

OA 10-16-86

IN THE SUPREME COURT
STATE OF FLORIDA

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D. L. WHITE

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SUPREME COURT
Deputy Clerk

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IN RE:

THOMAS C. TODD and PEOPLE
AGAINST LEGALIZED LOTTERIES,
INC.,

Appellants,

vs.

Case Number 69,426

HONORABLE GEORGE FIRESTONE and
E.X.C.E.L., INC.,

Appellees.

BRIEF OF AMICUS CURIAE,
FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSOCIATION

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STATEMENT OF INTEREST

The Florida Teaching Profession-National Education Association (FTP-NEA) is a statewide teacher organization which has more than 35,000 members. In addition, the FTP-NEA represents more than 70,000 public employees in collective bargaining with their educational public employers throughout the State of Florida. The FTP-NEA has therefore been intimately involved in the development of educational policy in the State of Florida and the allocation of funds for implementing that policy. The organization views a state operated lottery as a legitimate alternative for generating additional public funds, some of which will inevitably be allocated for educational purposes.

When analyzing the proposed amendment to determine whether to support it, the FTP-NEA was fully aware that there is no guarantee that any funds generated by a state run lottery would be allocated by the Florida Legislature to education. It was equally obvious to the FTP-NEA, however, that through the political process, representatives of educational interests would be able to secure a substantial portion, if not all, of the funds generated by such a lottery for educational purposes. As a result of this possibility and the great need for additional funds for public education, the FTP-NEA concluded that the citizens of this State should be afforded the opportunity to vote on the proposed amendment.

It is for this purpose, to urge this Court to allow this matter to be submitted to the electorate, that the FTP-NEA has chosen to participate in this case. For the reasons which follow, the FTP-NEA urges this Court to affirm the logical and well-reasoned opinion of the trial judge and allow the proposed amendment to remain on the ballot.

ARGUMENT

I.

THE STATE OPERATED LOTTERIES AMENDMENT EMBRACES ONLY ONE SUBJECT

Article XI, Section 3 of the Florida Constitution requires that amendments to the Constitution through the initiative process "embrace but one subject and matter directly connected therewith." Judge J. Lewis Hall, the learned trial judge in Case Number 69,426, accurately synthesized this Court's recent decisions on the single-subject issue:

[C]ompliance with the single-subject limitation of Art. XI, Sec. 3 is had when the proposed amendment deals with one governmental function in logical and natural oneness of purpose, permissibly supported by other portions of the proposed amendment incidentally and reasonably necessary to implement the single-function purpose. Conflict with existing constitutional provision[s] or location no longer appear to be fatal defects.

Order Denying Motion for Judgment on the Pleadings at 2. Judge Hall concluded that the state operated lotteries amendment embraces but one subject. The issue before this Court is whether he was correct.

In making this determination, this Court should reject the tortured and sophistic arguments of the opponents of the proposed amendment. The text of the lottery amendment is clear and unambiguous as to its sole purpose - the authorization of a state operated lottery. The sole substantive statement as to the

amendment's purpose is contained in subsection (a) which no one has suggested embraces more than a single subject. The remainder of the amendment is incidental to the amendment's chief purpose and is reasonably necessary to implement the operation of a lottery by the state. As Judge Hall's opinion on this issue demonstrates, extensive legal analysis of the convoluted arguments of the opponents is unnecessary to discharge the judicial function imposed by Article XI, Section 3.

The primary functions of the single-subject limitation of Article XI, Section 3 were accurately summarized by Justice Shaw in his concurring opinions in Fine v. Firestone, 448 So.2d 984, 998 (Fla. 1984) and Evans v. Firestone, 457 So.2d 1351, 1360 (Fla. 1984):

1. Ensuring that initiatives are sufficiently clear so that the reader, whether layman or judge, can understand what it purports to do and perceive its limits.
2. Ensuring that there is a logical and natural unity of purpose in the initiative so that a vote for or against the initiative is an unequivocal expression of approval or disapproval of the entire initiative.

Evaluating a proposed amendment in light of these purposes requires the application of a "reasonable person" standard and common sense. As long as the proponents of a particular position are required by law to draft the language of the proposed amendment which they seek, it is illogical and unreasonable to expect absolute clarity or neutrality in the language of such proposed amendments. On the contrary, the judiciary should

expect the proponents within permissible limits, to draft the language of their proposal to facilitate interest in its adoption. The judiciary's function is not to require precision or absolute neutrality, but to determine whether any lack of precision or presence of political commentary in the language of a proposed amendment is sufficiently excessive to cause the proposed amendment to fail one of the prongs of the test outlined above.

There are essentially two issues to consider in applying the above test to the state operated lotteries amendment. The first is whether anything in subsection (b), the severance clause, logically can be perceived as confusing a reasonably intelligent voter of the purpose, scope or meaning of the proposed amendment. The second is whether any of the language in subsection (c) of the proposed amendment relating to education reasonably would cause that same voter to conclude that any funds generated by the lottery would be earmarked solely for education.

Although it is unclear why the drafters of the proposed amendment included subsection (b), the severance clause, it is very clear that the inclusion of such language in no way confuses a voter as to the chief purpose of the amendment. On the contrary, if it does anything at all, this provision emphasizes that the sole purpose of the amendment is the authorization of a state run lottery by informing the voter that anything else in the amendment is secondary and therefore incidental to subsection

(a). The FTP-NEA agrees with Judge Hall that this provision, for purposes of this inquiry, is legally irrelevant. It was apparently a failed attempt by the drafters of the proposed amendment to avoid the very kind of inquiry as to the amendment's purpose which is now being conducted by this Court. This failure is not, however, a reason to invalidate the amendment. Rather, it is simply a reason to ignore this provision as surplusage.

The FTP-NEA also agrees with Judge Hall that "[r]egardless of labels used, it is apparent that education has nothing to do with the proposal and the Legislature may utilize [lottery] funds as it sees fit." No reasonable person can conclude simply from the language obtained in subsection (c) that lottery funds will be earmarked for education. Such a voter could reasonably conclude that the drafters of the amendment intend that the generated funds be so used, but this fact does not render the amendment defective. Such a voter still has the ability to evaluate this aspect of the proposed amendment and unequivocally express his or her approval or disapproval of the entire initiative as stated in the proposed amendment.

The contrary arguments by the opponents of the proposal are, in actuality, political arguments which they have attempted to read into the language of the proposal but which are more properly relegated to debate in the political arena. There can be no doubt that even the "unreasonable" person who reads the text of the proposed amendment in the manner suggested by the opponents will have a full and fair opportunity to become

informed about the true purpose of the proposed amendment through the political process prior to the general election.

In comparison with recent proposed amendments which have been invalidated by this Court, the state operated lotteries amendment is a model of clarity with respect to the single-subject limitation. It affects but a single function of government, and its purpose is abundantly clear, even to the layman. Therefore, the judgment of the trial court should be affirmed and the proposed amendment should be submitted to the people in the general election.

II.

THE STATE OPERATED LOTTERIES AMENDMENT BALLOT SUMMARY COMPLIES WITH SECTION 101.161, FLORIDA STATUTES (1985)

Section 101.161, Florida Statutes (1985), requires that the summary of a proposed constitutional amendment which appears on the ballot must be fair and enable the voter intelligently to cast his ballot with regard to the subject matter of the proposed amendment. Askew v. Firestone, 421 So.2d 151 (Fla. 1982). Although the opponents of the proposed amendment have outdone themselves in generating tortured and hypertechnical arguments as to the summary's deceit and ambiguity, only one argument deserves consideration: that a voter reading the summary in the ballot box would reasonably conclude that funds generated by the lottery would be earmarked for education. Judge Hall correctly concluded that "the language of the summary contains no such representation."

The issue before the Court is not whether a better summary could be drafted, but whether the summary before it fails to inform the electorate of the chief purpose of the amendment. Grose v. Firestone, 422 So.2d 303 (Fla. 1982). There simply can be no reasonable doubt that the summary satisfies this test.

The full text of the summary is as follows:

The Amendment authorizes the state to operate lotteries. It provides a severance clause to retain the above provision should any subsection or subsections be held unconstitutional because of more than one subject. The schedule provides, unless

changed by law, for the lotteries to be known as the Florida Education Lotteries and for the net proceeds derived to be deposited in a state trust fund, designated State Education Lotteries Trust Fund for appropriation by the Legislature.

The summary is a fair and straightforward statement of, in Judge Hall's words, "the meat of the proposal." It contains exactly seventy-five words, the maximum allowed by statute. The language describing subsection (c), the schedule for implementation, clearly and accurately informs the voter that the implementing schedule, which contains the only language relating to education, may be changed by law.

One of the opponents' primary arguments is constructed wholly upon the omission of the word "general" from the phrase "unless changed by law." The opponents allege that this omission creates confusion among voters and hypothesizes several possible conclusions which a voter might reach. However, these arguments entirely ignore the fact that this language relates solely to the implementing schedule, not the chief purpose of the amendment. These arguments are, therefore, completely irrelevant to compliance with Section 101.161, Florida Statutes (1985).

By similar reasoning, the opponents' argument that a voter is likely to conclude that the monies are earmarked for education is without merit. Again, the only language even mentioning the subject of education appears only in the portion relating to the implementing schedule. The portion of the summary containing the chief subject of the proposal, the first sentence, is

straightforward and unambiguous. Simply put, no reasonable person would conclude from reading the above summary that a vote for the amendment would earmark funds for education.

As with the one subject requirement, the law does not require absolute clarity and precision in drafting the summary. Yet, that is exactly what the opponents seek to have this Court require in this case. The Court should reject the opponents' invitation and apply a pragmatic and realistic approach which recognizes that the drafters of the summary are necessarily proponents of the subject matter contained in the proposed amendment. It is natural that proponents will, within the bounds of the law, attempt to summarize the amendment in terms which are the most favorable to their point of view. Lawyers and judges operate daily in a system which ethically requires advocates to present factual and legal arguments in the light most favorable to their clients without misrepresentation. It is submitted that laymen, no less than lawyers and judges, are capable of sifting and weighing such arguments which are presented to them daily in a multitude of contexts, including commercial advertising and political issues. Thus, where, as in this case, there is no explicit or implicit misrepresentation or deceit, the voter must be left to make his or her own judgment with regard to political rhetoric.

The only other issue generated by the opponents of import is the argument that the failure of the summary to mention the exception which the instant proposal would create to the

prohibition against lotteries contained in Article X, Section 7 of the Florida Constitution violates Section 101.161, Florida Statutes (1985). Although the effect of a proposed amendment upon other portions of the Constitution are quite important in some cases, such as the drastic effects of the proposed amendment in Evans v. Firestone, 457 So.2d 1351 (Fla. 1984), it is not a meaningful issue in this case. Article X, Section 7 prohibits private lotteries. The proposed amendment authorizes state operated lotteries. Private lotteries remain prohibited and no useful purpose is served by requiring that to be announced in the summary of the proposed amendment. It is simply a technical argument which elevates form over substance.

Furthermore, it is perfectly obvious that lotteries are currently prohibited or it would not be necessary to initiate a constitutional amendment to authorize them. The failure to mention this obvious fact in the ballot summary therefore in no way misleads or confuses the voter or in any other manner interferes with the ability of the voter to evaluate the impact of a "yes" or "no" vote on the amendment.

The requirements of Section 101.161, Florida Statutes (1985), are ultimately an implementation of the single-subject limitation of Article XI, Section 3. Unlike the ballot summary in Evans, the ballot summary in this case does not mislead or confuse the voter as to either of the primary purposes for the single-subject limitation mentioned in the first argument of this brief. Based solely upon a reading of the ballot summary, a

reasonably intelligent voter is able to understand what the state operated lotteries amendment proposes to do, to perceive its limits, and to cast a vote for or against the initiative as an unequivocal expression of approval or disapproval of the entire initiative. The summary therefore complies with Section 101.161, Florida Statutes (1985), and the judgment of the trial court should therefore be affirmed.

CONCLUSION

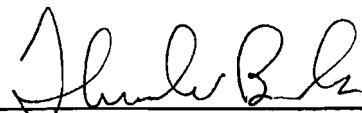
The drafters of the state operated lotteries amendment and its ballot summary have fully and fairly complied with the legal prerequisites to placing this matter before the electorate in the general election. Based primarily upon a perceived lack of uniformity in this Court's recent decisions on constitutional amendments sought through the initiative process, opponents of the state operated lotteries amendment have sought to strike the proposal from the ballot by dressing purely political arguments in legal clothing. The opponents' efforts notwithstanding, the proposed amendment and ballot summary survive the application of a reasonable, realistic and pragmatic application of the requirements of Article XI, Section 3 and Section 101.161, Florida Statutes (1985).

This is not a case, like many recent cases presented to this Court, which is a thinly disguised attempt to perpetrate a fraud upon the public. Rather, as recognized by the learned trial judge, this proposed amendment is a straightforward and honest attempt to allow the citizens of the State of Florida to decide whether to authorize their government to operate lotteries to generate additional public funds. While there is no doubt that the proponents of this amendment desire that a substantial portion, if not all, of the funds thus generated be appropriated for public education, neither the text of the proposed amendment nor the ballot summary contain any such explicit or implicit

representations. Therefore, the proposal and ballot summary are legally sufficient and should remain on the ballot for the general election.

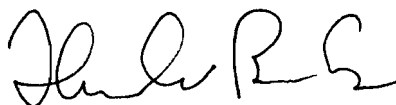
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 13th day of October, 1986, to: Joseph W. Little, Esquire, 3731 Northwest 13th Place, Gainesville, Florida 32605; Robert T. Mann, Esquire, 2626 Northwest 18th Way, Gainesville, Florida 32605; Herbert R. Kraft, Esquire, 1020 East Lafayette Street, Suite 210, Tallahassee, Florida 32301; Dexter Douglas, Esquire, Douglass, Cooper and Coppins, Post Office Box 1674, Tallahassee, Florida 32302; and, Eric J. Taylor, Esquire, Assistant Attorney General, Florida Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301.


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