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SJC-13110

KELLIE PEARSON¹ & others² vs. SHERIFF OF BRISTOL COUNTY & another.³

Suffolk. November 1, 2021. - May 17, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Wendlandt,
& Georges, JJ.

Sheriff. Telephone. Imprisonment, Inmate telephone calls.

Certification of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.

Ian D. Roffman, Special Assistant Attorney General, for Sheriff of Bristol County.

Jason D. Frank for Securus Technologies, Inc.

James R. Pingeon for the plaintiffs.

Daniel Greenfield, of Illinois, Kathrina Szymborski, of New York, & Maggie Filler, for American Civil Liberties Union of Massachusetts & others, amici curiae, submitted a brief.

¹ Individually and on behalf of all others similarly situated.

² Roger Burrell, Brian Givens, and the Law Offices of Mark Booker, individually and on behalf of all others similarly situated.

³ Securus Technologies, Inc.

BUDD, C.J. The office of the sheriff of Bristol County (sheriff's office) contracted with a third-party vendor, Securus Technologies, Inc. (Securus), to provide inmate calling services in its correctional facilities. Pursuant to this contract, Securus paid to the sheriff's office a percentage of its monthly revenues and annual lump-sum amounts. The plaintiffs brought suit against the sheriff of Bristol County, Thomas M. Hodgson (sheriff), and Securus, alleging that the sheriff lacks authority to raise revenues for his office in this manner. The sheriff, joined by Securus, argued that the necessary authority may be found in St. 2009, c. 61, An Act transferring county sheriffs to the Commonwealth (2009 act).⁴

The United States District Court for the District of Massachusetts has asked this court by way of certified question the following:

"Did the Massachusetts Legislature, through the provisions of [St. 2009, c. 61, §§ 12 (a), 12 (c), 15, or G. L. c.] 127, § 3, taken separately or together, authorize the Bristol County Sheriff's Office to raise revenues for the Office of the Sheriff through inmate calling service contracts?"

For the reasons explained infra, we answer the question "yes."

⁴ We acknowledge the amicus brief submitted by the American Civil Liberties Union of Massachusetts, MediaJustice, and Worth Rises.

Background. 1. A brief history of county politics and the 2009 act. Historically, the offices of each of the Commonwealth's fourteen sheriffs were part of their respective county governments.⁵ Beginning in 1997, certain of those offices were transferred to the Commonwealth when the Legislature abolished their respective county governments (abolished counties).⁶ See G. L. c. 34B, §§ 1, 2; St. 1998,

⁵ Counties are "territorial subdivisions of the Commonwealth bounded and organized by the General Court for the convenient administration of some parts of government." County of Middlesex v. Waltham, 278 Mass. 514, 516 (1932). First created in 1643, county governments historically were responsible for the maintenance of county courts, registries of deed, jails and houses of correction, and county roads. 1961 Senate Doc. No. 580, at 54-55. In counties whose governments have not been formally abolished -- Barnstable, Bristol, Dukes County, Nantucket, Norfolk, Plymouth, and Suffolk -- general executive authority is vested in a panel of county commissioners who are elected or serve ex officio. See G. L. c. 34, § 4; G. L. c. 54, § 158. Among other responsibilities, county commissioners are charged with the care of county property and general management of the county's business and affairs. G. L. c. 34, § 14.

⁶ The county government system had long come under attack by those claiming that it was antiquated, plagued by financial crises, and riddled with debt. See, e.g., Letter to Senate and House Representatives from Governor William F. Weld and Lieutenant Governor Argeo Paul Cellucci, dated January 7, 1997, enclosing legislative proposal entitled "An Act abolishing county government," 1997 House Doc. No. 1256; Governor's Budget Recommendations for Fiscal Year 1998, 1997 House Doc. No. 1, at 8 (Governor's Message). Following a push by Governor Weld and his successor, Governor Cellucci, the Legislature abolished Middlesex County government in 1997. See St. 1997, c. 48, § 1; 1997 House Doc. No. 4736. The county governments of Berkshire, Essex, Franklin, Hampden, Hampshire, and Worcester soon met the same fate. See G. L. c. 34B, § 1; St. 1997, c. 48, § 1; St. 1998, c. 300, § 11.

c. 300, § 11. Pursuant to this new scheme, the Commonwealth is responsible for the "operation and management of the county jail and house of correction"; however, the sheriffs of the abolished counties retain "administrative and operational control over the office of the sheriff, the jail, and the house of correction," including "the procurement of supplies, services and equipment." G. L. c. 34B, §§ 4, 12. The offices of sheriffs in the remaining counties, including the Bristol County sheriff's office, continued to operate as part of their respective county governments.⁷

In 2008, when the collapsing national economy resulted in shortfalls in revenues from the deeds excise taxes⁸ that

⁷ Subsequent efforts to abolish the remaining county governments of Barnstable, Bristol, Dukes County, Nantucket, Norfolk, Plymouth, and Suffolk (remaining counties) did not gain sufficient traction against those who argued that they were efficient and provided important services. See Still Intact, For Now Counties Left Alone by Governor's Cuts, Boston Globe, Mar. 2, 2003.

⁸ Massachusetts imposes an excise tax on the transfer of any deed, instrument, or other writing whereby realty is conveyed to a purchaser. G. L. c. 64D, § 1. Prior to the passage of the 2009 act, a statutorily mandated percentage of the revenues derived from the collection of this tax in each of the remaining counties was allocated to a deeds excise fund for each remaining county. A percentage of each deeds excise fund was further allocated to a county correction fund for each remaining county, which was used to fund the operations of the offices of the sheriffs in the remaining counties. G. L. c. 64D, §§ 11, 13 (2000). The 2009 act abolished the county correction fund and reallocated the deeds excise fund to satisfy unfunded county pension and other benefit liabilities of retired employees in

comprised a primary source of funding for the offices of these remaining sheriffs, Governor Deval Patrick introduced legislation proposing that they too be transferred to the Commonwealth, rendering them agencies of the Commonwealth, without abolishing their county governments, in order to "promote more efficient government" and "provide more stable and predictable budgeting for the transferred sheriffs' offices." 2008 House Doc. No 4498 (2008 bill). Among other things, the 2008 bill proposed that "all revenues received with respect to programs, functions or activities of the office of the sheriff shall be paid to the state treasurer." Id. at § 5. This bill was not adopted.

The next year, after "extensive discussion with the seven county sheriffs and others," Governor Patrick introduced a revised bill, again proposing the transfer of the seven remaining sheriffs' offices to the Commonwealth. 2009 Senate Doc. No. 7 (2009 bill). Unlike the 2008 bill, the 2009 bill provided specific guidance regarding the posttransfer status of various administrative functions, duties, and obligations of the offices of the remaining sheriffs; clarified the status of the employees in those offices; and allocated responsibility for funding unfunded county pension liabilities and management of

the office of a sheriff. See St. 2009, c. 61, § 2 (repealing G. L. c. 64D, § 13, which established county correction fund).

employee insurance and retirement benefits. See, e.g., id. at §§ 6, 7, 9, 10, 14, 18-21. The final version, "An Act transferring county sheriffs to the Commonwealth," enacted in August 2009, transferred "all functions, duties and responsibilities" of the offices of the sheriffs in the remaining counties, including in Bristol County, along with all assets, valid liabilities and debts, property, leases, and contracts, from their respective counties to the Commonwealth.⁹ St. 2009, c. 61, §§ 4, 6, 7 (a), 9. The transferred offices retained "administrative and operational control over the office of the sheriff, the jail, the house of correction and any other occupied buildings controlled by a transferred sheriff upon the effective date of [the] act." Id. at § 15. Revenues for "civil process, inmate telephone and commissary funds" would remain with each transferred office, and any sheriff who had "developed a revenue source derived apart from the state treasury" was permitted to retain that funding. Id. at § 12 (a), (c).

⁹ The 2009 act is a special act, meaning it has not been codified in the General Laws. A special act typically refers to "legislation addressed to a particular situation, that does not establish a rule of future conduct with any substantial degree of generality, and may provide ad hoc benefits of some kind for an individual or a number of them." Concord v. Water Dep't of Littleton, 487 Mass. 56, 59 n.3 (2021), quoting Commissioner of Pub. Health v. Bessie M. Burke Memorial Hosp., 366 Mass. 734, 740 (1975). A special act has the "same force and effect as a General Law." Desrosiers v. Governor, 486 Mass. 369, 381 n.21 (2020), cert. denied, 142 S. Ct. 83 (2021).

2. The contract with Securus. The facts relevant to the certified question are undisputed. In May 2011, pursuant to its procurement policy and 801 Code Mass. Regs. §§ 21.00 (2003),¹⁰ the sheriff's office issued a request for response (RFR) soliciting bids for an inmate and public calling system at its correctional facilities. The RFR required bidders to meet technical and system management specifications and provided that the sheriff's office would not bear the cost of installing or maintaining the telephone system. It further required bidders to propose site commissions¹¹ payable to the sheriff's office

¹⁰ The Commonwealth's "Policy Governing the Procurement of Commodities and/or Services" provides, to the office of each sheriff that adopts the policy, uniform rules and standards governing the procurement of commodities and services. This policy aims to ensure that any procurements are in the best interest of, or best value to, the office of a sheriff. The sheriff's procurement policy is consistent with the Commonwealth's regulations for the procurement of commodities or services, 801 Code Mass. Regs. §§ 21.00.

¹¹ "Site commissions" are "any form of monetary payment, in-kind payment, gift, exchange of services or goods, fee, technology allowance, or product that a Provider of Inmate Calling Services or affiliate of a[] Provider of Inmate Calling Services may pay, give, donate, or otherwise provide to an entity that operates a correctional institution, an entity with which the Provider of Inmate Calling Services enters into an agreement to provide [Inmate Calling Services], a governmental agency that oversees a correctional facility, the city, county, or state where a facility is located, or an agent of any such facility." 47 C.F.R. § 64.6000(t). The sheriff's office is not alone in requiring its inmate calling services provider to pay "site commissions" in the form of monetary payments or allowances. See Global Tel*Link v. Federal Communications Comm'n, 866 F.3d 397, 404, 413 (D.D.C. 2017) ("In awarding contracts to [inmate calling services] providers, correctional

based on a percentage of the revenue the bidder would receive from operating the telephone system and encouraged them to include and pay the salary of two on-site administrators. Three companies submitted bids.

In August 2011, the sheriff's office awarded Securus a contract for the provision of a coinless inmate and public telephone system in its correctional facilities. The contract provided, among other things, that Securus would pay the sheriff's office site commissions.¹² The parties represent that the cost of inmate telephone calls is borne exclusively by call recipients, who either may receive (and pay for) collect calls from inmates or establish an account with Securus from which the cost of calls received will be deducted.

facilities usually give considerable weight to which provider offers the highest site commission, which is typically a portion of the provider's revenue or profits. . . . [S]ite commissions obviously are costs of doing business incurred by [inmate calling services] providers").

¹² Under the original contract, the site commissions were comprised of a percentage of Securus's monthly revenues from the inmate calling services as a commission, annual funding for two on-site administrators, and annual funding for technology expenditures. Of the three bidders, Securus proposed the lowest commission percentage and was the only bidder that agreed to provide funding for technology expenditures or specified funding for the on-site administrator positions. In 2015, Securus ceased paying commissions as percentage of revenue entirely but continued to provide the sheriff's office with annual funding for the on-site administrator positions and the technology budget.

3. Procedural posture. In May 2018, the plaintiffs commenced a putative class action in the Superior Court against the sheriff and Securus, alleging that the agreement with Securus was an illegal kickback scheme resulting in inflated rates for inmate telephone calls and impeding inmates' ability to communicate with loved ones and counsel. The plaintiffs assert in relevant part that the sheriff lacked statutory authority to collect revenues through contracts for inmate calling services. They further contend that Securus is engaging in unfair and deceptive trade practices in violation of G. L. c. 93A, § 2, by, among other things, paying the site commissions to the sheriff's office and charging correspondingly higher telephone call rates.

Securus removed the case to the United States District Court for the District of Massachusetts under the Federal Class Action Fairness Act of 2005. Following a June 2020 hearing, a judge in the District Court granted the defendants' motions for judgment on the pleadings and denied the plaintiffs' motions for partial summary judgment and class certification. Central to the judge's decision was the conclusion that the 2009 act together with G. L. c. 127, § 3, authorized the sheriff's office to generate revenues from its contract with Securus to provide inmate calling services. The plaintiffs moved to alter or amend the judgment and to certify a question of law to this court.

The judge thereafter vacated the judgment and certified the question now before us, pursuant to S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981):

"Did the Massachusetts Legislature, through the provisions of [St. 2009, c. 61, §§ 12 (a), 12 (c), 15, or G. L. c.] 127, § 3, taken separately or together, authorize the Bristol County Sheriff's Office to raise revenues for the Office of the Sheriff through inmate calling service contracts?"

We answer the question "yes," as we conclude that § 12 (a) of the 2009 act, independently and buttressed by §§ 12 (c) and 15, authorizes the sheriff's office to collect and retain revenues through inmate calling services contracts.

Discussion. In Souza v. Sheriff of Bristol County, 455 Mass. 573, 574-575 (2010), inmates in Bristol County correctional facilities challenged the sheriff's imposition of inmate fees to cover the cost of their care, including medical care, haircut services, and general education development (GED) testing. Rejecting the sheriff's contention that he derived authority to impose the challenged fees from his common-law duties to operate and administer the county's correctional facilities, this court concluded that, "in the absence of specific legislative authority," the sheriff lacked authority to

impose such fees on inmates to defray the cost of their incarceration.¹³ Id. at 586.

The plaintiffs contend that, as was the case in Souza, here too, the sheriff lacks the statutory authority to enter into inmate calling services contracts that generate revenue for the office. As the defendants counter that such authority may be found in the 2009 act, we turn our attention there, beginning with § 12 (a). See Dental Serv. of Mass., Inc. v. Commissioner of Revenue, 479 Mass. 304, 306 (2018) ("[O]ur analysis begins with the statutory language, the principal source of insight into [l]egislative purpose" [quotation and citation omitted]).

1. Section 12 (a). Section 12 (a) of the 2009 act states in pertinent part: "Notwithstanding any general or special law to the contrary . . . , revenues of the office of sheriff in [Bristol County] for civil process, inmate telephone and commissary funds shall remain with the office of sheriff." St. 2009, c. 61, § 12 (a). The plaintiffs contend that the reference to inmate telephone funds in § 12 (a) is ambiguous and

¹³ This court further concluded that imposition of the challenged fees was inconsistent with statutory provisions addressing the same subject matter. Souza, 455 Mass. at 583, 586-588, citing G. L. c. 124, § 1 (r) (Commissioner of Correction may establish haircut fees for State and county inmates), 1 (t) (county inmates' health insurance plans to be billed for medical services); G. L. c. 127, §§ 86F (deductions from inmate work-release program earnings), 92A (Department of Education may not charge fee for GED testing).

that interpreting the section as allowing the sheriff to collect revenues from Securus would be tantamount to conferring unfettered authority to adopt new methods of generating income regardless of the source.¹⁴ We disagree.

As the 2009 act does not describe what comprises inmate telephone revenues, "we look to external sources, including the legislative history of the statute, its development, its progression through the Legislature, prior legislation on the same subject, and the history of the times." Worcester v. College Hill Props., LLC, 465 Mass. 134, 139 (2013), quoting 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 115 (2008).

Notably, prior to the passage of the 2009 act, the Legislature long had known that the sheriff collected revenues from inmate calling services providers. At least as early as fiscal year 2001, the Legislature specifically accounted for revenues from county correctional inmate telephone services in annual budgets, providing that, "notwithstanding the provisions of any special law to the contrary, no county treasurer shall retain revenues derived by the sheriffs from commissions on telephone service provided to inmates or detainees" and that such revenues "shall be retained by the sheriffs not subject to

¹⁴ For example, the plaintiffs argue, such an interpretation theoretically would authorize the sheriff to require inmates to pay a fee for the privilege of using the telephone.

further appropriation for use in a canteen fund." St. 2000, c. 159, § 2, line item 8910-0000. See St. 2001, c. 177, § 2, line item 8910-0000; St. 2002, c. 184, § 2, line item 8910-0000; St. 2003, c. 26, § 2, line item 8910-0000; St. 2004, c. 149, § 2, line item 8910-0000; St. 2005, c. 45, § 2, line item 8910-0000; St. 2006, c. 139, § 2, line item 8910-0000; St. 2007, c. 61, § 2, line item 8910-0000; St. 2008, c. 182, § 2, line item 8910-0000. Additionally, in 2013, a special commission¹⁵ noted that "[p]rior audits disclosed that [s]heriffs' [o]ffice[s] received commissions on inmate telephone services and that these funds were deposited into commissary, canteen, or inmates benefit accounts." 2013 Senate Doc. No. 1865, at 42.

Thus, we conclude that § 12 (a)'s reference to revenues from inmate telephone funds refers to site commissions paid by inmate calling services providers, such as those at issue here. Given the Legislature's actual knowledge of the sheriff's long-standing practice of collecting inmate telephones revenue from inmate calling services providers, the "absence of any

¹⁵ Section 22 of the 2009 act required the formation of a special commission charged with "making an investigation and study relative to the reorganization or consolidation of sheriffs' offices, to make formal recommendations regarding such reorganization or consolidation and to recommend legislation, if any, to effectuate such recommendations relating to the reorganization, consolidation, operation, administration, regulation, governance and finances of sheriffs' offices." St. 2009, c. 61, § 22.

legislative objection whatsoever [in the 2009 act] is telling." Pavian, Inc. v. Hickey, 452 Mass. 490, 494 (2008), quoting Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 820 n.8 (2006) (Legislature presumed to be aware of commission's long-standing interpretation of statute). See McCarty's Case, 445 Mass. 361, 368-369 (2005) (Sosman, J., concurring). Had the Legislature intended to put an end to the sheriff's practice of collecting inmate telephone revenues, it could have done so. Instead, § 12 (a) expressly provides that the sheriff may continue to retain inmate telephone revenues even after the transfer of the sheriff's office to the Commonwealth.¹⁶

The plaintiffs also propose that because § 12 (a) states only that the revenues from the listed sources "shall remain with the office of sheriff," the section gives authorization not to collect revenues, but only to retain them (rather than depositing them into the Commonwealth's General Fund).¹⁷ If we

¹⁶ We additionally note that the 2008 bill, which contained no reference to inmate telephone revenues and would not have permitted the sheriff to retain any revenues, was rejected by the Legislature. See 2008 House Doc. No. 4498, § 5.

¹⁷ At a hearing on a motion for partial summary judgment in the Federal District Court, the plaintiffs argued that § 12 (a) "merely says that any funds previously collected should 'remain' with the sheriff during the one-time transfer" (emphases added). In briefing before this court, the plaintiffs appeared to echo this reasoning, arguing that § 12 (a) "dealt only with what should happen to any telephone funds that might exist, as opposed to making any kind of statement about the lawfulness of their collection." At oral argument, however, the plaintiffs

were to adopt this interpretation, it would mean that the sheriff would be authorized to retain revenues that he is not authorized to collect in the first place.¹⁸ Such an illogical and unreasonable result cannot be what the Legislature intended. See Meshna v. Scrivanos, 471 Mass. 169, 173 (2015) ("our respect for the Legislature's considered judgment dictates that we interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation" [citation omitted]). See also Ciani v. MacGrath, 481 Mass. 174, 178 (2019).

Indeed, the sensible interpretation of the phrase "shall remain with the office of sheriff" is that it confers authority to the sheriff to both collect and retain inmate telephone revenue. See Ciampi v. Commissioner of Correction, 452 Mass. 162, 168-169 (2008) ("[a]n express grant carries with it by implication all incidental authority required for the full and efficient exercise of the power conferred" [citation omitted]). See also Alliance to Protect Nantucket Sound, Inc. v. Department of Pub. Utils. (No.1), 461 Mass. 166, 187 (2011) ("[p]owers

took the position that § 12 (a) contemplates, and applies to, ongoing revenue streams from sources enumerated in that section after the transfer date.

¹⁸ Moreover, if, as the plaintiffs allege, the sheriff is not authorized to collect inmate telephone revenue, there would be no reason for the Legislature to provide for the retention of such revenue.

granted include those necessarily or reasonably implied"
[citation omitted]).

2. Sections 12 (c) and 15. Sections 12 (c) and 15 of the 2009 act reinforce our conclusion. Section 12 (c) provides that "[a]ny sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county." St. 2009, c. 61, § 12 (c). The plaintiffs argue that this language does not permit the sheriff to develop new sources of revenue that otherwise may be unlawful. We agree. However, as we have discussed, sheriffs have been collecting revenue from inmate calling services for decades. Section 12 (c) confirms that the sheriff may retain this statutorily authorized source of revenue.

Additionally, § 15 works in tandem with § 12 (a). It provides in relevant part that the "sheriff shall retain administrative and operational control over the office of the sheriff, the jail, [and] the house of correction."¹⁹ St. 2009, c. 61, § 15. As sheriffs are required by regulation to provide inmates with "[r]easonable access to public telephones," 103

¹⁹ This "administrative and operational control" includes the authority over "the procurement of supplies, services and equipment." G. L. c. 34B, § 12 (sheriffs of abolished counties retain "administrative and operational control" over their offices and county correctional facilities, which includes "the procurement of supplies, services and equipment").

Code Mass. Regs. § 948.10 (2009), § 15 confirms a sheriff's continuing authority to enter into contracts for the provision of inmate calling services.

3. Plaintiffs' remaining arguments. The plaintiffs present a number of additional arguments; we briefly address two of them.²⁰ The plaintiffs assert that it would be "illogical" and "entirely arbitrary" to conclude that the 2009 act authorized the transferred sheriffs to collect inmate telephone revenue because it would have the effect of permitting only some sheriffs to contract for commissions with inmate telephone service providers. However, the legality of a legislative scheme that treats different offices of sheriffs differently is not before us. Further, the plaintiffs' contention that the Legislature would not have formalized the sheriff's authority to collect revenue from inmate calling services contracts in an uncodified special act is unpersuasive. As noted, see note 9, supra, a special act has the "same force and effect as a General Law." Desrosiers v. Governor, 486 Mass. 369, 381 n.21 (2020), cert. denied, 142 S. Ct. 83 (2021).

Conclusion. We answer the certified question as follows: "Yes," § 12 (a) of the 2009 act, independently and buttressed by §§ 12 (c) and 15, authorizes the Bristol County sheriff's office

²⁰ The other points raised by the plaintiffs are without merit. See Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

to collect and retain revenues through inmate calling services contracts.²¹

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the question certified, and also will transmit a copy to each party.

²¹ Because we find that the 2009 act alone affirms the sheriff's authority to collect and retain revenues from inmate calling services contracts, we need not consider whether G. L. c. 127, § 3, either independently or together with sections of the 2009 act, provides an additional source of authority. We note, however, that G. L. c. 127, § 3, permits the keepers of State and county correctional facilities to retain "revenues generated by the sale or purchase of goods or services to persons in correctional facilities (emphasis added)." Because telephone calls are not sold "to persons in correctional facilities," id., but rather are sold to and paid for by the call recipients outside the correctional facilities, the statute would not be applicable to revenue generated through inmate calling services contracts.