

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 19, 2001 Session

**MARTIN MCCLAIN Individually and d/b/a “MAC’S PLACE” v. CITY OF
MILLINGTON, ET AL.**

**A Direct Appeal from the Chancery Court for Shelby County
No. CH-00-0135-2 The Honorable Floyd Peete, Jr., Chancellor**

No. W2000-02254-COA-R9-CV - Filed October 23, 2001

Owner of establishment selling liquor by the drink and beer filed a complaint to declare a city ordinance conflicting with the state law unconstitutional and to issue a temporary injunction prohibiting the enforcement of the city ordinance pending a decision on the merits. The trial court issued a temporary injunction and city was granted an interlocutory appeal to consider whether the trial court erred in granting the injunction. We vacate and remand.

**Tenn.R.App.P. 9; Interlocutory Appeal; Judgment of the Chancery Court Vacated and
Remanded**

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY KIRBY LILLARD, J., joined.

Edward J. McKenney, Jr., Memphis, for Appellants, City of Millington, George R. Harvell, Jr., Mayor, and Millington Beer Board, City of Bartlett, City of Germantown, City of Collierville

Rex L. Brasher, Jr., Memphis, For Appellee, Martin McClain

OPINION

Plaintiff, Martin McClain, individually and d/b/a “Mac’s Place,” filed a complaint in the chancery court against defendants, City of Millington, George R. Harvell, Jr., Mayor, and Millington Beer Board, seeking a declaration that the Millington beer ordinance is unconstitutional and invalid because it was more restrictive in terms of hours of sale than that permitted by the state law for liquor-by-the-drink establishments. The complaint also seeks a temporary injunction against the defendants “prohibiting the enforcement of hours of sale on Sunday against the Plaintiff and until such time as this matter may be heard on the merits.”

The trial court granted the temporary injunction and subsequently allowed the City of Bartlett, City of Germantown, and Town of Collierville to intervene as party defendants. All defendants filed motions to dismiss which were denied by the trial court by order entered June 20, 2000. The trial court granted the defendants' motion for interlocutory appeal pursuant to Tenn.R.App.P. 9, and this Court granted the defendants' application by order entered April 4, 2001.

We must first consider what issues are properly before this Court for review. The defendants' motion in the trial court for extraordinary appeal focused on the trial court's grant of a temporary injunction which, in effect, enjoined the defendants from enforcing their beer sale ordinances. The trial court's order granting the interlocutory appeal notes a threshold issue: "[W]hether this Court has jurisdiction to enjoin pending or threatened criminal proceedings or enjoin the enforcement of the ordinances of the City of Millington as they relate to beer sales." This Court granted the defendants' application based upon the trial court's order.

In *Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911 (Tenn. Ct. App. 2000), this Court said:

The scope of the issues raised on Tenn. R. App. P. 9 and 10 appeals differs from the scope of the issues that can be raised on appeals as of right under Tenn. R. App. P. 3. Subject to the limitations in Tenn. R. App. P. 3(e) and 13(b), both the appellant and the appellee have broad latitude with regard to the issues they can raise on a direct appeal. The same is not the case for interlocutory appeals under Tenn. R. App. P. 9 or extraordinary appeals under Tenn. R. App. P. 10. For interlocutory appeals, the only issues that can be raised are those certified in the trial court's order granting permission to seek an interlocutory appeal and in the appellate court's order granting the interlocutory appeal. *Tennessee Dep't of Mental Health & Mental Retardation v. Hughes*, 531 S.W.2d 299, 300 (Tenn. 1975); *Montcastle v. Baird*, 723 S.W.2d 119, 122 (Tenn. Ct. App. 1986); *Pass v. Shelby Aviation, Inc.*, No. W1999-00018-COA-R9-CV, 2000 WL 388775, at *6 (Tenn. Ct. App. Apr. 13, 2000) (No Tenn. R. App. P. 11 application filed).

Id. at 914.

Since we are limited in our scope of issues for review by the trial court's order granting interlocutory appeal, we will not consider the additional issues presented by the plaintiff. We will consider only the issue of whether the chancery court has jurisdiction to enjoin pending or threatened criminal proceedings, or enjoin the enforcement of ordinances of the defendants as they relate to beer sales.

It is well settled in this state that a license to sell alcoholic beverages does not confer a property right on the licensee. *See Grubb v. Mayor and Aldermen of Morristown*, 203 S.W.2d 593, 594 (Tenn. 1947); *Martin v. Beer Board for City of Dickson*, 908 S.W.2d 941, 955 (Tenn. Ct. App.1995); *Medley v. Maryville City Beer Board*, 726 S.W.2d 891, 892 (Tenn. 1987). In *Martin v. Beer Board for City of Dickson, supra*, this Court stated:

The local governments have primary control over the sale of beer. *State ex rel. Amvets Post 27 v. Beer Bd.*, 717 S.W.2d 878, 881 (Tenn. 1986); *Claiborne Country Club, Inc. v. City of Tazewell*, 872 S.W.2d 685, 687 (Tenn. Ct. App. 1993). Incorporated cities have greater control over the sale of beer than counties. While counties are limited to enforcing the restrictions in state law, cities may impose additional restrictions on the sale of beer. *Howard v. Willocks*, 525 S.W.2d 132, 135 (Tenn. 1975). The only limits placed on the cities' regulatory powers are found in the state and federal constitutions, the state statutes, and in the requirement that cities cannot exercise their power in an arbitrary or discriminatory manner. *Beer Bd. v. Brass A Saloon of Rivergate, Inc.*, 710 S.W.2d 33, 35 (Tenn. 1986); *Pantry, Inc. v. City of Pigeon Forge*, 681 S.W.2d 23, 23-24 (Tenn.1984).

Id. at 945-46.

The ordinances in question regulate the times for the sale of beer making it illegal to sell beer at certain times. Ordinance 8-218 provides:

8-28. Violations. Any violation of the provisions of this chapter or any rule or regulation of the beer board, or any violation of any law or regulation of the State of Tennessee relative to the sale, distribution, manufacture or storage of beer, shall be a Class A misdemeanor, and where the punishment is not otherwise fixed, the offender shall be punished in accordance with the provisions of the general penalty clause in this Official Code of the City of Millington. (1981 Code, § 2-218).

Beer ordinances are expressly prohibitory and penal in nature. *See Grubb v. Mayor and Aldermen of Morristown*, 203 S.W.2d 593 (Tenn. 1947).

It has long been held in this state that the chancery court lacks jurisdiction to enjoin criminal prosecutions under statute or ordinances. *See Kelly v. Conner*, 122 Tenn. 339, 391, 123 S.W. 622, 635-37 (1909); *Franklin Carriage Co. v. City of Jackson*, 160 Tenn. 649, 28 S.W.2d 343 (Tenn. 1930); *Earhart v. Young*, 174 Tenn. 198, 124 S.W.2d 693 (Tenn. 1939); *Grubb v. Mayor and Aldermen of Morristown, supra*; *Kirk v. Olgiati*, 203 Tenn. 1, 308 S.W.2d 471 (1957); *Chevenell Const. Co. v. City of Memphis*, 8 Tenn. App. 22 (1928). It is recognized as an exception to the well-

established rule of lack of jurisdiction that the chancery court can take jurisdiction where property rights are affected. *See Franklin Carriage Co. v. City of Jackson, supra.* As noted above, a license or permit to sell beer does not confer a property right upon the licensee; therefore, an exception to the general rule is not involved.

Although the injunction in this case is in inverse order, i.e., the injunction grants persons the right to sell and serve beer at times prohibited by the applicable ordinance, the effect is to enjoin the prosecution of such persons under the ordinance.

Accordingly, the order of the trial court granting temporary injunction is vacated, and the injunction is dissolved. The case is remanded to the trial court for such further proceedings as are necessary. Costs of the appeal are assessed against the appellee, Martin McClain.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.