No. 032055

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GREENBRIER COUNTY COALITION AGAINST GAMBLING EXPANSION, and CABELL COUNTY COALITION AGAINST GAMBLING EXPANSION, unincorporated associations,

Petitioners,

v.

WEST VIRGINIA LOTTERY COMMISSION, and ITS DIRECTOR, JOHN MUSGRAVE,

Respondents.

FILED
SEP 22 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RESPONDENTS' MEMORANDUM IN OPPOSITION TO MOTION FOR TAKING EVIDENCE

As requested by this Court, Respondents, The West Virginia Lottery Commission and John C. Musgrave, respectfully submit this Memorandum in Opposition to the "Motion for Taking Evidence" filed by Petitioners on September 16, 2003. As Respondents will show below, the motion should be denied.

This petition is related to an earlier mandamus petition that was filed in the Circuit Court of Kanawha County. *Greenbrier County Coalition Against Gambling Expansion v. West Virginia Lottery Comm'n*, No. 03-Misc.-266 (Kanawha (W.Va.) Cir. Ct.). This earlier action was dismissed by order of the Circuit Court because Petitioners had failed to provide Respondents with thirty days' notice of their intention to sue as required by W.Va. Code § 55-17-3(a)(1). *Id.* (Order of June 23, 2003). Petitioners then sought extraordinarily relief from the Circuit Court's order in this Court, which

unanimously denied the such relief. *State ex rel. Greenbrier County Coalition Against Gambling Expansion v. Zakaib*, No. 031300 (W.Va., July 2, 2003).

By correspondence received on August 4, 2003, Petitioners gave notice to Respondents of their intention to bring a second suit against them. *See* Exhibit A. According to the notice, "the attached civil action shall be brought in the Circuit Court of Kanawha County after thirty (30) days of the date of this Notice." *Id.* A copy of the intended Complaint was provided with the notice.

The instant petition is not the action for which Petitioners gave the statutory notice. The ten counts in the noticed Complaint have grown into thirteen. Although some allegations are identical, many have been expanded or reformulated, and at least two (Petition Counts V and X) are brand new.

At any rate, the reason Petitioners did not follow through with their noticed filing is likely apparent to this Court. On August 25, 2003, two cities and two counties filed a mandamus petition in this Court seeking expedited resolution of all issues relating to the legality and constitutionality of the issuance of revenue bonds pursuant to W.Va. Code § 29-22-18a(d)(1). *State ex rel. Cities of Charleston and Huntington v. West Virginia Economic Development Authority*, No. 31540. Among these issues is the constitutionality *vel non* of the operation of the lottery games authorized by the Racetrack Video Lottery Act, W.Va. Code § 29-22A-1 *et seq.*, and the Limited Video Lottery Act, W.Va. Code § 29-22B-101 *et seq.* *Id.*, Petition for Relief by Writ of Mandamus, at 2 (Issues A and B). This Court granted expedited review by order entered September 10, 2003, and further ordered that the case be consolidated with *State ex rel. Lewis v. West Virginia Economic Development Grant Committee*, No. 31541. The latter action involves

other challenges to the legality of the bond issuance, and petitioners in that case are represented by the same counsel as Petitioners herein.

In its September 10 order, this Court further ordered that any applications to intervene or to participate as *amicus curiae* should be submitted by September 22, 2003. Respondents promptly filed such an application to intervene, and, if their application is granted, they intend to and will defend the constitutionality *vel non* of the video lottery operations the Legislature has authorized them to conduct.

As of this writing, Petitioners have neither sought to intervene in the consolidated cases nor filed their properly noticed complaint in the Circuit Court of Kanawha County. Instead, they filed the instant petition and an accompanying motion for evidentiary development under W.Va. R. App. P. (e) and (f).

The issues raised in this case are of two types: (i) challenges to the constitutionality of video lottery; and (ii) assertions that Respondents are failing to conduct video lottery in the manner prescribed by the legislature. The motion to take evidence is addressed to the second group. As the motion itself notes, the issues allegedly requiring factual development involve "respondents' *compliance*" with the law. Motion ¶ 1 (emphasis added).

Of the two groups, the constitutional issues pose questions of law. These issues can be and will be addressed in the pending consolidated proceedings, in which Petitioners may seek to – and their counsel certainly will – participate.

The "compliance" issues are of another character entirely. For the Court's information, Respondents deny that they have refused to enforce the law or that any of Petitioners' claims warrant relief. But as the Court knows, the remedy against a public

official who refuses to enforce the law is an order *enforcing*, and not *enjoining*, the law. Hence, even if Petitioners' allegations were true, the appropriate relief would not call into doubt the legality of video lottery operations *per se*.[1]

Hence, to the extent that the Petition presents any claims not already within the scope of the consolidated proceedings, the claims are ordinary grist for the ordinary course of the Circuit Court's mill. There is no reason for this Court to become involved at this time. "Generally, we decline to exercise original jurisdiction in cases involving merely factual disputes." *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 480 S.E.2d 548, 554 (1996).

The motion to take evidence in this proceeding should be denied, and the petition should be dismissed without prejudice. *See Knotts v. Moore*, 177 W.Va. 9, 350 S.E.2d 9 (1986).

Respectfully submitted,

THE WEST VIRGINIA LOTTERY COMMISSION, and
JOHN C. MUSGRAVE,

By counsel,

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[1] A second difference between the two groups of issues involves the character of Petitioners' standing. Without conceding Petitioners' standing to bring the constitutional claims as mere citizens or taxpayers, Respondents point out that their claim to standing for most if not all of the "compliance" claims appears to be very weak. Only a person who *plays* video lottery would suffer an injury-in-fact if laws enacted for his protection are not enforced. The petition identifies no member of either petitioner organization who has suffered such an injury.

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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, Special Assistant Attorney General and one of counsel for the Respondents, certify that service of the foregoing "Respondents' Memorandum in Opposition to Motion to Take Evidence" was made this 22nd day of September, 2003, by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Larry Harless
Rt. 2, Box 186C
Cottageville, WV 25239

THOMAS R. GOODWIN