

**FILED**

**July 11, 2006**

Starcher, J., dissenting:

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OF WEST VIRGINIA

I dissent because I believe that the majority’s opinion ignored the facts developed in the court below. By ignoring the facts, the majority’s opinion made the Tax Commissioner look like the “bad guy” beating up on a bunch of sweet, innocent, good Samaritans.

Nothing could be further from the truth.

I concede – even the Tax Commissioner concedes – that the Loyal Order of Moose contributes lots of money to local and national charities that it raises through its gambling operations.<sup>1</sup> But this case wasn’t really about whether this local Moose Lodge could, or could not, donate money to charitable organizations. There was therefore no need for the majority opinion to chide the Tax Commissioner into “assist[ing] the Moose Lodge in guiding it through the balkanized maze enveloping West Virginia’s charitable raffle laws.”

This case was about a local Moose Lodge that routinely conducted gambling operations without having a license to do so, in plain violation of state law. This Moose Lodge had its charitable raffle license suspended on October 26, 2001. This order was never,

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<sup>1</sup>As the majority opinion says, this Moose Lodge has “repeatedly made countless donations” to the United Way, the Berkeley County Senior Services, the Berkeley County Alzheimer’s Association, the Youth Awareness Programs, etc. The Loyal Order of the Moose also supports Moosehaven, a retirement facility in Florida for senior members of the Moose, and Mooseheart, a city and school in Illinois for children and teens in need.

ever appealed. The Lodge continued its gambling operations. When it then broke the law, by conducting raffle-type games when the license was suspended, the Tax Commissioner decided to not renew the Moose Lodge's license.

Now, five-and-a-half years later the majority's opinion has taken it upon itself to reverse that order. This alone is troubling, because appellate courts are not constitutionally supposed to reverse orders that haven't been appealed.

Furthermore, how the Tax Commissioner applied the rules regarding the use of the proceeds of charitable raffles had nothing to do with the denial of the Moose Lodge's license renewal application. The majority's opinion is, therefore, entirely advisory because the thrust of the Moose Lodge's lawsuit centered upon the denial of the application.

But most troubling is the complete absence from the majority's opinion of the facts explaining *why* the Tax Commissioner felt compelled to issue the October 26, 2001 order suspending the charitable raffle license.

In 1999, the Tax Commissioner sanctioned the Moose Lodge for prior problems with its gambling operations, and a notice of intent to suspend the Moose Lodge's gambling operations was issued in July 1999. The Moose Lodge, by its board of directors, voluntarily elected to waive its right to any hearing on the notice – that is, they tacitly admitted that the facts supporting the suspension of the charitable raffle license were true. However, to avoid having the license suspended, the Moose Lodge – with the advice of a lawyer – entered into an “alternative disposition agreement” with the Tax Commissioner on October 14, 1999.

In the alternative disposition agreement, the Moose Lodge agreed to do two things: contribute \$81,018.00 to charitable or public service purposes; and comply with charitable gaming laws for the next three years. The Moose Lodge never challenged this agreement, never filed any collateral proceeding, never asked for a hearing or petitioned the circuit court for relief. But that didn't matter. The Moose Lodge never complied with either provision of the agreement.

First, no one disputes that the Moose Lodge failed to make the \$81,018.00 contribution. Instead, the majority opinion decides that this contribution amount "was coerced by the Commissioner," and therefore that the Moose Lodge's promise to make this contribution could be ignored. This is surprising. It is quite rare to see the members of the majority say that if a law breaker signs an agreement with a prosecutor, and agrees to some penalty – say, a fine or jail time – then this Court will set aside that plea agreement if it was "coerced by the prosecutor." But then, Moose Lodge members vote; most other law-breakers don't.

Second, while most citizens must follow the law as a matter of daily living, the Moose Lodge in the alternative disposition agreement actually went one step further and said to the Tax Commissioner, "we agree to follow the law!" And then, the Moose Lodge broke the law. The Moose Lodge blatantly violated the State's charitable gaming laws.

On September 18, 2001, investigators for the Tax Commissioner inspected the Moose Lodge and inventoried the charitable games that were on the premises. Investigators found numerous raffle-type games for which the Moose Lodge could not produce invoices

or other supporting documents, as was required by law. Moose Lodge employees told the investigators they had never seen the games, or that the games must have been given to the Moose Lodge by the raffle distributor as a gift. The employees then suggested that maybe some other organization had used the Moose Lodge premises and accidentally left the games behind – however, a review of the other organizations’ records showed none had conducted any raffle events at the Moose Lodge.

The Moose Lodge’s license was suspended for six months effective October 30, 2001. As previously mentioned, the suspension order was never appealed. But the Moose Lodge kept right on gambling.

On December 23, 2001, investigators entered the Moose Lodge premises and immediately saw people selling raffle games. When people saw the investigators, they began dumping raffle tickets into trash cans, grabbing the trash bags out of the cans and hustling them out the back door of the building. The investigators confiscated tubs, trash cans and trash bags filled with raffle tickets. When a Moose Lodge employee was asked why they were selling raffle tickets when their license was suspended, the employee told the investigator “the Moose Lodge was going broke and needed the money.” Once again, the Moose Lodge had no invoices or receipts for the raffle-type games – as required by law.

Moose Lodge employees said they weren’t sure how the games came to be on the premises, but one told investigators that the games had been “donated” by someone who was not a licensed distributor or wholesaler of games. Instead, he was “just an old boy that buys raffle items.” This gentleman later produced an invoice for the Moose Lodge – but the

Tax Commissioner rightly ignored the invoice, since state law said the Moose Lodge was legally required to obtain raffle boards or games only from a licensed wholesaler or distributor. *See W.Va. Code, 47-23-9.*

In sum, the majority's opinion started with a result designed to be "politically appealing" to the Moose Lodge, and then fumbled around to make up some reasoning to support that result. And to get that result required a fastidious avoidance of the facts. The facts developed below clearly show that this particular Moose Lodge routinely broke the law, and was repeatedly given "another chance" by the Tax Commissioner to clean up its act. The majority opinion deliberately ignored the evidence, and thereby manufactured a politically appealing decision.

I therefore respectfully dissent.