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Filed December 7, 2009

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A.D., 2009

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08--CM--991
	)	
KATHLEEN KANE,	)	
	)	Honorable James E. Egan,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the opinion of the court:

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The State charged defendant, Kathleen Kane, with violating section 15 of the Smoke Free Illinois Act (the Smoke Free Act) (410 ILCS 82/15 (West 2008)). Defendant filed a variety of motions attacking the manner in which she was prosecuted, the charging instrument, as well as the constitutionality of the Smoke Free Act. The circuit court of Will County denied those motions. Defendant was convicted following a jury trial. Defendant appeals, claiming that the Smoke Free Act is not enforceable through criminal proceedings, that the trial court erred in refusing to instruct the jury regarding the meaning of

the term "bar," and that the Smoke Free Act is unconstitutional.

#### BACKGROUND

Police detective Kevin O'Boyle and Cynthia Jackson from the Will County health department observed defendant smoking in Woody's tavern in Will County, Illinois. Detective O'Boyle issued defendant a ticket, using the Illinois citation and complaint form, accusing her of violating section 15 of the Smoke Free Act. 410 ILCS 82/15 (West 2008). Defendant filed various unsuccessful motions to dismiss the case against her, attacking the charging instrument, the constitutionality of the Smoke Free Act, the alleged search of Woody's Tavern, and her prosecution through the criminal courts. The case proceeded to jury trial; defendant was found guilty. The circuit court sentenced defendant to six months' court supervision and ordered her to pay a fine in the amount of \$231.

Defendant filed a posttrial motion, arguing that the Smoke Free Act is unconstitutional, and in the alternative, if the Smoke Free Act is constitutional, then it may only be enforced through administrative proceedings and not in criminal cases initiated in the Illinois courts. Defendant's posttrial motions also claimed that the State failed to prove defendant guilty beyond a reasonable doubt and that the trial court erred in instructing the jury. Defendant's posttrial motion was denied and this appeal followed.

## ANALYSIS

Defendant argues on appeal that the State cannot prosecute violations of the Smoke Free Act through the use of criminal proceedings in the circuit courts. Specifically, defendant argues that the fines discussed in the Smoke Free Act are neither criminal nor penal, and that it was the legislature's intent to enforce the fines discussed in the Smoke Free Act through administrative proceedings. Defendant asks us to declare that the trial court did not have jurisdiction to hear this matter and, therefore, reverse her conviction and dismiss this case. The State responds by claiming the Smoke Free Act does not contain any language specifically depriving the circuit court of jurisdiction and, therefore, we must find the circuit courts have concurrent jurisdiction with the Department of Public Health to issue fines in violation of the Smoke Free Act. To support its position, the State cites *People v. NL Industries*, 152 Ill. 2d 82, 604 N.E.2d 349 (1992), and *Employers Mutual Cos. v. Skilling*, 163 Ill. 2d 284, 644 N.E.2d 1163 (1994).

It is well settled that the courts of Illinois have original jurisdiction over all justiciable matters. Ill. Const. 1970, art. VI, §9. The legislature, however, may vest exclusive original jurisdiction in an administrative agency. *People v. NL Industries*, 152 Ill. 2d 82, 604 N.E.2d 349 (1992). For a legislative enactment to divest circuit courts of their original

jurisdiction through a comprehensive statutory scheme, it must do so explicitly. *NL Industries*, 152 Ill. 2d at 96-97.

In *People v. NL Industries*, our supreme court held that since the Illinois Environmental Protection Act (the Environmental Act) contained no language explicitly excluding the circuit courts from hearing cases seeking cost recovery, punitive damages, civil penalties, and attorney fees pursuant to the Environmental Act, the circuit courts had concurrent jurisdiction with the Pollution Control Board to address such matters. *People v. NL Industries*, 152 Ill. 2d at 97. The *NL Industries* court held that the circuit court retained its general original jurisdiction since the defendant could not show that the legislature intended, by enacting the Environmental Act, to deprive the circuit courts of jurisdiction to entertain such matters. *People v. NL Industries*, 152 Ill. 2d at 96.

In *Employers Mutual Cos. v. Skilling*, our supreme court acknowledged the Workers' Compensation Act's pronouncement that all questions arising under the Workers' Compensation Act shall be determined by the Industrial Commission. *Employers Mutual Cos. v. Skilling*, 163 Ill. 2d at 289. Nevertheless, the *Skilling* court, relying heavily on *NL Industries*, held that circuit courts do have jurisdiction to resolve certain disputes in workers' compensation matters. *Skilling*, 163 Ill. 2d at 289. Relying on passages from *NL Industries* and *Skilling*, the State argues that

it is clear the circuit courts have concurrent jurisdiction with the Illinois Department of Public Health concerning enforcement of the Smoke Free Act. We disagree.

*Skilling* involved a declaratory judgment action filed by the insurance carrier for an employer following an employee's injury. *Skilling*, 163 Ill. 2d at 285. The employee was injured in Illinois and the carrier filed a declaratory judgment action seeking a declaration by the court that its policy only covered injuries occurring in Wisconsin. *Skilling*, 163 Ill. 2d at 285. The employee and employer sought dismissal of the declaratory judgment action, arguing that the Industrial Commission had exclusive jurisdiction over all workers' compensation matters and the carrier failed to exhaust its administrative remedies with the Industrial Commission prior to bringing the declaratory action. The trial court agreed and dismissed the suit, and the appellate court affirmed. *Skilling*, 163 Ill. 2d at 286.

The supreme court, however, found the circuit court and the Industrial Commission had concurrent jurisdiction "to hear the insurance coverage issue." *Skilling*, 163 Ill. 2d at 287. Since it "is the particular province of the courts to resolve questions of law such as the" coverage dispute between the parties, the *Skilling* court found it was proper for the circuit court to exercise jurisdiction in the matter. *Skilling*, 163 Ill. 2d at 289. The *Skilling* court cited to section 2--701 of the Code of

Civil Procedure, which pertains to declaratory judgment actions, and acknowledged a circuit court's authority to make binding declarations of rights in cases of actual controversy, including the determination of the construction of a contract and the rights of the parties thereunder. *Skilling*, 163 Ill. 2d at 289, citing 735 ILCS 5/2--701 (West 1992).

The *Skilling* court then stated that the circuit court was only asked to determine whether injuries in Illinois were included in the scope of coverage under the plaintiff's workers' compensation insurance contract with defendant's employer. This, the *Skilling* court found, presented a question of law best addressed by a court. *Skilling*, 163 Ill. 2d at 289.

While *Skilling* discusses theories of concurrent jurisdiction, it is far from being on all fours with the case at bar. *Skilling* involved a civil, and not quasi-criminal, matter in which a court was asked to declare the parties' rights and duties under a contract. That task, the *Skilling* court acknowledged, presented a "question of law." *Skilling*, 163 Ill. 2d at 290. As such, the Workers' Compensation Act's pronouncement that all questions arising under the Smoke Free Act shall be adjudicated by the Industrial Commission did not defeat the circuit court's authority to enter declaratory judgments pursuant to section 2--701 of the Illinois Code of Civil Procedure. *Skilling*, 163 Ill. 2d at 290.

Such principles are only marginally relevant in the case at bar. The matter before us does not involve a declaratory judgment action. Unlike the Workers' Compensation Act, there is no specific pronouncement in the Smoke Free Act that all controversies thereunder must be litigated administratively by an entity other than the circuit courts. 410 ILCS 82/1 *et seq.* (West 2008). As no explicit language is present in the Smoke Free Act divesting the circuit courts of their original jurisdiction, we find the circuit courts have jurisdiction with regard to matters discussed in the Smoke Free Act. The question we must answer, however, is: jurisdiction to do what?

Notably, section 50 of the Smoke Free Act provides that a circuit court may "enjoin violations" of the Smoke Free Act for repeated violations. 410 ILCS 82/50 (West 2008). Clearly, the circuit courts have subject matter jurisdiction regarding matters that arise under the Smoke Free Act.

Does this mean that the State, as here, can charge one with violating the Smoke Free Act in a criminal court proceeding? We think not.

Our supreme court has noted:

"Where the legislature enacts a comprehensive statutory scheme, creating rights and duties which have no counterpart in common law or equity, the legislature has created a

'justiciable matter.' [Citation.] Once the right is created, it is by reason of our constitution that our circuit courts acquire power to adjudge concerning that right.

[Citation.] However, it is by reason of the statute that the justiciable matter exists.

The legislature may define the 'justiciable matter' in such a way as to preclude or limit the authority of the circuit court. [Citations.] When a court's power to act is controlled by statute, the court is governed by the rules of limited jurisdiction [citations] and courts exercising jurisdiction over such matters must proceed within the strictures of the statute [citation]." *In re M.M.*, 156 Ill. 2d 53, 65-66, 619 N.E.2d 702, 710 (1993).

It is clear from our review of the record that this matter did not proceed within the strictures of the statute. *In re M.M.*, 156 Ill. 2d at 66. The Smoke Free Act states as follows:

"§ 40. Enforcement; complaints.

(a) The Department, State-certified local public health departments, and local law enforcement agencies shall enforce the

provisions of this Act through the issuance of citations and may assess fines pursuant to Section 45 of this Act.

(a-2) The citations issued pursuant to this Act shall conspicuously include the following:

\* \* \*

(6) the amount of the imposed fine and the location where the violator can pay the fine without objection;

(7) the address and phone number of the enforcing agency where the violator can request a hearing before the Department to contest the imposition of the fine imposed by the citation under the rules and procedures of the Administrative Procedure Act;

(8) the time period in which to pay the fine or to request a hearing to contest the imposition of the fine imposed by the citation[.]

\* \* \*

(b) Any person may register a complaint with the Department, a State-certified local

public health department, or a local law enforcement agency for a violation of this Act. The Department shall establish a telephone number that a person may call to register a complaint under this subsection (b).

(c) The Department shall afford a violator the opportunity to pay the fine without objection or to contest the citation in accordance with the Illinois Administrative Procedure Act, except that in case of a conflict between the Illinois Administrative Procedure Act and this Act, the provisions of this Act shall control.

(d) Upon receipt of a request for hearing to contest the imposition of a fine imposed by a citation, the enforcing agency shall immediately forward a copy of the citation and notice of the request for hearing to the Department for initiation of a hearing conducted in accordance with the Illinois Administrative Procedure Act and the rules established thereto by the Department applicable to contested cases." 410 ILCS 82/40 (West 2008).

Defendant was not afforded the opportunity "to pay the fine without objection or to contest the citation in accordance with

the Illinois Administrative Procedure Act" as mandated by section 40(c) of the Smoke Free Act. 410 ILCS 82/40(c) (West 2008). The citation and complaint given to defendant noted, "Court appearance required" in the circuit court of Will County and contained no option to summarily pay the fine or contest the citation in accordance with the Administrative Procedure Act (5 ILCS 100/1--1 (West 2008)). These facts alone mandate that we reverse defendant's conviction.

Further review of the Smoke Free Act requires us to find, as defendant requests, that the State may not prosecute violations of the Smoke Free Act through criminal proceedings in the circuit courts. Reading the Smoke Free Act as a whole, it is clear that the legislature intended violations of the Smoke Free Act to be enforced administratively, not in criminal proceedings. Nowhere does the Smoke Free Act describe a violation as a criminal act. Violations are not referred to as "offenses" or "crimes." Moreover, numerous provisions of the Smoke Free Act make clear the legislature's intent that it be enforced administratively.

Section 40(d) of the Smoke Free Act notes that upon receipt of a request for a hearing to contest the imposition of a fine, the enforcing agency shall forward the request "to the Department for initiation of a hearing conducted in accordance with the Illinois Administrative Procedure Act and the rules established thereto by the Department applicable to contested cases."

(Emphasis added.) 410 ILCS 82/40(d) (West 2008). Subsection (d) continues that the "Department shall notify the violator in writing of the time, place, and location of the hearing" which shall be "conducted at the nearest regional office of the Department, or in a location contracted by the Department in the county where the citation was issued." 410 ILCS 82/40(d) (West 2008).

The Smoke Free Act's consistent references to "the Department" in relation to enforcing fines (410 ILCS 82/40(a), (d), (e), 45(c)(1) (West 2008)), as well as its mandate that hearings be "conducted in accordance with the Illinois Administrative Procedure Act" (410 ILCS 82/40(d); see also 410 ILCS 40(a--2)(7), (c), (f) (West 2008)), make clear the legislature intended that violations thereof be enforced administratively. Therefore, we hold that the State may not enforce violations of the Smoke Free Act through criminal proceedings in the circuit courts.

Having reversed defendant's conviction on other grounds, we need not address defendant's contentions regarding the form of the complaint or the jury instructions, and we are prohibited from considering defendant's argument that the statute is unconstitutional. *People v. Carpenter*, 228 Ill. 2d 250, 264, 888 N.E.2d 105, 114 (2008); *People v. Lee*, 214 Ill. 2d 476, 828 N.E.2d 237 (2005).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the circuit court of Will County and vacate defendant's conviction.

Reversed.

O'BRIEN, P.J., and WRIGHT, J., concur.