts. See Final Judgment ¶s 6, 7, 8. It could not have done so in the context of a summary judgment proceeding. The best the trial court could do was to say that criminal acts could occur as readily on one day as another.

In response to the five possible justifications for requiring pari-mutuel facilities to close on Sunday that appellant put forth on page 9 of their brief, appellees, quoting from Schweiker v. Wilson, 450 U.S. 244 (1981), suggest that counsel's explanations indicate "not so much . . . a legislative policy

choice, as its absence." (Appellees fail to note they are quoting from a dissenting opinion.) It is submitted the legislature's policy decision to prohibit all pari-mutuel activity on Sunday could not have been more clearly stated. The statutory ambiguities and contradictions present in Schweiker simply do not exist in this case. In any event, Schweiker differs so greatly from the case before this Court that it would perhaps be more instructive to analyze these justifications on the basis of other cases on which appellees purport to rely. Since appellees reassert this argument under a Point II, appellant will also address it under Point II, infra.

Appellees, in concluding Point I, suggest that the after midnight activity allowed by section 550.162, Florida Statutes, for jai-alai and dog racing demonstrate the legislature has no firm purpose in prohibiting pari-mutuel activity for the remainder of Sunday. The statute, however, allows no operation after 2 a.m. and no race to begin after 1:30 a.m. This hardly subverts the general closing requirement with which all pari-mutuel facilities must comply. Similar discrepancies in laws governing the sale of alcoholic beverages have not been found discriminatory. Dinkler v. Jenkins, 163 S.E.2d 443, 454 (Ga. 1968).

POINT II. THE TRIAL COURT ERRED IN REACHING A CONCLUSION THAT THE SUNDAY RACING RESTRICTION SERVES NO VALID STATE PURPOSE IN THE ABSENCE OF EVIDENCE OR ARGUMENT SHOWING THE STATUTES TO BE CLEARLY ERRONEOUS OR ARBITRARY OR WHOLLY UNWARRANTED.

Contrary to appellees' assertion that they made "a showing of no factual basis to support Sunday closing", the record reveals that both Secretary Rutledge and former Director Smith were being questioned as to policies of the Department of Business Regulation and as to these both said they were not aware of "policy directives or policy papers within the Division or . . . Department" relating to Sunday closing. The deposition pages appellees cite in support of their assertion are appended to this brief. [A 2, 3, 9, 10][2]

It is to be noted that the Department did not enact the Sunday closing requirement and the absence of policy directives in its files hardly rebuts the presumption of the statutes' constitutionality or of facts, reasonably to be assumed, that could justify the law. Neither Rutledge nor Smith testified they were personally involved in the enactment of the statutes in question. Neither spoke to legislative history. Smith, in fact,

---

[2] Lines 6-9 on page 9 [A 10] of Robert Smith's deposition were stricken by stipulation of the parties. [R 73] Lines 1-6 on page 18 of Gary Rutledge's deposition were also stricken by the same stipulation.

candidly admitted he had never been involved with the Legislature and knew nothing of its reasoning or philosophy. [A 12]

On cross examination, Secretary Rutledge acknowledged the existence of various criminal activities associated with pari-mutuel gambling. [A 5, 6] There can be no dispute that these exist or that the trial court acknowledged them. Their existence is not a disputed question of fact but rather, in this case, established fact.

A reading of the the depositions shows that appellees proved nothing that required countervailing proof of facts by the state. Hence, their reliance upon United States v. Carolene Products Company, 304 U.S. 144 (1938) is misplaced. They did not show they were "so different from others of the [prohibited] class as to be without the reason for the prohibition." Id. at 154.

In making the ultimate determination of constitutionality Carolene holds that:

> [W]here the legislative judgment is drawn in question, [inquiry] must be restricted to the issue whether any state of facts either known or which could be reasonably assumed affords support for it. Id. at 154.

Appellees attack the justifications offered on page 9 of appellants' initial brief by suggesting they require proof. These justifications are matters of common sense, and unless

gambling has become a socially healthy and socially desirable activity, to infer that the Legislature did not want wide open gambling throughout the weekend should not require proof. In any event, the record shows 1) that pari-mutuel gambling can engender criminal activity; and 2) that racing requires a day or two of rest per week. There is no evidence that Sunday is an inappropriate day to call a halt to racing and gambling activity.

The justifications offered for the statute are certainly consonant with the Supreme Court's analytical method employed in the four Sunday closing cases decided in 1961. In McGowan, supra, the Supreme Court held that:

> [a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. at 426.

Looking at the statute in question, the Supreme Court stated:

> It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day . . . [E.S.] Id.
>
> The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment. [Citations omitted.] Likewise, the fact that these exemptions exist and deny some vendors and operators the day of rest and recreation contemplated by the legislature

> does not render the statutes violative of equal protection since there would appear to be many valid reasons for these exemptions, as stated above, and no evidence to dispel them. [E.S.] Id.

The same analytical approach obtains in the companion cases.[3]

As the Supreme Court's analysis demonstrates, common sense conclusions do not have to be proved. Reasonable facts may be assumed. In this case, it is certainly reasonable to assume that the legislature thought it contrary to the public welfare to have gambling facilities open on both days of the weekend; that Sunday closing would reduce both criminal opportunity and law enforcement burdens; and that Sunday was an appropriate day to require the rest that all agree is needed for the industry's benefit. There is no evidence to the contrary, much less that which proves

---

[3] "It is within the power of the legislature to have concluded that these businesses were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted, the danger of their competitors also opening on Sunday and their large number of employees." Two Guys from Harrison - Allentown v. McGinley, 366 U.S. 582, 591-592 (1961).

"It is conceivable that the legislature believed that the sale of fish and perishable foodstuffs at wholesale would not detract from the atmosphere of the day, while the retail sale of these items would inject the distinctly commercial element that exists during the other six days of the week. It is fair to believe that the allowance of professional and amateur sports on Sunday would add to the day's special character rather than detract from it. And the legislature could find that the circumstances attendant to the conduct of professional sports are sufficiently different from those of amateur sports to justify different treatment as to the hours during which they may be played." Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 623 (1961).

the statutes to be clearly erroneous, arbitrary or wholly unwarranted, the standard of proof demanded by State v. Bales, 343 So.2d 9 (Fla. 1977), and Fulford v. Graham, 418 So.2d 1204 (Fla. 1st DCA 1982).

CONCLUSION

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

Respectfully submitted,

JIM SMITH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General

MITCHELL D. FRANKS
Chief Trial Counsel

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

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 28th day of September, 1984.

Louis F. Hubener

LOUIS F. HUBENER