16

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF BUSINESS REGULATION,

Appellant,

vs. CASE. NO. 73,189

CLASSIC MILE, INC., ETC., ET AL.,

Appellees

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THE GALAXY PROJECT, INC., ETC.,

APPELLANT,

vs. CASE NO. 73, 121

CLASSIC MILE, INC., ETC., ET. AL.,

Appellees.

_____/

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

APPELLANT DEPARTMENT OF BUSINESS REGULATION'S REPLY BRIEF

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cover
1-12

TABLE OF CONTENTS

TABLE OF CITATIONS

I. BECAUSE IT INVOLVES ACTIVITIES EXCLUSIVELY WITHIN THE POWER OF STATE GOVERNMENT AND WHICH DIRECTLY AND INDIRECTLY AFFECT ALL OF THE CITIZENS OF THIS STATE, THE SIMULCAST LICENSURE CREATED BY SECTION 550.355, FLORIDA STATUTES, IS PROPERLY VIEWED AS A GENERAL LAW EXERCISING A STATE FUNCTION.

In striking the simulcast legislation, the district court summarily rejected the argument that the legislation involved the exercise of a state function and was thus a general law. In defense of the district court's action, Appellees propose a restrictive view of what activities may constitute a state function. Specifically, they suggest that the determinative factor is whether the legislation involves activities or instrumentalities which are owned and operated by the State. (Classic answer brief at 14.) The Department maintains that this approach is much too narrow and is not consistent with the previous opinions of this court or with the reasoning supporting the exclusion of these types of activities from the notice or referendum provisions of Article III, Section 10 of the Florida Constitution. Instead, the Department submits that the focus, as reflected in the cases discussed below, should be on the nature of the activity and specifically should be directed to whether it is an activity which transcends parochial concerns by broadly affecting the citizenry of this state and which involves issues where the authority of the state is paramount.

In Cantwell v. St. Petersburg Port Authority, 21 So.2d 139 (Fla. 1945), for example, the challenged legislation established an independent authority which was authorized to grant franchises to construct and maintain various types of transportation improvements across certain waterways in the state. The legislation allowed franchises in many but not all of the counties of the State. In concluding that the legislation was a general law because it was an exercise of a state function, this Court emphasized that these activities would "affect directly or indirectly every citizen of the state." Cantwell at 140. The opinion made no mention of any concern over who would own or operate these improvements and, in fact, the ferry franchise which gave rise to the litigation had been owned and operated by a private corporation. Cantwell at 140. Similarly, in State of Florida v. Florida State Turnpike Authority, 80 So.2d 337 (Fla. 1955), this Court upheld legislation which authorized the construction of portions of a planned turnpike even though it would directly impact only a couple of counties. In concluding that the activity was a state function, however, the opinion clearly emphasized the nature and statewide impact of the activity-not who would own or operate the highway. In the words of this Court:

> The Turnpike Authority is a State agency charged with creating a highway that is bound, it seems to us, to affect traffic statewide. As a main artery to facilitate the flow of travel northward and southward not only by residents but by those who make up one of the principal industries of the State, the tourist industry, not to mention the many businesses incident to the use of the motor vehicle, whether by resident or visitor, the entire State, will be affected. It is our opinion that such a turnpike may no more logically be said to be local than the aorta may be said to perform a local function independent of the other blood vessels of the human body.

Florida Turnpike Authority at 344. Finally, in St. Johns River Water Management District v. Deseret Ranches of Florida Inc., 421 So.2d 1067 (Fla. 1982), this Court again addressed the issue of whether legislation having local impact might nevertheless be considered to be an exercise of a state function and therefore a general law.

The legislation challenged in St. Johns authorized the operation of a single sub-district within the comprehensive statewide plan for water management. Notwithstanding the clear local impact under the legislation, this court concluded that it was a state function and focused on the nature of the activity and the extent of its impact. Again, the legislation was viewed as an exercise of state sovereign power not because it involved the ownership and operation of state property but because it involved an activity which impacted the citizens of

this state generally and was of paramount state concern. The thread running through each of the above cases, is the fact that the state was exercising its regulatory authority over matters in which it had preemptive authority and the activities broadly impacted the citizens of the state. In each case, the notion of providing local notice, which all parties agree is the purpose behind the constitutional provision at issue here, would be a useless gesture because it is the citizens of the state whose interests will be affected.

The simulcast licensure legislation challenged here has the same characteristics which were critical for this court to conclude in the above cases that the activity involved was a state function. The licensure under this bill is essentially a franchise which is exclusively granted by the state and which authorizes the operation of a new type of pari-mutuel wagering activity. As specifically found by the trial court, it is an activity which directly or indirectly materially affects all the citizens of this state. (R. 618-19) The citizens in each of the counties where races will be broadcast or received are directly impacted by the legislation. Furthermore, all of the citizens of this state are affected by the revenue collection and distribution activities specifically provided for in this legislation. The very heart of this legislation is the stewardship of a valuable state resource i.e., the collection

of tax revenue for distribution to the state and to every county in the state. In light of the above, requiring local notice to the citizens of Marion County would serve no useful purpose. It is the citizens of this state who are impacted by the legislation and it is a general law within the sovereign power of the state and therefore not subject to the constitutional provisions for local notice or referendum.

In urging this court to recognize this legislation as an exercise of state power, the Department submits that such action would not be inconsistent with the previous pari-mutuel wagering "closed class" cases relied upon by Appellees. E.g. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983); Biscayne Kennel Club v. Florida State Racing Commission, 165 So.2d 762 (Fla. 1964); and West Flagler Kennel Club v. Florida State Racing Commission, 153 So.2d 5 (Fla. 1963). In each of the above cases the legislation at issue was challenged because it allegedly carved out special benefits which were granted to existing permitees but which were denied to similarly situated tracks. In each case the legislation was challenged as a special law enacted in an area where general legislation was required and, more importantly, was challenged because it allegedly violated the constitutional equal protection rights of certain permitees. In none of these cases did this court have to characterize the

authority to authorize a new type of activity in a particular geographical locale. Cf. Miami Jockey Club, Inc., v. State ex. rel. Wells, 227 So.2d 96 (Fla. 1st DCA 1969) (legislation authorizing new type of summer racing permit in single location upheld) The Department submits that this is not just a state regulatory activity but is a matter which directly impacts the revenue of this state and transcends parochial concerns. By recognizing this to be a state function and, affirming this legislation, Florida will be allowed to initiate, in a limited manner, a new form of wagering activity at a new type of facility. This seems to be a matter particularly appropriate for state control when you consider the overall concern, i.e., increasing state revenue without adversely affecting competition so as to disrupt future revenue for the state, which appeared to prompt the adoption of Chapter 87-38, Laws of Florida. See particularly §1, Ch. 87-38, Laws of Florida. Although the challenged section does not expressly reflect the legislative intent, the Appellants submit that these provisions must be read in pari materia to support this legislation.

II. GIVEN THE SUBJECT OF THE SIMULCAST LEGISLATION, SECTION 550.355, FLORIDA STATUTES, IT WAS REASONABLE TO CLASSIFY MARION COUNTY AS THE SITUS FOR THE SIMULCAST LICENSE AND TO LIMIT THIS ACTIVITY TO A SINGLE LOCATION.

The opposing parties in this appeal have a fundamental difference in the way they apply the language of Article III, Section 11(b) of the Florida Constitution, to evaluate the simulcast legislation. Appellees suggest that this court should look only to the words of the classification language contained in the challenged legislation and then determine whether this language reasonably relates to the subject of the legislation. Not surprisingly, they conclude that the language, which all parties agree is simply a descriptive technique used to identify Marion County, does not even remotely relate to the simulcast legislation and is therefore unconstitutional. The Department respectfully suggests that this approach elevates form over substance and that the purpose of the constitutional provision will be best served by identifying the actual class which is created by the legislative language and by asking whether this classification reasonably relates to the subject of the legislation. After all, this is how legislation which is general in its terms is determined to be a special bill with application only to

certain locations or to certain identified persons. E.g. State ex. rel. Baldwin v. Coleman, 3 So.2d. 802, 803 (Fla. 1941).

In the present case, the statutory classification language simply identified Marion County. No doubt, it would have been easier to identify the class had the legislature simply specified Marion County in wording this law. This classification in no way, however, limited who in Marion County could obtain the simulcast license and, as both the Department and Galaxy have pointed out in their initial briefs, the legislature has traditionally used various types of descriptive techniques in drafting legislation regarding the issuance of pari-mutuel wagering licenses. Only recently has the legislature shown a willingness to simply use county names rather than the types of descriptive techniques reflected in the simulcast legislation. See e.g. Ch. 88-346, §21, Laws of Florida. Nevertheless, the key point is that however the classification is identified by language, the focus is on the classification created and whether it reasonably relates to the subject of the legislation. Contrary to Appellees' position, this does not conflict with this court's opinion in West Flagler Kennel Club v. Florida State Racing Commission, 153 So.2d 5 (Fla. 1963). While that case did involve

legislation which used a descriptive technique and which was found to be unconstitutional, this holding was apparently based not on the fact that a descriptive technique was used to identify the class but on the basis that the classification provided special benefits to particular permitees and unreasonably denied these same benefits to other permitees. West Flagler at 9. In the present case, the Department submits that the pertinent question is simply whether designating Marion County as the only situs for the simulcast license reasonably relates to the subject of the law.

At the outset, it seems clear that Appellees do not question whether Marion County is an appropriate location for the simulcast facility. Indeed, the undisputed findings of the trial court seemed to make it clear that it is a particularly appropriate location. It is a state and national center for thoroughbred racing and the area has a nexus with the horse racing industry. (R. 618-19.) The key issue seems to be whether limiting this simulcast facility to a single location reasonably related to the subject of the bill. Without reiterating in detail the arguments presented in the initial briefs, the Department's position can be summarized by saying that the subject of the legislation was to authorize a new form of pari-mutuel wagering at a new type of facility. It is a new

type of business in Florida and will require new types of regulation. As reflected in various provisions of the enacting legislation, Chapter 87-38, Laws of Florida, the legislature was generally concerned with increasing state revenue without, at the same time, compromising this Department's regulatory capabilities or jeopardizing state revenue by allowing harmful competition between the various forms of pari-mutuel wagering. Given the subject of this legislation as reflected above and the special characteristics of Marion County, the Department submits that classifying this county as the one and only location for this new facility was reasonable.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Appellant, Department of Business Regulation, asks this court to reverse the decision of the First District Court of Appeal and to affirm the final judgement of the trial court upholding the constitutionality of Section 550.355, Florida Statutes (1987).

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 Gary J. Anton, Esquire, 315 S. Calhoun St., Suite 750, Tallahassee, Florida 32302, and to Frederict P. Karl, Thomas J. Maida, and Michael G. Maida of Karl, McConnaughhay, Roland & Maida, PA., 101 North Monroe Street, Monroe Park Tower, Suite 950, Tallahassee, Florida 32302, this 5th day of December, 1988.

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