RENDERED: JULY 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000470-MR

GREG SHAW — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE JULIA H. ADAMS, SPECIAL JUDGE
ACTION NO. 09-CI-00608

TONY SALYER; THOMAS SKAGGS; LISHA POPPELWELL; LARRY BENNETT; VICTOR HILL; AND DARYL ROBERTSON — APPELLEES

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: Greg Shaw appeals from an order of the Russell Circuit Court setting aside a local option election conducted in the Lake and Jamestown precincts of Russell County, Kentucky. The circuit court cited two primary reasons for invalidating the election: 1) that Kentucky Revised Statute (KRS) 242.185(6), the statute under which the election was conducted, does not authorize

local option elections by precinct; and 2) that even had the local option election statute been properly invoked, the question put to the electorate in the two precincts did not substantially comply with the specific language required by the statute. Finding no error in either conclusion, we affirm the decision of the Russell Circuit Court.

Every resident of the city of Jamestown, Kentucky, resides in either the Lake or the Jamestown Precinct of Russell County, but not every resident of the Lake or Jamestown Precinct lives within the confines of the city of Jamestown. Proponents of the sale of alcohol beverages by the drink in certain restaurants petitioned for a local option election pursuant to KRS 242.185(6), which provides:

> In order to promote economic development and tourism, other provisions of the Kentucky Revised Statutes notwithstanding, **a city or county** in which prohibition is in effect may, by petition in accordance with KRS 242.020, hold a local option election on the sale of alcoholic beverages by the drink at restaurants and dining facilities which seat a minimum of one hundred (100) persons and derive a minimum of seventy percent (70%) of their gross receipts from the sale of food. The election shall be held in accordance with KRS 242.030(1), (2), and (5), 242.040, and 242.060 to 242.120, and the proposition on the ballot shall state **"Are you in favor of the sale of alcoholic beverages by the drink in (name of city or county) at restaurants and dining facilities with a seating capacity of at least one hundred (100) persons and which derive at least seventy percent (70%) of their gross receipts from the sale of food?"**. If the majority of the votes in an election held pursuant to this subsection are "Yes", licenses may be issued to qualified restaurants and dining facilities and the licensees may be regulated and taxed in accordance with subsections (4) and (5) of this section. [Emphases added.]

Despite a declaratory challenge to the propriety of the election in the precincts outside the city of Jamestown, the Russell Circuit Court concluded that the following question was to be placed upon the ballot in the Jamestown Precinct in the November 24, 2009, election:

> Are you in favor of the sale of alcoholic beverages by the drink in the Jamestown Precinct at restaurants and dining facilities with a seating capacity of at least 100 persons and which derive at least 70% of their gross sales from food, in order to promote economic development and tourism pursuant to KRS 242.125-1292, et seq.

An identical question was posed to the electorate of Lake Precinct, with only the identity of the precinct being changed. It is undisputed that the phrase "in order to promote economic development and tourism pursuant to KRS 242.124-1292, et seq." does not appear in the language prescribed in the statute.

The local option election produced a "no" vote within the city of Jamestown, but the proposition received a "yes" vote in each of the Lake and Jamestown Precincts. A post-election contest resulted in the order invalidating the local option election. In his appeal from that order, appellant Greg Shaw argues that the trial court erred in: 1) granting appellees additional time in which to complete their proof in the contest proceeding; 2) ruling that a precinct cannot conduct a local option election under KRS 242.185(6); (3) violating the principle of *res judicata* by invalidating the election; and (4) concluding that the ballot questions did not substantially comply with the statutory prescription. We find no merit in any of these contentions.

First, KRS 120.165(2) unequivocally authorizes the trial court to grant either party in an election contest a reasonable extension of time in which to complete its proof:

> The evidence in chief for the contestant shall be completed within thirty (30) days after service of summons; the evidence for the contestee shall be completed within twenty-five (25) days after filing of answer, and evidence for contestant in rebuttal shall be completed within seven (7) days after the contestee has concluded; **provided that for cause the court may grant a reasonable extension of time to either party.** [Emphasis added.]

The assessment of whether "cause" has been demonstrated is a matter addressed to the discretion of the trial court which we will not disturb absent a clear showing of abuse. No abuse has been demonstrated in this case, nor do we find any evidence of prejudice to appellant Shaw given the relatively short additional time granted. Thus, we cannot say the trial court erred in granting appellees a **reasonable** extension of time in which to complete their proof.

Similarly, we find no abuse of the doctrine of *res judicata* in the trial court's decision to invalidate the election. In support of his contention, Shaw argues that the pre-election declaratory judgment action which permitted the questions to be placed on the November 24th ballot conclusively determined the validity of conducting the local option election in the Lake and Jamestown Precincts. We agree with the analysis of the circuit court that because the pre-election declaratory action was not an adversarial proceeding, it cannot operate as a bar to a properly prosecuted post-election contest.

Turning now to the pivotal issues, we are convinced that the circuit court correctly determined: 1) that the plain language of KRS 242.185(6) limits its application to cities and counties and therefore the election conducted in the Lake and Jamestown precincts is invalid; and 2) even if it had been proper to conduct a precinct election under the statute, the addition of language not contained in the statute would have nevertheless required the local option election to be set aside.

KRS Chapter 242 provides a comprehensive mechanism for obtaining a local option vote concerning the sale of alcoholic beverages and permits a local option precinct vote in certain narrowly defined circumstances. For example, KRS 242.123 permits local option elections concerning the limited sale of alcoholic beverages in precincts containing a golf course and KRS 242.1242 provides for local option elections concerning the limited sale of alcoholic beverages in precincts containing a qualified historical site. KRS 242.185(6) however by its own terms limits the local option election for qualified restaurants to cities and counties.

A fundamental rule of statutory construction requires courts to interpret statutes by reference to the ordinary meaning of the words used by the legislature:

> We have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. A legislature making no exceptions to the positive terms of a statute is presumed to have intended to make none.

> Here, giving the words of the statute their literal meaning and adding no exceptions neither leads to absurdity nor to a wholly unreasonable conclusion. On the contrary, there appears to be bona fide reasons why the two-years statute is both sensible and reasonable.

Bailey v. Reeves, 662 S.W.2d 832, 834 (Ky. 1984) (internal citations omitted). In the instant case, we are required to defer to the General Assembly's judgment in determining the appropriate locus for a local option election and presume that there are "*bona fide* reasons" for limiting the application of KRS 242.185(6) to cities and counties.

Nor can we agree that the Kentucky Constitution compels a different result. Section 61 grants the General Assembly the exclusive authority to prescribe the means for taking the sense of the people as to the sale of alcoholic beverages. It does not require every local option election be conducted at the precinct level. So long as there is a rational basis for the legislation, it will not fail to pass constitutional muster. The legislature's determination that the sale of alcoholic beverages by the drink at qualified restaurants will serve to promote economic development and tourism in cities and counties constitutes just such a rational basis. Thus, the statute is not unconstitutional in its application.

Furthermore, even were we not constrained by the plain language of the statute, we would nevertheless agree with the trial court that the addition of language to that provided in the statute would require invalidation of the election. Contrary to Shaw's argument, this is not a case in which mere variations in the language used nevertheless substantially comply with the statutory proposition. As

noted by the trial court, the question posed in KRS 242.185(6) is "not confusing and does not invite enlargement or embellishment, however well intended." The language added in this case is not substantially the same as the statutory language because it introduces an additional element to the statutory question – whether the voter is in favor of promoting economic development and tourism – an element which is not germane to whether a voter is in favor of the sale of alcoholic beverages in qualified restaurants and dining facilities. The cases cited by Shaw are therefore distinguishable.

For all the foregoing reasons, we conclude that the well-reasoned judgment of the Russell Circuit Court must be affirmed.

Shaw's motion to advance this appeal is DENIED AS MOOT.

ALL CONCUR.

ENTERED: July 9, 2010

/s/ Janet L. Stumbo
JUDGE, COURT OF APPEALS

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