



“Tubin.....On a Sunday Afternoon.”

by Aidan J. Moore, JD*



On August 19, 2010, the Mississippi Supreme Court, en Banc, handed down their opinion in the case of *Perry v. The Board of Supervisors of Pike County* 2009- CA-00243-SCT (MSSC).

Appellants Wendy Ryals and Ronald Perry each own inner tube, canoe, and kayak rental businesses on the Bogue Chitto River and Topisaw Creek in Pike County. After the Pike County Board of Supervisors enacted an ordinance prohibiting the possession and consumption of alcoholic beverages on portions of the two waterways, Ryals and Perry filed a bill of exceptions in the Pike County Circuit Court. Aggrieved by the circuit court’s dismissal of the bill of exceptions, they have appealed to the Mississippi Supreme Court.

Issue

The issues on appeal to the Court were:

- (1) Whether the Board of Supervisors has exceeded its statutory authority in passing an ordinance prohibiting the (a) possession and (b) consumption of alcoholic beverages on portions of the Bogue Chitto River and Topisaw Creek, and
- (2) Whether the enactment of the ordinance was arbitrary and capricious or unsupported by substantial evidence.

The Facts of the Case

Topisaw Creek is a tributary of the Bogue Chitto (Choctaw for “big creek”) River. The river itself begins in Lincoln County, Mississippi, just south of Brookhaven, at the confluence of the East Bogue Chitto and the West Bogue Chitto Rivers. The main stem of the Bogue Chitto meanders southeasterly through Pike and Walthall Coun-

Continued on page 9

Law Corner - continued from page 8

ties, then flows into Louisiana, where it merges with the Pearl River. *Ryals v. Pigott*, 580 So.2d 1140, 1144-45 (Miss. 1990). Recreationists enjoy floating Topisaw Creek and the Bogue Chitto River on inner tubes, canoes, and other small watercraft. Historically, some of the boaters and floaters have possessed and consumed alcoholic beverages as they traversed these pristine waters.

Following years of complaints from riparian land owners and law enforcement officers of problems allegedly related to alcohol consumption on these waterways, including excessive littering, lewd behavior, disturbances of the peace, use of profane language, and possession and consumption of alcohol by minors, the Pike County Board of Supervisors conducted a public hearing at which residents of Pike County were afforded the opportunity to speak for or against a proposed ban on the consumption and possession of alcoholic beverages on portions of Topisaw Creek and the Bogue Chitto River. A month after the hearing, the board unanimously enacted an ordinance prohibiting the possession and the consumption of alcohol beverages, namely “wine, beer, ale, or other liquid containing alcoholic (sic), intended for beverage purposes.” The ordinance reads, in relevant part:

It is unlawful for any person to possess or consume alcoholic beverages of any type or description, on the waters of the Bogue Chitto River from the Holmesville Bridge downstream to the water park, and on the Topisaw Creek from the Leatherwood Bridge downstream to its place of merger into the waters of the Bogue Chitto.

The ordinance notes that, prior to the enactment of the ordinance, the board had become aware of numerous drownings and other serious accidents resulting in bodily injury caused by excessive consumption of alcoholic beverages.

Appellants Ryals and Perry (hereinafter “business owners”) own business enterprises which rent inner tubes, canoes, and kayaks to customers for use on the Bogue Chitto River and Topisaw Creek. Believing themselves aggrieved by the enactment of the ordinance, the business owners filed a Notice of Appeal with the Pike County Circuit Court, attaching a copy of the ordinance and a proposed Bill of Exceptions. After the board’s president and the board’s attorney modified and signed the Bill of Exceptions, the board filed its Response in Nature of Answer to Notice of Appeal, and a hearing was held on the Bill of Exceptions in the Pike County Circuit Court.^[1]

At the hearing, Pike County Sheriff Mark B. Shepherd

testified that numerous persons owning land adjacent to the Bogue Chitto River and Topisaw Creek had reported alleged alcohol-related offenses over the years, including minors in possession of alcohol and public drunkenness. Sheriff Shepherd also testified that one alcohol-related drowning had occurred in 2003, and that other alcohol-related injuries commonly had occurred on the two streams.

Master Sergeant Troy Travis of the Mississippi Highway Safety Patrol testified that he had worked at numerous drivers’ license checkpoints in the area, and that these exercises had resulted in multiple arrests of intoxicated drivers allegedly leaving the Bogue Chitto Water Park, a frequently used exit point of the Bogue Chitto River. Master Sergeant Travis averred that many of the intoxicated drivers had informed him that their intoxication was the result of their having consumed alcohol while floating down the Bogue Chitto River and/or Topisaw Creek.

Lane Ball, an administrator of the Mississippi Department of Wildlife, Fisheries and Parks, testified that in 2001, that department had received complaints about an alleged drinking and trespassing problem on the Bogue Chitto River. Ball testified that after the department had begun investigating activities on the river, it became apparent that the great number of infractions being committed there prevented the department from patrolling the area adequately. Ball also presented statistical information on the number of citations issued for public drunkenness and for minors in possession of alcoholic beverages, noting that, between 2000 and 2005, the number of citations totaled 1, 381, with 143 of those citations having been for minors in possession of alcoholic beverages, and twenty-one of the 1, 381 citations having been for public intoxication. Ball also opined that the vast majority of other offenses, including trespassing and possession of controlled substances, had been linked to alcohol consumption on the two streams.

The business owners also testified at the circuit court hearing, and both averred that the amount of commercial activity on the streams had been reduced drastically by the enactment of the ordinance. Ryals said that she had suffered a 90% loss of business since the ban of alcoholic beverages had become enforceable, and Perry testified that, prior to the ban, he had been renting five or six hundred tubes per day, and that, after the ban had become enforceable, his tube rentals had been reduced to

Continued on page 10

Law Corner - continued from page 9

less than one hundred tubes per day.

Following the hearing, the circuit court issued a Memorandum Opinion and Order, upholding the ordinance and finding that the ordinance “is neither in conflict with a State statutory scheme, nor arbitrary and capricious in its application or enforcement.” After the business owners’ post-trial motions were denied by the trial court, they appealed to this Court.

Standard of Review

“The standard of review of an order of a Board of Supervisors is the same standard which applies in appeals from the decisions of administrative agencies. The decision of the board will not be disturbed unless its order ‘was unsupported by substantial evidence; was arbitrary or capricious; was beyond the [board’s] scope or powers; or violated constitutional or statutory rights of the aggrieved party.’” (Citations omitted).

The Court’s Analysis

I. *Whether the Board of Supervisors exceeded its statutory authority in prohibiting the possession and the consumption of alcoholic beverages on portions of the Bogue Chitto River and Topisaw Creek.*

The board of supervisors of any county shall have the power to adopt any orders, resolutions or ordinances with respect to county affairs, property and finances, for which no specific provision has been made by general law and which are not inconsistent with the Mississippi Constitution, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi. Miss. Code Ann. § 19-3-40(1) (Rev. 2003).

If a county or municipality passes an ordinance which stands in opposition to the law as pronounced by the legislature, the ordinance, to the extent that it contradicts state law, will be found void by this Court, as the laws of this state supersede any and all local ordinances which contradict legislative enactments. *Id.* (citing *Watkins v. Navarrette*, 227 So.2d 853, 855 (Miss. 1969)); *Collins v. City of Hazlehurst*, 709 So.2d 408, 411 (Miss. 1997) (citing *City of Amory v. Yielding*, 34 So.2d 726, 728 (Miss. 1948)). Accordingly, the question this Court must answer is whether state statutory enactments contradict the Pike County ordinance, which criminalizes the possession and consumption of alcoholic beverages on the specified portions of the Bogue Chitto River and Topisaw Creek.

(a) Possession

With regard to the possession of alcoholic beverages containing more than five percent alcohol by weight, the Mississippi Code provides: . . . the manufacture, sale, distribution, *possession* and transportation of alcoholic beverages *shall be lawful*, subject to the restrictions hereinafter imposed, in those counties and municipalities of this state in which, at a local option election called and held for that purpose under the provisions of this chapter, a majority of the qualified electors voting in such election shall vote in favor thereof. Miss. Code Ann. §§ 67-1-5, 67-3-7 (Rev. 2005) (emphasis added).

As for beer and light wines, the Mississippi Code provides that, unless a majority of the duly qualified electors votes to prohibit the sale or possession of such beverages, “[i]t shall be lawful . . . in this state to transport, store, sell, distribute, *possess*, receive, and/or manufacture wine and beer of an alcoholic content of not more than five percent (5%) by weight. Miss. Code Ann. §§ 67-3-5, 67-3-7(1), 67-3-13(1) (Rev. 2005) (emphasis added).

Thus, Mississippi statutes explicitly provide for the lawful possession of alcoholic beverages in this state. Unless the voters of a county or municipality elect to prohibit the possession of beer or light wines within the political subdivision (county or municipality), possession of those beverages is lawful. Miss. Code Ann. §§ 67-3-5, 67-3-7(1), (2) (Rev. 2005). If a majority of the qualified electors votes in favor of legalizing the possession of alcoholic beverages containing more than five percent of alcohol by weight, Mississippi Code Section 67-1-7(1) makes it lawful to possess those beverages in that county or municipality. Miss. Code Ann. § 67-1-7(1) (Rev. 2005).

In this case, the record reveals that the residents of Pike County have not voted to prohibit the sale and possession of beer and light wines, and that the possession of those beverages has been legal there since 1934, when the legislature ended the era of prohibition of those beverages in Mississippi. The record also establishes that, in 1966, following the effective date of the Local Option Alcoholic Beverage Control Law, a majority of the electors in Pike County voted to legalize the manufacture, sale, distribution, possession, and transportation of alcoholic beverages containing more than five percent alcohol by weight. Thus, Pike County is a “wet” county for beer, light wine, and liquor, and controlling legislative enactments provide that a person may not be prosecuted merely for pos-

Continued on page 11

Law Corner - continued from page 10

sessing an unopened alcoholic beverage in Pike County, with very few exceptions.^[2]

Because the Pike County ordinance makes it unlawful to possess alcoholic beverages on portions of the Bogue Chitto River and Topisaw Creek, the ordinance stands in opposition to Code Sections 67-1-7 and 67-3-5, which make it legal to possess alcoholic beverages in Pike County, subject only to several statutory exceptions. Accordingly, the possession provision is void, as “[i]t is well established that in any conflict between an ordinance and a statute, the latter must prevail.” *Collins*, 709 So.2d at 411 (quoting *Watkins*, 227 So.2d at 855).

If the Pike County Board of Supervisors has the authority to prohibit the possession of alcoholic beverages on Topisaw Creek and the Bogue Chitto River, which it does not, nothing prevents the board’s imposing prohibition anywhere or everywhere in the county. This would amount to a majority of a five-person board’s having the power to override the will of a majority of the county’s voters. Such is clearly contrary to this state’s established law. The Pike County Board of Supervisors, however well intentioned, has exceeded its authority in this instance.

b) Consumption

The provision of the ordinance prohibiting consumption of alcoholic beverages on portions of the two specified waterways is a different creature. Mississippi Code Sections 67-1-7 and 67-3-65 expressly make it legal to possess alcoholic beverages within Pike County; however, these statutes are silent on the issue of consumption. Moreover, no other Mississippi statute announces the legislature’s will to regulate the matter of consumption of alcoholic beverages in wet counties.

In *Maynard v. City of Tupelo*, this Court considered a Tupelo municipal ordinance which prohibited “commercial establishments in Tupelo from allowing consumption of alcohol between the hours of midnight and 7 a.m.” *Maynard v. City of Tupelo*, 691 So.2d 385, 386 (Miss. 1997). The ordinance did not penalize individuals who possessed alcohol, but limited the penalties to the commercial establishments which allowed their patrons to consume alcohol or possess open containers on such establishments’ premises. *Id.* at 388. In upholding the ordinance, this Court noted: The Legislature has not clearly expressed an intent that the consumption of alcoholic beverages, as opposed to the mere possession thereof, be permitted with-

out limitation in wet areas. Absent such a clear expression of intent . . . this Court will allow the ordinance to stand. *Id.* (emphasis added).

Because the legislature has not spoken directly on the issue of consumption of alcoholic beverages in wet counties, the Pike County provision relating to consumption of alcoholic beverages on the specified portions of the two streams does not contradict any state statute; therefore, the Pike County Board of Supervisors was within the power granted to it by Section 19-3-40(1) to enact and enforce that provision of the ordinance. Miss. Code Ann. § 19-3-40(1) (Rev. 2003).

(II) Whether the Board of Supervisors’ adopting the ordinance was arbitrary and capricious or unsupported by substantial evidence.

As noted above, “[t]he decision of the Board will not be disturbed unless its order ‘was unsupported by substantial evidence; was arbitrary or capricious; was beyond the [Board’s] scope or powers; or violated the constitutional or statutory rights of the aggrieved party.’” *A & F Properties, LLC*, 933 So.2d at 299-300 (citing *Ladner v. Harrison County Bd. of Supervisors*, 793 So.2d 637, 638 (Miss. 2001) (citing *Barnes v. Bd. of Supervisors, DeSoto County*, 553 So.2d 508, 511 (Miss. 1989))). A “decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.” *Limbert v. Miss. Univ. for Women Alumnae Ass’n, Inc.*, 998 So.2d 993, 1000 (Miss. 2008) (quoting *Miss. Dep’t of Human Servs. v. McNeel*, 869 So.2d 1013, 1018 (Miss. 2004); *Miss. State Dep’t of Health v. Natchez*, 743 So.2d 973, 977 (Miss. 1999)).

Here, the record reveals that, prior to enacting the ordinance, the Pike County Board of Supervisors had been confronted with a plague of illegal activity and public nuisances on the Bogue Chitto River and Topisaw Creek, including littering, drug possession, public profanity, indecent exposure, disorderly conduct, trespassing, minors in possession of alcohol, and public drunkenness. During a relatively brief number of years, numerous alcohol-related arrests had been made. Peace officers averred that, because of the number of infractions being committed on the two streams, officers were unable to patrol the vicinity in a manner that ensured the safety of those visit-

Law Corner - continued from page 11

ing the river and the creek. Other Pike County residents and land owners testified at the board's hearing and at the circuit court hearing that intoxicated river and creek goers commonly had trespassed on their land, and that lewd verbal and sexual conduct frequently had been committed by drunk patrons of the waterways.

Given the evidence with which it was presented, it cannot be said that the board's decision to prohibit the *consumption* of alcoholic beverages on the Bogue Chitto River and Topisaw Creek was without reason, or that the board lacked an understanding of the surrounding facts. That being the case, the adoption of the disputed ordinance was not arbitrary or capricious, and this issue is without merit.

Conclusion

To the extent that the Pike County ordinance undertakes to prohibit the possession of alcoholic beverages on the Bogue Chitto and Topisaw waterways, it is hereby declared null and void, as it stands in opposition to Mississippi Code Sections 67-1-7 and 67-3-5, which make it legal to possess alcoholic beverages everywhere in Pike County, except in those places statutorily specified. See *supra* n.2. The ordinance's ban of alcohol consumption, however, is valid and enforceable, and shall remain in full force and effect, unless and until it is lawfully repealed or modified by the Board of Supervisors, because this portion of the ordinance does not conflict with state law, and because the board did not act arbitrarily or capriciously in its enactment.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART...Dissenting opinion of Justice Carlson omitted. ●

Footnotes:

[1]Mississippi Code Section 11-51-75 (Rev. 2002) provides that the circuit court sits as an appellate court in cases presented by bills of exceptions. See, e.g., *City of Greenwood v. Henderson*, 84 Miss. 802, 37 So. 745 (1905) (appeal on bill of exceptions "must be heard and decided on the record so made, and cannot be considered on oral testimony"); but see, e.g., *Electronic Data Sys. v. Miss. Div. Of Medicaid*, 853 So.2d 1192, 1200-02 (Miss. 2003) (original action commenced in chancery court appropriately treated as administrative appeal, although chancellor conducted two-day hearing in which sworn testimony and exhibits were received into evidence). Here, the board presented eight witnesses at the circuit court hearing, and the business owners called five. Given that neither party contends that the circuit court erred in conducting an evidentiary hearing, this Court will not address the propriety of the circuit court's having conducted such a hearing in the case at hand.

[2] A nonexhaustive list of reasons for which a person may suffer legal consequences for mere possession of an unopened alcoholic beverage in Pike County includes: 1) that he or she is under the age of twenty-one years, see Miss. Code Ann. §§ 67-3-70(1), 67-1-81 (Rev. 2005); 2) that he or she possesses the beverage on the premises of any correctional facility within the state, see Miss. Code Ann. § 97-31-35 (Rev. 2006); or 3) that the possession of an alcoholic beverage violates a term or condition of his or her probationary or post-release supervision status, see Miss. Code Ann. § 47-7-35 (Miss. 2004).

[3]The business owners also cite an excerpt from Section 67-1-11(4), which essentially reads the same as 67-1-7. Section 67-1-11(4) states, in pertinent part: If, in such election, a majority of the qualified electors participating therein shall vote in favor of the proposition, this chapter shall become applicable and operative in such county and the manufacture, sale, distribution and possession of alcoholic beverages therein shall be lawful to the extent and in the manner permitted hereby. Miss. Code Ann. § 67-1-11(4) (Rev. 2005).

* Aidan Moore served as NLLEA President from 2003-2004.