Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002000-OA

INTERACTIVE MEDIA
ENTERTAINMENT AND
GAMING ASSOCIATION, INC. PETITIONER

v. AN ORIGINAL ACTION
ARISING FROM FRANKLIN CIRCUIT COURT
ACTION NO. 08-CI-01409

HONORABLE THOMAS D. WINGATE,
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

COMMONWEALTH OF KENTUCKY, EX
REL. J. MICHAEL BROWN, SECRETARY,
JUSTICE AND PUBLIC SAFETY CABINET;
AND JACK CONWAY, ATTORNEY
GENERAL, CABINET OF KENTUCKY REAL PARTIES IN INTEREST

AND NO. 2008-CA-002019-OA

PLAYERSONLY.COM; SPORTSBOOK.COM;
SPORTSINTERACTION.COM;
MYSPORTSBOOK.COM; AND LINESMAKER.COM PETITIONERS

v. AN ORIGINAL ACTION
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HONORABLE THOMAS D. WINGATE, JUDGE
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RESPONDENT

COMMONWEALTH OF KENTUCKY, EX REL.
J. MICHAEL BROWN, SECRETARY, JUSTICE
AND SAFETY CABINET

REAL PARTY IN
INTEREST

AND

NO. 2008-CA-002036-OA

VICSBINGO.COM AND INTERACTIVE
GAMING COUNCIL

PETITIONERS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
ACTION NO. 08-CI-01409

HONORABLE THOMAS D. WINGATE,
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

COMMONWEALTH OF KENTUCKY, EX
REL. J. MICHAEL BROWN, SECRETARY,
JUSTICE AND PUBLIC SAFETY CABINET

REAL PARTY IN INTEREST

ORDER
GRANTING PETITION FOR
WRIT OF PROHIBITION

** ** ** ** **

BEFORE: CAPERTON, KELLER AND TAYLOR, JUDGES.

These consolidated petitions for a writ of prohibition stem from orders of the Franklin Circuit Court seizing 141 Internet domain names identified in a civil complaint filed by the Justice and Public Safety Cabinet of the Commonwealth of Kentucky. The trial court justified the seizure order on the basis that the domain names constituted "gambling devices" subject to the court's in rem jurisdiction. The petitioners argue that they are entitled to the extraordinary remedy of prohibition because the Franklin Circuit Court is acting outside its jurisdiction and the parties have no adequate remedy by appeal. Having considered the consolidated petitions for relief, the response of the Cabinet, the briefs submitted by the amici curiae, argument of counsel, and being otherwise sufficiently advised, the Court ORDERS that the petitions be GRANTED and the Franklin Circuit Court is hereby PROHIBITED from enforcing its order seizing the 141 domain names and from conducting a scheduled forfeiture hearing.

There is no dispute as to the facts. The Cabinet instituted a civil in rem action pursuant to Kentucky Revised Statute (KRS) 528.100 and KRS 500.090 against 141 named domain defendants for the purpose of stopping, as stated in

their response, "unregulated, unlicensed illegal Internet gambling that is occurring within the Commonwealth, in blatant disregard for, and in violation of, Kentucky law." After conducting an *ex parte* hearing on the Cabinet's application for seizure and forfeiture of the domain names, the Franklin Circuit Court entered an order on September 18, 2008, adjudging that:

> 1. Probable cause did and does exist under KRS 528.100 to believe that the Domain names listed on Exhibit A [the 141 domain names in issue here] were and are being used in connection with illegal gambling activity within the Commonwealth of Kentucky in violation of KRS Chapter 528.
> 2. A sufficient basis did and does exist for the seizure and forfeiture of the Domain Defendants by the Commonwealth.
> 3. The Domain Defendants are properly seized by the Commonwealth of Kentucky pursuant to KRS 528.100.

The order also directed the domain names to be "immediately transferred by their respective Registrars" to an account or other Registrar as designated by the Commonwealth and set a forfeiture hearing pursuant to KRS 500.090.

After the forfeiture hearing conducted on September 26, 2008, the trial court entered an order on October 2, 2008, which granted the motions of the Interactive Gaming Council (IGC), Interactive Media Entertainment and Gaming Association, Inc. (iMEGA), and counsel for seven specifically enumerated domain names (7 Domain Names) for leave to intervene in order to appear and assert the rights of their members regarding the following issues:

> a) whether the Intervening Parties have standing to appear in this matter; b) whether this Court has Jurisdiction; c) whether the Domain Defendants are property; d) whether the Domain Defendants constitute a "gambling device or gambling record" for purposes of KRS Chapter 528; and e) whether poker is "gambling" for purposes of KRS Chapter 528.

That order also provided that if the trial court determined that jurisdiction exists and that the domain defendants were properly subject to forfeiture, only the owners of the domain defendants would be permitted to appear and defend the forfeiture.

Finally, the trial court entered the October 16, 2008 order which precipitated the petitions now under review by this Court. In essence, that order set forth the followings conclusions of the trial court:

1. that it had jurisdiction to adjudicate the Cabinet's civil forfeiture claim;
2. that there was a reasonable basis for the Court to assert jurisdiction over the domain names and their owners/operators;
3. that the domain names are property subject to *in rem* jurisdiction;
4. that the domain names are "gambling devices" subject to seizure and forfeiture;
5. that the seizure was consistent with Due Process;
6. that the Secretary of the Justice Cabinet has standing to bring the action on behalf of the Commonwealth;
7. that IGC and iMEGA lacked standing to intervene but could continue to appear as amici; and
8. that counsel for the group of 7 Domain Names must disclose the identities of the persons who engaged them and divulge their interest in the *res*.

A final hearing on forfeiture was scheduled for November 17, 2008, which was later rescheduled for December 3, 2008. This Court subsequently entered a stay of that forfeiture hearing to allow for oral argument on the consolidated petitions.

ANALYSIS

As a preliminary matter, we address the availability of the extraordinary remedy of prohibition as an avenue of redress for the seizure of the 141 domain names. Writs are generally divided into two classes: (1) those where the inferior court is acting without jurisdiction; or (2) those in which the court is acting within its jurisdiction but erroneously. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004). If the inferior court is acting erroneously but within its jurisdiction, a writ may be granted if "there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004). However, irreparable harm need not be shown "provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." (Emphasis in original) *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). Finally, we note that the right to appeal does not necessarily indicate an adequate remedy. *Chamblee v. Rose*, 249 S.W.2d 775, 777 (Ky. App. 1952).

Thus, the focus of our inquiry is necessarily whether the trial court had jurisdiction to act. This determination requires analysis of two factors: 1) whether petitioners have standing to pursue a writ in this forum; and 2) whether the domain names fit within the statutory definition of "gambling devices" so as to trigger subject matter jurisdiction over the nature of the case and the type of relief sought.

Although the trial court concluded in its October 16th order that the associations had no standing to advance the interests of their members, the fact remains that they were initially granted leave to intervene to assert those very interests. Having participated in the proceedings below, and given the adverse ruling on their claims of lack of jurisdiction, we find no basis for denying those same participants the right to seek relief in this proceeding.

Next, because the Cabinet predicated its claim of entitlement to seize the domain names upon their status as illegal gambling devices, we turn our attention to a matter of statutory construction. Before proceeding, we note that the single issue presented in this regard, whether domain names fall within the statutory definition of KRS 528.010(4), is purely a matter of law and is subject to *de novo* review by this Court. *Revenue Cabinet v. Hubbard,* 37 S.W.3d 717, 719 (Ky. 2000).

KRS 528.010(4) defines "gambling device" as:

> (a) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and which when operated may deliver, as a result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
> **(b) Any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling** and which when operated may deliver, as the result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; [Emphasis added.]

Suffice it to say that given the exhaustive argument both in brief and oral form as to the nature of an Internet domain name, it stretches credulity to conclude that a series of numbers, or Internet address, can be said to constitute a "machine or any mechanical or other device...designed and manufactured primarily for use in connection with gambling." We are thus convinced that the trial court clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100.

We find the analysis of subject matter jurisdiction in this case remarkably similar to the analysis set out by the Supreme Court in *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008). In that case, the Supreme Court concluded that the General Assembly's decision to enact a narrow definition of "out-of-

wedlock birth" deprived the family court of subject matter jurisdiction to rule upon a putative father's paternity petition. We find the following rationale set out in that opinion particularly *apropos* to the matter before us here:

> We recognize that the General Assembly may have chosen to bar paternity suits where there is no allegation of a cessation of marital relations for the ten-month period in part because of difficulties in accurately determining the biological father of a child at the time these statutes were enacted or amended to their present form. In view of modern DNA testing, the legislature might reasonably choose to amend the statutes again to recognize an alleged biological father's right to have paternity determined in court of a child born to a mother married to another man even where (as here) there is no evidence or allegation that marital relations ceased ten months before the child's birth. **But the choice is a policy decision that belongs to the General Assembly. And since the General Assembly has not yet chosen to amend KRS Chapter 406 in such a manner, we are without authority to amend the law for them.**

Id. at 593, footnote omitted, emphasis added.

So it is in the instant case. Regardless of our view as to the advisability of regulating or criminalizing Internet gambling sites, the General Assembly has not seen fit to amend KRS 528.010(4) so as to bring domain names within the definition of gambling devices. Neither we, nor the Justice Cabinet, are free to add to the statutory definition. If domain names cannot be considered gambling devices, Chapter 528 simply does not give the circuit court jurisdiction over them. Accordingly, petitioners have satisfied the criteria for obtaining a writ

prohibiting enforcement of the circuit court's previous orders and the conduct of the scheduled forfeiture hearing. No showing of irreparable injury is required.

Because we have concluded that petitioners are entitled relief on the above-stated basis, we decline to address other issues presented in the briefs and/or argued at oral argument.

TAYLOR, JUDGE, CONCURS BY SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

TAYLOR, JUDGE, CONCURRING: I concur with the majority's opinion in its entirety, but I would also grant the Writ of Prohibition pursuant to CR 76.36 for an additional reason. I do not believe there is statutory authority for an *in rem* civil forfeiture proceeding under KRS 528.100. Thus, the forfeiture of the 141 internet domain names under KRS 528.100 was improper. My rationale is as follows.

The forfeiture statute at issue, KRS 528.100, is found in the Kentucky Penal Code under the caption of "Gambling." To properly dispose of this petition, it is necessary to understand the legislative history of the statute and that of its predecessor, KRS 436.280.

KRS 436.280 (now repealed) read as follows:

> Any bank, table, contrivance, machine or article used for carrying on a game prohibited by KRS 436.230, together with all money or other things staked or exhibited to allure persons to wager, may be seized by any justice of

> the peace, sheriff, constable or police officer of a city, with or without a warrant, and upon conviction of the person setting up or keeping the machine or contrivance, the money or other articles shall be forfeited for the use of the state, and the machine or contrivance and other articles shall be burned or destroyed. Though no person is convicted as the setterup or keeper of the machine or contrivance, yet, if a jury, in summary proceedings, finds that the money, machine or contrivance or other articles were used or intended to be used for the purpose of gambling, they shall be condemned and forfeited.

Under the provisions of KRS 436.280, gaming devices could be forfeited under two scenarios: (1) upon conviction of any person using the gaming device as prohibited by statute; or (2) upon a finding by a jury that the device was used for gaming. Under the second scenario, a number of cases have interpreted the plain language of KRS 436.280 as providing for a civil *in rem* forfeiture proceeding allowing confiscation of gaming devices. *See Sterling Novelty Co. v. Com.*, 271 S.W.2d 366 (Ky. 1954). However, KRS 436.280 was repealed effective January 1, 1976, and KRS 528.100 was enacted to replace it.

KRS 528.100 reads:

> Any gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state, and shall be disposed of in accordance with KRS 500.090, except that the provisions of this section shall not apply to charitable gaming activity as defined by KRS 528.010(10).

Particularly of interest is the following 1974 Kentucky Crime Commission/LRC Commentary (commentary) to KRS 528.100:

> This section provides for the forfeiture of gambling devices and records and for the uniform disposition of such forfeited devices and records.
>
> Previously, possession of a gambling device was not an offense and a conviction of using the device was necessary before forfeiture was authorized. If there was no conviction, KRS 436.280 required that a jury be impanelled and find that the money, machine or contrivance or other articles were used or intended to be used for the purpose of gambling. In effect, this resulted in a forfeiture of gambling devices possessed although possession was not previously an offense.

As succinctly stated in the commentary, the prior forfeiture statute, KRS 436.280, provided for a civil *in rem* civil forfeiture proceeding because at that time "possession" of gambling devices was not a criminal offense; rather, "use" of a gambling device was criminally prohibited. Upon enactment in 1974 of KRS Chapter 528 and specifically KRS 528.080, the Legislature criminalized possession of a gambling device if a person in possession believed that the device was to be used in the advancement of unlawful gambling activity.[1] Concomitantly therewith, the General Assembly repealed the prior forfeiture statute, KRS 436.280. As possession of a gambling device may now constitute a crime under KRS 528.080, KRS 528.100 does not provide a civil *in rem* forfeiture proceeding, in my opinion.

[1] I do not believe that mere possession of a gambling device alone constitutes criminal conduct under KRS 528.080. Rather, a defendant must also have knowledge of the character of the device and believe or intend that the device is to be used in the advancement of gambling activity. *See* 10 Leslie W. Abramson, *Kentucky Practice – Substantive Criminal Law* § 10.9 (2008).

Indeed, the plain language of the statute specifically states that for a gambling device to be forfeited, it must be "possessed or used in violation of this chapter." Considering the legislative history of KRS 528.100 and the unambiguous language of the current statute, it is clear that the General Assembly intended to extinguish the civil *in rem* forfeiture proceeding as to gambling devices.[2] It is also interesting to note that there are no reported civil *in rem* forfeiture cases under KRS 528.100 since its enactment in 1974.

Thus, to trigger a forfeiture under KRS 528.100, we must closely look at the language therein. As noted, the statute clearly states that for a gambling device to be forfeited, it must be possessed or used in violation of KRS Chapter 528. The operative statutes in this Chapter are KRS 528.020-.080, which set out several separate crimes for which violations thereof could result in criminal penalties, including imprisonment.

However, in this case, there have been no criminal charges or indictments filed against any persons or entities involved. I believe for there to be a forfeiture, the clear legislative intent requires a conviction of one of the crimes enumerated in KRS Chapter 528. No other logical interpretation of the "violation" requirement of KRS 528.100 can be made, given that KRS Chapter 528 is a penal

[2] When considering a forfeiture statute, it is generally recognized that such statute is to be construed strictly against forfeiture and liberally in favor of the individual opposing forfeiture. *See Bratcher v. Ashley*, 243 S.W.2d 1011 (Ky. 1951).

statute. This deficiency in the Commonwealth's case is further amplified by the conspicuous absence of the Kentucky Attorney General, the Commonwealth's chief law officer, who pursuant to KRS 15.020 clearly has the authority to pursue the prosecution of crimes under KRS Chapter 528. The Secretary of the Justice and Public Safety Cabinet has no such authority.

Even assuming for argument that the dissent is correct that the domain names are gambling devices as defined in KRS 528.010, without a conviction under KRS Chapter 528, there can be no forfeiture in my opinion.

CAPERTON, JUDGE, DISSENTING: The issues before our Court necessarily turn upon the meaning of "device" as the term is used in KRS 528.100. I limit my dissent to this issue as this was the issue addressed by the majority.[3]

In Black's Law Dictionary 483 (8th ed. 2004) *device* is defined as "an apparatus or an article of manufacture." *Article* is defined as "[p]atents. An article of manufacture. See Manufacture." Black's Law Dictionary 119 (8th ed. 2004). *Manufacture* is defined as "[a] thing that is made or built by a human being, as distinguished from something that is a product of nature . . ." Black's Law Dictionary 984 (8th ed. 2004). Little doubt can be cast upon the fact that a computer is built by a human being; thus, a computer is a device.

[3] In search of the meaning of device, I found little if any Kentucky case law relevant to the issue before our Court. Thus, I resorted to Black's Law Dictionary, Eighth Edition.

Is programming a device? The Computer Software Protection Act of 1980 says it is a literary work. However, a *software based invention* is defined as "[a] *device* or machine that uses innovative software to achieve results." Black's Law Dictionary 844 (8th ed. 2004). (Emphasis added). Thus, it appears that a computer using software remains a "device".

In the case before our Court, internet gambling requires several components. First, there is a local computer terminal located in Kentucky. Second, there is a remote computer located elsewhere. Third, the two computers are linked by the internet and compatible software. Thus, we have two devices using software and linked by the internet into a system. Based on the foregoing analysis, I believe it to be a computer system[4] that is, for the period of time linked together for the purpose of internet gambling, unified into one device.[5]

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[4] The system consists of at least two computers, the internet, and the addresses at issue.

[5] If the gambling system at issue consisted of a local computer connected to a remote computer, whether in the same room or across the world and connected by a cable consisting of wires, then I believe there would be little question that the combination of such components would be a device. However, the question posed today is when the connecting cable is replaced with the internet and an address, i.e. a string of numbers or domain name, is the gambling system then something else or does the substitution present a mere differentiation with no real difference? I am of the opinion that even though the components of the device may change, it is still a device nonetheless. For instance, if a wire were removed from the computer all would likely agree that it is a wire, but when replaced into the computer it is then a part of the computer. Mere removal and replacement did not change the computer to something else, nor does mere substitution of the internet and a domain name for a wired cable change the gambling device to some mystical marvel of science that rises above the law of this Commonwealth.