

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Convenient Food Mart, Inc., No. 392,	:	
Appellant-Appellant,	:	No. 10AP-248
v.	:	(C.P.C. No. 09CVF08-11911)
Ohio Liquor Control Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on September 28, 2010

Gearhiser Law Firm, Inc., and Kurt O. Gearhiser, for appellant.

Richard Cordray, Attorney General, and Scott A. Longo, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Cleveland-based Convenient Food Mart ("Food Mart" or "permit premises") is appealing the order of the Ohio Liquor Control Commission ("Commission" or "agency"), which resulted in a 30-day suspension of its Class C/D liquor license. Food Mart's suspension was based on the permit holder's stipulation to facts that Food Mart was allowing gambling on its premises, in violation of Ohio Adm.Code 4301:1-1-53. Food Mart appealed the agency's decision to the common pleas court, arguing that R.C.

Chapter 2915 (Crimes – Procedure – Gambling) was not one of the enumerated criminal statutes in R.C. Chapter 4301, and that because the Commission derives its enforcement authority from R.C. Chapter 4301, the Commission lacked authority to regulate gambling on the permit premises. The trial court disagreed, and affirmed the agency's order. Food Mart has appealed to this court as to a question of law, only—whether the Commission has authority to regulate gambling activities at establishments holding permits issued by the Division of Liquor Control.¹ We answer that question in the affirmative, and for the reasons discussed more fully below, we affirm the order of the agency and the trial court.

FACTS

{¶2} Food Mart operates a convenient store—with a license to sell carryout beer and wine, for off-premises consumption—at 7488 Mentor Avenue, Mentor, Ohio (suburb of Cleveland). (Trial Court's Decision & Entry, Feb. 18, 2010, at 2) (hereafter "Trial Court"). (R. 26, 29.) In November 2008, the Cleveland Enforcement Office of the Ohio Department of Public Safety Investigative Unit² ("DPS") received a complaint regarding gambling activity at Food Mart. (Trial Court, at 2.) (R. 29.) Over the next several months, DPS sent undercover agents into Food Mart to investigate the complaint. On February 26 and March 7, 2009, undercover DPS agents actually participated in the

¹ In the trial court, appellant also argued that the agency's penalty was excessive, and therefore violated the Eighth Amendment's prohibition against cruel and unusual punishment. The trial court summarily dismissed this argument, and appellant has not renewed it as part of this appeal.

² The Ohio Department of Public Safety Investigative Unit is the investigative and enforcement arm of the Division of Liquor Control, and is the agency responsible for enforcing Ohio's liquor control laws. Prior to July 1, 1997, DPS worked under the Ohio Department of Liquor Control, but since the legislature disbanded that agency in lieu of creating the Division of Liquor Control, which is within the Department of Commerce, DPS has continued to serve in substantially the same investigative and enforcement capacity. See, e.g., *C & H Investors, Inc. v. Ohio Liquor Control Comm.* (Dec. 9, 1999), 10th Dist. No. 98AP-1519, 1999 WL 1124672, at *1, n.1; R.C. 121.02(l), R.C. 4301.10(4); see also R.C. 5502.13; ODPS – Ohio Investigative Unit, at <http://investigativeunit.ohio.gov/index.stm> (last visited Sept. 9, 2010).

gambling activity at Food Mart, by inserting U.S. currency into the gambling machines on the premises. (R. 29, 30.); (Ohio Liquor Control Comm., No. 875-09, Transcript of Hearing Proceedings, July 16, 2009, at 8–10.) On the latter occasion, agents observed two electronic video slot machines, one of which was named "\$10 Fruit, Jokers Wild Edition." (R. 29.) One of the agents inserted \$20 into the machine, which resulted in 2,000 credits. (R. 29–30.) The agent played several rounds, sometimes winning, other times losing (credits). After a while, the agent decided to stop playing, and cashed out, by pressing the "print ticket" button on the machine. At that time, the agent had 1,060 credits remaining, thus, the machine issued a \$10.60 ticket to the agent. The agent then presented the ticket to the Food Mart cashier/clerk, who paid the agent \$10 in cash, from the drawer. (R. 30.)

{¶3} On March 12, 2009, undercover DPS agents returned to Food Mart. Again, one of the agents put \$20 into the electronic slot machine, and again the agent received 2,000 credits. (R. 30.) The agent played the game for a while, winning some and losing some, and cashed out with 1,240 credits remaining. The machine printed a \$12.40 ticket, which the agent presented to the Food Mart clerk. This time, the on-duty clerk happened to be the permit holder's wife, Vaishali K. Kasabwala. Mrs. Kasabwala told the agent that the payout would be in gas cards, and gave him a \$10 card. (R. 30.) She then offered him store merchandise for the remaining \$2.40. The agent selected a 20-ounce Coca-Cola, which apparently cost \$2, and thereafter, the clerk paid the agent \$.40 in U.S. coins, also from the cash register drawer. (Tr. 8–12.)

{¶4} The agents collected the money and merchandise as evidence, and obtained a search warrant for the permit premises, which they served upon Food Mart

later that same day. (Trial Court, at 2.); (Tr. 8–12.); (R. 30.) After being advised of her Miranda rights (and waiving them), Mrs. Kasabwala told investigators that Food Mart had had the slot machines on the premises for about three months, and that they had a 40/60 profit-splitting agreement with the gaming machine distributor. (R. 30–31, 40.) She further stated that the money was collected daily from the machines, and later split pursuant to the terms of the agreement. (Trial Court, at 2.); (R. 30–31.) The agents seized the two slot machines, and the \$1,316 that was inside them. (R. 31.) They also confiscated other evidence having a nexus to running a gambling operation, including five business ledgers with gambling machine profit entries. After taking possession of the slot machines, DPS agents performed an audit of the machines, which revealed that the transaction history of both machines had recently been reset, and that in the two weeks that elapsed between the reset and seizure, they raked in a combined \$39,023. (R. 31–32.)

{¶5} The record showed that on two separate occasions nearly a year earlier, both DPS agents and local police detectives had informed Mrs. Kasabwala that giving cash prizes, gift cards, or gas cards as payment for playing on the machines was a direct violation of Ohio law. (R. 33.) On May 22, 2008, Mrs. Kasabwala thanked the agent for the warning, and advised him that she would have the machines removed. The record also showed that this was Food Mart's third violation in two years, and that in the five years prior to this gambling incident, Food Mart was cited four times for selling alcohol to minors. (Trial Court, at 8.); (Tr. 19–20.)

{¶6} Based on these facts and evidence, the Commission charged Food Mart with three violations pertaining to gambling. (Trial Court, at 3.); (R. 4, 26.) At the hearing

before the Commission, on July 16, 2009, Food Mart stipulated to the facts in violations one and three, and the Commission agreed to dismiss violation two. (Tr. 4.) Essentially, Food Mart's defense was that, although they admitted to allowing gambling on the permit premises, they had not violated any of Ohio's liquor control laws.

{¶7} On July 24, 2009, the Commission issued its order finding that Food Mart had violated the laws and regulations as per violations one and three, and ordering Food Mart to pay a \$10,000 fine, or have its liquor license suspended for 30 days. (R. 3.) Pursuant to R.C. 119.12, Food Mart appealed the Commission's order to the Franklin County Court of Common Pleas by its notice filed August 7, 2009. (R. 16.) The common pleas court found that there was reliable, probative, and substantial evidence to support the Commission's order and, on February 18, 2010, affirmed same. Food Mart filed a timely notice of appeal, and now presents a single assignment of error to this court:

THE COURT BELOW ERRED WHEN IT FOUND THAT THE LIQUOR CONTROL COMMISSION HAS STATUTORY AUTHORITY TO PROMULGATE AND ENFORCE RULES APPLICABLE TO PERMIT HOLDERS AND THEREFORE HEAR CASES WHICH INVOLVE GAMBLING VIOLATIONS WHICH ARE ISSUED BY AGENTS OF THE OHIO DEPARTMENT OF PUBLIC SAFETY.

{¶8} This case being an administrative appeal of an agency decision, the standard of review is provided in R.C. 119.12, which states that the trial court may affirm the agency's decision if, after considering the entire record, the court determines that the order is "supported by reliable, probative, and substantial evidence and is in accordance with the law." *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571. Reliable evidence is that which can be trusted because it has a "reasonable probability" of being true; probative evidence is that which helps to prove the issue(s) in

question; and substantial evidence is evidence that has "importance and value" to the case. *Id.*

{¶9} The trial court's review of the administrative record is neither a trial de novo, nor an appeal on questions of law only; rather, it is a "hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207 (quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280). Although the trial court must give deference to the agency's resolution of evidentiary conflicts, the agency's findings are by no means conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶10} Our review is more limited than that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. We review the record to determine whether the trial court abused its discretion, i.e., "being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency." *Id.* Absent a finding that the trial court abused its discretion, we may not substitute our judgment for that of the trial court or the agency. *Id.* Absent a finding that the trial court abused its discretion, this Court must affirm the decision below. *Id.* (citing *Lorain City Sch. Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260–61.) Appellate courts do, however, have plenary review of questions of law in administrative appeals. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶15.

{¶11} Food Mart does not dispute any factual portions of the record below; in fact, they stipulated to the following facts in the Commission's violation notice(s):

Violation No. 1: On or about March 12, 2009, you and/or your agent and/or employee(s) Vaishali Kasabwala * * * did permit and/or allow in and upon the permit premises, gaming or wagering on a game and/or scheme of skill and/or chance. To wit, ACQUIRE, POSSES, CONTROL OR OPERATE A GAMBLING DEVICE in violation of Regulation 4301:1-1-53, Ohio Admin. Code.

Violation No. 3: On or about March 12, 2009, you and/or your agent and/or employee(s) Vaishali Kasabwala * * * did permit and/or allow in and upon the permit premises, gaming or wagering on a game and/or scheme of skill and/or chance. To wit, OPERATING A GAMBLING HOUSE in violation of Regulation 4301:1-1-53, Ohio Admin. Code.

{¶12} Ohio's liquor control and liquor consumption permit laws are located in Chapters 4301 and 4303 of the Revised Code, respectively. The Liquor Control Commission predominantly derives its powers from R.C. 4301.022, 4301.03 and 4301.04. As appellant points out, the Commission does not have the authority to place anyone under arrest, their authority is limited to liquor control—i.e., they may suspend or revoke permits to sell liquor in the state of Ohio. In this case, the Commission ordered a 30-day suspension of Food Mart's permit to sell liquor. Appellant argues that the Commission lacks the authority to order sanctions against a permit holder for committing a gambling violation because R.C. 4301.03 does not specifically state that the Commission may order sanctions against a permit holder for committing a gambling violation. Not only do we find this argument unpersuasive, but moreover, the Supreme Court of Ohio specifically rejected the same argument nearly three decades ago. See *Queensgate Inv. Co. v. Liquor Control Comm.* (1982), 69 Ohio St.2d 361, 363 (per curiam) (holding that R.C. 4301.03 grants the Liquor Control Commission the authority to adopt rules

necessary to carry out liquor control statutes, including rules and regulations governing all advertising).

{¶13} The pertinent portion of R.C. 4301.03 provides that:

The liquor control commission may adopt and promulgate, repeal, rescind, and amend, in the manner required by this section, rules, standards, requirements, and orders necessary to carry out this chapter and Chapter 4303. of the Revised Code * * *. The rules of the commission may include the following:

(A) Rules * * * for and the issuance of permits for the manufacture, distribution, transportation, and sale of beer and intoxicating liquor * * *; and rules governing the procedure of the division of liquor control in the suspension, revocation, and cancellation of those permits;

(B) Rules and orders providing in detail for the *conduct* of any retail business authorized under permits issued pursuant to this chapter and Chapter 4303 of the Revised Code, with a view to ensuring compliance with those chapters and laws relative to them, and the maintenance of public decency, sobriety, and good order in any place licensed under the permits. * * *

{¶14} We first note that *Queensgate* notwithstanding, R.C. 4301.03 is a remedial statute (as opposed to penal); therefore, we must interpret its meaning broadly. See, e.g., *Miami Cty. v. Dayton* (1915), 92 Ohio St. 215, 219 ("A statute undertaking to provide a rule of practice, a course of procedure, or a method of review, is * * * remedial [and] should receive a broad and liberal construction to effect the purposes of its enactment."). Next, we point out that possessing a liquor permit is not a fundamental right—similar to a license to drive, it is a privilege. Because possessing a liquor permit is a privilege, which also carries with it great responsibility, the General Assembly has vested the Liquor Control Commission with broad authority to regulate that practice in this State. As a

result, the Commission may impose a stricter standard of conduct upon its permit holders than that which is applicable to the general public, and the Commission may prohibit conduct by its permit holders that may otherwise be lawful. *Angola Corp. v. Liquor Control Comm.* (1972), 33 Ohio App.2d 87, syllabus.

{¶15} Chapter 4301 of the Ohio Administrative Code was promulgated by the Commission pursuant to the authority granted to them in R.C. 4301.03. See, e.g., *Queensgate* at 363; *American Legion Post 0046 Bellevue v. Liquor Control Comm.* (1996), 111 Ohio App.3d 795, 799 (citing *Kelly v. Accountancy Bd. of Ohio* (1993), 88 Ohio App.3d 453, 457).

{¶16} With respect to gambling, Ohio Adm.Code 4301:1-1-53 provides that:

(A) Conviction in any court of competent jurisdiction of any holder of any permit, or of any agent or employee of a permit holder, or of any person, for keeping, exhibiting for gain, or operating gambling devices, or conducting or permitting on the liquor permit premises any gambling in violation of Chapter 2915 of the Revised Code, shall be grounds for suspension or revocation of such permit.

(B) No person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess or employ, or allow to be kept, exhibited, or used in, upon or about the premises of the permit holder of any gambling device as defined in [R.C.] 2915.01(F) * * *.

{¶17} It seems fairly clear from Ohio Adm.Code 4301:1-1-53 that gambling activities are strictly prohibited in liquor establishments, however, gambling activities are not only prohibited by liquor permit holders, they are prohibited in this state. See R.C. 2915.01 et seq. The fact that the Commission is without authority to arrest or charge a permit holder for a violation of R.C. Chapter 2915 has no bearing on the Commission's authority to sanction the individual's liquor permit for the same violation. See, e.g., *VFW*

Post 8586 v. Ohio Liquor Control Comm., 83 Ohio St.3d 79, 1998-Ohio-181, syllabus (holding that proof of the same elements in R.C. 2915.01(G) are necessary to prove a violation of Ohio Adm.Code 4301:1-1-53); *Massa v. Ohio Liquor Control Comm.* (Mar. 21, 1985), 10th Dist. No. 84AP-634, 1985 WL 9908, at *3 (holding that possession of a machine as described in R.C. 2915.01(D) constituted a violation of Ohio Adm.Code 4301:1-1-53(B)).

{¶18} For these reasons, we find no merit in appellant's sole assignment of error and we overrule same. We, accordingly, affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER, J., concurs.
FRENCH, J., concurs in judgment only.
