25.0

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
NOV 8 1988
CLERK, SUPREME COURT
By
Deputy Clerk

DEPARTMENT OF BUSINESS REGULATION,

Appellant,

vs.

CASE NO. 73,119

CLASSIC MILE, INC., a Florida corporation, and ANTHONY ALTMAN,

Appellees.

_____/

THE GALAXY PROJECT, INC., ETC.,

Appellant,

vs.

CASE NO. 73,121

CLASSIC MILE, INC., a Florida corporation, and ANTHONY ALTMAN,

Appellees.

_____/

APPEAL FROM THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPELLEES' ANSWER BRIEF

Frederick B. Karl
Thomas J. Maida
Michael G. Maida
Karl, McConnaughhay, Roland
& Maida, P.A.
Post Office Drawer 229
Tallahassee, FL 32302-0229
904/222-8121

Attorney for Appellees

TABLE OF CONTENTS

TABLE OF CITATIONS

Other

PRELIMINARY STATEMENT

In this brief, the Appellees, Classic Mile, Inc., and Anthony Altman shall be referred to as "Classic Mile" or "Altman," respectively. Appellant, State of Florida, Department of Business Regulation shall be referred to as the "State," and the Galaxy Project, Inc., shall be referred to as "Galaxy."

References to the record on appeal will be designated by the prefix "R," followed by the appropriate page number. Reference to the trial transcript will be designated by the prefix "T," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellees accept the statement of the case and facts as presented by Galaxy.

SUMMARY OF ARGUMENT

The First District Court of Appeal correctly held that section 550.355, Florida Statutes (1987) is a special act passed in the guise of a general law and that it was enacted in violation of article III, section 10 of the Florida Constitution. Section 550.355(2) permits the simulcasting of thoroughbred horse races "[i]n any county in which there has been issued by the Division of Pari-Mutuel Wagering of the Department of Business Regulation, as of January 1, 1987, two quarter horse racing permits, neither of which was utilized for racing prior to January 1, 1987, and only one jai alai permit."

The classification scheme contained in the statute is nothing more than a descriptive technique used to identify Marion County. Furthermore, because of the temporal limitation contained in the classification scheme, "January 1, 1987," no other county may ever hope to have such a facility. Accordingly, the statute creates a "closed class" comprised solely of Marion County.

Furthermore, use of a classification scheme which distinguishes counties on the basis of various types of permits as well as a historical date is an arbitrary method of classification. Under this statute, counties are not classified in any meaningful, material way. Article III, section 11(b) of the Florida Constitution requires that

political subdivisions be classified on a basis reasonably related to the subject of the law. The subject of the law is simulcasting. There is no reasonable relationship between this subject and the method used to classify counties. Thus, even if the challenged statute is held to be a general law, it is still unconstitutional as a violation of Article III, Section 11(b).

The holding of the District Court should be affirmed.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD SECTION 550.355(2), FLORIDA STATUTES (1987) UNCONSTITUTIONAL IN THAT IT IS A SPECIAL ACT PASSED IN THE GUISE OF A GENERAL LAW AND WAS ENACTED IN VIOLATION OF ARTICLE III, SECTION 10, FLORIDA CONSTITUTION.

Article III, section 10 of the Florida Constitution prohibits the enactment of any special law unless the legislature publishes notice of its intention to enact the law or unless the law is conditioned to become effective only upon a vote of the electors which are affected. Specifically, the constitution provides that:

> No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. Such notice shall not be necessary when the law, except the provision for the referendum, is conditioned to become effective only upon approval by vote of the electors of the area affected.

Art. III, § 10.

The constitution defines "special law" to mean a special or local law. Art. X, § 12(g), Fla. Const. (1968). Although the constitution does not expand on this definition or define a "general law," this Court has explained that a general law is "[a] statute relating to subdivisions of this State or subjects, persons or things of a class, based upon proper distinctions and differences that inhere in or are peculiar or appropriate to the class." Carter v. Norman, 38 So. 2d 30, 32 (Fla. 1948). The classification scheme contained in the

statute must bear a reasonable relationship to the subject matter in respect to which the classification is proposed. State ex rel. Blalock v. Lee, 146 Fla. 385, 1 So. 2d 193 (1941).

Special laws or local laws do not employ classification schemes which are reasonably related to their subjects.

> ...A statute relating to particular subdivisions or portions of the state, or to particular places of classified locality is a local law. A statute relating to particular persons or things or other particular subjects of a class is a special law.

Housing Authority of St. Petersburg v. City of St. Petersburg, 287 So. 2d 307, 310 (Fla. 1973)(quoting Carter v. Norman, 38 So. 2d at 32).

The mere fact that a piece of legislation does not identify a locality by name does not automatically mean that the legislation is a general law. Nor does it matter that the legislature treated the legislation as a general law while the bill was winding its way through the House and Senate.

> Even though a bill is introduced and treated by the Legislature as a general law, if the bill in truth and in fact is clearly operative as a local or special act and the court can so determine from its obvious purpose or legal effect as gathered from its language or its context, this court will so regard it and deal with it as a local or special act regardless of the guise in which it may have been framed and regardless of whether the particular county or locality intended to be affected by it is in terms named or identified in the act or not.

State ex rel. Baldwin v. Coleman, 3 So. 2d 802, 803 (Fla. 1941).

The people of this state chose to require that special acts be enacted only upon approval by the voters in the area affected by the local or special laws. As explained by this Court, the rationale for proscribing the implementation of a special act without the benefit of notice or referenda is

> to throw certain safeguards around the passage of local and special legislation by which the people of the locality to be affected would be given fair notice of the intention to get such legislation adopted, and of the substance thereof. . . . In order to make this amendment to the constitution effective for the beneficient purpose for which it was evidently adopted by the people of this state, the constitutional requirements must be carefully complied with by the legislative body and fairly and thoroughly enforced by the courts.

Milner v. Hattan, 100 Fla. 210, 129 So. 593, 596 (1930)(cited with approval in Housing Authority of St. Petersburg v. City of St. Petersburg, 287 So. 2d 307 (Fla. 1973). Simply put, the purpose of article III, section 10 "is to apprise the people in the locality to be particularly affected of such proposal so that those interested may take steps to oppose its enactment." Dickinson v. Bradley, 298 So. 2d 352, 354 (Fla. 1974). See also State v. Lewis, 368 So. 2d 1298 (Fla. 1979).

In the case of section 550.355, the legislature clearly framed a local bill in the guise of a general law. Although section 550.355 does not identify Marion County by name, the classification scheme employed can only apply to Marion County. As will be addressed in the following subsection, the

First District Court of Appeal correctly held that section 550.355 is a special act passed in contravention of article III, section 10 because: (1) the classification scheme employed in the statute is nothing more than an arbitrary descriptive technique designed to identify Marion County; and, (2) the use of that descriptive technique for the sole purpose of identifying Marion County amounts to the creation of a completely "closed class" under the guise of creating a valid classification for the enactment of a general law.

> A. THE CLASSIFICATION SCHEME EMPLOYED IN SECTION 550.355 IS NOTHING MORE THAN A DESCRIPTIVE TECHNIQUE FOR THE SOLE PURPOSE OF SPECIFICALLY IDENTIFYING MARION COUNTY, AND IT AMOUNTS TO THE CREATION OF A COMPLETELY "CLOSED CLASS" UNDER THE GUISE OF CREATING A VALID CLASSIFICATION FOR THE ENACTMENT OF A GENERAL LAW.

The district court correctly held that section 550.355 was a special act passed under the guise of creating a valid classification for the enactment of a valid general law. In so holding, the district court correctly found that the classification scheme contained in the statute was nothing more than a descriptive technique for the sole purpose of identifying Marion County and that the descriptive technique created a completely "closed class."

The classification scheme permits simulcasting

> [i]n any county in which there has been issued by the Division of Pari-Mutuel Wagering of the Department of Business

> Regulation, as of January 1, 1987, two quarter horse racing permits, neither of which was utilized for racing prior to January 1, 1987, and only one jai alai permit. . . .

§ 550.355, Fla. Stat. (1987). Although the statute does not identify Marion County by name, both the State and Galaxy candidly admit that Marion County is the only county identified. (Galaxy Initial Brief at 11, 12; R 644-645). Moreover, because of the temporal limitations contained in the classification scheme, Marion County is the only county that may ever hope to have a simulcasting facility under this statute.

However, both the State and Galaxy argue that the fact that the class is closed has little bearing on whether the challenged statute is unconstitutional. Appellants seek support from Givens v. Hillsborough County, 46 Fla. 502, 35 So. 8 (1935), and Bloxham v. Florida Central and Peninsular Railroad Company, 35 Fla. 65, 17 So. 902 (1885), to support this contention. Understandably, Galaxy attempts to argue that Givens is "not inconsistent" with subsequent decisions of this Court. (Galaxy Initial Brief at 12). However, in the area of pari-mutuel legislation, Givens and Bloxham have no application whatsoever.

In West Flagler Kennel Club, Inc. v. Florida State Racing Commission, 153 So. 2d 5 (Fla. 1963), a statute was held to be unconstitutional under circumstances similar to those in the instant case. West Flagler dealt with pari-mutuel legislation

which provided that holders of existing permits of specified characteristics would have the right to obtain licenses for operation in Broward County. The permits were distinguished on the basis of such factors as time of issuance and time of operations conducted. With respect to time of operations, only those permittees which had conducted racing within five years of the act's passage could apply for a permit to operate in Broward County. Thus a factor in the putative classification was fixed to a historical time frame. The statute was challenged, in part, because it contained an arbitrary classification. This Court agreed, holding that:

> Obviously, then, the effort is not to make the act applicable to a permit or permits of like kind, differing from others in some material respect, but instead the descriptive technique is employed merely for identification rather than classification. Upon analysis we think this legislation must be regarded as an enactment granting to certain permit holders, designated in terms not susceptible of generic application now or in the future, the right to conduct harness racing in Broward County upon compliance with its conditions. The act is therefore arbitrary and not uniform or equal in its specification of the thing as well as the county affected.

Id. at 8. (Emphasis added).

In the instant case, as in West Flagler, the statute employs a method of classification based upon factors which include a temporal limitation. Just as in West Flagler, the classification scheme challenged here grants the affected county privileges that no other county may ever enjoy, and, as

properly found by the district court, the classification scheme in the instant case is nothing more than a "descriptive technique for the sole purpose of identifying Marion County." Classic Mile, Inc. v. State of Florida Department of Business Regulation, 13 FLW 2036, 2036 (Fla. 1st DCA, September 1, 1988).

Moreover, the analysis in West Flagler was carried over by this Court in the case of Department of Legal Affairs v. Sanford - Orlando Kennel Club, 434 So. 2d 879 (Fla. 1983). In Sanford-Orlando, a statute was enacted permitting the conversion of a harness track to a dog track if a financially ailing track fell within a certain classification. The classification was based on the amount of "handle" over a period of ten years prior to the time the applicant sought conversion. The constitutionality of the statute was challenged on the grounds that the classification scheme was impermissible.

The district court in State of Florida, Department of Legal Affairs v. Sanford-Orlando Kennel Club, 411 So. 2d 1012, 1016-17 (Fla. 5th DCA 1982), held that the statute was unconstitutional, in part because the statute would permit only one facility to be converted. Thus, according to the district court, the classification was arbitrary and the statute was enacted in violation of article III, section 10, of the Florida Constitution.

This Court rejected the district court's holding and held that the classification scheme was in fact an open class. Sanford-Orlando, 434 So. 2d at 882. However, Galaxy fails to appreciate the legal significance of this factual distinction when it states that "the issue was whether the District Court was correct in its factual determination that the class was closed, and not the legal ramifications of a closed class." (Galaxy Initial Brief at 14). On the contrary, this Court was concerned about the legal significance of this factual distinction when it said:

> The controlling point is that even though this class did in fact apply to only one track, it is open and has the potential of applying to other tracks. . . . The fact that matters is that the classification is potentially open to other tracks.

Sanford-Orlando, 434 So. 2d at 882. It was on this factual distinction that this Court upheld the challenged legislation.

In the instant case, no attempt has been made to suggest that the classification scheme employed in section 550.355 may ever apply to any other county. Indeed, no such argument can be made. The temporal limitation contained in the statute precludes any other county from ever having such a facility. The decisions of this Court in West Flagler, Sanford-Orlando, and Biscayne Kennel Club, Inc. v. Florida State Racing Commission, 165 So. 2d 762 (Fla. 1964), clearly mandate that the classification scheme employ factors that are potentially applicable to others. The challenged legislation fails in this

regard. Moreover, West Flagler obviously requires that the putative classification scheme be more than a descriptive technique used to identify a given county. Rather, the method of classification must distinguish counties in some material respect.

The use of factors which include a historical date does not differentiate counties in a material manner, and neither the state nor Galaxy has argued that the statue employs a meaningful, material method of classifying counties. Clearly, the temporal limitation creates a wholly arbitrary method of classifying counties. Accordingly, the law is nothing more than a special act passed under the guise of creating a valid classification for the enactment of a general law. Therefore, the First District Court of Appeal was correct in its holding, and the decision should not be disturbed by this Court.

B. THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT LAWS RELATING TO PARI-MUTUEL WAGERING DO NOT CONSTITUTE A STATE PROPRIETARY FUNCTION

In its initial brief, the State argues that the statutory language which limits the location of a simulcasting facility is constitutionality valid despite the fact that such a facility may be located in one county, for now and forevermore. In support of this argument, the state contends that the district court erred as a result of its failure to hold that the impact of laws relating to pari-mutuel wagering is equivalent to the exercise of a state proprietary function.

The State cites Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879 (Fla. 1983), for the proposition that "our courts have long recognized that some laws, because they involve an exercise of a state function or instrumentality, are general in character even though they may be local in application." (State Initial Brief at 9). Although Sanford-Orlando dealt with the constitutionality of pari-mutuel legislation, the holding in that case did not turn on whether pari-mutuel regulation "relates to a state function or instrumentality." Id. at 881. Rather, the decision in Sanford-Orlando turned on whether the method of classifying tracks was open and had the potential of applying to other tracks. In fact, in its brief before the district court, the State conceded that "there are no appellate cases which have specifically decided that pari-mutuel wagering activities are a

state function." (State Answer Brief, filed before the District Court of Appeal, at 10).

The State further argues that the notice requirements of article III, section 10 would be futile when dealing with laws relating to a state function, because pari-mutuel legislation "involves the exercise by the state of its sovereign powers and the legislation will involve a statewide impact." (State Initial Brief at 9). The State seeks support from Cantwell v. St. Petersburg Port Authority, 21 So. 2d 139 (Fla. 1945). Although the questioned legislation was held to be a general law, Justice Terrell explained the relationship between general laws and proprietary functions of the state:

> A law does not have to be universal in application to be a general law. Laws relating to the location of the capital of the state, the state university, the state prison farm, the hospital for the insane and other state institutions are local in character but general in application and are regarded as general laws.

Id. at 140. The examples of "general laws" discussed above share a common characteristic: they are laws dealing with facilities that are owned and operated by the State of Florida. In State v. Florida Turnpike Authority, 80 So. 2d 337 (Fla. 1955), legislation was passed authorizing the issuance of bonds for the purpose of building a "partpike" through a small part of the state. The legislation was challenged as a special act. Although the act was held to be a general law, it is

important to note the state proprietary nature of the legislation: the State of Florida was to own the "partpike" to be constructed.

Finally, in St. Johns River Water, Etc. v. Deseret Ranches, 421 So. 2d 1067 (Fla. 1982), this Court was again asked to consider whether an act was passed in violation of article III, section 10. The act dealt with the creation of a water basin which, in conjunction with other basins, provided for the "conservation, protection, management and control of state waters." Id. at 1068. (Emphasis added). Although the challenged act was held to be a general law, the act related to a state function which was proprietary in nature.

In the instant case, the statute does not affect a state owned or operated facility. Rather, it deals with an activity that is merely regulated by the state. Acceptance of the State's argument would mean that any regulated activity would be immune from challenge as a special or local law.

The State further argues that the challenged legislation is a general law because it involves the state's power to tax and distribute revenue. Acceptance of this argument would effectively eviscerate the provisions of article III, section 10. Only those bills which have absolutely no financial impact could ever be challenged under article III, section 10.

Given the foregoing, the district court correctly held that laws relating to pari-mutuel legislation do not constitute a state proprietary function. Accordingly, section 550.355,

Florida Statutes, was passed in violation of article III, section 10 of the Florida Constitution.

II

THE DISTRICT COURT CORRECTLY HELD THAT SECTION 550.355 (2), FLORIDA STATUTES, VIOLATES ARTICLE III, SECTION 11(b), FLORIDA CONSTITUTION (1968) WHERE THE CLASSIFICATION SCHEME EMPLOYED IS NOT REASONABLY RELATED TO THE SUBJECT MATTER OF THE LAW.

As a separate basis for finding the challenged statute unconstitutional, the district court held that the act failed to pass the reasonable relationship requirements set forth in article III, section 11(b) of the Florida Constitution (1968), which provides that:

> In the enactment of general laws..., political subdivisions... may be classified only on a basis reasonably related to the subject of the law.

According to the commentary, "[s]uch classification must be on a basis reasonably related to the law." See Commentary, F.S.A. Const. Art. III Section 11(b). (Emphasis added).

In their initial briefs, both the State and Galaxy misdirect the proper focus of review by failing to argue whether the classification scheme employed in section 550.355 is reasonably related to the subject of the law. No argument has been made that the method of classification is reasonably related to the simulcasting of thoroughbred horse races. Rather, Appellants argue that the issue presented is whether

there is a reasonable relationship between Marion County and section 550.355.

In taking such a position, Appellants ignore the constitutional proscription set forth above as well as applicable case law. Essentially, Appellants are asking this Court to ignore the method of classifying counties and, instead, to focus on which county is afforded beneficial treatment under the challenged legislation. The constitution does not require that the affected county be related to the subject of the law. Instead, the constitution unambiguously requires that the classification of counties be reasonably related to the subject of the law.

In ignoring the constitutional mandate set forth in article III, section 11(b). Appellants essentially contend that the method of classification is immaterial and that this Court should look to the fact that the legislature identified Marion County by description, rather than by any meaningful classification. However, as has been previously addressed, such a practice is not permissible in light of West Flagler Kennel Club, Inc. v. Florida State Racing Commission, 153 So. 2d 5 (Fla. 1963). Moreover, if this argument were accepted, article III, section 11(b) would be rendered meaningless. Under Appellants reasoning, it would not matter how a given locality was classified, so long as it was adequately described. Accordingly, as far as Appellants are concerned, it would be constitutionally sound to identify Marion County by

the number of convenience stores, movie theaters or eating establishments in Marion County.

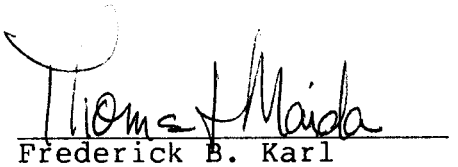
The issue presented is whether section 550.355 appropriately classifies counties on a basis reasonably related to the subject of the law. Specifically, section 550.355(2) classifies counties on the basis of "two quarter horse racing permits, neither of which was utilized for racing prior to January 1, 1987, and one jai alai permit" The subject of the legislation is simulcasting. There is no reasonable relationship between the two, and Classic Mile respectfully submits that the legislature has exceeded its authority by providing a method of classification which bears no reasonable relationship to the subject of the law. Neither the State nor Galaxy has argued that such a relationship exists. Indeed, no such argument can be made.

Under section 550.355, the location of a simulcasting facility is tied to the type of permits issued in a given county, and to "January 1, 1987." Logic and reason cannot support a county being classified based upon a historical date specified in the statute. In short, the classification scheme is wholly arbitrary. Section 550.355 is unconstitutional, and the district court's decision should, therefore, be affirmed.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Classic Mile and Altman respectfully request that this Court affirm the decision of the First District Court of Appeal in Classic Mile, Inc. v. State of Florida, Department of Business Regulation, 13 FLW 2036 (Fla. 1st DCA, September 1, 1988).

Respectfully submitted,



Frederick B. Karl
Thomas J. Maida
Michael G. Maida
Karl, McConnaughhay, Roland
& Maida, P.A.
Post Office Drawer 229
Tallahassee, FL 32302-0229
904/222-8121

Attorney for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished, by U.S. Mail, to Young J. Simmons, Esquire, 125 Northeast First Avenue, Suite 1, Ocala, Florida 32670; Robert B. Beitler, Esquire and Thomas A. Bell, Esquire, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32399-1007; and Gary J. Anton, Esquire, Post Office Box 11059, Tallahassee, Florida 32302, this 8th day of November, 1988.

Frederick B. Karl
Thomas J. Maida
Michael G. Maida
Karl, McConnaughhay, Roland
& Maida, P.A.
Post Office Drawer 229
Tallahassee, FL 32302-0229
904/222-8121

Attorney for Appellees