

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001282-MR

GREATER ST. MARKS MISSIONARY
BAPTIST CHURCH

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 97-CI-01150

DIVISION OF CHARITABLE GAMING,
JUSTICE CABINET

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Greater St. Marks Missionary Baptist Church (St. Marks) appeals from an order entered by the Franklin Circuit Court on April 30, 1998, which affirmed an order of the Justice Cabinet revoking St. Marks charitable gaming license. We affirm.

On March 28, 1997, the Justice Cabinet's Division of Charitable Gaming (the Cabinet) filed an administrative complaint seeking to revoke St. Marks' charitable gaming license. The Cabinet alleged that St. Marks had failed to retain 40% of the adjusted gross receipts from its bingo operation for the third and fourth quarters of 1996 as required by KRS 238.550(4). By

order of the Cabinet entered April 8, 1997, a hearing was set for May 1, 1997, and St. Marks was advised of the allegations against it and informed that it had the right to be represented by counsel at the hearing.

On the day of the hearing, St. Marks appeared pro se, and while it called witnesses on its own behalf, it did not cross-examine the witness for the Cabinet. The evidence produced at trial clearly showed that St. Marks was not in compliance with KRS 238.550(4). In a recommended order entered June 19, 1997, the hearing officer found that St. Marks was not in compliance with KRS 238.550(4), and that under KRS 238.535(12) he had no alternative but to recommend that the license be revoked. St. Marks was advised in the recommended order that it had fifteen days from the date of the order to file exceptions to the recommendation. St. Marks did not file any exceptions, and its license was revoked by a final order of the Cabinet entered July 17, 1997. The final order was affirmed by an order of the trial court entered April 28, 1998, and this appeal followed.

St. Marks contends that it did not have adequate representation at the hearing because it appeared pro se. St. Marks further alleges that the decision of the Cabinet was arbitrary and capricious because "all facts were not known to the fact finder" therefore a new hearing is required. Both arguments are entirely without merit.

First, we note that the decision to appear pro se was entirely that of St. Marks. St. Marks was duly advised by the Cabinet of its right to appear at the hearing with counsel but

chose not to do so. Having made that decision, St. Marks cannot be heard to complain now about its representation.

St. Marks' argument regarding the facts placed before the fact finder is equally without merit. A review of the hearing transcript shows that St. Marks was given ample opportunity to place facts into evidence to counter the allegations against it. St. Marks urges us to go beyond the record to consider these additional facts, but we decline to do so for two reasons. First, under KRS 13B.150, a review of a final order in an administrative hearing "shall be confined to the record, unless there is fraud or misconduct." St. Marks freely admits in its brief that there was no fraud or misconduct on behalf of the Cabinet or hearing officer. Secondly, despite St. Marks' protestations to the contrary, this Court is clearly precluded from considering matters which do not appear in the record on appeal. Jackson v. Jackson, Ky. App., 571 S.W.2d 90, 93 (1978).

Finally, St. Marks contends that the Cabinet's decision violated constitutional and statutory provisions and was in excess of the Cabinet's statutory authority. Without discussing the merits of St. Marks' arguments, we find that we cannot address these issues.

In regard to St. Marks' argument concerning the constitutionality of KRS 238.550(4), we note that the record shows that St. Marks did not advise the Kentucky Attorney General of its constitutional challenge as required by KRS 418.075. "Unless the record shows that the requirements of KRS 418.075

have been observed, any judgment rendered which decides the constitutionality of a statute shall be void." Maney v. Mary Chiles Hospital, Ky., 785 S.W.2d 480, 482 (1990).

Secondly, we note that St. Marks failed to raise these issues either before the hearing officer or in exceptions to the recommended order. "Trial courts should first be given the opportunity to rule on questions before those issues are subject to appellate review." Swatzell v. Commonwealth, Ky., 962 S.W.2d 866, 868 (1998). Where an issue is not first presented to the trial court for a ruling, there is no error for this Court to review. Kaplon v. Chase, Ky. App., 690 S.W.2d 761, 763 (1985).

Having considered the parties' arguments on appeal, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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