

STATE OF TENNESSEE

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Opinion No. 13-46

Constitutionality of Rule Limiting Advertising of Alcoholic Beverages

QUESTIONS

1. Is Tenn. Comp. R. & Regs. 0100-03-.05(1), which limits outdoor advertising of distilled spirits and wine in certain counties, constitutional and enforceable under the First Amendment or any other provisions of the United States Constitution?

2. Is Tenn. Comp. R. & Regs. 0100-03-.05(1), which limits outdoor advertising of distilled spirits and wine in certain counties, constitutional and enforceable under the Tennessee Constitution?

3. If Tenn. Comp. R. & Regs. 0100-03-.05(1) is constitutional, does it prohibit retail package stores from advertising in counties that have not legalized the sale of alcoholic beverages, where there is no reference to, mention of, or depiction of alcoholic beverages on the sign?

4. If Tenn. Comp. R. & Regs. 0100-03-.05(1) is constitutional, where a municipality within a county has legalized the sale of alcoholic beverages, is outdoor advertising of alcoholic beverages allowed in the county, outside of the municipality in which legalization has occurred?

OPINIONS

1 & 2. Tenn. Comp. R. & Regs. 0100-03-.05(1) is constitutional. The rule is not an impermissible restriction on speech in violation of the First Amendment to the United States Constitution because the rule prohibits sign and billboard advertising of alcoholic beverages only in counties in which the sale of alcoholic beverages has not been legalized. For the same reason, Tenn. Comp. R. & Regs. 0100-03-.05(1) is not an impermissible restriction on speech in violation of the Tennessee Constitution.

3. Tenn. Comp. R. & Regs. 0100-03-.05(1) prohibits sign and billboard advertisements of alcoholic beverages in counties in which the sale of alcoholic beverages has not been legalized. The rule would include any advertisements by retail package stores even if such advertisements do not reference, mention, or depict alcoholic beverages, given such retail package stores are primarily in the business of offering alcoholic beverages for sale.

4. Tenn. Comp. R. & Regs. 0100-03-.05(1) prohibits advertisements of alcoholic beverages on signs and billboards in counties in which the sale of alcoholic beverages has not been legalized. Under the rule, if a municipality elects to permit the sale of alcoholic beverages, sign and billboard advertisements of alcoholic beverages are permitted within the municipality and within the county in which the municipality is located.

ANALYSIS

1 & 2. The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The First Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996).

The Twenty-first Amendment to the United States Constitution ended the federal government’s attempt to prohibit sales of alcoholic beverages by repealing the Eighteenth Amendment and leaving the question whether to prohibit alcoholic beverages to each individual state. Section 2 of the Twenty-first Amendment provides that “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const. amend. XXI, § 2.

In Tennessee, the decision whether to prohibit alcoholic beverages is made at the county and municipal level. Tenn. Code Ann. § 57-3-106(a) provides that the voters of any county may, by local option election, permit or forbid “the manufacture, receipt, sale, storage, transportation, distribution and/or possession of alcoholic or intoxicating beverages, within the territorial limits of such county, by a majority vote.” Tenn. Code Ann. § 57-3-106(a). Tenn. Code Ann. § 57-3-106(b) similarly provides that municipalities meeting certain criteria may, by local option election, permit or forbid “the manufacture, receipt, sale, storage, transportation, distribution, and/or possession of alcoholic or intoxicating beverages, within the territorial limits of such municipality, by a majority vote.” Tenn. Code Ann. § 57-3-106(b).

The Tennessee Alcoholic Beverage Commission was created by statute to regulate the sale and manufacture of intoxicating liquors, Tenn. Code Ann. §§ 57-1-101 to -2-211, and given the authority to promulgate rules and regulations pertaining to alcoholic beverages, Tenn. Code Ann. § 57-1-209. Pursuant to its rulemaking authority, the Alcoholic Beverage Commission promulgated Tenn. Comp. R. & Regs. 0100-03-.05. Section 1 of Tenn. Comp. R. & Regs. 0100-03-.05 provides that “[a]lcoholic beverages may be advertised on signs and billboards only in those counties which have legalized the sale of such beverages under the provisions of T.C.A. § 57-3-106.” Tenn. Comp. R. & Regs. 0100-03-.05(1).

The United States Supreme Court has long held that “the First Amendment protect[s] the dissemination of truthful and nonmisleading commercial messages about lawful products and services.” *44 Liquormart*, 517 U.S. at 496. “By contrast, the First Amendment does not protect commercial speech about unlawful activities.” *Id.* at 497 n.7. The Court has adopted a four-part analysis for determining whether restrictions on commercial speech violate the First Amendment:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980). “The last two steps of the *Central Hudson* analysis basically involve a consideration of the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.” *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986).

The United States Supreme Court has applied the *Central Hudson* analysis to strike down restrictions on alcoholic beverage labeling and advertising. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court struck down a federal law which prohibited brewers from disclosing the alcohol content of their beers on package labeling. The Court held that the law did not significantly advance the governmental interest in suppressing “strength wars” because it was inconsistent with other provisions of federal law which allowed the identification of certain beers with high alcohol content as “malt liquors” and required disclosure of alcohol content on the labels of wines and spirits. 514 U.S. at 488-89. The Court also held that the law was more extensive than necessary because available alternatives to the labeling ban would prove less intrusive to the First Amendment’s protections for commercial speech. *Id.* at 490-91.

In *44 Liquormart*, the Court struck down a Rhode Island law banning advertising of the prices of alcoholic beverages. 517 U.S. at 489. The Court held that the prohibition did not significantly advance Rhode Island’s interest in promoting temperance. *Id.* at 505-06. The Court likewise held that the law failed to satisfy the requirement that the restriction on speech be no more extensive than necessary because less restrictive means of promoting temperance were readily available. *Id.* at 507-08.

In a prior opinion, this Office concluded that, under the analysis of *Central Hudson* and its progeny, certain rules of the Alcoholic Beverage Commission that banned radio and television advertising of alcoholic beverages were unlikely to withstand a First Amendment challenge. *See* Tenn. Att’y Gen. Op. 05-040 (Apr. 5, 2005). The rules at issue in that opinion were of statewide applicability and constituted outright bans on public dissemination of truthful and non-misleading information regarding alcoholic beverages.

Unlike the factual situation that was at issue in Opinion 05-040, Tenn. Comp. R. & Regs. 0100-03-.05(1) is not an outright statewide ban on the public dissemination of truthful and non-misleading information about a lawful activity. The advertising ban applies only in counties that have elected to forbid the sale of alcoholic beverages. In such counties, the sale of alcoholic beverages is not a lawful activity. The rule seeks to balance the policy interests of local governments that forbid the sale of alcoholic beverages with the policy interests of local

governments that permit the sale of alcoholic beverages. In that way, the rule is similar to the advertising ban addressed by the United States Supreme Court in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). In *Edge Broadcasting*, the Court upheld a federal law which restricted radio advertising of state-run lotteries to broadcasters located in states that had adopted a state-run lottery. 509 U.S. at 426-31. Broadcasters located in non-lottery states were prohibited from advertising the lotteries of neighboring states. Applying the *Central Hudson* analysis, the Court held that the law directly advanced the substantial governmental interest in supporting the policy of non-lottery states and not interfering in the policy of states that had a lottery. *Id.* at 427-28. The Court likewise held that the law was no more extensive than necessary to advance the government's interest. *Id.* at 429-31.

In Tennessee, the policy determination regarding whether to permit or forbid the sale of alcoholic beverages is made at the county or municipality level. As in *Edge Broadcasting*, Tennessee has a substantial governmental interest in supporting the policy of local governments that forbid the sale of alcoholic beverages and not interfering in the policy of local governments that permit the sale of alcoholic beverages. Tenn. Comp. R. & Regs. 0100-03-.05(1) allows alcoholic beverages to be advertised on signs and billboards only in counties that permit the sale of alcoholic beverages. Based on the rationale of the Supreme Court in *Edge Broadcasting*, the rule should survive a First Amendment challenge because the rule directly advances the State's substantial governmental interest in supporting the policy of "dry" counties and not interfering in the policy of "wet" counties, and the law is no more extensive than necessary to advance the State's interest.

Like the First Amendment, the Tennessee Constitution protects freedom of speech. Article I, Section 19 of the Tennessee Constitution provides that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tenn. Const. Art. I, § 19. The analysis applied above also applies to the determination of the constitutionality of Tenn. Comp. R. & Regs. 0100-03-.05(1) under the Tennessee Constitution. *See H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 451-52 (Tenn. 1979). Therefore, for the reasons stated above, Tenn. Comp. R. & Regs. 0100-03-.05(1) is valid under Article I, Section 19 of the Tennessee Constitution.

3. By its terms, Tenn. Comp. R. & Regs. 0100-03-.05(1) applies only to advertising of alcoholic beverages. The rule allows sign and billboard advertising of alcoholic beverages only in counties in which the sale of alcoholic beverages has been legalized. The rule does not specifically prohibit a retail package store from advertising in a county in which the sale of alcoholic beverages is illegal, provided that the package store does not advertise alcoholic beverages. The primary purpose of advertising, however, is to convince potential customers to buy the products offered for sale by a business, and here retail package stores are licensed to sell, and primarily in the business of selling, only alcoholic beverages. Thus, advertisements by retail package stores inherently amount to advertisements of alcoholic beverages. *See Steppach v. Thomas*, 346 S.W.3d 488, 506 (Tenn. Ct. App. 2011) (quoting *State v. Edmondson*, 231 S.W.3d 925, 927 (Tenn. 2007)) (citing the general rule that, when interpreting the language of a statute, courts will consider "the language of the statute, its subject matter, the object and reach

of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment”).

4. Tenn. Code Ann. § 57-3-106(b) provides that municipalities that meet certain criteria may, by local option election, permit or forbid the sale of alcoholic beverages “within the territorial limits of such municipality.” Tenn. Code Ann. § 57-3-106(b). If such a municipality elects to permit the sale of alcohol, the sale of alcohol in the municipality shall be lawful “notwithstanding the fact that the county or any portion thereof in which such municipality is located has, or has not, voted to the contrary under any other provision of this chapter.” *Id.* In other words, certain municipalities are authorized to adopt an alcohol policy that is contrary to the alcohol policy adopted by the county within which the municipality is located. The alcohol policy adopted by such a municipality applies only “within the territorial limits of such municipality.” *Id.*

Tenn. Comp. R. & Regs. 0100-03-.05(1) provides that “[a]lcoholic beverages may be advertised on signs and billboards only in those counties which have legalized the sale of such beverages under the provisions of T.C.A. § 57-3-106.” The rule is silent regarding the treatment of outdoor advertising in counties in which the sale of alcoholic beverages has been legalized by a municipality within the county, but not by the county as a whole. The Tennessee Alcoholic Beverage Commission has informed this Office that the Commission applies the outdoor advertising restrictions of Tenn. Comp. R. & Regs. 0100-03-.05(1) only in counties that have not legalized the sale of alcoholic beverages at either the county or municipal level. As applied by the Commission, if a municipality has legalized the sale of alcoholic beverages, then outdoor advertising of alcoholic beverages is permitted throughout the county in which the municipality is located, even if the county as a whole has not legalized the sale of alcoholic beverages.

We believe that the Commission’s application of the rule is reasonable. The Commission promulgated the rule pursuant to its statutory authority to regulate the sale and manufacture of intoxicating liquors. The Commission’s interpretation of its own rule is entitled to great weight. *See Byrd v. Tennessee Bd. of Chiropractic Examiners*, 2011 WL 3558166, at *8 (Tenn. Ct. App. Aug. 11, 2011) (“As a general rule, courts must give great deference and controlling weight to an agency’s interpretation of its own rules and regulations, except where the interpretation is plainly erroneous or inconsistent with the regulation itself.”) Although the rule does not reference municipalities, it does reference legalization of alcoholic beverages under Tenn. Code Ann. § 57-3-106, which authorizes both counties and municipalities to legalize the sale of alcoholic beverages. It is thus reasonable to interpret the rule to allow outdoor advertising of alcoholic beverages within a county that includes a municipality that has legalized the sale of alcoholic beverages, even if the county as a whole has not legalized the sale of alcoholic beverages. This reading is also reasonable because the small geographic size of some municipalities could make it virtually impossible to advertise by signs and billboards within the city limits.

Additionally, the Commission’s application of the rule is consistent with the free speech protections of the First Amendment. The United States Supreme Court disfavors bans on truthful, non-misleading speech concerning lawful commercial activities and products. Under

the First Amendment, the Commission cannot apply the rule to ban outdoor advertising of alcoholic beverages in municipalities that have legalized the sale of alcoholic beverages. The Commission could perhaps allow outdoor advertising of alcoholic beverages only within the territorial limits of a municipality that has legalized the sale of alcoholic beverages, if the county as a whole has not legalized the sale of alcoholic beverages. In municipalities of small territorial size, however, such an application of the rule would be a significant restriction on commercial speech, and the restriction would be more extensive than necessary to advance the State's substantial governmental interest in balancing the competing policy interests of "dry" localities and "wet" localities. The Commission's application of the rule is preferable because it directly advances the State's substantial governmental interest without being more extensive than necessary.

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