IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 3, 2008 Session

A.K. REEVES, INC. d/b/a A.K.'s DELI & MARKET v. METROPOLITAN BEER PERMIT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Direct Appeal from the Chancery Court for Davidson County
No. 07-512-II Carol L. McCoy, Chancellor

No. M2008-00085-COA-R3-CV - Filed December 23, 2008

This appeal arises from a beer board's revocation of Petitioner's permit to sell beer. The trial court determined that, under T. C. A. § 57-5-108, it could not consider the board's administrative record where it had not been moved into evidence by the board. The trial court granted Petitioner's motion for directed verdict, reversing the board's decision to revoke the beer permit. We reverse and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Reversed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Paul Jefferson Campbell, II and Lora Barkenbus Fox, Nashville, Tennessee, for the appellant, Metropolitan Beer Permit Board of the Metropolitan Government of Nashville and Davidson County, Tennessee.

J. Robin McKinney, Jr., Nashville, Tennessee, for the appellee, A.K. Reeves, Inc. d/b/a A.K.'s Deli & Market.

OPINION

This appeal requires us to determine whether, under Tennessee Code Annotated § 57-5-108(d), (e) & (f), which govern the trial court's review of agency decisions revoking or suspending permits to sell beer and alcoholic beverages, the "complete transcript of the proceedings in the cause" which must be reviewed by the trial court when conducting a trial *de novo* pursuant to the section includes the entire administrative record. We hold that it does.

Following a hearing on February 28, 2007, Appellant/Respondent the Metropolitan Beer Permit Board of the Metropolitan Government of Nashville and Davidson County ("the Board") revoked Appellee/Petitioner A.K. Reeves, Inc.'s ("Reeves") permit to sell beer on the grounds that he had violated the prohibition against selling alcohol to minors. In March 2007, Reeves filed a petition in the Chancery Court for Davidson County for statutory writ of certiorari under Tennessee Code Annotated § 57-5-108. In his petition challenging the Board's decision, Reeves also prayed for a writ of supersedes to permit him to sell beer pending the trial court's review. The trial court granted a stay of the Board's decision on March 7.

In response to Reeves' petition, in April 2007 the Board filed a notice of filing of the administrative record, which included the transcript of the February 28 hearing before the Board and a certified copy of the administrative record. In May, the Board moved for dismissal of Reeves' petition for failure to file a brief as required by Davidson County Local Rule 25. After much ado over Rule 25 and whether the Board is an "administrative agency" as contemplated by the Rule, the matter was set to be heard on December 5, 2007.

At the conclusion of the Board's proof at the December 5 hearing, Reeves moved for a directed verdict on the basis that the Board had failed to produce evidence that the person to whom Reeves sold beer was under 21 years of age. Reeves further asserted the Board had failed to produce evidence of its allegations that Reeves had been penalized for selling alcohol to minors on three prior occasions. Reeves asserted that the copy of the administrative record filed by the Board in April was not properly before the court where the Board had not introduced it into evidence at the hearing in compliance with the Tennessee Rules of Civil Procedure.

After noting that the certified record contained evidence of three valid previous sanctions against Reeves for selling alcohol to minors, evidence that was not included in the transcript of the February 28 hearing before the Board, the trial court determined that, under Tennessee Code Annotated § 57-5-108(d), (e), & (f), the entire administrative record in the matter was not properly before the court. The trial court determined that the statute permitted it to review only the "transcript" of the February hearing, and that the Board had failed to properly introduce evidence of Reeves' previous violations for the purposes of the trial *de novo* mandated by the section. The trial court entered final judgment in the matter on December 21, 2007, granting Reeves' motion for directed verdict on the grounds that the Board had failed to carry its burden of proof. The trial court remanded the matter to the Board for appropriate action. The Board filed a timely notice of appeal to this Court.

Issue Presented

The only issue presented for our review, as we slightly reword it, is whether the trial court erred in holding that the *de novo* review to be conducted by the trial court under the statutory writ of certiorari prescribed by Tennessee Code Annotated § 57-5-108 includes review of only the transcript of the hearing before the Board and not the entire administrative record where that record was not moved into evidence pursuant to the Tennessee Rules of Civil Procedure at trial.

Standard of Review

Our analysis of the issue presented in this case requires us to construe Tennessee Code Annotated § 57-5-108(d), (e) & (f). It is well-settled that the court's primary purpose when construing a statute is to ascertain and give effect to the intention and purpose of the legislature. *McLane Co. v. State of Tennessee*, 115 S.W.3d 925, 928 (Tenn. Ct. App. 2002) (citations omitted). The construction of a statute is a question of law which we review *de novo* with no presumption of correctness attached to the determination of the trial court. *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn. 2000).

Analysis

We begin our discussion with a procedural observation. This matter was heard by a chancellor sitting without a jury. However, a motion for directed verdict pursuant to Tennessee Rule of Civil Procedure 50 is appropriate only in a jury trial. *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977). A party challenging the sufficiency of a plaintiff's proof in a nonjury trial must file a Tennessee Rules of Civil Procedure 41.02 motion for involuntary dismissal at the close of plaintiff's proof. *Id.* This distinction can be critical because the trial court's review of the two motions is substantively different. *Id.* We recently addressed the marked differences between the court's review of the two motions in *In Re Estate of Roberts*, No. W2007-01903-COA-R3-CV, 2008 WL 5070127, at *2 (Tenn. Ct. App. Dec. 2, 2008). Although we are compelled to observe this procedural distinction, because the determinative issue in this case is not one of fact but one of law which we review *de novo*, the distinction does not alter our review here. We accordingly turn to the provisions of Tennessee Code Annotated § 57-5-108.

The Code provides, in relevant part:

> (d) The action of such agency in connection with the issuance of any order of any kind, including the revocation or suspension of a license or permit, imposition of a civil penalty or the refusal to grant a license or permit under §§ 57-5-105, 57-5-106 and this section, may be reviewed by statutory writ of certiorari, with a trial de novo as a substitute for an appeal, the petition of certiorari to be addressed to the circuit or chancery court of the county in which any such order was issued.
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> (e) Immediately upon the grant of the writ of certiorari, the agency revoking or suspending a license or permit or imposing a civil penalty shall cause to be made, certified and forwarded to the court a complete transcript of the proceedings in the cause.
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> (f) The provisions of this section shall be the sole remedy and exclusive method of review of any action or order that may have been issued by any county legislative body, or any committee appointed by any county legislative body, or from any board or commission authorized under §§ 57-5-105 and 57-5-106, including the refusal or failure to grant any license or permit or the imposition of a civil penalty. The provisions of the Tennessee Rules of Civil Procedure shall be applicable in

> connection with such review. Any party dissatisfied with the decree of the court may, upon giving bond as required in other cases, appeal, where the cause shall be heard upon the transcript of the records from the circuit court.

Tennessee Code Annotated § 57-5-108(d), (e) & (f)(2002). The issue before us is whether the "complete transcript of the proceedings in the cause" to be "made, certified and forwarded to the court" by the Board for review by the trial court within the context of "a trial de novo as a substitute for an appeal" under the writ of certiorari prescribed by the section includes the entire administrative record. We hold that it does.

Prior to the 1961 amendments to the section, a trial court's scope of review of a beer board's decision was limited to review under a common law writ of certiorari. *Cantrell v. DeKalb County Beer Bd.*, 376 S.W.2d 480, 481 (Tenn. 1964). Under such review, "the reviewing court is limited to inquiry as to whether the administrative agency acted fraudulently, illegally or arbitrarily." *Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 276 (Tenn. 1980)(quoting *Hoover Motor Express Co. v. R.R. and Pub. Util. Comm'n*, 261 S.W.2d 233 (Tenn. 1953)). The reviewing court does not re-weigh the evidence, but must uphold the agency's decision if it acted within its jurisdiction and did not act illegally, arbitrarily, or fraudulently. An agency's determination is arbitrary and void if it is unsupported by any material evidence. *Id.* at 276-77. Whether material evidence supports the agency's decision is a question of law to be decided by the reviewing court based on the evidence submitted to the agency. *Id.* at 276.

The 1961 amendments to the section "made material changes in the scope of review." *Cantrell*, 376 S.W.2d at 481-82. The section currently provides for statutory writ with a "trial de novo, as a substitute for an appeal." Tennessee Code Annotated § 57-5-108(d). In *Cantrell*, the supreme court held that the "trial de novo" provided by the section "means the cause is [to be] tried as if it originated in the circuit or chancery court." *Id.* at 482. Thus, under the statute, the trial court is required to weigh the evidence and render an independent judgment based on the merits. *Id.* Further, the Tennessee Rules of Civil Procedure are applicable to the trial court's review under the section. Tennessee Code Annotated § 57-5-108(f).

However, although the trial *de novo* mandated by the section permits the introduction of additional or supplemental evidence not presented to the board, the section requires the board to forward to the trial court "a complete transcript of the proceedings in the cause." Tennessee Code Annotated § 57-5-108(e); *Cooper v. Alcohol Comm'n of Memphis*, 745 S.W.2d 278, 280 (Tenn. 1988). Therefore, the trial court may limit the introduction of additional evidence to evidence that is "truly supplemental or additional and is not required to hear all of the evidence anew if [it] does not find this necessary." *Cooper*, 745 S.W.2d at 281(quoting *Frye v. Memphis State Univ.*, 671 S.W.2d 467, 469-70 (Tenn. 1984)). Thus, the trial *de novo* is based upon all the evidence presented to the trial court, including a "complete transcript of the proceedings in the cause," and the trial court's review is not limited to whether the board acted arbitrarily, capriciously, or without authority. Rather, the trial court must "redetermine both the facts and the law from all the evidence as if no such determination had been previously made." *Id.*

In *Cooper*, the supreme court addressed the application of the Tennessee Rules of Civil Procedure to section 57-5-108(e) as it then existed, which stated that the "agency shall 'immediately . . . cause to be made' the filing of the transcript." *Id*. The question in that case was one of timeliness and immediacy.[1] *Id.* at 281-82. The *Cooper* court's analysis in that case is instructive here, however, where, quoting *Frye*, the court noted that a new hearing in the trial court was based upon the administrative record and additional evidence. The *Cooper* court quoted *Frey* for the proposition that "'obviously the administrative record is to be transcribed and transmitted.'" *Id.* at 281(quoting *Frye*, 671 S.W.2d at 469, n.2).

Clearly, the legislature intended to expand rather than limit the trial court's scope of review under section 57-5-108. *See Cantrell*, 376 S.W.2d at 482. Thus, under the section, the parties may introduce additional evidence, but they are not so required. *Id.* In *Cantrell*, for example, neither party introduced additional evidence upon review. *Id.* Rather, the matter was heard on the record, which included the applicant/petitioner's application filed with the beer board. *Id.* Clearly, the "complete transcript of the proceedings" in that cause included more than the transcript of the hearing before the beer board where it included the petitioner's application. *See id.*

In light of the supreme court's analysis in *Cantrell* and *Cooper*, we hold that the "complete transcript of the proceedings in the cause" required to be filed in the reviewing court by the agency under section 57-5-108(e) includes the entire administrative record, and not only the transcript of the hearing before the board.

Holding

In light of the foregoing, the judgment of the trial court is reversed. This matter is remanded to the trial court for further proceedings in light of this opinion. Costs of this appeal are taxed to the Appellee, A. K. Reeves, Inc. d/b/a A.K.'s Deli & Market.

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DAVID R. FARMER, JUDGE

[1] The term "immediately" is not contained in the current version of Tennessee Code Annotated § 57-5-108(e).