IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
NOV 2 1988
CLERK, SUPREME COURT
By ____ Deputy Clerk

CANADIAN EXPRESS CLUB, a
foreign business,

Petitioner,

vs. CASE NO. 73,074

STATE OF FLORIDA, DEPARTMENT
OF LEGAL AFFAIRS, ROBERT A.
BUTTERWORTH, ATTORNEY GENERAL,

Respondent.

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On Review of the Decision of the

Fifth District Court of Appeals

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RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent disagrees with Petitioner CANADIAN EXPRESS CLUB's description, in its Statement of the Case and of the Facts, that none of the procedural aspects in the case prior to the filing of the Motion to Dismiss are material. Respondent would show this Honorable Court that significant procedural matters were considered by the trial court before the entry of the Order of Dismissal on appeal.

On April 6, 1987, Petitioner, STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS, Plaintiff below, filed a Complaint for Injunctive Relief against CANADIAN EXPRESS CLUB, seeking to enjoin the Petitioner from violating the Deceptive and Unfair Trade Practices Act, Chpt. 501, Part II, Fla. Stat. by engaging in lottery activities prohibited by §849.09, Fla. Stat. (R 22-28) In response thereto, Petitioner CANADIAN EXPRESS CLUB filed a Motion to Dismiss (R 33), which was denied on June 12, 1987. (R 127-129) Thereafter a full evidentiary hearing was held on Plaintiff's Complaint, and a Preliminary Injunction was entered on June 22, 1987. (R 127-129)

In its Order Granting a Preliminary Injunction, the trial court made findings of fact and law. The trial court found that Petitioner CANADIAN EXPRESS CLUB engaged in gambling activity in violation of the public policy of Florida as codified in §849.09, Fla. Stat., and thereby committed unfair and deceptive acts or practices in violation of §501.204(1), Fla. Stat. (R 129) No appeal was taken from the entry of that Injunction Order.

Several weeks later, on July 20, 1987, the trial court in the companion and factually similar (and now consolidated) case of State v. Winshare Club of Canada, (Sp. Ct. No. 72,924), heard the Motion of the Winshare Defendant to Dismiss. (Because of the similarities of the cases, both were assigned to Judge Frederick Pfeiffer. (R 29)) At the conclusion of that hearing, the trial court dismissed the action, ruling that §849.09, Fla. Stat. was unconstitutional under the Commerce Clause of the United States Constitution. That Order of Dismissal was entered on August 11, 1987. (R 149)

Within days after the Winshare case was dismissed, Petitioner CANADIAN EXPRESS CLUB, on July 27, 1987, filed another Motion to Dismiss, characterizing this one as an Amended Motion to Dismiss or in the Alternative Motion to Dissolve. (R 138-139) The trial court treated the motion as one to dismiss and this time, in an Order dated August 24, 1987, dismissed the case on the same ground that it had dismissed the Winshare case, to wit: that §849.09, Fla. Stat. was unconstitutional as violative of the United States Constitution Commerce Clause. (R 149A) Respondent appealed both cases to the Fifth District Court of Appeal.

Respondent disagrees with the facts of the case as presented by Petitioner CANADIAN EXPRESS CLUB. Petitioner sets forth what it describes as a "factual inconsistency between the complaint allegations and the exhibits" in that the exhibits to the complaint show that Petitioner is essentially a "club" that offers it's members a chance to participate in a group which

purchases lottery tickets and that the "club members" do not purchase an interest in a lottery ticket.

The facts cannot be in dispute. By moving to dismiss the complaint, Petitioner, for purposes of ruling on the motion, is deemed to have admitted all facts well pleaded in the complaint. Russell v. Community Blood Bank, Inc., 185 So.2d 749 (Fla. 2d DCA 1966), rev. on other grounds, 196 So.2d 115. Allegations in a complaint are assumed to be true for purposes of considering a motion to dismiss; the facts pleaded are taken as true. Hobbs v. Florida First Nat. Bank of Jacksonville, 406 So.2d 63 (Fla. 1st DCA 1981), Mills v. Ball, 372 So.2d 497 (Fla. 1st DCA 1979).

Petitioner was engaged in a continuous and systematic mail order campaign of direct solicitation of Florida consumers, urging and inducing such consumers to participate in various foreign lotteries. (The Florida Public Education Lottery Act, Chpt. 24, Fla. Stat. had not yet been enacted when the instant litigation was initiated, so any and all reference to "lotteries" in the Complaint did not refer to the Florida Public Education Lottery). Petitioner advertised and offered, for a fee, to aid and assist Florida consumers in purchasing or procuring foreign lottery tickets. Petitioner offered to act as an "agent" for Florida residents and in that capacity, offered to purchase and procure lottery tickets and shares in lottery tickets for Florida residents, keep track of the entries and help to collect any winnings. Florida consumers could purchase foreign lottery tickets by telephone or by mail. (R 22-28)

By engaging in the activity set forth, Petitioner aided or assisted in promoting or conducting a lottery, aided or assisted in the sale, disposal, or procurement of lottery tickets, advertised and attempted to advertise a lottery scheme by circulars, pamphlets, and otherwise, and sold and offered for sale and transmitted lottery tickets, coupons, or shares by mail.

SUMMARY OF ARGUMENT

The only substantive argument set forth by Petitioner urges, essentially, that a violation of the State's criminal gambling laws cannot constitute a per se violation of the Florida Deceptive and Unfair Trade Practice Act, Chpt. 501, Part II, Fla. Stat.

Respondent answers that an act or practice that offends public policy is unfair and as such constitutes a per se violation of the Florida Deceptive and Unfair Trade Practices Act. Further, that the public policy of this state is established by the Florida legislature and the Florida legislature has declared that the public policy of this State prohibits the gambling activity in which Petitioner was engaged.

Respondent also asserts that the Petitioner has failed to meet its burden of demonstrating that either §849.09, Fla. Stat. or Chpt. 501, Part II, Fla. Stat., is unconstitutional.

The Fifth District Court Appeal was correct in reversing the trial court's Order of Dismissal.

ARGUMENT

I. SECTION 849.09(1), FLA. STAT. (1985) AS APPLIED IN THIS CASE IS AN UNCONSTITUTIONAL VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Petitioner CANADIAN EXPRESS CLUB has set forth no legal argument on the issue framed but has instead, on this issue agreed with, adopted and deferred to the brief filed by the Petitioner in Winshare Club of Canada v. Department of Legal Affairs, Case No. 72,924, pending before this Court which has been consolidated with the instant case.

Respondent will not answer the argument here but will answer and respond to the argument as presented in the Winshare case.

There being no argument set forth by Petitioner on this issue, there is no answer in response.

II. THE APPLICATION OF §§849.09 AND 501.204(1), FLA. STAT. IN THIS CASE IS AN UNCONSTITUTIONAL ABRIDGEMENT OF THE FREEDOM OF SPEECH GUARANTEES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner did not raise a First Amendment issue before the trial court and cannot now raise it for the first time before the Supreme Court. An appellate court should review only those alleged errors properly presented to it and only those issues presented to and ruled on by the lower tribunal. Duber v. Worrell, 401 So.2d 1322 (Fla. 1981), Foley v. State, ex rel., Gordon, 50 So.2d 179 (Fla. 1981), Clark v. Dept. of Professional Regulation, 463 So.2d 328, petition for review denied 475 So.2d 693, (5 DCA 1985).

The issue not having been raised below, cannot now be considered.

Petitioner CANADIAN EXPRESS CLUB has set forth no legal argument on the issue framed but has instead, on this issue agreed with, adopted and deferred to the brief filed by the Petitioner in Winshare Club of Canada v. Department of Legal Affairs, Case No. 72,924, pending before this Court which has been consolidated with the instant case. Respondent will therefore answer and respond to the issue in the Answer in the Winshare case.

III. THE MERE MARKETING OF A LOTTERY OPERATED BY A FOREIGN GOVERNMENT CANNOT, STANDING ALONE, CONSTITUTE A DECEPTIVE OR UNFAIR TRADE PRACTICE IN FLORIDA.

Petitioner has argued "as an alternative" that the trial court's Order of Dismissal should be affirmed on grounds other than the constitutionality of §849.09, Fla. Stat. In essence, Petitioner puts forth an argument that the trial court was correct in dismissing the case but for the wrong reason.

Petitioner asserts that the marketing of lottery tickets cannot cannot constitute an unfair and deceptive trade practice. Petitioner argues that its gambling activities were not deceptive, misleading or otherwise fraudulent or unfair to consumers and as such that these activities, concededly in violation of §849.09, Fla. Stat., could not constitute a violation of the Florida Deceptive and Unfair Trade Practices Act.

The Petitioner has waived its right to bring that issue before this Court because it was not presented to or ruled on by the lower tribunal. An appellate court should review only those alleged errors properly presented to it and only those issues presented to and ruled on by the lower tribunal. Clark v. Dept. of Professional Regulation, supra.

In ruling on Petitioner's Motion to Dismiss or In the Alternative Motion to Dissolve, (which resulted in the Order of Dismissal here on review) the trial court did not address the applicability of §501.204(1), Fla. Stat. to the case. Having ruled §849.09, Fla. Stat. unconstitutional, the trial court did

not reach the issue of the applicability of Chpt. 501, Part II, Fla. Stat. to the case.

The Order of Dismissal now on appeal is not to be confused with the previous ruling the trial court had made in this case in which the issue of the applicability of Chpt. 501, Part II, Fla. Stat. was raised and ruled on. Some two months prior to the trial court's Order of Dismissal, the trial court had entered an Order Granting Preliminary Injunctive Relief as to Petitioner. It was in that Order that the trial court ruled Petitioner's gambling activities constituted a per se violation of the Deceptive and Unfair Trade Practices Act. The trial court specifically found:

> That Defendant [Petitioner here] Canadian Express Club has engaged in gambling activity in violation of the public policy of Florida as codified in Section 849.09(1), Florida Statutes, and has thereby committed unfair and deceptive acts or practices in violation of Section 501.204(1), Florida Statutes.

Although the Order Granting Injunctive Relief was appealable, Petitioner-Defendant failed to perfect an appeal. By not appealing the Order Granting Preliminary Injunctive Relief, Petitioner waived the opportunity to allege error of the trial court in ruling that a violation of the State's gambling laws constitutes a per se violation of the Deceptive and Unfair Trade Practices Act.

Moreover, after Respondent initiated an appeal from the trial court's Order dismissing the case, Petitioner failed to allege error on the part of the trial court. If the Petitioner perceived that the trial court committed the error alleged here

in its Order of Dismissal, it was incumbent on the Petitioner to cross-appeal from that Order. Petitioner's failure to cross-appeal on the issue further precludes it from raising the issue on appeal now. Jessup v. Redondo, 394 So.2d 1031 (Fla. 3d DCA 1981). The very function of a cross-appeal is to call into question error in the order appealed, which, although substantially favorable to the prevailing party, does not completely accord the relief to which the prevailing party believes itself entitled. Webb General Contracting, Inc. v. PDM Hydrostorage, Inc., 397 So.2d 1058 (Fla. 3d DCA 1981). An appropriate cross-appeal is the means by which a party prevailing in the lower court can preserve an alternative ground for affirmance which was raised below but either expressly rejected or simply avoided. Hillsborough County v. Bennett, 167 So.2d 800 (Fla. 2d DCA 1964). Rulings adverse to an appellee will not be considered in the absence of a cross-assignment of error (now termed "cross-appeal"). Florida Nat. Bank of Jacksonville v. Kassewitz, 156 Fla. 761, 25 So.2d 271 (Fla. 1945). Without question, a cross-appeal would have been proper here where the order appealed is perceived by Petitioner as not wholly favorable to it.

Petitioner could have and should have if it claims error in the lower court, either appealed the lower court's granting of the preliminary injunction or cross-appealed the lower court's Order dismissing the case. Having done neither, this Honorable Court should not consider the issue now raised by Petitioner.

Petitioner not only failed to properly preserve this issue for review in this Court, but its analysis of the issue is incorrect.

The State alleged in its Complaint that by engaging in activity that offends and is contrary to public policy as established by and codified in §849.09, Fla. Stat., Petitioner committed unfair or deceptive acts and practices in violation of §501.204(1), Fla. Stat.

Section 501.204, Fla. Stat., declaring unfair or deceptive acts or practices to be unlawful, requires that due consideration and great weight be given to the interpretations of the Federal Trade Commission and the federal courts relating to the Federal Trade Commission Act.

The United States Supreme Court has interpreted what constitutes an unfair trade practice under the Federal Trade Commission Act. In F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 275, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972), the Supreme Court accepted the Federal Trade Commission's description of factors it considers in determining whether any given practice constitutes an unfair or deceptive trade practice. Among those factors are whether the practice offends public policy as it has been established by statute. The court held as reasonable the Federal Trade Commission's conclusion that a practice is unfair when it offends public policy as it has been established by statutes, the common law, or otherwise. F.T.C. v. Sperry & Hutchinson Co., supra. A practice is also unfair when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious

to consumers. Spiegel, Inc. v. F.T.C., 540 F.2d 287 (7th Cir. 1976). However, to constitute an unfair trade practice, an act or practice need not be unlawful and immoral and unethical and oppressive and unscrupulous and substantially injurious to consumers, as urged by Petitioner. Such a standard would be impossible to reach. The Petitioner is correct that the State did not allege that Petitioner's activities were fraudulent. A finding of fraud is not necessary to sustain a Florida Deceptive and Unfair Trade Practices Act violation. Urling v. Helms Exterminators, Inc., 468 So.2d 451 (Fla. 1st DCA 1985).

Petitioner concedes that it has engaged in gambling activity in violation of the public policy of Florida as established by and codified in §849.09, Fla. Stat. It has thereby, committed an unfair act or practice in violation of §501.204(1), Fla. Stat. The gambling activity offends established public policy because the Florida legislature, by enacting §849.09, Fla. Stat., and by specifically retaining the pertinent provisions in Chpt. 24, Fla. Stat., declared that the public policy of this state prohibits the activity alleged in the complaint.

Petitioner's argument that the recent adoption of a constitutional amendment permitting a state-operated lottery indicates that Florida's public policy against gambling no longer exists is not supported by law or logic. Public policy is a matter of legislative determination. Davis v. Strine, 141 Fla. 23, 191 So. 451 (Fla. 1939). The legislature declares and establishes the public policy of the State. Noble v. State, 68 Fla. 1, 66 So. 153 (Fla. 1914). Moreover, the same electorate

which allowed state-run lotteries, has twice, in recent years, rejected a proposed constitutional amendment to permit casino gambling. See M & R Investments, Co., Inc. v. Hacker, 511 So.2d 1099, (Fla. 5th DCA 1987).

The Petitioner's practice of soliciting and inviting Floridians to violate the State's criminal gambling laws, for a fee, is most assuredly unfair and is therefore subject to the relief afforded by the Florida Deceptive and Unfair Trade Practices Act.

In any event, the applicability of Chapter 501, Part II, Fla. Stat., to the activities of Petitioner is not now before this Court. The question certified by the Fifth District Court of Appeal to be of great public importance is the constitutionality -- not the applicability -- of the statutes. Respondent submits that Petitioner has not put forth any argument, nor cited any authority showing that either Chpt. 501, Part II, Fla. Stat., or §849.09, Fla. Stat., violates the Commerce Clause of the United States Constitution.

It is fundamental that all statutes are presumed constitutional. Kass v. Lewin, 104 So.2d 572 (Fla. 1958). All doubts as to the validity of a statute should be resolved in favor of its constitutionality. McKibben v. Mallory, 293 So.2d 48 (Fla. 1974), Hamilton v. State, 366 So.2d 8 (Fla. 1978). Petitioner has the burden to demonstrate, free from all doubt, that §849.09, Fla. Stat. is unconstitutional. Brewer v. Gray, 86 So.2d 799 (Fla. 1956). Petitioner has failed to overcome the

presumption of constitutionality of §§849.09 or 501. 204, Fla. Stat.

The law is well established that one who challenges the constitutionality of an act of the legislature must point out to the court exactly how and in what manner his constitutional rights will surely be, or have been invaded or infringed. Smith v. Ervin, 64 So.2d 166 (Fla. 1953). Petitioner's unsupported position that the State is somehow precluded from prosecuting gambling violations because the State now operates a Public Education Lottery fails to point out to the Court how or in what manner its constitutional rights were infringed.

A suggestion or implication of constitutional impropriety will not suffice as a valid explanation of exactly how and in what manner Petitioner's constitutional rights have been invaded.

In order to support a conclusion that legislation is unconstitutional, it is the Constitution that must be found to be violated and not such things as reason, justice, or morals. 10 Fla. Jur. 2d, Const. Law, Section 56. Unless Petitioner specifically and conclusively shows that the statute violates the United States Constitution, the statute must survive the attack.

Chapter 501, Part II, Fla. Stat. has already survived a constitutional attack on due process grounds. Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976). Based on the argument set forth herein, Petitioner's challenge on commerce clause grounds should also fail.

CONCLUSION

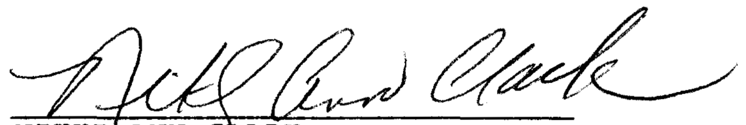
Petitioner has failed to meet the heavy burden of proof required in attacking the constitutional validity of a statute. The presumption of the constitutionality of §§849.09, or 501.204, Fla. Stat. has not been rebutted.

Neither §§849.09 nor 501.204 Fla. Stat. violate the United States Commerce Clause. The lower court erred when it ruled that §849.09, Fla. Stat. offends the Commerce Clause. It did not rule on the constitutionality of §501.204, Fla. Stat.

This Honorable Court should affirm the Fifth District Court of Appeal ruling reversing the lower court's dismissal.

RESPECTFULLY SUBMITTED,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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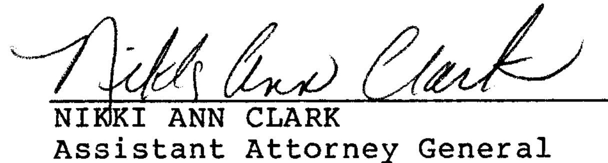
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by United States Express Mail to George E. Adams, Esquire, ADAMS, HILL, FULFORD & MORGAN, 1417 East Concord Street, Suite 101, Orlando, Florida 32803; David L. Fleming, Esquire, 205 E. Intendencia Street, Pensacola, Florida 32501; Gene Coker, General Attorney, A.T.&T. COMMUNICATIONS, INC., 1200 Peachtree Street, NE, Atlanta, Georgia 30357; Richard Robison, Esquire, ROBISON, OWEN & COOK, P.A., 5250 South U.S. Highway 17-92, Casselberry, FL 32707, and Louisa E. Hargrett, DEPARTMENT OF THE LOTTERY, Capitol Complex, Tallahassee, FL 32301 this 2nd day of November, 1988.



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