No. 29178 - Gary W. Frantz, dba Frantz Lumber Company, Gary W. Frantz, dba Tri-State Logging and Tri-State Logging, Inc. v. Joseph M. Palmer, State Tax Commissioner of the State of West Virginia

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November 14, 2001
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OF WEST VIRGINIA

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Davis, J., dissenting:

This case was a straightforward appeal by Gary W. Frantz. Mr. Frantz contested the dismissal of his administrative appeal by the Circuit Court of Kanawha County. The circuit court dismissed the administrative appeal concluding that it did not have jurisdiction because Mr. Frantz failed to post an appeal bond as required by W. Va. Code § 11-10-10(d) (1986) (Repl. Vol. 1999).[1] Mr. Frantz unsuccessfully attempted to post an appeal bond under a provision of the statute requiring "the taxpayer

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[1]W. Va. Code § 11-10-10(d) (1986) (Repl. Vol. 1999) reads in full:

> If the appeal is of any assessment for additional taxes (except a jeopardy assessment for which security in the amount thereof was previously filed with the tax commissioner), then within ninety days after the petition for appeal is filed, or sooner if ordered by the circuit court, the taxpayer shall file with the clerk of the circuit court a cash bond or a corporate surety bond approved by the clerk. The surety must be qualified to do business in this state. These bonds shall be conditioned that the taxpayer shall perform the orders of the court. The penalty of this bond shall be not less than the total amount of tax, additions to tax, penalties and interest for which the taxpayer was found liable in the administrative decision of the tax commissioner. Notwithstanding the foregoing and in lieu of such bond, the tax commissioner, in his discretion upon such terms as he may prescribe, may upon a sufficient showing by the taxpayer, certify to the clerk of the circuit court that the assets of the taxpayer subject to the lien imposed by section twelve of this article, or other indemnification, are adequate to secure performance of the orders of the court.

[to] file with the clerk of the circuit court a cash bond or a corporate surety bond approved by the clerk." *Id.* Because the appeal bond is statutorily mandated, the circuit court was correct in finding that it had no jurisdiction to address the merits of the administrative appeal. Based upon the posture of the case presented by the circuit court's ruling, the only issue presented to this Court was whether the circuit court was correct in determining it had no jurisdiction because Mr. Frantz failed to file with the clerk of the circuit court a bond approved by the clerk. Rather than addressing this narrow issue, the majority opinion has held as unconstitutional the bond waiver under W. Va. Code § 11-10-10(d). Insofar as the bond waiver provision was never invoked, nor attempted to be invoked by Mr. Frantz, I dissent.

I.

The West Virginia Supreme Court of Appeals of Is Not Generally Empowered to Give Advisory Opinions

The record in this case is clear. Mr. Frantz never sought to invoke the alternative to an administrative appeal bond under W. Va. Code § 11-10-10(d). W. Va. Code § 11-10-10(d) provides, in pertinent part:

> Notwithstanding the aforegoing and in lieu of such bond, the tax commissioner, in his discretion upon such terms as he may prescribe, may upon a sufficient showing by the taxpayer, certify to the clerk of the circuit court that the assets of the taxpayer subject to the lien imposed by section twelve of this article, or other indemnification, are adequate to secure performance of the orders of the court.

Mr. Frantz never requested that the Tax Commissioner "certify to the clerk of the circuit court that the assets of the taxpayer . . . are adequate to secure performance of the orders of the court." The circuit court

was never presented with a complaint by Mr. Frantz that the Tax Commissioner refused to make the bond waiver as is provided for under the statute. Even so, the majority opinion has undertaken to address the constitutionality of the bond waiver provision when the provision was never in controversy.

It is well-settled and fundamental law that "this Court is not authorized to issue advisory opinions[.]" *State ex rel. City of Charleston v. Coghill*, 156 W. Va. 877, 891, 207 S.E.2d 113, 122 (1973) (Haden, J., dissenting). In this regard, this Court observed in *Harshbarger v. Gainer*, 184 W. Va. 656, 659, 403 S.E.2d 399, 402 (1991) that "[s]ince President Washington, in 1793, sought and was refused legal advice from the Justices of the United States Supreme Court, courts--state and federal--have continuously maintained that they will not give 'advisory opinions.'" Likewise, we noted in *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 578, 80 S.E. 931, 934 (1914), that "[b]y the plain terms of the Constitution appellate jurisdiction is limited to controversies arising in judicial proceedings[.]" This Court further addressed the issue of advisory opinions in *Mainella v. Board of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943), as follows:

> Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.

Accord State ex rel. ACF Indust., Inc. v. Vieweg, 204 W. Va. 525, 533 n.13, 514 S.E.2d 176, 184 n.13 (1999). Despite these strong admonitions, though, we have recognized narrow exceptions to the rule against advisory opinions in cases involving "friendly" lawsuits. "Nonetheless, before this Court will

undertake to adjudicate any matter directly affecting the public in general . . ., it must appear conclusively that every issue which could be raised in a proceeding to settle rights was raised[.]" *State ex rel. Alsop v. McCartney*, 159 W. Va. 829, 834, 228 S.E.2d 278, 281 (1976).

In the instant appeal, the majority opinion rendered an advisory decision that the bond waiver provision is unconstitutional without first considering whether such a decision is appropriate, which, I submit, it is not. The majority opinion further concluded in its self-appointed advisory capacity, that Mr. Frantz thought it would be futile to ask the Tax Commissioner to waive the bond. However, even if such a decision were warranted in this case, the majority opinion sets forth no facts to support the futility argument. None existed. Under the "futility" standard adopted by the majority of the Court, anyone can refuse to comply with a statutory or administrative procedure and yet challenge the constitutionality of the procedure by simply stating that the act would be futile. Such reasoning is illogical and one with which I cannot agree.

II.

The Majority Opinion Both Nullifies and Validates W.Va. Code § 11-10-10(d)

Assuming, for the sake of argument, that the majority could legally address the Tax Commissioner's bond waiver authority under W. Va. Code § 11-10-10(d), I still dissent because its interpretation of this statutory provision is fraught with irreconcilable inconsistencies.

The majority opinion concluded that the bond waiver provision under W. Va. Code § 11-10-10(d) was unconstitutional because it "violates the open courts provision set forth in article III, section 17 of the West Virginia Constitution." Immediately after invalidating the bond waiver provision as unconstitutional, the majority opinion then proceeded to resurrect the provision by stating that the bond waiver provision *could* be used by the Tax Commissioner so long as the taxpayer "is entitled to apply to the circuit court for a review of any adverse determination concerning bond waiver." This reasoning is both illogical and contrary to the manner by which the case should have been resolved.

Obviously, the bond waiver provision cannot be both unconstitutional and constitutional. What the majority intended to say, and should have said to support its position, is that for the bond waiver provision to be constitutional, the majority would impose a requirement that circuit courts be allowed to review a bond waiver determination. Under this approach, it would then have been logical to permit the Tax Commissioner to continue to employ this provision. This method of decision embodies the Court's traditional way of doing what the majority opinion attempted to do in this case. That is, such an approach is consistent with this Court's prior pronouncements that "[u]nder the doctrine of the least obtrusive remedy, this Court will not strike down a statute as unconstitutional whenever there is an adequate less obtrusive remedy which will assure that the statute will not be unconstitutionally applied." Syl. pt. 1, *State ex rel. Harris v. Calendine*, 160 W. Va. 172, 233 S.E.2d 318 (1977). *See also* Syl. pt. 5, *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 474 S.E.2d 554 (1996) ("Where a statute . . . is technically deficient for constitutional reasons, this Court will apply the remedy and give the statute, wherever possible, an interpretation which will cure its defect and save it from total invalidation."); Syl. pt.

2, *McGuire v. Farley*, 179 W.Va. 480, 370 S.E.2d 136 (1988) (same); Syl. pt. 2, *Anderson's Paving, Inc. v. Hayes*, 170 W. Va. 640, 295 S.E.2d 805 (1982) (same); Syl. pt. 2, *Weaver v. Shaffer*, 170 W. Va. 105, 290 S.E.2d 244 (1980) (same); Syl. pt. 4, in part, *State ex rel. Alsop v. McCartney*, 159 W. Va. 829, 228 S.E.2d 278 (1976) (same). Indeed this Court has long admonished that "[e]very reasonable construction must be resorted to in order to save a statute from unconstitutionality." Syl. pt. 3, *State v. Massie*, 95 W. Va. 233, 120 S.E. 514 (1923). *Accord* Syl. pt. 2, *State ex rel. Cosner v. See*, 129 W. Va. 722, 42 S.E.2d 31 (1947) ("In passing upon the validity of a statute which is challenged as violative of the Constitution of this State, every reasonable construction will be resorted to by the court to sustain its constitutionality."); *State ex rel. Downey v. Sims*, 125 W. Va. 627, 649, 26 S.E.2d 161, 170 (1943) ("It is the duty of courts to adopt a construction of a statute that will bring it into harmony with the Constitution, if its language will permit. The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score." (internal quotations and citation omitted)). In light of the majority opinion's failure to justify its decision in this regard, and its overarching consideration of an issue that was not even properly before it for consideration, I continue to disapprove of the majority's decision herein.

For the foregoing reasons, I respectfully dissent.