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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2009-2010

1090548

John M. Tyson, Jr.

v.

Macon County Greyhound Park, Inc., d/b/a VictoryLand

Appeal from Macon Circuit Court
(CV-10-9)

PER CURIAM.

Macon County Greyhound Park, Inc., d/b/a VictoryLand (hereinafter "VictoryLand"), commenced an action in the Macon Circuit Court against John M. Tyson, Jr., individually and in his official capacity as special prosecutor and task force

commander of the Governor's Task Force on Illegal Gaming pursuant to Executive Order No. 44 (hereinafter "Tyson"), seeking injunctive and declaratory relief stemming from Tyson's arrival at the premises of VictoryLand without a search warrant in the early morning hours of January 29, 2010, for the purpose of seizing machines that, Tyson says, are illegal gambling devices.

The gravamen of the complaint is VictoryLand's assertion that its activities are lawful and that it will suffer irreparable injury if the machines are seized. Immediately after the complaint was filed, the Macon Circuit Court, after giving Tyson an opportunity to be heard, entered an oral temporary restraining order, followed by a written order, barring, among other things, further action by Tyson pending a hearing to be held on February 5, 2010. Tyson complied with the order and, immediately after the entry of the written order, filed an emergency motion in this Court to stay or to vacate the trial court's order. Tyson contends that the Macon Circuit Court does not have subject-matter jurisdiction over an action seeking to enjoin the enforcement of criminal laws of the State of Alabama. We agree.

The general rule is that a court may not interfere with the enforcement of criminal laws through a civil action; instead, the party aggrieved by such enforcement shall make his case in the prosecution of the criminal action:

> "It is a plain proposition of law that equity will not exert its powers merely to enjoin criminal or quasi criminal prosecutions, 'though the consequences to the complainant of allowing the prosecutions to proceed may be ever so grievous and irreparable.' Brown v. Birmingham, 140 Ala. [590,] 600, 37 South. [173,] 174 [(1904)]. 'His remedy at law is plain, adequate, and complete by way of establishing and having his innocence adjudged in the criminal court.' Id."

Board of Comm'rs of Mobile v. Orr, 181 Ala. 308, 318, 61 So. 920, 923 (1913). See also 22A Am. Jur. 2d Declaratory Judgments § 57 (2003) ("A declaratory judgment will generally not be granted where its only effect would be to decide matters which properly should be decided in a criminal action.").

> "The general rule that courts of equitable jurisdiction will not enjoin criminal proceedings or prosecutions applies ... to prosecutions which are merely threatened or anticipated as well as to those which have already been commenced. The rule extends to ... searches and seizures in the course of investigation of crime ....
>
> "It is not a ground for injunctive relief that the prosecuting officer has erroneously construed the statute on which the prosecution is based so as

> to include the act or acts which it is the purpose of the prosecution to punish. ...
>
> "If the statute, or interpretation thereof, on which the prosecution is based is valid, the fact that the enforcement thereof would materially injure the complainant's business or property constitutes no ground for equitable interference, and is not sufficient reason for asking a court of equity to ascertain in advance whether the business as conducted is in violation of a penal statute ...."

43A C.J.S. Injunctions § 280 (2004) (footnote omitted).

This Court has recognized an exception to the general rule whereby the equitable powers of the court can be invoked to avoid irreparable injury when the plaintiff contends that the statute at issue is void. See Orr, 181 Ala. at 319-20, 61 So. at 924 ("This situation of the complainant, we think, ... brings [his case] fairly within that class of cases in which equity will intervene for the prevention of oppressive and vexatious litigation affecting property rights where it takes, or is about to take, the form of an effort to enforce a void municipal ordinance by means of repeated prosecutions thereunder." (emphasis added)). Such intervention by a court exercising equitable jurisdiction does not interfere with the orderly functioning of the executive branch within its zone of discretion in violation of the separation-of-powers doctrine

set forth at § 43 of the Alabama Constitution of 1901 ("In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."). The exercise of equitable jurisdiction in such cases is consistent with this Court's recognition of the propriety of actions against State officials in their official capacity to enjoin enforcement of a void law because such conduct--enforcing a void law--exceeds the discretion of the executive in administering the laws of this State. See, e.g., Aland v. Graham, 287 Ala. 226, 250 So. 2d 677 (1971) (permitting actions to enjoin State officials from enforcing an unconstitutional law).

The complaint in this action does not present a situation in which the plaintiff acknowledges that his conduct is prohibited by a statute and then challenges the enforceability of the statute. To the contrary, VictoryLand strenuously

maintains its innocence. Entertainment of a civil action for injunctive and declaratory relief under such circumstance cannot be countenanced lest the trial court become involved in a role that should be left to the fact-finder in a criminal proceeding following a plea of not guilty. The circumstance presented in Walker v. City of Birmingham, 216 Ala. 206, 208-09, 112 So. 823, 825 (1927), is distinguishable because the issue presented in that case was the lack of authority of a municipal official to deny arbitrarily a license to operate a dairy farm, activity beyond the discretion of the official, and did not deal with an injunction against enforcement of the criminal laws.

This principle has ample footing in our precedent in those cases where the issue of subject-matter jurisdiction has been considered. See Eastburn v. Holcombe, 243 Ala. 433, 434, 10 So. 2d 457, 458 (1942) ("It is a sound principle of law, well recognized in our decisions, that a court of equity will not intervene to restrain officers from the enforcement of criminal statutes, the constitutional integrity of which have been sustained, especially where, as here, the statute itself affords a full hearing in the courts. Higdon v. McDuff, 233

Ala. 497, 172 So. 636, 637 [(1937)]; Fisher v. McDuff, 233 Ala. 499, 172 So. 637 [(1937)]; Ex Parte State, 200 Ala. 15, 75 So. 327 [(1917)]."). Under such a circumstance, there is no basis on which to find irreparable injury. See also Kennedy v. Shamblin, 234 Ala. 230, 231, 174 So. 773, 774 (1937):

> "As the averments of the bill show, the only property rights involved are such as the complainant has in said slot machines, in which he has invested his money and the profits which said machines are taking. And the only ground on which he invokes the injunctive protection of the court is that said machines are not within the interdiction of the statute.
>
> "Courts of equity do not extend their aid to the protection of such property rights, unless authorized by statute, but leave such matters to the court of criminal jurisdiction. Ex parte State ex rel. Martin, 200 Ala. 15, 75 So. 327 [(1917)].
>
> "Moreover, the statute, the enforcement of which the complainant seeks to enjoin, provides a remedy for the protection of complainant's property rights and an adjudication in respect thereto. Caudell v. Cotton, Sheriff (Ala. Sup.) 173 So. 847 [(1937)]; Hidgen v. McDuff, Sheriff, 233 Ala. 497, 172 So. 636 [(1937)]; Fisher v. McDuff, Sheriff, 233 Ala. 499, 172 So. 637 [(1937)]."

(Emphasis added.)

VictoryLand states, with no explanation and no citation to any authority, that it will be provided no due process of

law in a civil-forfeiture proceeding. At this point, nothing before us indicates that the procedures to be used in a forfeiture proceeding will be inadequate to protect VictoryLand's due-process rights. Nor are we impressed by the contention that the prospect for Tyson's resort to a civil court to enforce a seizure of property pursuant to § 13A-12-30, Ala. Code 1975, a provision found in the Criminal Code, confers jurisdiction on a civil court to enjoin Tyson's attempt to enforce provisions of the criminal law.

We recognize that in Barber v. Cornerstone Community Outreach, Inc., [Ms. 1080805, November 13, 2009] ___ So. 3d ___ (Ala. 2009), and Barber v. Jefferson County Racing Association, Inc., 960 So. 2d 599 (Ala. 2006), where the plaintiffs sought to block enforcement of a statute in the Criminal Code without acknowledging that their conduct fell within the statutory prohibition and without an accompanying prayer for a judgment declaring the statute invalid, we did not adhere to the boundary lines long established in our precedent. In those cases the issue was not raised. Our absence of attention to the issue of subject-matter jurisdiction in those cases cannot justify action by the

judiciary in this case in contravention of our duty to observe the proper boundaries between judicial and executive functions mandated by § 43 of the Alabama Constitution of 1901 and, thereby permit, sub silentio, the overturning of the settled principles of constitutional law applicable to this proceeding.

Justice Woodall's dissenting opinion would perpetuate the disorderly practice of permitting those threatened with criminal prosecution to seek relief in civil proceedings, without alluding to the long line of cases from which this Court departed in the recent past when such action was permitted. The time has come to return to the sounder course dictated by our established precedent, rather than continue down the wrong road because of timidity in admitting that we had done so. To call this alternative a circus, as the dissenting opinion suggests, ignores the reality that in the many years of adherence to wise and settled principles limiting our jurisdiction in such cases we were not embroiled in repeated efforts to frustrate enforcement of the criminal laws by attempts to pursue preemptive civil proceedings.

As we stated recently in an order entered in the case of Barber v. Houston County Economic Development Association (No. 1090444, January 15, 2010), the trial court "lacks subject-matter jurisdiction to interfere with a criminal proceeding by civil action." As in that case, we vacate the order before us, dismiss the action, and dismiss the appeal.

ORDER VACATED; ACTION DISMISSED; APPEAL DISMISSED.

Lyons, Stuart, Bolin, Parker, and Shaw, JJ., concur.

Smith, J., concurs specially.

Murdock, J., concurs in the rationale in part and concurs in the result.

Cobb, C.J, and Woodall, J., dissent.

SMITH, Justice (concurring specially).

I write separately to express my basis for joining the main opinion. As I understand it, the main opinion rests on the conclusion that the "'only effect [of the declaratory-judgment action filed by Macon County Greyhound Park, Inc., d/b/a VictoryLand (hereinafter "VictoryLand"),] would be to decide matters which properly should be decided in a criminal action.'" ___ So. 3d at ___ (quoting 22A Am. Jur. 2d Declaratory Judgments § 57 (2003) (emphasis added)). That conclusion, in turn, rests on the conclusion that VictoryLand's declaratory-judgment action is solely an attempt to use a civil proceeding to interfere with a criminal investigation.

I do not read the main opinion as holding that the trial court would be without subject-matter jurisdiction to entertain an action, such as the action filed in State ex rel. Tyson v. Ted's Games Enterprises, 893 So. 2d 355 (Ala. Civ. App. 2002), aff'd, Ex parte Ted's Games Enterprises, 893 So. 2d 376 (Ala. 2004), in which it cannot be said that the action is solely an attempt to use a civil proceeding to interfere with a criminal investigation.

MURDOCK, Justice (concurring in the rationale in part and concurring in the result).

I agree with almost all aspects of the main opinion. I find it unnecessary in deciding this case, however, to conclude that a plaintiff must concede that his or her conduct satisfies the elements of a criminal statute in order to seek equitable or declaratory relief on the different ground that the statute is void on its face or that, for some other reason, the actions or threatened actions sought to be restrained fall outside that generous measure of discretion afforded by the constitution to the executive in regard to criminal law enforcement.

In this case, any error in judgment as to whether VictoryLand's conduct or the machines in question fall within the strictures of our criminal statutes pertaining to gambling and gambling devices does not place the law-enforcement activity at issue here outside the parameters of the discretion delegated to the executive under our constitution. It is the fundamental concern for the protection of that discretion that informs the general rule against the use of a civil action to interfere with efforts by the executive relating to the enforcement of criminal and quasi-criminal

laws. See Piggly Wiggly No. 208, Inc. v. Dutton, 601 So. 2d 907, 910-11 (Ala. 1992); Fitts v. McGhee, 172 U.S. 516, 531-32 (1899).

In addition, I write separately in regard to certain aspects of the dissenting opinion. I am not persuaded at this juncture that the decision in State ex rel. Tyson v. Ted's Game Enterprises, 893 So. 2d 355 (Ala. Civ. App. 2002), aff'd Ex parte Ted's Game Enterprises, 893 So. 2d 376 (Ala. 2004), is not distinguishable for the reason that, in that case, there was a seizure of contraband by law-enforcement officials, the filing of a forfeiture action with respect to that contraband, and the inclusion in that forfeiture action of a request by the executive for a declaratory judgment relating thereto. I note the dissent's comment that there is no authority to support a rule of law that would prevent an actual or prospective criminal defendant from using a civil action to interfere with law-enforcement activity if such an action is available to the executive in aid of law-enforcement activity. If the law is indeed as posited, I would point to the description above of the fundamental concern that informs the general rule and § 43 of the Alabama Constitution.

WOODALL, Justice (dissenting).

In recent years, Alabama appellate courts have exercised jurisdiction in cases distinguishable in no material respect from this case. In those cases, not a single Judge or Justice has questioned the subject-matter jurisdiction of the trial court. The Court's departure today from that practice is, in my opinion, unnecessary and, under the facts of this case, unfair to Macon County Greyhound Park, Inc., d/b/a VictoryLand ("VictoryLand"), whose duly licensed bingo operation is at risk of irreparable harm because of a difference of opinion between the Macon County law-enforcement officials and the commander of Governor Riley's Task Force on Illegal Gambling, John M. Tyson, Jr. Therefore, I respectfully dissent.

The majority does not discuss State ex rel. Tyson v. Ted's Game Enterprises, 893 So. 2d 355 (Ala. Civ. App. 2002), aff'd, Ex parte Ted's Game Enterprises, 893 So. 2d 376 (Ala. 2004). In that case, it was Tyson, then acting as district attorney of Mobile County, who invoked the civil jurisdiction of the Mobile Circuit Court by seeking "a judgment declaring that ... machines owned and distributed by Ted's [were] illegal 'slot machines' and 'gambling devices' under Alabama's

criminal gambling statutes." Tyson, 893 So. 2d at 358. In its opinion, which rendered a judgment in favor of the State, the Court of Civil Appeals held that "the State's right to seek a declaratory judgment with respect to [such] matters" was "particularly appropriate" given "the invasive power the State wields when it seeks to enforce statutory provisions against its citizens." Tyson, 893 So. 2d at 362. In so holding, the court was well aware that "[t]he trial court's entry of a judgment adverse to the State [would], if not reversed ..., have an adverse impact on how the State enforces the criminal gambling statutes as to other machines." Tyson, 893 So. 2d at 362 n.5. I am aware of no authority that would allow one party to a dispute to seek a resolution of that dispute through a declaratory-judgment action, while denying that same right to the other party to the dispute. In other words, if Tyson had that right, so does VictoryLand.

This Court's decision in Barber v. Jefferson County Racing Ass'n, Inc., 960 So. 2d 599 (Ala. 2006), is consistent with this Court's affirmance of the Court of Civil Appeals' judgment in Tyson. One of the parties in that case was David Barber, who was then acting as district attorney for the Tenth

Judicial Circuit of Alabama and who preceded Tyson as the commander of the Governor's task force. In pertinent part, the issue in Barber was whether devices being operated at the Birmingham Race Course "involve[d] the use of slot machines." 960 So. 2d at 603. In the trial court, the race-track operator "sought a judgment ... declaring that its [Quincy's] MegaSweeps operation was lawful and ... enjoining [the sheriff] from interfering with its MegaSweeps operation." 960 So. 2d at 602. Barber intervened in that civil action and filed a counterclaim for declaratory and injunctive relief, taking the position that the MegaSweeps operation involved illegal gambling devices and should be permanently enjoined. The trial court entered a judgment declaring that the MegaSweeps operation was legal and enjoining the sheriff from interfering with it. Barber then appealed to this Court, which, in a unanimous decision, reversed the judgment of the trial court and rendered a judgment in favor of Barber. No party and no member of this Court questioned the subject-matter jurisdiction of the trial court or the jurisdiction of this Court to address the legality of the devices in question.

Barber, acting in his capacity as the commander of the Governor's task force, later obtained relief from this Court in Barber v. Cornerstone Community Outreach, Inc., [Ms. 1080805, November 13, 2009] ___ So. 3d ___ (Ala. 2009). This Court denied rehearing in that case on the same day that Tyson filed his emergency motion to stay in this case claiming that the trial court had no subject-matter jurisdiction. Cornerstone arose from a declaratory-judgment action filed by the operator of a bingo-gaming facility, seeking, "among other things, a declaratory judgment and preliminary and permanent injunctive relief regarding the seizure of the electronic gaming machines by the Task Force." ___ So. 3d at ___. The trial court entered a preliminary injunction ordering the return of the property that had been seized and enjoining any further interference with the bingo operation during the pendency of the action. Barber, Governor Riley, and other members of the task force appealed, and this Court reversed the order entering the preliminary injunction and remanded the case for further proceedings. If this Court had determined that the trial court lacked subject-matter jurisdiction, it would have vacated its order, dismissed the case, and

dismissed the appeal. No party and no member of this Court questioned the subject-matter jurisdiction of the trial court to address the legality of the machines in question. Indeed, this Court relied on its decision in Cornerstone to reach its unanimous decision in Surles v. City of Asheville, [Ms. 1080826, January 29, 2010] ___ So. 3d ___ (Ala. 2010). In Surles, this Court ruled in favor of the sheriff of St. Clair County, holding that an ordinance adopted by the City of Asheville "provides for the operation of games that extend beyond the permissible definition of bingo," __ So. 3d at ___, as defined in Cornerstone.

In this case, VictoryLand seeks, in pertinent part, preliminary injunctive relief preventing the task force from interfering with the bingo gaming it operates pursuant to licenses issued by the sheriff of Macon County pending a judgment declaring whether its machines meet the definition of bingo adopted in Cornerstone and applied in Surles. This is the same type of relief sought by the plaintiffs in both Barber and Cornerstone. In other words, VictoryLand, faced with a disagreement between the Macon County law-enforcement officials and the task force as to the legality of

VictoryLand's operation, merely seeks to preserve the status quo until the Macon Circuit Court resolves the issue. In my opinion, allowing it to do so is consistent with the authorities I have cited and is the only means of resolving this dispute in a manner that is fair to all concerned.

The purpose of the Declaratory Judgment Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations and [it] is to be liberally construed and administered." § 6-6-221, Ala. Code 1975. The State has sought a declaratory judgment where the entry of a judgment adverse to it could "have an adverse impact on how the State enforces the criminal gambling statutes." Tyson, 893 So. 2d at 362 n.5. The "Declaratory Judgment Act was designed to supply the needs of a form of action that will set controversies at rest before they lead to repudiation of obligations, the invasion of rights, and the commissions of wrongs." Thompson v. Chilton County, 236 Ala. 142, 144, 181 So. 2d 701, 703 (1938)(emphasis added). VictoryLand is certainly faced with "uncertainty and insecurity" regarding the legal status of its bingo operation,

and the task force's seizure of its machines could possibly amount to an "invasion of [its] rights."

It is true that "[i]njunctive relief ... will not be granted 'merely to allay an apprehension of possible injury; the injury must be imminent and irreparable in an action at law.' Carson v. City of Prichard, 709 So. 2d 1199, 1207 (Ala. 1998)." Ex parte Alabama Dep't of Mental Health, 837 So. 2d 808, 811 (Ala. 2002). As revealed by the task force's attempted raid and by Tyson's stated intent to return to the premises for the purpose of seizing the machines, it is clear that an injury is "imminent."

VictoryLand alleges in its verified complaint that an unlawful seizure of its machines would cause it irreparable injury. I agree. Although its property would have to be returned, see Rule 3.13(a), Ala. R. Crim. P., any such seizure would undoubtedly cause a loss of revenue, goodwill, and business reputation, losses that VictoryLand could not recover from the sovereignly immune State.

Today's decision casts a cloud upon this Court's prior decisions, as well as numerous trial court judgments addressing the legality of various bingo operations. What has

been an orderly process, I suspect, will soon resemble a three-ring circus.

Cobb, C.J., concurs.