

No. 20325 - Common Cause of W. Va., et al. v. Earl Ray Tomblin, et al.

Miller, Justice, dissenting:

The majority has obscured the real issue in this case, i.e., can over \$11.5 million in pork barrel projects be allocated through the Budget Digest? The majority whitewashes the legal precepts in this area with this novel brush: "In deciding this case, it must be reality, not theory, that is the interpretative principle." ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 5).

The result is a great deal of unreality and a future potential for much mischief.

In a number of cases, we have adhered to the salutary principle that the enactment of legislation should be the product of the entire legislature (or a quorum thereof) and not the handiwork of a small group. This is the wellspring of a democratic society and is embodied in this terse statement in Section 1 of Article VI of the West Virginia Constitution: "The legislative power shall be vested in a senate and house of delegates."

In our seminal case of State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981), we struck down a statute which

created the Legislative Rule-Making Review Committee, a twelve-member committee consisting of an equal number of members from the Senate and House, the purpose of which was to review and either approve or disapprove of the various rules and regulations promulgated by administrative agencies given rule-making powers by the legislature. 1976 W. Va. Acts, ch. 117. In Syllabus Points 2 and 3 of Barker, we explained the reasons why this enactment was invalid:

"2. While the Legislature has the power to void or to amend administrative rules and regulations, when it exercises that power it must act as a legislature, within the confines of the enactment procedures mandated by our constitution. It cannot invest itself with the power to act as an administrative agency in order to avoid those requirements.

"3. W. Va. Code §§ 29A-3-11 and 12 (1980 Replacement Vol.), empowering the Legislative Rule-Making Review Committee to veto rules and regulations otherwise validly promulgated by administrative agencies pursuant to a legislative delegation of rule-making power, violate the separation of powers doctrine embodied in article five, section one of our state constitution and are, therefore, void."

The United States Supreme Court subsequently used much this same reasoning to invalidate a one-house congressional veto power over decisions of the Immigration and Naturalization Service allowing a particular deportable alien to remain in this country.

Immigration & Naturalization Serv. v. Chada, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983).

We have rejected the notion that the legislature can amend or abolish specific statutes through the budget. Most recently in Benedict v. Polan, ___ W. Va. ___, ___ S.E.2d ___ (No. 20116 12/13/91), we held that the legislature could not withdraw funds from special revenue accounts through a supplemental appropriations bill. In Benedict, we relied on Syllabus Point 13 of Dadisman v. Moore, ___ W. Va. ___, 384 S.E.2d 816 (1989), where we held, in part: "It is fundamental to our constitutional law and we affirm that the Legislature cannot amend general substantive statutes with budgetary language."

In O'Connor v. Margolin, 170 W. Va. 762, 296 S.E.2d 892 (1982), the Department of Finance and Administration (Department) attempted to replace the State capitol's janitorial staff with private janitorial services. The Department failed to include funding for janitorial employees in its budget, and the legislature adopted a budget without allocating such funds. Because the Department was statutorily required to provide janitorial employees for the capitol complex, we held that the Department could not replace the current public employees for the purpose of contracting privately

for the same services. We also held that the legislature could not abolish such statutorily created positions by failing to fund them in the budget. We recognized, however, that the legislature could repeal or amend the statute authorizing janitors. See also Jones v. Rockefeller, 172 W. Va. 30, 303 S.E.2d 668 (1983) (governor could not close statutorily authorized state hospital); DeVault v. Nicholson, 170 W. Va. 719, 296 S.E.2d 682 (1982) (statutorily created

¹Syllabus Point 1 of O'Connor states:

"W.Va.Code, 5A-4-1 [1969], which requires that the Director of the General Services Division of the Department of Finance and Administration furnish janitors for the maintenance of the State capitol buildings and grounds in Charleston, West Virginia, requires that janitors so retained be State employees, and the Commissioner of Finance and Administration and the Director of the General Services Division of that Department are without authority to terminate the employment of such employees as a class for the purpose of obtaining the same type janitorial service through private contracting."

²Syllabus Point 3 of O'Connor provides:

"W.Va.Code, 5A-4-1 [1969], which requires that the janitors employed pursuant to that statute be State employees, was not amended by way of the funding provisions in the State budget for fiscal year 1983, to provide that such janitorial services may be secured to the State by private contracting."

women's prison could not be closed by Department of Corrections without specific legislative act).

Although the majority concedes, as it must, that the Budget Digest "does not have the force and effect of law," Syllabus Point 2, in part, it then proceeds to invest it with some type of Frankenstein-like half-life. The majority allows the Digest to direct funds if its decision is supported by "memoranda of the negotiations, compromises and agreements or audio recordings of committee or subcommittee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest." Syllabus Point 5, in part.

What a true laboratory of horrors the majority has concocted with this lineage of back-room documents that will transform what was originally pronounced as dead and having no force and effect of law into something alive. The Igers of the world may rejoice at the majority's concoction. I do not, because it takes the legislative process out of the clear light of day where matters are voted on by the entire legislature and condemns it to that subterranean realm where memoranda of negotiations, compromises, and agreements exist and discussions in committee are used to

validate the specific expenditure of funds through the Budget Digest.

In its haste to legitimize the monster that it has created, the majority has ignored an entire series of statutes that govern the budget-making process. W. Va. Code, 5-1A-1, et seq., provides, in detail, how the governor's budget bill shall be itemized and classified to give the legislature sufficient details as to the proposed budget spending. W. Va. Code, 5-1A-4, outlines the various expenditure classifications. This section permits the governor to include an unclassified spending item, provided that it is limited to "an amount not exceeding one percent of the total amount of the proposed appropriations for such spending unit." W. Va. Code, 5-1A-4(b). Obviously, this limitation is designed to prevent large sums from being itemized as "unclassified" and then spent with virtually no accountability.

Of equal, if not of more importance are the provisions of W. Va. Code, 5A-2-1, et seq., dealing with the preparation of the governor's budget and the duties of the various spending units after the budget is adopted. In particular, W. Va. Code, 5A-2-4 (1990), lists in detail the information that each spending unit must

submit to the Secretary of Finance and Administration. This information is then used to prepare the governor's budget. Under

³W. Va. Code, 5A-2-4, provides:

"A request for an appropriation for a spending unit shall specify and itemize in written form:

"(1) A statement showing the amount and kinds of revenue and receipts collected for use of the spending agency during the next preceding fiscal year and anticipated collections for the fiscal year next ensuing;

"(2) A statement by purposes and objects of the amount of appropriations requested for the spending unit without deducting the amount of anticipated collections of special revenue, federal funds or other receipts;

"(3) A statement showing the actual expenditures of the spending unit for the preceding year and estimated expenditures for the current fiscal year itemized by purposes and objects, including those from regular and supplementary appropriations, federal funds, private contributions, transfers, allotments from an emergency or contingent fund and any other expenditures made by or for the spending unit;

"(4) A statement showing the number, classification and compensation of persons employed by the spending unit distinguishing between regular, special and casual employees during the preceding fiscal year and during the current fiscal year. The statement shall show the personnel requirements in similar form for the ensuing fiscal year for which appropriations are requested;

"(5) A statement showing in detail the purposes for which increased amounts of appropriations, if any, are requested, and giving a justification statement for the expenditure of the increased amount. A

W. Va. Code, 5A-2-2 (1990), the Secretary is required to "[s]erve the governor in the consideration of requests for appropriations and the preparation of the budget document."

W. Va. Code, 5A-2-10 (1990), provides that the Secretary "shall supervise and control the expenditure of appropriations made by the Legislature" and that such expenditures "shall be expended only in accordance with this article."

construction or other improvement request shall show in detail the kind and scope of construction or improvement requested;

"(6) A statement of money claims against the state arising out of the activities of the spending unit; and

"(7) Such other information as the secretary may request."

⁴The full text of W. Va. Code, 5A-2-10, is:

"The secretary shall supervise and control the expenditure of appropriations made by the Legislature excluding those made to the Legislature and those made to the judicial branch of the state government. The expenditure of an appropriation made by the Legislature except that made for the Legislature itself and the judicial branch of state government shall be conditioned upon compliance by the spending unit with the provisions of this article. An appropriation made by the Legislature except that made for the Legislature itself and the judicial branch of state government shall be expended only in accordance with this article."

Under W. Va. Code, 5A-2-12 (1990), each spending unit is required to submit a detailed expenditure schedule to the Secretary outlining how the money allocated to the unit will be spent for the ensuing fiscal year. Under W. Va. Code, 5A-2-13 (1990), the expenditure schedule must be reviewed by the Secretary, and, if found to comply with the legislative appropriation for the spending unit, it may be approved. Under W. Va. Code, 5A-2-15 (1990), thirty days prior to the beginning of each quarter of the fiscal year, the spending units are required to submit requests for allotments of

⁵W. Va. Code, 5A-2-12, provides, in material part:

"The schedule shall show:

"(1) A proposed monthly rate of expenditure for amounts appropriated for personal services;

"(2) Each and every position budgeted under personal services for the next ensuing fiscal year, with the monthly salary or compensation of each such position;

"(3) A proposed quarterly rate of expenditure for amounts appropriated for employee benefits, current expenses, equipment and repairs and alterations classified by a uniform system of accounting as called for in section twenty-five [§ 5A-2-25] of this article for each item of every appropriation;

"(4) A proposed yearly plan of expenditure for amounts appropriated for buildings and lands; and

"(5) A proposed quarterly plan of receipts itemized by type of revenue."

public funds to meet their expenditures in accordance with the approved expenditure schedule.

We spoke to the earlier counterparts of these provisions in State ex rel. West Virginia Board of Education v. Miller, 153 W. Va. 414, 168 S.E.2d 820 (1969), and recognized they were designed to implement the Modern Budget Amendment found in Section 51 of Article VI of the West Virginia Constitution. This latter provision clearly contemplates that an itemized budget bill will be adopted.

⁶The current statute is the result of a 1990 revision of Chapter 5A, Article 2. See 1990 W. Va. Acts, ch. 2. The predecessor statutes contain similar provisions. The Secretary of Finance and Administration was formerly called the Commissioner of Finance and Administration. See W. Va. Code, 5F-2-1, et seq.

⁷The relevant language from Section 51 of Article VI of our Constitution is:

"(3) Each budget shall embrace an itemized estimate of the appropriations, in such form and detail as the governor shall determine or as may be prescribed by law: (a) For the legislature as certified to the governor in the manner hereinafter provided; (b) for the executive department; (c) for the judiciary department, as provided by law, certified to the governor by the auditor; (d) for payment and discharge of the principal and interest of any debt of the State created in conformity with the Constitution, and all laws enacted in pursuance thereof; (e) for the salaries payable by the State under the Constitution and laws of the State; (f) for such other purposes as are set forth in the Constitution and in laws made in pursuance thereof.

We have found this constitutional provision to provide for an executive budget, as we explained in Syllabus Point 7 of State ex rel. Moore v. Blankenship, 158 W. Va. 939, 217 S.E.2d 232 (1975):

"While under W. Va. Const., art. VI, § 51, [sub.] B(5) and [sub.] C(7) there is unambiguous language permitting reduction of amounts in the budget bill by the Legislature and subsequent passage of supplementary appropriation bills, the Legislature is not permitted to subvert the intent of the electorate in adopting the concept of an executive budget in art. VI, § 51 by making the constitutionally mandated budget bill a mere formality and then establishing an essentially legislative budget through the devise of supplementary appropriation bills."

"(4) The governor shall deliver to the presiding officer of each house the budget and a bill for all the proposed appropriations of the budget clearly itemized and classified, in such form and detail as the governor shall determine or as may be prescribed by law; and the presiding officer of each house shall promptly cause the bill to be introduced therein, and such bill shall be known as the 'Budget Bill.' . . .

"(5) The legislature shall not amend the budget bill so as to create a deficit but may amend the bill by increasing or decreasing any item therein: . . . Provided . . . that the legislature shall not increase the estimate of revenue submitted in the budget without the approval of the governor."

See also State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 207 S.E.2d 421 (1973).

To my mind, this law mandates a finding that any attempt by way of the Budget Digest to allocate funds or to direct expenditures differently from that prescribed in the budget and its complementary legislation is void. The Constitution and the statutory framework are too detailed to permit the Digest to intrude under the guise of legislative intent. The statutory language authorizing the Digest plainly states that it is "a digest or summary of the budget bill containing detailed information similar to that included in the budget document submitted to the Legislature by the governor but including amendments of legislative committees, and as finally enacted by the Legislature." W. Va. Code, 4-1-18 (1969).

⁸The complete text of W. Va. Code, 4-1-18, is:

"The Legislature, acting by its appropriate committees, shall consider the budget bill, the budget document and matters relating thereto, and following such consideration and upon the passage of the budget bill by the Legislature, the Legislature shall prepare a digest or summary of the budget bill containing detailed information similar to that included in the budget document submitted to the Legislature by the governor but including amendments of legislative committees, and as finally enacted by the Legislature. Such digest or summary shall be prepared at the direction of and approved by members of the

Thus, the plain language of this statute reflects that the Digest is designed to do two things: first, summarize the budget bill as passed; and, second, reflect the legislative changes made to the budget as submitted by the governor.

What the majority has done is distort the constitutional and legislative framework surrounding the budget and ignore our cases that preclude amending legislation without the full vote of the legislature. I respectfully dissent.

conferees committee on the budget and shall be included in the journals of the Legislature or printed as a separate document, and copies shall be furnished to the governor, commissioner of finance and administration, and the various state spending units for such use as may be deemed proper."