Received 4/18/2018 3:30:26 PM Supreme Court Middle District

Filed 4/18/2018 3:30:00 PM Supreme Court Middle District
216 MM 2017

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 216 MM 2017

SANDS BETHWORKS GAMING, LLC,

Petitioner

v.

PENNSYLVANIA DEPARTMENT OF REVENUE; C. DANIEL HASSELL IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE; and THE PENNSYLVANIA GAMING CONTROL BOARD,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE ARGUMENTS ADVANCED BY THE INTERVENOR

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INTRODUCTION

Petitioner Sands Bethworks Gaming, LLC, commenced this action against the Pennsylvania Department of Revenue, C. Daniel Hassell (in his official capacity as the Secretary of the Pennsylvania Department of Revenue), and the Pennsylvania Gaming Control Board, seeking the entry of a judgment declaring 4 Pa. C.S. §§ 1407(c.1), 1407.1 and 1408(c.1) to be in violation of the Uniformity and Special Law Clauses of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. Shortly thereafter, Sands filed an application for special relief in the nature of a preliminary injunction. The Respondents answered both filings in a timely manner. In an attempt to resolve the application for special relief, the parties filed a joint stipulation and proposed order. The Court denied the parties' request for the entry of an order approving their joint stipulation, thereby leaving them free to "present arguments in the[ir respective] briefs regarding possible remedies." The Prothonotary was directed to establish a briefing schedule and list the case for oral argument. In response to the Court's order, the Prothonotary provided the parties with notice of the briefing schedule and the argument date.

Shortly before Sands filed its brief, Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino ("GGE"), filed an application for leave to intervene in this

action on the side of Sands. In its application, GGE stated that it was "willing to accept the pleadings" contained in Sands' verified petition, and that it was prepared to comply with the briefing schedule that was already in place. The application for leave to intervene was accompanied by a proposed brief in support of the petition. The Respondents answered the application without taking a position as to whether GGE should be permitted to intervene. In their subsequent brief in opposition to Sands' verified petition, the Respondents noted that their arguments in defense of §§ 1407(c.1), 1407.1 and 1408(c.1) would apply with equal force to any parallel claims asserted by GGE. Before Sands filed its reply brief, GGE filed an application for leave to file its own brief in response to the arguments advanced by the Respondents. GGE's proposed reply brief was attached to its application.

In a *per curiam* order, the Court granted GGE's application for leave to intervene and directed the Prothonotary to docket the brief that was attached to that application. The entry of that order rendered GGE's motion for leave to file a reply brief moot. The Prothonotary later docketed both of the briefs that GGE had previously submitted for filing.

The Court's *per curiam* order also provided the Respondents with an opportunity to file a supplemental brief that was "directly responsive" to the arguments made by GGE. Because the Court's jurisdiction in this case is limited to determining whether the challenged statutory provisions are constitutional, most

of the issues raised by the verified petition have already been addressed in the Respondents' earlier brief. Despite GGE's intervention as a co-petitioner, there are no new claims in the case. In conformity with the Court's *per curiam* order, the Respondents will limit the arguments made in this supplemental brief to matters that are raised by GGE and not previously addressed by the Respondents. To the extent that GGE advances arguments that mirror those previously made by Sands, the Respondents will continue to rely on their earlier brief in opposition to the verified petition.

ARGUMENT

A. THIS COURT LACKS ORIGINAL JURISDICTION TO ENTERTAIN THE PETITIONERS' REQUESTS FOR INJUNCTIVE RELIEF

The statutory provision codified at 4 Pa. C.S. § 1904 provides this Court with "exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of" the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act") [4 Pa. C.S. §§ 1101 *et seq.*]. This Court is specifically "authorized to take such action as it deems appropriate, consistent with [its retention of] jurisdiction over such a matter, to find facts or to expedite a final judgment in connection with such a challenge or request for *declaratory relief*." 4 Pa. C.S. § 1904 (emphasis added). Nothing in § 1904 grants this Court original jurisdiction to entertain a request for injunctive relief.

In an effort to procure injunctive relief in this case, GGE attempts to make a distinction between the Court's "jurisdiction" to resolve the pending controversy and its authority to grant a particular form of relief. Intervenor's Reply Brief at 15. Relying on *DePaul v. Commonwealth of Pennsylvania*, 969 A.2d 536, 554 (Pa. 2009), GGE argues that this Court's authority to restrain the enforcement of §§ 1407(c.1), 1407.1 and 1408(c.1) is clear. *Id.* at 17. Although the Court enjoined the enforcement of an unconstitutional statutory provision in *DePaul*, it did not discuss the jurisdictional issue raised by the Respondents in this case or otherwise acknowledge the possibility that it lacked jurisdiction to issue an injunction. *DePaul*, 969 A.2d at 554.

The United States Supreme Court has held that 42 U.S.C. § 1983 "only provides a remedy and does not itself create any substantive rights." *Wilson v. Garcia*, 471 U.S. 261, 278 (1985). The precise nature of the available "remedy" turns on whether a particular plaintiff has commenced "an action at law," a "suit in equity," or some other type of "proceeding for redress[.]" 42 U.S.C. § 1983. In certain instances, § 1983 can provide a vehicle for challenging the constitutionality of a state statute and seeking the entry of an order enjoining its enforcement. *Skinner v. Switzer*, 562 U.S. 521, 529-534 (2011). State courts ordinarily have jurisdiction to adjudicate claims brought under § 1983. *Haywood v. Drown*, 556 U.S. 729, 734-735 (2009). Although § 1904 gives this Court "exclusive

jurisdiction to hear any challenge to . . . the constitutionality of" the Gaming Act, this Court held in *Mount Airy #1, LLC v. Pennsylvania Dept. of Revenue*, 154 A.3d 268, 271, n. 1 (Pa. 2016), that it *lacked original jurisdiction* to consider a § 1983 claim purporting to challenge the constitutionality of one of the Gaming Act's provisions under the Equal Protection Clause of the Fourteenth Amendment. Because the challenged provision was found to be in violation of the Uniformity Clause, there was no need for the Court to determine whether it also contravened the Equal Protection Clause. *Mount Airy #1, LLC*, 154 A.3d at 271, n. 1. By holding that it lacked jurisdiction to entertain the petitioner's § 1983 claim while acknowledging that it could otherwise adjudicate an "equal protection claim" falling within the parameters of § 1904, this Court necessarily held that its *jurisdiction* did not extend far enough to embrace certain *remedies* available under § 1983.[1] *Ibid.* The reasoning employed in *Mount Airy #1, LLC*, plainly refutes GGE's contention that § 1904 imposes no jurisdictional limitations on the form of relief that Sands and GGE can seek in this case. Intervenor's Reply Brief at 15-18.

The precise language of § 1904 defines the "jurisdiction" that this Court may exercise in the present case. *Pennsylvania State Troopers Association v.*

[1] This Court's suggestion that it could entertain a challenge to the Gaming Act brought under the Equal Protection Clause pursuant to the language of § 1904 is consistent with the United States Supreme Court's decision in *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008), which recognizes that a State may provide its citizens with a remedy to redress violations of the United States Constitution.

Commonwealth of Pennsylvania, 920 A.2d 173, 176-177 (Pa. 2007). That statutory provision specifically provides this Court with "exclusive jurisdiction . . . to render a declaratory judgment concerning the constitutionality of" the Gaming Act. 4 Pa. C.S. § 1904. It further authorizes this Court to "retain[] jurisdiction" over a covered constitutional challenge in order to "expedite a final judgment in connection with such a challenge or request for declaratory relief." *Ibid.* The General Assembly's decision to explicitly authorize "declaratory relief" in a statutory provision defining this Court's jurisdiction implies that this Court lacks original jurisdiction to entertain requests for injunctive relief. *Pane v. Commonwealth of Pennsylvania*, 222 A.2d 913, 915 (Pa. 1966) (observing that "the mention of a specific matter in a general statute implies the exclusion of others not mentioned").

B. THE GRANT DISTRIBUTION SCHEME DOES NOT VIOLATE THE UNIFORMITY CLAUSE

The Uniformity Clause of the Pennsylvania Constitution provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority *levying* the tax, and [that such taxes] shall be *levied and collected* under general laws." PA. CONST., ART. VIII, § 1 (emphasis added). It says absolutely nothing about how tax money must be *distributed* after it has already been collected. Although GGE accuses the General Assembly of "imposing

disparate tax rates" on covered slot machine licensees based on their respective levels of income, the income-based distinctions found in § 1407.1(e)(1) plainly relate only to the manner in which money from the Casino Marketing and Capital Development Account ("CMCD Account") is *distributed* to qualifying slot machine licensees. Intervenor's Brief at 9; 4 Pa. C.S. § 1407.1(e)(1). For this reason, there is simply "no factual predicate for a Uniformity Clause challenge" in this case. *Pennsylvania Medical Society v. Dept. of Public Welfare*, 39 A.3d 267, 286 (Pa. 2012).

Several state courts presented with constitutional challenges similar to the challenge brought by Sands and GGE in this case have drawn a clear line between the levying and collection of taxes and the distribution of tax money. *Meierhenry v. City of Huron*, 354 N.W.2d 171, 177 (S.D. 1984); *South Bend Public Transportation Corp. v. City of South Bend*, 428 N.E.2d 217, 223-224 (Ind. 1981); *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1386 (Colo. 1980); *State of Kansas ex rel. Schneider v. City of Topeka*, 605 P.2d 556, 561-563 (Kan. 1980). This line "distinguishing past payments from future obligations" is "consistent with the distinction that the law often makes between actions previously taken and those yet to come." *Armour v. City of Indianapolis*, 566 U.S. 673, 683-684 (2012). GGE repeatedly invites the Court to ignore this distinction by incorrectly equating the distributions required by § 1407.1(e)(1) with tax

credits. Intervenor's Brief at 12, 23. In any event, the misleading terminology used by GGE cannot change the dispositive distinction between tax liabilities and post-collection distributions.

Under Pennsylvania law, the term "tax credit" is defined as "a direct reduction from the liability for tax[es] owed." *Berks County Tax Collection Committee v. Pennsylvania Dept. of Community & Economic Development*, 60 A.3d 589, 593 (Pa. Cmwlth. 2013); *Dunmire v. Applied Business Controls, Inc.*, 440 A.2d 638, 640 (Pa. Cmwlth. 1981). A slot machine licensee who neglects or refuses to pay a slot machine tax may be subject to the liens and suits for overdue taxes available to the Commonwealth under the Tax Reform Code of 1971 [72 P.S. §§ 7101 *et seq.*]. 4 Pa. C.S. § 1502. Regardless of whether a slot machine licensee qualifies for a distribution under § 1407.1(e)(1), the classifications contained within that statutory provision do not increase or decrease the tax *liabilities* of slot machine licensees. 4 Pa. C.S. § 1407.1(e)(1). Consequently, the required distributions cannot be regarded as "tax credits" for purposes of the Uniformity Clause.[2]

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[2] In its reply brief, GGE accuses the Respondents of mischaracterizing the arguments advanced by Sands and GGE. Intervenor's Reply Brief at 9. This alleged mischaracterization pertains to the distinction between the levying and collection of taxes, which fall within the purview of the Uniformity Clause, and post-collection distributions of tax money, which do not. *Ibid.* Contrary to GGE's suggestion, the Respondents do not mischaracterize any of the arguments made by Sands or GGE. The Court need only read the plain text of § 1407.1(e)(1) in order

It is not uncommon for tax revenues to be used to provide for payments only to those who demonstrate a need for them. *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 732-733 (7th Cir. 2011) ("Rarely are taxpayers closely matched with the recipients of the spending that the taxes support. If you die before reaching the age of 62, you get no social security benefits even if you've been paying social security tax for 40 years."). Every Category 1, Category 2 and Category 3 slot machine licensee operating in Pennsylvania derives some "benefit" from the financial safety net created by §§ 1407(c.1), 1407.1 and 1408(c.1). *Walker v. Zuehlke*, 642 N.W.2d 745, 752 (Minn. 2002). Accordingly, the Gaming Act's "statutory scheme for revenue sharing" does not violate the Uniformity Clause. *Village of Burnsville v. Onischuk*, 222 N.W.2d 523, 532-533 (Minn. 1974).

C. THE GRANT DISTRIBUTION SCHEME DOES NOT VIOLATE THE SPECIAL LAW CLAUSE

The Special Law Clause prohibits the General Assembly from passing a "local or special law in any case which has been or can be provided for by general law[.]" PA. CONST., ART. III, § 32. This constitutional provision was largely designed to preclude the enactment of legislation that would benefit only particular

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to see that the classifications challenged by Sands and GGE in this case relate to the distribution of grant money rather than to the levying and collection of taxes. 4 Pa. C.S. § 1407.1(e)(1).

localities. *Pennsylvania Turnpike Commission v. Commonwealth of Pennsylvania*, 899 A.2d 1085, 1094 (Pa. 2006). The statute invalidated in *Allegheny County v. Monzo*, 500 A.2d 1096, 1105 (Pa. 1985), ran afoul of that prohibition because *its very terms* rendered it applicable only to Allegheny County, which was the only second-class county in Pennsylvania. Because the statute was effective for only a specified period of time, there was "no possibility" that another county would come within its purview. *Monzo*, 500 A.2d at 1105. In other words, the relevant "class of one member" was unconstitutionally "closed" to outsiders by the mere operation of the statute itself. *West Mifflin Area School District v. Zahorchak*, 4 A.3d 1042, 1048 (Pa. 2010) (recognizing "legislation creating a class of one member that is closed or substantially closed to future membership" to be *per se* unconstitutional). Since *any* Category 1, Category 2 or Category 3 slot machine licensee operating in Pennsylvania could become eligible for a grant under § 1407.1(e)(1) in a particular year, the Gaming Act's distribution scheme bears no resemblance to the statutory provision invalidated in *Monzo*. 4 Pa. C.S. § 1407.1(e)(1).

In its reply brief, GGE invites the Court to ignore the limitations that the Gaming Act places on the locations of casinos by contending that those geographical restrictions "are not related" to the provisions challenged in this case. Intervenor's Reply Brief at 6. Attempting to deflect attention from the true

objectives of the grant distribution scheme, GGE goes on to say that the challenged provisions do not *themselves* require grant money to be spread throughout the various communities hosting covered facilities. *Ibid.* GGE essentially asks the Court to divorce the challenged provisions from the broader statutory context in which they operate.

Contrary to GGE's belief, the application of §§ 1407(c.1), 1407.1 and 1408(c.1) can only be understood in relation to the Gaming Act's broader statutory scheme. *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 906 (Pa. 2016). The provisions of the Gaming Act describing the permissible locations for slot machine licensees to operate their facilities independently ensure that the benefits of legalized gaming will not be concentrated in a particular locality. 4 Pa. C.S. §§ 1302(b), 1304(b)(1), 1305(b)(1.1). By making grant money available to *any* struggling facility, regardless of where it is located, the Gaming Act's distribution scheme operates as a "general law" that falls well within the General Assembly's legislative authority.[3] *Dufour v. Maize*, 56 A.2d 675, 677 (Pa. 1948). When the

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[3] The relevant provisions of the Gaming Act have only been in effect for a few months. P.L. 419, No. 42, § 36. Relying on historical financial information, GGE maintains that the General Assembly knew which slot machine licensees would receive mandatory distributions when it enacted § 1407.1(e)(1). Intervenor's Brief at 16. That is simply not true. The challenged statutory scheme requires that distributions be made to underperforming slot machine licensees based on their levels of gross terminal revenue "for the previous fiscal year[.]" 4 Pa. C.S. § 1407.1(e)(1)(i)-(iii). The General Assembly had no way of knowing how the gross terminal revenues of Category 1, Category 2 and Category 3 slot machine licensees

challenged statutory provisions are properly considered in connection with the General Assembly's reasons for enacting the Gaming Act in the first place, it becomes clear that those provisions do not contravene the Special Law Clause. 4 Pa. C.S. § 1102; *Leventhal v. City of Philadelphia*, 542 A.2d 1328, 1334-1335 (Pa. 1988).

D. THE GRANT DISTRIBUTION SCHEME DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

This Court, of course, is bound by the decisions of the United States Supreme Court interpreting federal constitutional and statutory provisions. *James v. City of Boise*, 136 S.Ct. 685, 686 (2016) (*per curiam*). In the portion of its brief discussing the application of the Due Process and Equal Protection Clauses of the Fourteenth Amendment in this case, GGE does not refer to a single decision of the Supreme Court. Intervenor's Brief at 27-29. That should not come as a surprise,

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would vary from one year to the next. Moreover, this Court is free to hypothesize as to why the General Assembly enacted the mandatory distribution scheme. *Robinson Township v. Commonwealth of Pennsylvania*, 147 A.3d 536, 573 (Pa. 2016). The legislative facts underpinning the General Assembly's decision to enact the challenged provisions of the Gaming Act need not be supported by empirical evidence. *Vance v. Bradley*, 440 U.S. 93, 110-111 (1979). "[T]he General Assembly's enactments are entitled to a strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements." *Shoul v. Commonwealth of Pennsylvania, Dept. of Transportation*, 173 A.3d 669, 678 (Pa. 2017).

since the relevant decisions confirm that GGE's federal constitutional claims are wholly lacking in merit.

Although the distributions required under § 1407.1(e)(1) are not "taxes" or "tax credits," GGE characterizes the Gaming Act's distribution scheme as a "tax scheme" that "imposes disparate tax rates upon casinos whose slot machine revenues exceed a particular threshold." Intervenor's Brief at 29. Even if the challenged provisions of the Gaming Act did establish a graduated tax system, they would clearly satisfy the requirements of the Due Process Clause. The Supreme Court has found progressive taxes existing under federal law to be permissible under the Due Process Clause of the Fifth Amendment. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24-26 (1916). This same line of reasoning applies to state taxes challenged under the Due Process Clause of the Fourteenth Amendment. *Bromley v. McCaughn*, 280 U.S. 124, 138-139 (1929). Furthermore, the Equal Protection Clause does not prohibit a State from establishing a graduated tax system. *Stebbins v. Riley*, 268 U.S. 137, 141-142 (1925). The Supreme Court's decision in *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103, 105-110 (2003), compels the conclusion that the classifications found in § 1407.1(e)(1) do not violate the Equal Protection Clause.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court deny the Petitioners' requests for declaratory and injunctive relief. It is further requested that the Court "expedite a final judgment" in favor of the Respondents, and against both Petitioners, with respect to all counts in the verified petition. 4 Pa. C.S. § 1904.

Respectfully submitted,

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Respondents.

CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,819 words within the meaning of Pennsylvania Rule of Appellate Procedure 2135. In making this certification, I have relied on the word count of the word processing system used to prepare the brief.

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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that, on April 18, 2018, I caused a true and correct copy of the foregoing Respondents' Supplemental Brief in Response to the Arguments Advanced by the Intervenor to be sent to the following:

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