

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

FILED

October 29, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29178

RELEASED

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

GARY W. FRANTZ, d/b/a FRANTZ LUMBER COMPANY,
GARY W. FRANTZ, d/b/a TRI-STATE LOGGING
AND TRI-STATE LOGGING, INC.
Petitioner Below, Appellant

v.

JOSEPH M. PALMER, STATE TAX COMMISSIONER
OF THE STATE OF WEST VIRGINIA
Respondent Below, Appellee

Appeal from the Circuit Court of Kanawha County
Honorable James C. Stucky, Judge
Civil Action No. 98-AA-141

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 18, 2001
Filed: October 29, 2001

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. “[A]dministrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted.” Syl. Pt. 7, in part, *Allen v. State Human Rights Comm’n*, 174 W.Va. 139, 324 S.E.2d 99 (1984).

3. “‘A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.’ Point 6, syllabus, *State v. Heston*, 137 W.Va. 375 [71 S.E.2d 481].” Syl. Pt. 4, *State ex rel. State Building Comm’n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966).

4. The statutory language of West Virginia Code § 11-10-10(d) (1986) (Repl.Vol.1999), which permits an administrative body to have ultimate discretionary authority on the critical issue of a bond

or a substitute therefor, required to perfect an appeal of that administrative body's decision to a circuit court, violates the open courts provision set forth in article III, section 17 of the West Virginia Constitution.

5. A taxpayer who chooses to proceed under the statutory alternative for an appeal bond under West Virginia Code § 11-10-10(d) (1986) (Repl.Vol.1999), and who otherwise complies with the statutory requirements for requesting a waiver of the appeal bond requirement, is entitled to apply to the circuit court for a review of any adverse determination concerning bond waiver.

Albright, Justice:

Appellant Gary W. Frantz, d/b/a Frantz Lumber Company, Tri-State Logging, and Tri-State Logging, Inc. (hereinafter “Taxpayer”), challenges the July 26, 1999, order of the Circuit Court of Kanawha County dismissing his appeal from an administrative ruling of Appellee Joseph M. Palmer, the State Tax Commissioner (hereinafter “Tax Commissioner”). As grounds for the appeal, Taxpayer challenges the constitutionality of West Virginia Code § 11-10-10(d) (1986) (Repl. Vol. 1999) insofar as that statutory provision reposes sole discretion in the Tax Commissioner with regard to issuance of a certification of adequate assets sufficient to secure performance in lieu of the appeal bond otherwise required by the statute. Upon careful examination of the statutory provisions, we find that West Virginia Code § 11-10-10(d) violates our constitutional guarantee of open access to the courts¹ by omitting any provision for judicial review of the Tax Commissioner’s discretion concerning the issuance of a certificate of adequate assets. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

I. Factual and Procedural Background

¹See W.Va. Const. art. III, § 17.

In 1990, the Tax Commissioner assessed Taxpayer, a Maryland resident who is in the timber business, for certain unpaid business and occupation,² severance, and franchise taxes covering the period of 1986 through 1989. The amount of the assessment was \$17,362.23 with additions of \$4,338.78 and interest of \$2,636.83 for a total amount owing of \$24,337.84. Taxpayer timely filed a petition seeking a reassessment of the taxes and an administrative hearing was held on August 20, 1991. The ruling relative to this administrative proceeding was issued on August 26, 1998—more than seven years after the hearing.³ In issuing its ruling, the Tax Commissioner affirmed the tax liabilities assessed but waived in full all the additions to the tax including the interest figure.

On October 22, 1998, Taxpayer timely filed an appeal from the Tax Commissioner's decision in accordance with the provisions of West Virginia Code § 11-10-10.⁴ As part of the provisions governing the appeal, Taxpayer was required within ninety days of the filing of the petition to file a cash or corporate surety bond or, alternatively, to seek a certificate from the Tax Commissioner dispensing with such bonds based on sufficient proof of assets. *See* W.Va. Code § 11-10-10(d). While Taxpayer

²The business and occupation tax was repealed in 1989 with regard to timbering. *See* W.Va. Code § 11-13-2a (1985) (repealed by 1989 W.Va. Acts, 1st Ex. Sess., ch.2).

³In explanation, the Tax Commissioner suggested that Taxpayer's request to submit documentation in support of his position following the administrative hearing may have contributed to the delayed ruling.

⁴Appeals taken from administrative tax decisions are required to be filed within sixty days of service of the ruling upon the taxpayer. *See* W.Va. Code § 11-10-10(a).

undertook efforts to obtain a corporate surety bond,⁵ the surety company contacted was unwilling to issue a bond based on the fact that Taxpayer's business records for the relevant time period had been destroyed due to the flooding of his Maryland residence in 1995.

Following the passage of the ninety-day period for filing the appeal bond, the Tax Commissioner filed a motion to dismiss⁶ the appeal, citing lack of jurisdiction for Taxpayer's failure to obtain the requisite appeal bond.⁷ On April 15, 1999, Taxpayer filed a motion for leave to proceed without bond or alternatively, with a reduced bond. As exhibits to this motion, Taxpayer filed an affidavit setting forth in detail his unsuccessful efforts regarding securing a surety bond, as well as a financial statement offered to demonstrate the availability of personal assets sufficient to cover the amount of the tax assessment. The circuit court, upon its consideration of the various filings of the parties, ruled that Taxpayer's failure to file an appeal bond within the statutory requirements of West Virginia Code § 11-10-10(d) prevented it from hearing the appeal on jurisdictional grounds. Seeking to obtain an appeal on the merits of his case, Taxpayer asks this Court to reverse the lower court's ruling.

⁵According to the affidavit of Gary W. Frantz, he contacted BGS&G Company who in turn contacted Travelers Casualty and Surety Company with reference to obtaining a surety bond.

⁶According to the certificate of service, the Tax Commissioner served the motion to dismiss on Taxpayer on March 30, 1999. The motion, however, was not entered into the Kanawha County Circuit Court's file until July 26, 1999--the same date the circuit court's ruling was entered.

⁷In its response to the petition for appeal filed on December 21, 1998, the Tax Commissioner raised as an affirmative defense the resulting lack of jurisdiction in the event Taxpayer failed to timely file an appeal bond as required by West Virginia Code § 11-10-10(d).

II. Standard of Review

Our review of this matter is *de novo* consistent with our holding in syllabus point one of *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995), that “[w]here the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Plenary review is required in this case as issues of statutory interpretation as well as the constitutionality of West Virginia Code § 11-10-10(d) are presented.

III. Discussion

A. Undue Delay

While we find it unnecessary to resolve this case on grounds of delay, we wish to comment nonetheless on the lengthy period of time that ensued between the administrative hearing and the issuance of the Tax Commissioner’s ruling. More than seven years transpired between the August 1991 administrative hearing and the Tax Commissioner’s ruling in late August 1998. Tax decisions are governed by the requirement set forth in West Virginia Code § 11-10-9 (1978) (Repl.Vol.1999) that the tax commissioner’s decision “shall” be provided in writing “within a reasonable time” after the administrative hearing takes place. *Id.* Rather than offering any explanation for the protracted delay that occurred in this case,⁸ the Tax Commissioner chose instead to criticize Taxpayer for failing to initiate a writ of mandamus to prompt the issuance of a ruling. *See, e.g.,* Syl. Pt. 2, in part, *Kanawha Valley Trans. Co. v. Public*

⁸*See supra* note 3.

Serv. Comm’n, 159 W.Va. 88, 219 S.E.2d 332 (1975) (“If a decision is unduly delayed, a proceeding in mandamus may be instituted to compel a decision . . .”).

Among the list of guarantees set forth in article III, section 17 of our state constitution is the laudatory mandate that “justice shall be administered without . . . delay.” W.Va. Const. art. III, § 17. Just as circuit court judges “have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission,” Syl. Pt. 1, in part, *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984), the obligation to act in a timely fashion is similarly imposed upon administrative bodies, as we recognized in syllabus point seven of *Allen v. State Human Rights Commission*, 174 W.Va. 139, 324 S.E.2d 99 (1984): “[A]dministrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted.”

When a litigant asserts constitutional violations predicated on decisional delay, the inquiry becomes one of whether the litigant can establish that his ability to prepare or defend his case has been substantially prejudiced as a result of the delay. *See Allen*, 174 W.Va. at 157 n. 22, 324 S.E.2d at 117 n. 22 (discussing correlation between administrative promptness and procedural due process); (*New York State NOW v. Cuomo*, 14 F.Supp.2d 424, 431 (S.D. N.Y. 1998) (holding that administrative delay may rise to level of constitutional violation if substantive constitutional rights are violated), *order vacated on other grounds*, 261 F.3d 156 (2nd Cir. 2001); *O’Keefe v. Murphy*, 345 N.E.2d 292, 294 (N.Y. 1976) (“[W]henver a delay in an administrative adjudication significantly or deliberately interferes with a party’s capacity to prepare or to present his case, the right to due process has been violated”); *see*

generally 2 Am.Jur.2d Admin. Law § 379 (1994). Taxpayer asserts that, due to the decisional delay, his ability to defend his position with regard to challenging the tax assessment has been prejudiced by the staleness of the evidence and the intervening flood-related destruction of his business records. Rather than addressing the effects of the delay on Taxpayer's appeal,⁹ the Tax Commissioner observes only that Taxpayer has benefitted from the delay because he enjoyed the benefits of an interest-free loan of money otherwise owed.¹⁰

"Time limitations," as we recognized in *Allen*, "are frequently imposed by the Legislature in recognition of the need for expeditiousness." 174 W.Va. at 158, 324 S.E.2d at 119. In this case, the within a "reasonable time" period prescribed by the Legislature for the issuance of tax decisions was clearly exceeded by the Tax Commissioner. We would be hard pressed to find the existence of good cause with regard to the seven-year delay between the administrative hearing and the issuance of the decision at issue here. We admonish the Tax Commissioner to comply with the legislatively-selected time period for the issuance of tax decisions. *See* W.Va. Code § 11-10-9. Despite the availability of extraordinary relief as a means of seeking the issuance of delayed decisions, taxpayers should not have to resort to the judicial system to obtain a timely tax ruling.

⁹Because this appeal is predicated on issues of the lower court's jurisdiction, we do not address the merits of those prejudices Taxpayer asserts with regard to the issue of delay.

¹⁰The administrative decision provided that no interest accrued for the period covering approximately six months after the hearing to the August 26, 1998, date of the Tax Commissioner's ruling.

B. Constitutional Defects

To determine whether West Virginia Code § 11-10-10(d) violates the West Virginia Constitution, we examine the pertinent statutory provisions which require as follows:

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.**

W.Va. Code § 11-10-10(d) (emphasis supplied). Taxpayer's challenge to this constitutional language arises from the legislative decision to grant the Tax Commissioner sole dispositional authority to dispense with the bond requirement. With this unfettered grant of discretionary power, Taxpayer maintains that the Legislature has violated our state constitution's guarantee of open access to the courts. W.Va. Const. art. III, §17.

Taxpayer asserts that to repose unchecked power in the administrative body that is a party to the tax appeal necessarily works an injustice in those instances where the Tax Commissioner's discretion is employed to deny a taxpayer access to the judicial system. Furthermore, Taxpayer suggests that the circuit court, not the Tax Commissioner, should be vested with ultimate authority to modify or waive the

bond required for an appeal under West Virginia Code § 11-10-10(d). We agree. An adverse party should not “hold the keys to the courthouse.”

In the criminal context we have recognized that “[o]nce a person is convicted of a misdemeanor and sentenced to jail, he must then post an appeal bond which, if cynically manipulated, can defeat his appeal.” *Champ v. McGee*, 165 W.Va. 567, 570, 270 S.E.2d 445, 447 (1980). We believe that the case before us implicates the principle recognized in *Champ*. When one party may--by the unchecked exercise of discretion--prevent the right to judicial review belonging to an opposing party, as West Virginia Code § 11-10-10(d) currently allows, then the right of open access to the courts guaranteed by article III, section 17 of the West Virginia Constitution has been contravened.

Other courts, in reviewing their respective tax statutes, have similarly determined that statutory provisions which deny a taxpayer’s access to judicial review are unconstitutional. *See, R Commun., Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1994) (finding statutory enactment removing remedy of prepayment declaratory relief from tax assessment to be unconstitutional denial of open courts mandate of Texas constitution); *Jensen v. State Tax Comm’n*, 835 P.2d 965, 968-69 (Utah 1992) (holding that violation of Utah open courts provision results where taxpayer is unable to deposit full amount of taxes, interest, and penalties as required by statute as condition to appeal of tax assessment).

Accordingly, we hold that the statutory language of West Virginia Code § 11-10-10(d), which permits an administrative body to have ultimate discretionary authority on the critical issue of a bond

or a substitute therefor,¹¹ required to perfect an appeal of that administrative body's decision to a circuit court, violates the open courts provision set forth in article III, section 17 of the West Virginia Constitution. That ultimate discretionary authority must be vested in the courts. Determining the sufficiency of an appeal bond or its alternatives is a judicial function and not an executive function.

Turning now to fashioning the limited relief required in this case, we heed the following axiom of statutory construction: "Acts of the Legislature are always presumed to be constitutional, and this Court will interpret legislation in any reasonable way which will sustain its constitutionality." *State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 883, 207 S.E.2d 113, 118 (1973). Equally applicable is our recognition that

"[a] statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained." Point 6, syllabus, *State v. Heston*, 137 W.Va. 375 [71 S.E.2d 481].

Syl. Pt. 4, *State ex rel. State Building Comm'n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966). Cognizant of our obligation to respect the legislative will and to uphold all constitutionally valid legislative provisions, we proceed to determine, to the greatest extent possible, the statutory provisions that may be sustained, and to identify, as narrowly as possible, the specific language that fails constitutional muster. *See*

¹¹We are unaware of any other statute that reposes in any other administrative body similar discretion with regard to the requirement of an appeal bond.

Syl. Pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) (“In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches.”).

We perceive no problem with the provisions of West Virginia Code §11-10-10(d) which permit the Tax Commissioner to examine whatever evidence the taxpayer presents regarding his sufficiency of assets to cover the amount of the tax assessment. Similarly we perceive no problems with authorizing the Tax Commissioner to certify that a taxpayer’s assets are deemed sufficient to permit an appeal to proceed without a bond or with some other arrangements in lieu of bond, so as to permit the parties to proceed to the appeal by agreement on the issue of a bond or other security.

The language in West Virginia Code § 11-10-10(d) which is troublesome to this Court is the statutory clause permitting the Tax Commissioner “**in his discretion upon such terms as he may prescribe**” to grant or withhold approval of a Taxpayer’s request to substitute taxpayer’s property “or other indemnification” for the required appeal bond, as a condition of Taxpayer prosecuting an appeal of the Tax Commissioner’s levy of taxes, penalties and interest.¹² W.Va. Code § 11-10-10(d) (emphasis supplied). Based on our conclusion that the courts, not the Tax Commissioner, must be vested with the

¹²We seek here to preserve and promote the separation of powers among the three branches of our state government, by limiting our action as narrowly as possible to the necessities created by the constitutional deficiency identified in West Virginia Code § 11-10-10(d). *See* W.Va. Const. art. V, §1.

ultimate discretionary authority to fix the terms upon which an appeal bond may be waived or other property or indemnification substituted for the bond, this broad grant of discretion to the Tax Commissioner--and the Tax Commissioner alone--does not survive constitutional scrutiny.

Consistent with the position of the Tax Commissioner and the court below, we acknowledge that this Court has generally viewed compliance with statutorily-imposed deadlines for the posting of bonds to prosecute an action or perfect an appeal as jurisdictional in nature. *See Stevens v. Saunders*, 159 W.Va. 179, 220 S.E.2d 887 (1975) (affirming dismissal on statute of limitations grounds where cost bond not obtained until after period of repose had run), *superseded by statute as stated in Crawford v. Hatcher*, 804 F.Supp. 834 (S.D. W.Va. 1992); *Gaines v. Hawkins*, 153 W.Va. 471, 170 S.E.2d 676 (1969) (applying statutory period for obtaining bond in connection with civil appeals); *Scott Coal & Coke Ry. Co.*, 70 W.Va. 777, 74 S.E. 992 (1912) (interpreting statutory provision regarding applicable period for perfecting civil appeals). None of those cases cited by the court below in support of its ruling, however, involve application of the statutory provision at issue in this case or raise the issue central to this case of a constitutional challenge to the statutory language vesting in an opposing party--a state administrative body--the final power to approve, modify, or excuse compliance with a bond requirement. In cases where statutory time periods for initiating litigation were relied upon to dismiss causes of action and the appellate courts subsequently determined that tolling statutes applicable to minors were unconstitutional, those cases were remanded despite the statute of limitations problem. *See, e.g. Whitlow v. Board of Educ.*, 190 W.Va. 223, 438 S.E.2d 15 (1993) (remanding case dismissed on statute of limitation grounds after determining that tolling statute was unconstitutional); *accord Strahler*

v. St. Luke's Hosp., 706 S.W.2d 7 (Mo. 1986); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). For analogous reasons, our conclusion regarding the unconstitutionality of certain language found in West Virginia Code § 11-10-10(d) requires that Taxpayer and others affected by this language have a meaningful opportunity to pursue their appeals through the posting of bond or providing substitute property or indemnification in a manner consistent with the principles set forth in this opinion.

Accordingly, pending legislative attention to the defect we have found in West Virginia Code § 11-10-10(d), reposing sole discretionary authority in the Tax Commissioner regarding bond waiver, we hold that a taxpayer who chooses to proceed under the statutory alternative for an appeal bond provided under West Virginia Code § 11-10-10(d), and who otherwise complies with the statutory requirements for requesting a waiver of the appeal bond requirement, is entitled to apply to the circuit court for a review of any adverse determination concerning bond waiver. In considering such an application, the lower court should consider evidence of Taxpayer's ability to pay the tax assessment and other relevant factors that the Tax Commissioner or Taxpayer wish to address with regard to the issue of adequate assets or other substitute indemnification. If the circuit court makes a determination that the Tax Commissioner has unreasonably refused to issue a certificate regarding the taxpayer's adequacy of assets or other proposed substitute indemnification, the circuit court has authority to set the terms of the appeal. While the ninety-day period prescribed by statute for obtaining an appeal bond or the statutory alternative remains enforceable, where a litigant who properly sought a waiver from the Tax Commissioner within the ninety-day statutory period seeks judicial review of the Tax Commissioner's decision within that ninety-day period, the lower court has jurisdiction to address the issue, and, in due course to hear a resulting appeal.

In undertaking to fashion relief for the Taxpayer aggrieved by the lack of a remedy at law due to the constitutional deficiency, we note the failure of Taxpayer to apply to the Tax Commissioner for a waiver of the appeal bond requirement within the ninety-day period after the appeal was filed.¹³ *See* W.Va. Code § 11-10-10(d). We note that while Taxpayer did undertake efforts within that time period to obtain a bond, his difficulty in obtaining a bond was attributable at least indirectly, if not directly, to the dilatory efforts of the Tax Commissioner to issue the ruling appealed from. Based on our determination that ultimate discretionary authority concerning the appeal bond or its substitute cannot rest with the administrative body who is a party to the appeal, we find it necessary to allow Taxpayer a reasonable opportunity to perfect his appeal. Accordingly, we are remanding this matter to the circuit court with the following directions. Within the ninety-day period next following the issuance of the mandate herein, Taxpayer shall: (1) post the required bond or propose to Tax Commissioner what property or other indemnification Taxpayer proposes to substitute for such bond, or, (2) failing such agreement, apply to the circuit court below for a judicial determination of what property or other indemnification may lawfully be substituted if Taxpayer and Tax Commissioner do not promptly reach an agreement well before the expiration of such ninety-day period. If it is necessary for the circuit court to fix the terms for substituted property or other indemnification, the lower court's order should be made as soon after the Taxpayer's application to the circuit court or the expiration of such ninety-day period as practicable. The lower court should consider evidence of Taxpayer's ability to pay the tax assessment and other relevant factors that the Tax Commissioner or Taxpayer wish to adduce with regard to the issue of adequate assets or other

¹³Taxpayer concluded that applying to the Tax Commissioner for relief from the bond requirement would likely be "futile."

substitute indemnification. Any agreement between Taxpayer and the Tax Commissioner should be filed with the Circuit Court within the ninety-day period, and preferably well before. Upon either agreement between Taxpayer and the Tax Commissioner or an order of the circuit court in lieu thereof, Taxpayer must either comply within ten days of the filing of the agreement or entry of the circuit court's order or his appeal shall be dismissed.

Accordingly, we hereby reverse the decision of the Circuit Court of Kanawha County and remand this matter for further proceedings consistent with the directives contained in this opinion.

Reversed and Remanded with Directions.