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Opinion No. 08-53

Constitutionality of Regulation of Ticket Resales

QUESTION

Would it be constitutional for the Legislature to regulate ticket resales to events by limiting the number of tickets an individual can buy for an event and/or by capping the price for which tickets can be resold?

OPINION

Yes, the Legislature may constitutionally regulate ticket resales to public events in the fashion suggested.

ANALYSIS

The Legislature may constitutionally regulate ticket resales to public events in its exercise of the state's police power. *State v. Spann*, 623 S.W.2d 272 (Tenn. 1981). "Police power" is the attribute of sovereignty by which the public policy is preserved and promoted. *State v. National Optical Stores Co.*, 189 Tenn. 433, 225 S.W.2d 263, 269 (1949). The present concept of public welfare or general good is considered "public policy." *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 648, 383 S.W.2d 1 (1964). The police power, which inheres in the sovereign state, is necessary to protect the public safety, health, morals and welfare; police power is of "vast and undefined extent." *Davis v. Allen*, 43 Tenn. App. 278, 307 S.W.2d 800, 802 (1957). The state's police power derives from the maxim that "a man must so use his own as not to do wrong to another . . . ." 6A Tenn. Juris. *Constitutional Law* § 102 at 486 (2003). The police power of the state extends to every conceivable subject, where the good order, the domestic peace, the private happiness or public welfare of the people demand legislation. *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 304 (1871).

The exercise of the police power by the Legislature must be reasonable. The attempted regulation must tend to such ulterior public good that, even if it infringes upon constitutional rights, the infringement is necessary in the promotion of the health, safety and welfare of the community.

Pitts v. Pilkerton, 714 F. Supp. 285, 289 (M.D. Tenn. 1988)(as a general rule, police power is paramount to contractual rights of individuals).

The purpose of the proposed prohibitory or restrictive regulations would be to protect against the charging of exorbitant prices by unscrupulous promoters and others making enormous profits on ticket resales. Regulation of ticket scalping would also tend to insure that all members of the public have a fair and equal opportunity to obtain tickets for public events.

The most common method of regulation used by legislative bodies to stop ticket scalping is prohibition of any resale of tickets for a profit or premium. Tennessee's Supreme Court upheld former criminal statutes which prohibited any resale of tickets for a profit or premium. *State v. Spann*, 623 S.W.2d 272 (Tenn. 1981). Notably, ticket resales, in and of themselves, were not banned. The Court found the regulation to be entirely reasonable and within the police power of the General Assembly. *Id.* at 273. The Court recognized that "'ticket scalping' and the abuses attendant thereon in connection with admissions to public events have long been the subject of regulation by legislative bodies." The legislative objective of regulating resale of tickets to public events, enabling all members of the public desiring to attend such events to have an equal and fair opportunity to obtain admission tickets, falls within the police power of the state. *Id.* at 273 (citing *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934)).

Other legislative bodies have chosen to allow some reasonable amount of profit or premium on ticket resales. For example, the State of New York has allowed ticket resales, but has mandated a maximum price at which a ticket can be resold. New York's maximum price includes taxes in excess of the maximum price printed on the ticket. *Gold v. DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520, 85 S. Ct. 1332, 14 L. Ed. 2d 266 (1965) (unlawful to resell a ticket for a public amusement event at a price more than $1.50 plus lawful taxes in excess of maximum price printed on the ticket). Maximum ticket price restrictions or caps contained in anti-ticket scalping statutes are common. *See People v. Rosenblatt*, 277 A.D.2d 61, 717 N.Y.S.2d 9 (2000); *People v. Patton*, 57 Ill. 2d 43, 309 N.E.2d 572 (1974).

The United States Supreme Court upheld New York's anti-scalping regulation (maximum price cap) against a due process challenge and an equal protection challenge. *Gold v. DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964), *aff'd*, 380 U.S. 520, 85 S. Ct. 1332, 14 L. Ed. 2d 266 (1965). Likewise, Tennessee's prohibition of resale of tickets for a premium or profit withstood a due process and equal protection challenge in *State v. Spann*, 623 S.W.2d 272 (Tenn. 1981). Courts have upheld anti-scalping statutes in the face of Commerce Clause challenges, as well. *E.g., People v. Concert Connection*, 211 A.D. 2d 310, 319, 629 N.Y.S.2d 254 (1995).

Accordingly, this office concludes that the Legislature may regulate ticket resales either by limiting the number of tickets an individual can buy for an event or by capping the price for which tickets can be resold. As discussed above, price cap statutes have been approved by the courts of several jurisdictions. Although our research has not disclosed any case that specifically addresses

a regulation of the number of tickets an individual may purchase to an event, such a regulation is constitutionally defensible in our view because it would bear a rational relationship to the achievement of the goals underlying anti-ticket scalping regulation generally.

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