REL: May 20, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1210012

State of Alabama

v.

Epic Tech, LLC, et al.

Appeal from Greene Circuit Court
(CV-17-900064)

MITCHELL, Justice.

This appeal is a follow-up to State v. Epic Tech, LLC, 323 So. 3d 572 (Ala. 2020) (Epic Tech I), and State v. Epic Tech, LLC, [Ms. 1200032,

May 28, 2021] __ So. 3d __ (Ala. 2021) (Epic Tech II), which stemmed from actions initiated by the State of Alabama to halt allegedly illegal gambling activities in three counties. In this action, the Greene Circuit Court dismissed the State's operative complaint based on grounds that we rejected in Epic Tech I. Consequently, we reverse and remand. We also grant the State's request to reassign the case to a different circuit judge.

Facts and Procedural History

We already recounted much of this case's background in Epic Tech I, 323 So. 3d at 574-75, and Epic Tech II, __ So. 3d at __. To briefly recap, in 2017, the State initiated three virtually identical actions "seeking to abate as public nuisances allegedly illegal gambling activities" in Greene, Lowndes, and Macon Counties. Epic Tech II, __ So. 3d at __. In 2019, the Lowndes and Macon Circuit Courts dismissed two of the State's complaints for lack of subject-matter jurisdiction. In Epic Tech I, we reversed those dismissals and remanded the cases for further proceedings. See Epic Tech I, 323 So. 3d at 606.

Meanwhile, the Greene County case, from which this appeal arises, "proceeded much slower than the other cases." Epic Tech II, __ So. 3d at

__ (Bolin, J., concurring specially). At the time of our decision in Epic Tech I, the parties had fully briefed and argued -- but the circuit court had yet to rule on -- motions to dismiss raising the same theories on which the Lowndes and Macon Circuit Courts had granted dismissal. Immediately after we released Epic Tech I, the State urged the circuit court to deny the pending motions to dismiss based on that decision. The State advised the circuit court that Epic Tech I had rejected "the exact same arguments presented by the defendants in [the Greene County] case," that it "directly applie[d] to the legal issues in this case," and that, accordingly, the circuit court "ha[d] no option but to deny the motions to dismiss and allow the State's case to proceed."

Little more than a week later, the circuit court entered an order dismissing the State's complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief could be granted. The court reasoned that it lacked subject-matter jurisdiction under State v. Greenetrack, Inc., 154 So. 3d 940 (Ala. 2014), and Tyson v. Macon County Greyhound Park, Inc., 43 So. 3d 587 (Ala. 2010), because adjudicating the State's public-nuisance claim would require determining whether the defendants' actions were criminal. The court also concluded, based on

Wilkinson v. State ex rel. Morgan, 396 So. 2d 86 (Ala. 1981), that the repeal of former § 13-7-90, Ala. Code 1975, deprived it of subject-matter jurisdiction over this action. These grounds were some of the very same theories we had just rejected in Epic Tech I. See 323 So. 3d at 579-84. The circuit court's order did not mention that decision.

The State appealed to this Court. Noticing that the record indicated that several defendants had withdrawn their motions to dismiss, we remanded the case to the circuit court for it to enter an amended order identifying the defendants to which the dismissal order pertained and for certification of the order as a final judgment under Rule 54(b), Ala. R. Civ. P. The circuit court promptly entered such an amended order and certification but stated its view that its dismissal order was not suitable for Rule 54(b) certification. On further review, we agreed with the circuit court and dismissed the appeal for lack of a final judgment. See Epic Tech II, __ So. 3d at __. Justice Bolin, in a special concurrence joined by three other Justices, noted the troubling delay that had marked the progress of this action, emphasized that "[t]his case presents a question of utmost importance involving an alleged public nuisance," and "urge[d] the parties, and the circuit court, to proceed with this case as promptly

as possible so as to avoid its continuing to languish and cause further delay." Id. at __ (Bolin, J., concurring specially). Justice Shaw, in another special concurrence, noted that the rationale of the circuit court's dismissal order logically implied that it should dismiss the State's complaint as to all defendants, regardless of whether they had pending motions to dismiss. Id. at __ (Shaw, J., concurring specially).

On remand, no further proceedings occurred for more than two months. Eventually, the State filed a motion asking the circuit court to reconsider its order of dismissal or, in the alternative, for a status hearing. In that motion, the State pointed to Justice Shaw's concurrence in Epic Tech II explaining that, if the circuit court believed that it lacked subject-matter jurisdiction, it should promptly dismiss the entire case. Alternatively, the State requested "a status hearing to determine how to proceed with this case." At the same time, the State emphasized that it "firmly believe[d] the law support[ed] its complaint and the claims against all defendants" and that, in the State's view, the action "should proceed against all named parties so that proper resolution of the claims [could] be made by the circuit court." In response, the circuit court entered an order that quoted Justice Shaw's Epic Tech II concurrence

and dismissed the action "in its entirety against all defendants." Two of the defendants (Next Level Leaders and Tishabee Community Center Tutorial Program, which do business together as River's Edge) then filed a motion to alter, amend, or vacate the judgment, see Rule 59(e), Ala. R. Civ. P., in which they noted that the circuit court had subject-matter jurisdiction under Epic Tech I. The circuit court denied that motion without explanation, and the State timely appealed from the judgment of dismissal.

Standard of Review

We review the dismissal of a complaint de novo. See Barber v. Jefferson Cnty. Racing Ass'n, Inc., 960 So. 2d 599, 603 (Ala. 2006). We may affirm the circuit court's judgment for any legal, valid reason, even one not raised in or considered by the circuit court, unless due-process fairness principles require that the ground have been raised below and it was not. See Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003).

Analysis

We divide our analysis into two parts. First, we explain that the dismissal of the State's complaint must be reversed. Second, we consider

the State's request to reassign the case to a different circuit judge on remand.

A. The Circuit Court's Erroneous Dismissal

It requires no analysis to show that the grounds on which the circuit court originally dismissed the State's complaint, and to which it evidently adhered in its amended orders on remand, are squarely contrary to our holdings in Epic Tech I. See 323 So. 3d at 579-84. Strangely, the defendants' briefs largely ignore this elephant in the room. One defendant, Greenetrack, Inc., tries to relitigate the questions resolved in Epic Tech I without acknowledging that it is effectively asking us to overrule that decision.[1] We will waste no further ink on such arguments.

The other defendants, more prudently, decline to defend the circuit court's reasoning but raise several alternative grounds in support of affirmance. Without exception, those arguments are unpersuasive.

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[1]In arguing that the circuit court lacked jurisdiction under Greenetrack and Macon County Greyhound Park, Greenetrack acknowledges Epic Tech I and tries to suggest that it can be distinguished. The attempt is futile; Greenetrack simply cannot get around the fact that Epic Tech I reversed the Lowndes and Macon Circuit Courts for dismissing actions identical to this one on grounds identical to what Greenetrack argues. When, later in its brief, Greenetrack relies on Wilkinson to argue that the State may not pursue this action due to the repeal of former § 13-9-70, it does not acknowledge Epic Tech I at all.

First, those defendants argue that the State invited the judgment of dismissal when, in moving for reconsideration, it pointed the circuit court to Justice Shaw's Epic Tech II concurrence. See Thompson v. Magic City Trucking Serv., 275 Ala. 291, 295, 154 So. 2d 306, 310 (1963) (explaining that, under the doctrine of invited error, "a party may not avail himself of error, if any, into which he has led the court"). As stated above, Justice Shaw had explained that, if the circuit court lacked subject-matter jurisdiction -- as it had originally ruled with respect to certain defendants -- it was bound to dismiss the action in its entirety. The record makes clear that the State raised this point only to ensure an appealable final judgment if the court adhered to its original rationale -- not to concede that the court's rationale was correct or that the court did lack jurisdiction. On the contrary, in the same motion for reconsideration in which it is contended to have invited dismissal, the State clearly reiterated its position that dismissal was erroneous. The State did not invite the circuit court's erroneous endorsement of the arguments we rejected in Epic Tech I and is not barred from seeking reversal.

Second, some of the defendants, relying on the statutory description of a "public nuisance" as "one which damages all persons who come within

the sphere of its operation, though it may vary in its effects on individuals," § 6-5-121, Ala. Code 1975 (emphasis added), argue that their alleged gambling operations cannot be public nuisances because they provide economic benefits to Greene County and certain local organizations. Taken to its logical conclusion, this argument would lead to absurd results. If a business raises large sums of money in a way that objectively constitutes a public nuisance, it cannot -- as the defendants' argument implies -- insulate itself against an abatement action simply by pointing to the revenue it brings the local community or by spreading the wealth around.

Third, several defendants argue that their gambling operations are legal under the framework of Amendment No. 743 to the Alabama Constitution of 1901 (Local Amendments, Greene County, § 1, Ala. Const. 1901 (Off. Recomp.)), which was adopted to permit certain bingo games in Greene County. That argument flatly ignores (1) the State's allegations that the defendants' "electronic bingo" operations are in fact a thinly disguised form of slot-machine gambling and (2) this Court's consistent holdings that such operations are not protected by Amendment No. 743. See State v. Greenetrack, Inc., 154 So. 3d 940, 962

(Ala. 2014) (quoting Ex parte State, 121 So. 3d 337, 358 (Ala. 2013)); Barber v. Cornerstone Cmty. Outreach, Inc., 42 So. 3d 65, 80 (Ala. 2009).

Fourth, the River's Edge defendants argue that the State failed to join certain necessary parties under Rule 19, Ala. R. Civ. P. The circuit court did not rule on this issue, and the defendants seem to concede that it provides no alternative basis for affirming the judgment under appeal. Specifically, the River's Edge defendants agree that the circuit court's order must be reversed and the case remanded, and they simply ask us to instruct the circuit court to join the purportedly necessary parties upon remand. In other words, the circuit court never ruled on this issue below, and it does not affect our disposition of the circuit court's erroneous dismissal judgment. Thus, we see no reason to address it.

Finally, several defendants assert that the Legislature may consider gambling-related legislation in the near future, and they ask us to order the circuit court to delay adjudicating this action in light of that prospect. Although delay would obviously suit the defendants, cf. Barber, 42 So. 3d at 76, the mere possibility that relevant law may change in the future does not deprive the State of its right to a timely adjudication of its present-day claims under present-day law. On the contrary, given the

significant delays that have already plagued this case, the circuit court on remand should "proceed with this case as promptly as possible so as to avoid its continuing to languish and cause further delay." Epic Tech II, __ So. 3d at __ (Bolin, J., concurring specially).

In sum, the circuit court's dismissal of the action must be reversed, and on remand the circuit court should proceed with dispatch.

B. Reassignment of the Action

The State's request that we reassign the action to a different circuit judge presents a closer question. As an appellate tribunal, this Court has the supervisory authority to order reassignment with remand; whether to do so in any given case is a prudential question that depends on the totality of the circumstances. Some of the most relevant factors are

> "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977); accord United States v. White, 846 F.2d 678, 696 (11th Cir. 1988); C.D.S. v. K.S.S., 978 So. 2d 782, 790 (Ala. Civ. App. 2007). As courts and commentators have

noted, a reassignment does not necessarily "imply any personal criticism of the [original] judge," nor does it require a finding that the original judge was actually biased or would be actually biased on remand. Robin, 553 F.2d at 10; see generally James A. Worth, Destigmatizing the Reassignment Power, 17 Georgetown J. Legal Ethics 565 (2004).

Here, the State's primary argument for reassignment is that the circuit judge either demonstrated bias or (at the very least) gave reasonable grounds to suspect bias through his repeated rulings adopting and adhering to legal theories rejected in Epic Tech I. To recap, the circuit judge: (1) initially ruled that subject-matter jurisdiction was lacking based on theories rejected in Epic Tech I, less than two weeks after we decided Epic Tech I and after the State had put that decision in front of him; (2) adhered to those rejected theories when, after Epic Tech II, he ruled on the State's motion for reconsideration by dismissing the action against all defendants; and (3) summarily denied the River's Edge defendants' Rule 59(e) motion, which pointed out that the circuit court had jurisdiction under Epic Tech I.[2]

[2]The State first raised the issue of reassignment in Epic Tech II, its attempted appeal from the first of the three rulings just listed. Naturally, we did not reach the issue in Epic Tech II given our decision that we

From the record, it does not appear that the circuit judge ever squarely acknowledged Epic Tech I or the inconsistency between it and his rulings. Nevertheless, either the circuit judge knew that he was ruling contrary to Epic Tech I or he did not. If it was the former, then he was consciously ignoring a controlling precedent of this Court -- without ever forthrightly admitting that he was doing so. If it was the latter, then he either neglected Epic Tech I or simply failed to understand its relevance here -- even after parties repeatedly raised that decision and we (in Epic Tech II) emphasized that the Epic Tech I actions and this action were functionally identical. In short, it seems impossible to

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lacked appellate jurisdiction at that time. And we reject the defendants' argument that the State forfeited the right to argue for reassignment on appeal by not moving for the circuit judge's recusal below. The question whether a party seeking reassignment after an appeal and remand must first have moved for recusal in the trial court appears to be relatively unexplored, but at least one commentator has stated that "[t]he question of reassignment originates on appeal, and thus is a function of issues unique to an appeal," suggesting that a recusal motion should not generally be a prerequisite for seeking reassignment. Worth, supra, at 580. In any event, this case does not require a comprehensive answer to that question. It is enough to say that here, where the State's reassignment argument is based on the circuit judge's substantive rulings, the State was not required to move for recusal before appealing those rulings.

explain the circuit judge's rulings without positing willfulness (at worst) or a troubling degree of inattention (at best).[3]

Ultimately, whatever may have been the circuit judge's subjective mindset, we agree with the State that the appearance of justice would be best served by reassigning this action on remand. We acknowledge, of course, that reassignment will have judicial-economy costs, both in terms of selecting a new judge and in the need for that judge to become acquainted with the case. But, given the snail's pace at which this action has moved, there is not much the new judge will need to do other than to read the operative complaint, Epic Tech I and Epic Tech II, and this opinion. In short, we do not believe "reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." Robin, 553 F.2d at 10.

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[3]The record reveals further cause for concern in the circuit judge's troubling neglect of the State's preliminary-injunction motion. The State filed that motion at the same time as its complaint, almost three years before the circuit judge's initial dismissal order. In that time, the circuit judge never addressed the preliminary-injunction motion at all, despite several requests by the State to set a hearing. It goes without saying that a circuit court should not allow a motion for preliminary relief to languish for so long, least of all in a case that "presents a question of utmost importance involving an alleged public nuisance." Epic Tech II, __ So. 3d at __ (Bolin, J., concurring specially).

Conclusion

We reverse the judgment of dismissal, remand the case for further proceedings consistent with this opinion, and order that the case be reassigned to a different circuit judge on remand.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur.

Sellers, J., concurs in the result.