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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002154-MR

JERRY JAMGOTCHIAN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-01047

KENTUCKY HORSE RACING COMMISSION; JOHN T. WARD, JR., IN HIS OFFICIAL CAPACITY, AS EXECUTIVE DIRECTOR, KENTUCKY HORSE RACING COMMISSION; ROBERT M. BECK, JR., IN HIS OFFICIAL CAPACITY AS CHAIRMAN, KENTUCKY HORSE RACING COMMISSION; AND TRACY FARMER, IN HIS OFFICIAL CAPACITY AS VICE-CHAIR, KENTUCKY HORSE RACING COMMISSION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Jerry Jamgotchian appeals from an order of the Franklin Circuit Court and challenges the constitutionality of 810 Kentucky Administrative Regulations (KAR) 1:015, Section One at Article 6(a)-(b), an administrative regulation enacted by the Kentucky Horse Racing Commission. After careful review, we affirm the circuit court's holding that the regulation is constitutional under the Commerce Clause of the United States Constitution.

The Kentucky General Assembly created the Kentucky Horse Racing Commission (KHRC) as an "independent agency of state government to regulate the conduct of horse racing and pari-mutuel wagering on horse racing and related activities within the Commonwealth of Kentucky." *See* Kentucky Revised Statutes (KRS) 230.260(8). The KHRC has the authority to enact administrative regulations that prescribe the terms under which horse racing shall be conducted in the Commonwealth. Pursuant to this authority, the KHRC enacted Article 6, which provides that "[a] horse claimed in a claiming race shall not be transferred, wholly or in part, within thirty (30) days after the day it was claimed, except in another claiming race. Unless the stewards grant permission for a claimed [Thoroughbred] horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse **shall not race elsewhere until the close of entries of the meeting at which it was claimed**." (Hereinafter referred to as "the Regulation"). The practical effect of the Regulation is that no privately owned Thoroughbred racehorse claimed in a Kentucky claiming race is eligible to race anywhere except in the Commonwealth of Kentucky until the meet has closed. According to the

KHRC regulatory policy, persons who violate Article 6 are subject to fines, license suspension, and other sanctions.

On May 21, 2011, the Appellant, Jamgotchian, purchased the horse Rochitta for $42,400.00 in a claiming race at Churchill Downs, a privately owned racetrack in Louisville, Kentucky. The Churchill meet began on April 30, 2011, and ended on July 4, 2011. Accordingly, based on the requirements of the above Regulation, Jamgotchian was restricted from racing Rochitta at any racetrack outside Kentucky until after this meet concluded on July 4, 2011.

Despite the restricted time imposed by the Regulation, Jamgotchian chose to submit Rochitta for entry at several racetracks in Pennsylvania during the month of June 2011. On May 31, 2011, Penn National Race Course Racing Secretary David F. Bailey (hereinafter "Mr. Bailey") noticed that Jamgotchian tried to enter Rochitta in a June 4, 2011, race at that facility. This prompted Mr. Bailey to contact Ben Huffman, Racing Secretary at Churchill, to obtain more details concerning Kentucky's "jail time" requirements. Mr. Huffman informed Mr. Bailey that pursuant to the Kentucky Regulation, a Thoroughbred claimed in Kentucky is not permitted to race anywhere outside of Kentucky until entries are taken for the last day of the meet where the horse was claimed.

Based upon this information and upon learning that the meet where Jamgotchian claimed Rochitta did not end until July 4, 2011, Mr. Bailey refused the entry of Rochitta to race at Penn National, and Jamgotchian forfeited his entry fee. Soon afterwards, Mr. Bailey told Jamgotchian that Rochitta was denied entry

at the Pennsylvania race because of Kentucky's restrictions imposed by the Regulation.

Jamgotchian filed suit against the KHRC and its chief agents in Franklin Circuit Court, seeking a declaration that the Regulation violates the "negative" aspect of the Commerce Clause that denies the States the power to unjustly discriminate against or burden the interstate flow of articles of commerce, or the dormant Commerce Clause. Jamgotchian also sought an injunction to prevent the KHRC and its agents from taking further action to implement or enforce the Regulation against him and other owners who want to race their claimed horses in other racing jurisdictions. Because the constitutionality of the Regulation is a matter of law, the parties submitted the case on cross-motions for summary judgment.

The circuit court first considered whether Jamgotchian had standing to seek declaratory and injunctive relief. In its November 29, 2012, order the circuit court resolved the standing issue in the affirmative, agreeing that Jamgotchian had alleged a sufficient deprivation of his liberty of action and financial interests to allow him to challenge the Regulation. Citing *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the court held that "an adequate case or controversy [exists] to ensure that the parties are adversarial and have a concrete stake in the outcome . . . ." The circuit court held that Jamgotchian failed to show that the Regulation imposes a burden on interstate commerce that amounted to a violation of the Commerce Clause. This appeal now follows.

On appeal, Jamgotchian argues that the circuit court committed reversible error when it found that the Regulation does not create the type of discrimination against or burden on interstate commerce that is prohibited by the Commerce Clause of the United States Constitution.

The KHRC counters that Jamgotchian is not entitled to a declaration of rights because his claims are not justiciable and argues that this Court lacks jurisdiction over Jamgotchian's declaratory judgment because no case or controversy exists and therefore he has no standing. We agree with the trial court that Jamgotchian has standing to challenge the Regulation. He has alleged a sufficient deprivation of his liberty of action and financial interests to allow him to challenge the Regulation. *See Board of Regents*, 408 U.S. at 570-71 (1972). We also agree with the trial court that the case was ripe for review and that there was an adequate case or controversy to ensure that the parties are adversarial and have a concrete stake in the outcome. *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926).

Turning to the merits of Jamgotchian's arguments on appeal, we review the Franklin Circuit Court's order granting summary judgment to determine whether the court correctly found "that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). We review questions of law *de novo*. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The Commerce Clause of the United States Constitution provides that Congress has the power to "regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. Art. I, §8 cl. 3. From this grant of authority, the United States Supreme Court judicially developed the "dormant" Commerce Clause, which imposes certain implicit limitations on the ability of states to burden the flow of interstate commerce. *McBurney v. Young*, 133 S.Ct. 1709, 1719, 185 L.Ed.2d 758 (2013).

The crux of the inquiry when a law, such as the Regulation at issue in the instant case, is alleged to have violated the dormant Commerce Clause is whether the challenged law is protectionist in measure, or "whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Starting from this basic premise, the United States Supreme Court imposes different standards for evaluating whether a law is protectionist in nature, and whether it pertains to a legitimate local concern, depending upon whether the challenged law pertains to a traditional government function. *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 341, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008).

Thus, the first step in determining the constitutionality of the Regulation is deciding whether it involves a traditional government function. *United Haulers Ass'n, Inc. v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). Jamgotchian argues that at no

point in the history of the United States of America has horse racing—unlike trash collection and state taxation—been considered to be a traditional government function. We agree with the KHRC that this argument mischaracterizes the role of the state in the regulation of horse racing. While horse racing itself is not a traditional governmental function, there can be no question that the regulation of horse racing is, and always has been, a traditional governmental function, at least since 1894 in Kentucky. *See* KRS Ch. 36 §§1326-1330 (1894). For more than 100 years, both statutory and case law have established that the state has a unique and far-reaching role in the regulation of this sphere of economic activity.

We agree with Jamgotchian that horse racing is conducted by private owners at privately-owned tracks, but every aspect of the operation of those tracks is closely supervised and regulated by the state. While the state is not a market participant as that term has been used in cases under the Commerce Clause, there can be little doubt that the pervasive role of the state in regulating the horse racing industry meets the broad criteria for traditional governmental function contemplated by the Supreme Court. *United Haulers Ass'n,* 550 U.S. at 338; *Davis*, *supra*, 533 U.S. at 342. The purpose and effect of the regulation in question is not to give preference to any individual in-state private party, but to nurture and promote the market for race horses, and to ensure that the public as a whole will benefit from the stronger fields and more competitive races that will result. In *Davis*, the Supreme Court held that the inquiry is "to find out whether the

preference was for the benefit of a government fulfilling governmental obligations, or the benefit of private interests because they were local." *Id.* at 342, n.9.

The KHRC also points out that the Regulation at issue is an exercise of the state's police power regarding the public health, safety, and welfare of the Commonwealth and its citizens. The Kentucky legislature has created a comprehensive regulatory scheme for horse racing, acting principally through the KHRC, which was created as part of the Public Protection Cabinet. *See* KRS 230.260. The regulation of horse racing is a valid exercise of the state's police power, as acknowledged in KRS 230.215:

> (1) It is the policy of the Commonwealth of Kentucky, in furtherance of its responsibility to foster and to encourage legitimate occupations and industries in the Commonwealth and **to promote and to conserve the public health, safety, and welfare**, and it is hereby declared the intent of the Commonwealth to foster and to encourage the horse breeding industry within the Commonwealth and to encourage the improvement of the breeds of horses. Further, it is the policy and intent of the Commonwealth to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane. Further, it hereby is declared the policy and intent of the Commonwealth that all racing not licensed under this chapter is a public nuisance and may be enjoined as such. Further, it is hereby declared the policy and intent of the Commonwealth that the conduct of horse racing, or the participation in any way in horse racing, or the entrance to or presence where horse racing is conducted, is a privilege and not a personal right; and that this privilege may be granted or denied by the racing commission or its duly approved representatives acting in its behalf.

> (2) It is hereby declared the purpose and intent of this chapter **in the interest of the public health, safety, and welfare**, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.
> …

(Emphasis added). Our highest state court has recognized that the KHRC was "properly invested by the legislature with authority under the police powers of the state to make and enforce rules for the conduct of horse racing in Kentucky, including claiming races." *Bobinchuck v. Levitch*, 380 S.W.2d 233, 236 (Ky. 1964). Just as the *Davis* Court recognized that Kentucky's tax structure "enable[d] Kentucky to promote its police power by protecting the health, safety, and welfare of its citizens," the Regulation, as part of the regulatory scheme created by the legislature and carried out by the KHRC, is expressly an exercise of the state's police power with respect to the public health, safety, and welfare of its citizenry. *Davis*, 553 U.S. at 341-42. This is established by the express language of the governing statutes and recognized by the Kentucky Supreme Court.

In addition, the KHRC notes that the regulation of horse racing—including the regulation of claiming races—is pervasive across the United States. Out of the thirty-eight states that permit wagering on horse racing, twenty-seven states have a claiming law similar to Kentucky's regulation. In *Davis*, the United States Supreme Court placed importance on the numerous other states having a tax law similar to Kentucky's in determining that Kentucky's law served a traditional public function. *Davis*, 553 U.S. at 335, 350. With respect to the Regulation, the significant majority of states that permit horse racing have enacted a claiming law similar to Kentucky's that serves their respective public interests.

We agree with the KHRC that the Regulation, which is part of a larger comprehensive regulatory scheme, constitutes a traditional governmental function because it directly satisfies every factor the United States Supreme Court articulated in *Davis*. Thus, the trial court properly rejected Jamgotchian's arguments to the contrary.

Because the Regulation involves a traditional governmental function, the second step in the Court's analysis is whether the Regulation is discriminatory. In making this determination, the Regulation is not subject to the more rigorous scrutiny generally applied to laws favoring in-state private entities over out-of-state private entities. *See Davis*, 533 U.S. at 342-43. Instead, the Court compares "substantially similar entities" subject to the Regulation, which in the instant case are Kentucky resident licensees who claim Thoroughbred horses in Kentucky races and out-of-state licensees, such as Jamgotchian, who claim Thoroughbred horses in

Kentucky races. A review of this inquiry indicates that the Franklin Circuit Court correctly held that the Regulation is not discriminatory on its face because it applies equally to Kentucky owners and out-of-state owners who have bought a horse at a claiming race in Kentucky. The Regulation treats all private actors—both Kentucky resident licensees and out-of-state licensees—exactly the same. All owners purchasing horses in claiming races on the day Jamgotchian did, regardless of whether they were a Kentucky resident or not, were treated the same under the Regulation. We agree that the Regulation is not discriminatory.

The third and final consideration in assessing whether the Regulation violates the Commerce Clause is whether the Regulation's burden on interstate commerce is clearly excessive in relation to its putative local benefits. *Davis*, 553 U.S. at 339; *United Haulers*, 550 U.S. at 338-39. This analysis was first set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), and the Court in *Davis* observed that "[s]tate laws frequently survive this *Pike* scrutiny." *Davis*, 553 U.S. at 338-39.

Jamgotchian has not established that the Regulation's impact on interstate commerce is anything more than incidental, especially with respect to his circumstances. The circuit court determined that other than Jamgotchian's claimed loss, "the burden on interstate commerce is unclear from the record in this case" and is thus "rather minor and somewhat speculative," while noting that Jamgotchian did not suggest even one potential alternative to the Regulation.

Nonetheless, even if Jamgotchian could demonstrate the Regulation had an impact on interstate commerce, the impact is certainly not more than incidental, for several reasons. First, the Regulation does not totally prohibit the transfer or sale of Thoroughbred horses outside of Kentucky because it only applies to a narrow set of circumstances. In order for the Regulation to apply, a licensee must elect to purchase a Thoroughbred horse at a claiming race in Kentucky. An individual, including a licensee, is free to purchase a Thoroughbred horse privately, outside of a claiming race, and is consequently not subject to the Regulation. A licensed individual such as Jamgotchian, who chooses to purchase a Thoroughbred racing horse in Kentucky, however, agrees to be bound by the Regulation for the privilege of participating in horse racing in this state. *See* KRS 230.290(2). Jamgotchian unilaterally chose to purchase a horse in a claiming race rather than purchase the horse privately; his elective action does not constitute an excessive burden on interstate commerce. The circuit court stated, and we agree, that Jamgotchian "seeks to obtain the benefits of the claiming race regulation" and that because he is a buyer he must "abide by the reasonable restrictions that are designed to promote the health of the horse racing industry as a whole," which necessarily includes the Regulation.

Second, the vast majority of states that permit wagering on horse racing—27 out of 38 states—have enacted laws similar to the Regulation. If nearly every other horse racing jurisdiction has a similar rule, the alleged impact on interstate commerce is likely inconsequential. Third, the Regulation's impact on interstate

commerce, if any, is of limited duration and scope. With respect to Rochitta, Jamgotchian purchased the horse on May 21, 2011, and the Regulation prevented him from racing the horse outside of Kentucky until July 4, 2011—meaning he was impacted for approximately forty days. Even if an individual claimed a horse on the first day of the longest meet in Kentucky, under the Regulation, the individual would be impacted for approximately three months. We agree with the circuit court that the relatively short duration of this restriction militates strongly in favor of upholding the Regulation as a reasonable exercise of the state's police power.

Our review also indicates that the benefits of the Regulation outweigh the trivial burden the Regulation may place on interstate commerce. The Regulation benefits the Commonwealth by preventing the uncontrolled transfer of Thoroughbred horses out of Kentucky in order to ensure larger fields of horses. Jamgotchian discounts this important benefit by asking the Court to take judicial notice of the fact that Churchill Downs was able to fill the field for the 2013 Kentucky Derby. More relevant evidence than the ability of Churchill Downs to fill its field for the most famous horse race in the world is that several of the races in which Jamgotchian sought to enter Rochitta were cancelled because they did not fill. The circuit court's order aptly noted that the Regulation permits the KHRC to accomplish "its core governmental function of ensuring that horse racing maintains competitive fields that are necessary for a healthy racing industry."

Another benefit of the Regulation is that the purchases of horses in claiming races generate revenue through sales taxes on the claimed horses. Jamgotchian, for example, paid $2,400.00 in sales tax to the Commonwealth for the purchase of Rochitta. It is undisputed that the generation of tax revenues benefits the Commonwealth. By ensuring there are a sufficient number of horses to fill races, the Regulation consequently promotes economic development in Kentucky, as did the tax law at issue in *Davis*, *supra*.

Our review indicates, as the trial court properly found, that the Regulation at issue in this case does not violate the dormant Commerce Clause of the United States Constitution. Therefore, we affirm the Franklin Circuit Court's November 29, 2012, opinion and order granting summary judgment in favor of the Kentucky Horse Racing Commission.

ALL CONCUR.

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