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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2015-000292

South Carolina Department of Revenue .....Respondent,

v.

Meenaxi, Inc., d/b/a Corner Mart.....Appellant.

FINAL REPLY BRIEF

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The Court of Appeals may reverse or modify the Administrative Law Court's ("ALC's") decision if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law. *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (S.C. Ct. App. 2008). *South Carolina Department of Revenue, et. al. v. Sandalwood Social Club,* 399 S.C. 267, 731 S.E.2d 330 (Ct. App. 2012). Judge Durden's finding that Appellant violated S.C. Code § 61-4-580(5) and that revocation of Appellant's license was the appropriate remedy were clearly erroneous, were not supported by the evidence presented before her, and constituted an abuse of discretion and should be overturned/reversed by this Court.

ARGUMENT

I. THE RESPONDENT FAILED TO PURSUE THIS ACTION AGAINST THE CORRECT PARTIES

As the initiating party in this proceeding, the Respondent carries the burden of proof, specifically to ensure that this action is brought and prosecuted against the correct entities/parties. In this case the Respondent failed to bring this action against the correct license holders, not only resulting in prejudice to the Appellant, but also in violation of the Appellant's due process rights. The Trial Judge erred in failing to grant Appellant's Motion to dismiss this action.

The evidence introduced at the hearing before Judge Durden clearly shows that the license in question was held by Malkesh Patel and Meenaxi, Inc. This fact was supported by the license itself as well as the testimony of Mr. Patel. (R. pp. 126, ll. 6-8;

166). While the Respondent argues that Malkesh Patel was "obviously mistaken," in his testimony as to the correct holder of the license, his testimony is consistent with the information contained on the license itself. (R. p. 166). Mr. Patel's name, as well as Meenaxi, Inc., appear on the license as the license holders, and not as any contact person, as asserted incorrectly by the Respondent. While the Respondent goes to great lengths to argue that the license cannot be held by more than one "person" or "entity," the license in this case was clearly issued to both Malkesh Patel and Meenaxi, Inc. (R. p. 166). Neither entity was made a party to this action at any time during these proceedings. Therefore the Trial Court erred in failing to grant Appellant's Motion to Dismiss.

II. THE TRIAL COURT ERRED BY FINDING AND CONCLUDING AS A MATTER OF LAW THAT THE APPELLANT KNOWINGLY PERMITTED A CRIMNAL ACT ON ITS PREMISES

A. Judge Durden's Order Not Supported by Evidence Presented at Hearing

S.C. Code § 61-4-580(5) provides that a holder of an off premises beer and wine permit is prohibited from knowingly allowing any criminal act to occur on licensed premises. The Respondent failed to meet its burden of establishing that Appellant violated S.C. Code § 61-4-580(5) by knowingly allowing a criminal act to occur on its premises. The Order of the Administrative Law Court should be reversed by this Court.

1. Respondent failed to meet their burden to establish that the machines were illegal

The Respondent failed to meet its burden of proof to establish that the machines at issue in this case were, in fact illegal. The machines were not available at the hearing before Judge Durden. Further, the evidence presented at trial was insufficient to

establish that the machines were, in fact illegal, an assumption that the Respondent makes throughout its Brief.

The agent who seized the machines did not turn them on and actually play them. Similarly, Judge Lollis, the Magistrate whose order is relied upon by the Respondent in this case, never turned the machines on, nor did he play them. (R. pp. 73, ll. 6-14; 75, ll. 10-25; 76, ll. 7-10, 14-18). At no time did anyone who determined these machines to be illegal actually turn them on and play them. Instead, they merely assumed that they were, in fact, illegal. By the time that the matter came before Judge Durden, the machines had been destroyed, making any extensive investigation impossible. The evidence presented to the Administrative Law Judge was simply insufficient to determine that the machines were, in fact, illegal. While Respondent continuously refers to the machines throughout its Brief as "illegal gaming machines," the evidence presented at the hearing was insufficient for anyone, including the Court, to make this determination.

2. Respondent failed to prove that the Appellant knowingly violated SC Code Ann. 61-4-580(c)

The Administrative Law Court erred in finding as a matter of law that Appellant violated S.C. Code Ann. § 61-4-580(5). The machines at issue in this appeal were owned by a third party, Encore Entertainment ("Encore"). Mr. Patel testified that at the time Encore placed them in his store he did not know how they operated. (R. p. 127, ll. 12-22). He testified on several occasions that he believed these machines were legal when they were placed in his store. (R. p. 128, ll. 8-18). He was informed by the owner of the machines that they were legal. He was provided with a copy of a Court Case from Greenville County stating that they were legal. This decisión was placed inside the machine. (R. p. 128, ll. 19-22). He testified that based on the information provided by

the owner (including the Court Order) he concluded that the machines were legal. Mr. Patel testified that he relied upon the information provided to him by the owner and the Court Order when he allowed the machines to be placed in his store. (R. pp. 28, l. 5-8; 130, l. 16 - 131, l. 5). The machines were actually licensed by Respondent South Carolina Department of Revenue and had a South Carolina Department of Revenue sticker attached to them. (R. p. 134, ll. 15-25). He testified that he would not have allowed them into his store had he known that they were illegal. (R. p. 129, ll. 10-16).

Mr. Patel testified that sometime after the machines were placed he learned that law enforcement was taking the position that the machines were, in fact, illegal. Although he still believed them to be legal, he unplugged the machines after learning of this position. (R. p. 129, ll. 17-25). This testimony was collaborated by Agent Bielawski who testified that the machines were unplugged when he came into the store and that there was no money in them. (R. p. 104, ll. 11-15). Mr. Patel testified that he did not allow anyone to play them and called the owner to come pick them up. (R. p. 130, ll. 1-12).

The evidence presented before the ALC clearly establishes that the Appellant did not know the machines at issue in this case were, in fact, illegal when he allowed them to be placed in the store. Therefore, the Respondent failed to meet its burden that Appellant violated Code Section 61-4-580(c) by allowing them to be placed on his premises.

The Trial Judge ruled as a matter of law that the machines at issue did not meet the "exceptions" or "safe harbor" provision contained in S.C. Code Ann. § 61-4-580(3). S.C. Code Ann. § 61-4-580(3) is clearly a "safe harbor" provision for promotional chance games which meet the criteria set forth in Section 580(3), subparts (a), (b) and (c). It is

well settled under South Carolina law that Statutes should be read together in order to produce a harmonious result. See, *Joiner ex. Rel. Rivas v. Rivas,* 342 S.C. 102, 536 S.E.2d 372 (2000). Further, when construing two statutes together, a more specific statute should be considered an exception to a more general one. See, *Denman v. City of Columbia,* 387 S.C. 131, 691 S.E.2d 465 (2010). In this case, the specific statute (S.C. Code Ann. 61-4-580(3)) should be considered an exception to the more general one (S.C. Code Ann. 12-21-2710). Finally, the fact that S.C. Code Ann. 61-4-580(3) serves as an exception of safe harbor to Section 12-21-2710 has been recognized on two occasions by the South Carolina Supreme Court, Justice Pleicones' dissent in the case of *Sunlight Prepaid Phone Card Co., Inc. v. State,* 360 S.C. 49, 600 S.E.2d 61 (2004) and in the case of *Ward v. West,* 387 S.C. 268, 692 S.E.2d 516 (2010).

The Trial Court based its finding that the machine at issue fell outside of these exceptions because payment "was clearly required" in order to play the games contained on the machines and further that the coupons provided to individuals playing the machines "lacked value" and were a "...thinly veiled artifice designed to conceal the fact that payout was made solely to play the games." (R. pp. 1-7). As set forth in the Appellant's Brief, these findings are clearly erroneous and not supported by the relevant, admissible evidence presented at trial.

The Court's finding that the exception of S.C. Code Ann. § 61-4-580(3) were inapplicable to the facts of the case was not supported by the evidence presented to her at trial. Her findings to the contrary should be reversed by the Court.

III. THE TRIAL COURT ERRED IN RULING THAT AGENT BIELAWSKI'S SEARCH WAS PROPER

The Trial Court erred in ruling that the Appellant's Due Process rights were not violated by Agent Bielawski's search of the Corner Mart on or about February 26, 2013. While S.C. Code Ann. §§ 61-4-230 and 61-6-4190 give SLED the right to enter a premises and perform an inspection, this right is not absolute.

The Respondent relies upon the "permission" that was given by Ms. Ursula Dean. There was no evidence presented to the Trial Judge as to who actually employed Ms. Dean. While Judge Durden (and the Respondent) assume and assert that Ms. Dean was an employee of Appellant and therefore a person who could give "permission" for a search, there was no evidence presented at trial as to who actually employed her. Therefore, any "permission" given by her - if such permission was actually given - would not serve to "rescue" the improper search conducted by the SLED agent in this case.

Further, the "plain view" "exception" does not save this illegal search. While the machines themselves were in plain view of the SLED agent, the agent exceeded the scope of any permissible search when he turned them on. Therefore, the search was improper and the Trial Judge erred in finding and ruling that Appellant's rights were not violated by this improper search.

IV. THE ADMINISTRATIVE LAW COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT THE APPROPIATE PENALTY FOR APPELLANT'S VIOLATION WAS A REVOCATION OF ITS LICENSE

"The court of appeals may reverse or modify the decision only if the appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." *SGM-*

Moonglo, Inc. v. S.C. Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (S.C. Ct. App. 2008). "Substantial evidence is evidence that, when viewing the record as a whole would allow reasonable minds to reach the same conclusion the ALC arrived at in justifying its decision." *South Carolina Coastal Conservation League v. S. C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 362, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008) (internal citations omitted).

The harsh penalty imposed in this case by the Administrative Law Judge, revocation of the Appellant's off premises beer and wine permit in this case, was excessive, unreasonable and unsupported by the facts surrounding the violation. Mr. Malkesh Patel testified on several occasions during the hearing that he always tried to operate his business legally and would not have done anything to violate the law with respect to the operation of his store. (R. pp. 126, ll. 3-5; p. 127, ll. 9-11). The machines at issue in this appeal were owned by a third party, Encore Entertainment ("Encore") (not a party to this appeal). At the time of the SLED visit (discussed below), they had only been on premises for 3 to 6 months. (R. p. 127, ll. 12-17).

Mr. Patel testified that at the time Encore placed them in his store he did not know how they operated. Mr. Patel testified that he had never operated these machines. (R. p. 127, ll. 12-22). He testified on several occasions that he believed these machines were legal when they were placed in his store. (R. p. 128, ll. 8-18). He was informed by the owner of the machines that they were legal. He was provided with a copy of a Court Case from Greenville County stating that they were legal. (R. p. 128, ll. 19-22). He testified that based on the information provided by the owner (including the Court Order), he concluded that the machines were legal. Mr. Patel testified that he relied upon the

information provided to him by the owner and the Court Order (a copy of which was actually in the machine) when he allowed the machines to be placed in his store. (R. pp. 28; 130, l. 16. - 131, l. 5). The machines were actually licensed by the Respondent South Carolina Department of Revenue and had a South Carolina Department of Revenue sticker attached to them. (R. p. 134, ll. 15-25). He testified that he would not have allowed them into his store had he known that they were illegal. (R. p. 129, ll. 10-16).

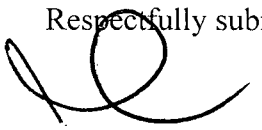
Mr. Patel testified that sometime after the machines were placed he learned that law enforcement was taking the position that the machines were, in fact illegal. Although he still believed them to be legal, he unplugged the machines after learning of this position. (R. p. 129, ll. 17-25). He did not allow anyone to play them and called the owner to come pick them up. (R. p. 130, ll. 1-12).

The penalty imposed by the Administrative Law Court was excessive, unreasonable and not supported by the evidence presented at Trial. The Court's Order imposing this excessive penalty should be reversed by this Court.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the Administrative Court Judge.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCAR.

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PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, PA, certify that I have served the Appellant's Final Reply Brief on counsel of record for Respondent in this action by depositing a copy of same in the United States Mail, postage prepaid, on September 10, 2015, addressed as follows:

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West Columbia, South Carolina
September 10, 2015