

NO. 21519 - CONTRACTORS ASSOCIATION OF WEST VIRGINIA, A WEST VIRGINIA CORPORATION, AND THE FLEXIBLE PAVEMENTS COUNCIL OF WEST VIRGINIA, AN UNINCORPORATED ASSOCIATION, V. WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY, DIVISION OF PUBLIC SAFETY; J. R. BUCKALEW, SUPERINTENDENT OF WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY; WEST VIRGINIA DEPARTMENT OF TRANSPORTATION; DIVISION OF MOTOR VEHICLES; AND JANE CLINE, COMMISSIONER OF THE WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES

Brotherton, Justice, dissenting:

"Our cup runneth over!" exclaimed the Executive and Legislative branches of our State government after reading the majority opinion. Never has the "horn of plenty" produced such a cornucopia of gifts, all delivered sua sponte and unexpectedly by a judiciary, which, incidentally, is elected and sworn to uphold the Constitution of the State of West Virginia.

This case evolves from legislation enacted during the 1990 legislative session to give salary increases to the uniformed members of the Department of Public Safety. I do not dispute the need for a salary increase. What I do dispute is the method by which the increase was funded. Because of budgetary constraints, the Legislature felt it could not fund the salary increases out of the general revenue budget. Consequently, legislation was enacted that would allow the Department of Motor Vehicles to pay the salary increases out of monies collected from the highway user tax on gasoline.<sup>1</sup> The Department of Public Safety would submit vouchers to

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<sup>1</sup>See W.Va. Code §§ 15-2-12(h) and (i), which provide:

the DMV for time that Department members spent providing "highway safety activities" on the state highways. These vouchers were not to exceed the amount the Legislature had determined was sufficient to pay the salary increases. To aid in this budgetary manipulation, the Legislature included a line item in the Department of Motor Vehicles' budget which was identified simply as "unclassified."

After this legislation was enacted, the petitioners brought this action, in which they alleged that the use of the gasoline tax  
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(h) The superintendent may also assign members of the division to administer tests for the issuance of commercial drivers' licenses, operator and junior operator licenses as provided for in section seven [§ 17B-2-7], article two, chapter seventeen-b of this code: Provided, That the division of motor vehicles shall reimburse the division of public safety for salaries and employee benefits paid to such members, and shall either pay directly or reimburse the division for all other expenses of such group of members in accordance with actual costs determined by the superintendent.

(i) The superintendent shall be reimbursed by the division of motor vehicles for salaries and employee benefits paid to members of the division of public safety, and shall either be paid directly or reimbursed by the division of motor vehicles for all other expenses of such group of members in accordance with actual costs determined by the superintendent, for services performed by such members relating to the duties and obligations of the division of motor vehicles set forth in chapters seventeen, seventeen-a, seventeen-b, seventeen-c and seventeen-d [§ 17-1-1 et seq., § 17A-1-1 et seq., § 17B-1-1 et seq., § 17C-1-1 et seq. and § 17D-1-1 et seq.] of this code.

for the Department salary increase was unconstitutional because it violated restrictions set forth under Article VI § 52 of the West Virginia Constitution which specify that gasoline and other motor fuel excise and license taxes are to be used solely for construction, reconstruction, repair, and maintenance of public highways.

In his 1993 State of the State message to the Legislature, the Governor emphasized the need for this State to come up with large sums of highway construction monies in order to maximize the amount of matching funds West Virginia would receive from the federal government. This was to be achieved by legislating a \$.05 per gallon gasoline tax. Needing full support for the gasoline tax, the 1994 budget bill presented to the Legislature at the conclusion of the Governor's State of the State message completely reversed the prior funding scheme and provided that the Department of Public Safety salary increases be paid out of the general revenue part of the budget<sup>2</sup> and took no funds from the highway users taxes. In other words, the salary increase was to come from general revenue funds and not the constitutionally restricted gasoline tax. This deviation would

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<sup>2</sup>See House Bill 2100, the budget bill, introduced in the House of Delegates on February 10, 1993. The same budget bill was introduced in the Senate as Senate Bill 50. See also, Department of Public Safety Account No. 5700, line item for salaries, \$34,974,582, and Division of Motor Vehicles Account No. 6710, unclassified item, \$4,313,697. (The Public Safety pay raise for 1993 was paid from the Department of Motor Vehicles' account and the unclassified item was listed at \$10,913.69.)

hopefully secure the petitioners support for the proposed \$.05 a gallon increase in the gasoline tax.

But now comes the reason for the exasperation expressed in the first paragraph of this dissent. The majority opinion, which was filed March 25, 1993, declared constitutional the 1990 legislative action which provided that money could be diverted from the constitutionally protected gasoline tax. As a result, a \$6.4 million windfall fell into the arms of a legislature and executive desperate for money to balance the fiscal year 1994 budget without raising more taxes.

The fiscal year budget finally passed during the first extraordinary session of the Legislature in May, 1993, reflected the results of the majority opinion. The salary increases would not come from the general revenue budget as originally proposed in February, but instead were to be paid out of the DMV's gasoline tax revenues.

The "unclassified" line item in the DMV budget was increased, while the line item in the Department of Public Safety budget to pay the salary increases was reduced.<sup>3</sup> Voila!! Their cup runneth over.<sup>4</sup>

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<sup>3</sup>Enrolled Committee Substitute for H.B. 105, the 1994 budget bill, was passed by the Legislature on May 27, 1993, effective from passing, during the First Extraordinary Session of the 71st Legislature; Enrolled Committee Substitute for H.B. 105 appropriated to the Division of Public Safety Account No. 5700, for fiscal year 1994, \$25,896,586 (some \$9,000,000 less than was requested in the budget bill submitted in February, 1993), which had been money for the pay increase; and Enrolled Committee Substitute for H.B. 105 appropriated to the Division of Motor Vehicles Account No. 6710, for

But enough about the rapture that the Executive and Legislative branches are enjoying, and more about the serious fissures the majority opinion creates.

Article VI, § 52 of the West Virginia Constitution, adopted by a vote of the citizens of this State in November, 1942, states that:

Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deduction of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways. (Emphasis added.)

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fiscal year 1994, unclassified item \$10,435,396. The difference of \$6,121,699 from the original budget bill introduced on February 10, 1993, and the final budget bill enacted was to pay the Department of Public Safety salary increase out of the gasoline tax revenues.

<sup>4</sup>The majority, on page 9 of their opinion, stated that for the purposes of the opinion the funds expended from the DMV pursuant to W.Va. Code § 15-2-12(i) (1990) involve funds described in the constitutional amendment (gasoline revenues).

The underlined language of this amendment is the subject of a lengthy and tortured interpretation in the majority opinion. I do not see why. In syllabus point 1 of this Court's unanimous opinion in Jarrett Printing Company v. Ronald Riley, et al., \_\_\_ W.Va. \_\_\_, 424 S.E.2d 738 (1992), filed only four months before the majority opinion, this Court once again reiterated the long accepted principle of constitutional interpretation:

"Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. pt. 3, State ex rel. Smith v. Gore, 150 W.Va. 71, 143 S.E.2d 791 (1965).

There are few constitutional provisions plainer than Article VI, § 52.

It is not written in Chaucerian English or the English used in 1863, or any version of the English language that might possibly be subject to interpretation. It is written in the English of 1942, the year the amendment was adopted, which happens to be the very same English that we still speak, read, and write today. A high school student would have no trouble reading the amendment and explaining the meaning of the words "construction, reconstruction, repair and maintenance."

Still, the majority was not deterred, and after fifty-one years it changed the definition of "maintenance" to justify the actions of a legislative body which was desperate to "find" money to avoid raising taxes.

The majority cites as authority for their decision syllabus point 4 of State ex rel. Smith v. Kelly, 149 W.Va. 381, 141 S.E.2d 142 (1965):

"Though it is a cardinal rule of constitutional construction to give effect to the intent of the framers of the Constitution and the people who adopted it, new and changing conditions not existing at the time the Constitution was adopted should be looked to and applied in the interpretation of a procedural provision of the Constitution." Point 4 Syllabus, State ex rel. Morgan et al. v. O'Brien, 134 W.Va. 1, 60 S.E.2d 722. (Emphasis added.)

To support its option, the majority finds "new and changing conditions" in the building of interstate highways, creating a greater need for highway safety. West Virginia had a vast network of highways in 1942, and the constitutional amendment adopted by the people in 1942 was to construct a new "primary" road system that would meet the needs of an increasingly mobile population, all to be constructed and financed from "road user" taxes.

The majority's use of syllabus point 4 of State ex rel. Smith v. Kelly, 149 W.Va. 391, 141 S.E.2d 142 (1965), as authority for interpreting the plain language of Article VI, § 52 creates a result quite different from what was originally intended, which was for gasoline tax revenues to be used solely for the construction, reconstruction, repair and maintenance of public highways. The majority's result permits funds to be diverted from gasoline tax revenues in order to pay for the costs of highway safety provided

by the West Virginia Department of Public Safety on state highways, which includes road patrol, traffic, including accident investigation, preparing accident reports, serving traffic warrants, time spent at traffic court involving highway violations, operators examinations, and assisting the Division of Motor Vehicles.<sup>5</sup>

Is the majority telling us that these things, which are essential to providing highway safety, are "new and changing conditions" which were not a part of providing highway safety way back in 1942? Surely, these same highway safety costs were incurred in 1942, when Article VI, § 52 was adopted. Regardless, fifty-one years later, four Justices of this Court redefine "maintenance" to include "highway safety," which encompasses all activities performed by the Department of public Safety or associated with activities performed by the Department of Public Safety on State highways. Does it also include the proportionate cost of the patrol car that is used in road patrol and the proportionate cost of a helicopter or airplane that is sometimes used in traffic surveillance?

The judicial cornucopia that is the majority opinion also includes other gifts. The majority opinion declared constitutional the DMV's use of money for implementation of W.Va. Code § 17A-4-10(c),

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<sup>5</sup>These costs are not recoverable from the Federal Highway Trust Fund as part of the federal government's share of matching money for construction of highways.



W.Va. Code § 17A-6B-3 (1990), and duties of the Department of Public Safety set out under W.Va. Code § 17C-1-1 et seq., W.Va. Code § 17A-3-3a(7) (1984), W.Va. Code § 17B-1D-7 (1990); W.Va. Code § 17A-4-10(c) (1990), and W.Va. Code § 17A-6B-3(b) (1990). The majority opinion states that the DMV's expenditure of monies in reimbursing the Department of Public Safety for their proven costs in implementing these Code sections is constitutional under Article VI, Section 52 of the West Virginia Constitution.

The majority finds some of these expenditures to be "administrative costs" authorized by Article VI, Section 52 of the West Virginia Constitution. Again, it is difficult to understand this rationale. The constitutional amendment clearly states:  
All . . . revenue derived from motor vehicles . . . shall,  
after deduction of statutory refunds and cost  
of administration and collection authorized by  
legislative appropriation, be appropriated and  
used solely for construction, reconstruction,  
repair and maintenance of public highways, and  
also the payment of the interest and principal  
on all road bonds heretofore issued . . . .

"Cost of administration," as set out in Article VI, § 52, refers to "deduction of statutory refunds and cost of administration and collection of the tax", for the payment of the bonds issued to provide the revenue for the construction, reconstruction, repair and maintenance of public highways. Some of these costs may be legitimate under the amendment, but to lump those expenditures under the umbrella of maintenance and administrative costs as part of highway safety

evidences the majority's intent to change the meaning of the constitutional amendment to meet expenditures which were not contemplated by the voters in 1942 when the constitutional amendment was adopted.<sup>6</sup>

The haunting question created by the majority opinion is whether the municipal police and deputy sheriffs can now ask the Legislature for equal treatment in view of the fact that they perform the same so-called "maintenance = highway safety duties," as the Department of Public Safety, and on the very same highways. The municipal police and deputy sheriffs perform patrol and traffic court activities on State highways passing through the various municipalities and counties. Their jurisdiction over these activities is concurrent in most cases, with the Department of Safety.

I am sure that the answer to this question would be that the Legislature would never do such a thing. However, be they public or private, special interest groups are the gasoline that fuels the legislative machine. Now that one group, like the camel, has gotten its nose under the tent, how long will it be before other camels start nosing around? It is amazing what can happen after a Pandora's "tent" is opened.

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<sup>6</sup>The majority opinion held that the expenditures of highway users funds for the construction of Department of Public Safety police barracks was not an activity that was connected to highway safety and was, therefore, unconstitutional under Article VI, Section 52 of the West Virginia Constitution.

Roads and education -- education and roads -- are two budgetary mainstays essential to providing a productive future for our present and future citizens. To dilute the taxes already dedicated to the construction, reconstruction, repair and maintenance of that road system is tragic. And to change the plain meaning of a well-defined word in order to satisfy a legislative act jeopardizes the future of the highway system of this State and creates a doubt in the mind of the voter when he or she votes for a constitutional amendment. Our citizens do not need further cause for any deeper cynicism about their government and the future of this State.

Why have a constitution if the plain meaning of its language can be so easily subverted and redefined to conform to legislative needs? Does the end justify the means? I don't think so.

For these reasons, I dissent.