[J-34-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

EARL NIXON, REGINALD CURRY, KELLY WILLIAMS, MARIE MARTIN, THEODORE SHARP, and RESOURCES FOR HUMAN DEVELOPMENT, INC.,	:	No. 004 MAP 2002
	:	Appeal from the Order of the Commonwealth Court entered December 11, 2001 at No. 359 M.D. 2000
Appellees	:	
	:	ARGUED: April 8, 2003
v.	:	
	:	
THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGING OF THE COMMONWEALTH OF PENNSYLVANIA, and DEPARTMENT OF HEALTH OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellants	:	

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: DECEMBER 30, 2003**

The majority concludes the General Assembly's preclusion of employment of certain enumerated convicts in designated elder care facilities has "no real and substantial relationship" to the provisions of the criminal records chapter of the Older Adults Protective Services Act (OAPSA), and therefore finds this legislation unconstitutional. I find such provisions precisely effectuate the stated and important governmental interest of protecting older adults incapable of safeguarding themselves. I respectfully dissent.

The majority notes the General Assembly's reasoning:

> It is declared the policy of the Commonwealth of Pennsylvania that older adults who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare….It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of abuse, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.

Majority Opinion, at 2 (citing 35 P.S. § 10225.102). Following such acknowledgment, the majority then concedes:

> There is no question that protecting the elderly, disabled, and infirm from being victimized is an important interest in this Commonwealth and that the General Assembly may enact laws that restrict who may work with these individuals. Further, barring certain convicted criminals from working with these citizens may, in fact, be an effective means of protecting such citizens from abuse and exploitation.

Id., at 16 (emphasis added). It is only because there is not a ban on existing employees that the majority finds this legislation fails constitutional muster. However, under "rational basis" review,[1] the legislature is not required to substantiate the entire scheme, nor does it have the "obligation to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320 (1993). Indeed, "[i]t could be

[1] Citing Pa. State Bd. of Pharmacy v. Pastor, 272 A.2d 487 (Pa. 1971), the majority suggests this Court has scrutinized substantive due process claims under our Constitution "more closely" than the United States Supreme Court has under the federal constitution; therefore, federal rational basis case law is no longer valid. Majority Opinion, at 15, n.15. A complete reading of Pastor reveals this Court has at times departed from the federal reasoning only as it relates to "local economic legislation" because "state courts may be in a better position to review local economic legislation than the Supreme Court....Thus Pennsylvania, like other state 'economic laboratories,' has scrutinized regulatory legislation perhaps more closely than would the Supreme Court of the United States." Pastor, at 490 (citations omitted) (emphasis added). This case does not pertain to economic restrictions levied against local businesses in need of more state protection than afforded under the federal constitution. Consequently, the federal authority pertaining to rational basis review in this area is still viable.

that '[t]he assumptions underlying these rationales [are] erroneous, but the fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [legislative] choice from constitutional challenge.'" Id., at 333 (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 320 (1993). Even unexpected, inequitable results do not form the basis of constitutional infirmity. See Gondelman v. Commonwealth, 554 A.2d 896, 901 (Pa. 1989). Further, this Court, in Gondelman, adopted the United States Supreme Court's rational basis rationale when dealing with unintended, or potentially unjust, results: "The problems of government are practical ones and may justify, if they do not require, rough accommodations–illogical, it may be, and unscientific. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id. (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)) (internal citations omitted).

Here, appellees claim they are being denied employment based upon distant convictions, and such discrimination bears no relation to a valid state concern. Relying on this Court's holding in Secretary of Revenue v. John's Vending Corp. 309 A.2d 358 (Pa. 1973), appellees argue they have been "rehabilitated," and the remoteness of these dated convictions do not represent their current propensity to re-offend. However, as noted by Judge Flaherty, writing for the Commonwealth Court dissent:

> Moreover, unlike John's Vending where the Court agreed that 'the legislature did not intend to bring his convictions within the purview of [the] statute, the legislature, by amending [OAPSA] in 1997 and removing the ten year look back period imposed in 1996, has clearly stated its intention that anyone convicted of any of the enumerated crimes at any time in their life, is precluded from working for facilities covered by the Act.

Nixon v. Commonwealth, 789 A.2d 376, 384 (Pa. Cmwlth. 2001) (Flaherty, J., joined by McGinley, J., dissenting). Clearly, John's Vending is inapplicable here. Further, some

drug and deviant convictions, as proscribed by the Act, will assuredly forever block appellees from other endeavors and potential employments. See Pa. Cons. art. 2, § 7 (prohibition against public office holder for conviction of "infamous crime"); Hunter v. Port Authority of Allegheny County, 419 A.2d 631, 638 (Pa. Super. 1980) ("a bar against the employment of convicted felons as police officers would probably be reasonable since 'a person who has committed a felony may be thought to lack the qualities of self-control or honesty that this sensitive job requires.'").

Just because the General Assembly has not subjected some tenured workers to summary termination does not mean the restrictive hiring mechanism now in place has no relation to fulfilling the General Assembly's objective. In actuality, and as referenced by the majority, this legislation will certainly detect and reduce the number of potentially dangerous staff members working with older Pennsylvanians. Erecting a hiring roadblock to the inflow of proven criminal offenders is not unconstitutional simply because others already beyond the roadblock were not forced out. Eventually, this legislation will eliminate those with convictions for the enumerated offenses from working in any covered institution. Wisdom often comes late, to court and legislature alike, and the failure to enact it when petitioners were hired does not make it less wise. This legislation is a rational means to a rational end.

This legislation is similar to other legislative efforts to begin "cleansing" certain at-risk facilities. See 23 Pa.C.S. § 6344(c)(2) (regarding prospective child-care personnel: "In no case shall an administrator hire an applicant if the applicant's criminal history record information indicates the applicant has been convicted of one or more of the following offenses…."); and 24 Pa.C.S. § 1-111 (public or private school employment

prohibition for applicants with convictions of enumerated offenses). It has a proper and rational basis supporting the underlying goal of more security for Commonwealth seniors. Accordingly, I would find this legislation constitutional and offer my dissent.