

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00463-CV

**Texas Department of State Health Services and John Hellerstedt, in his Official Capacity as
Commissioner of the Texas Department of State Health Services, Appellants**

v.

**Crown Distributing LLC; America Juice Co. LLC; Custom Botanical Dispensary, LLC;
and 1937 Apothecary, LLC, Appellees**

**FROM THE 345TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-20-004053, THE HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellees Crown Distributing LLC; America Juice Co. LLC; Custom Botanical Dispensary, LLC; and 1937 Apothecary, LLC (collectively, the Hemp Companies) sued appellants Texas Department of State Health Services and John Hellerstedt, in his official capacity as Commissioner (collectively, the Department), challenging certain statutes and a Department rule relating to consumable hemp products for smoking. The Hemp Companies applied for a temporary injunction; the trial court granted the injunction in part, enjoining the Department from enforcing rule 300.104, *see* 25 Tex. Admin. Code § 300.104 (2021) (Dep't of State Health Servs., Manufacture, Processing, Distribution, and Retail Sale of Hemp Products for Smoking); and the Department now appeals from the temporary injunction order. For the following reasons, we affirm in part and reverse and remand in part.

BACKGROUND

In 2019, the Legislature enacted chapter 443 of the Texas Health and Safety Code and other related statutory provisions regulating certain hemp products. *See generally* Tex. Health & Safety Code §§ 443.001–.207 (“Manufacture, Distribution, and Sale of Consumable Hemp Products”); *see also* Tex. Agric. Code § 122.301(b) (“A state agency may not authorize a person to manufacture a product containing hemp for smoking, as defined by Section 443.001, Health and Safety Code.”). Chapter 443 requires that “[t]he executive commissioner shall adopt rules and procedures necessary to administer and enforce this chapter” and that “[r]ules adopted by the executive commissioner regulating the sale of consumable hemp products must to the extent allowable by federal law reflect the following principles,” including that “the processing or manufacturing of a consumable hemp product for smoking is prohibited.” Tex. Health & Safety Code §§ 443.051, .204(4). In 2020, the Department adopted rule 300.104: “The manufacture, processing, distribution, or retail sale of consumable hemp products for smoking is prohibited.” 25 Tex. Admin. Code § 300.104.

The Hemp Companies then filed suit against the Department raising two claims for declaratory relief and requesting injunctive relief, described in their petition as follows:

1. This lawsuit seeks a declaration that the Legislative Ban contained in Texas Agriculture Code § 122.301(b) and Texas Health & Safety Code § 443.204(4), which bans the processing and manufacture of hemp products for smoking in Texas, is unconstitutional.
2. This lawsuit further seeks a declaration that the administrative rule enacted by the Texas Department of State Health Services, which bans the distribution and retail sale of hemp products for smoking, is invalid pursuant to Texas Government Code § 2001.038.
3. This lawsuit seeks to enjoin Defendants from enforcing two statewide bans on the manufacturing, processing, distribution, and retail sale of smokable hemp products.

The Hemp Companies claimed that the “Legislative Ban” violates their constitutional right to due course of law, *see* Tex. Const. art. I, § 19, and that the enactment of rule 300.104’s ban on distribution and retail sale exceeds the scope of the Department’s authority because “[t]he Legislature expressed no intent to ban the retail sale or distribution of smokable hemp product” and “[t]he express mention of ‘manufacture’ and ‘processing’ [in section 443.204(4)] evidences an affirmative intent to permit other activities,” *see* Tex. Gov’t Code § 2001.038 (providing for rule validity challenge). As to the injunctive relief, the Hemp Companies’ petition requested that the trial court “enjoin[] [the Department] from enforcing the Legislative Ban (Tex. Health & Safety Code § 443.204(4), and Tex. Agric. Code § 122.301(b)) and the Rule (25 Tex. Admin. Code § 300.104), assessing any fines from violation of the Rule, or otherwise penalizing any entity in any way from violating the Rule.”

After an evidentiary hearing on the application for a temporary injunction, the trial court notified the parties of its decision to grant the temporary injunction in part and requested a proposed order. The parties could not agree on the wording of the order, and both parties sent email correspondence with different proposed orders to the judge, which were filed with the trial court. The Department asserted that the Hemp Companies “are not challenging the Rule with respect to ‘manufacture’ and ‘processing’”; that they “challenged the Rule only with respect to ‘distribution’ and ‘retail sale’”; and that their “proposed order therefore does not match the relief requested or the relief available.” The Hemp Companies responded that “[t]he basis for enjoining enforcement of the Rule until final disposition on the merits is based on [the Hemp Companies’] Substantive Due Course of Law claim” and that “[i]f the Legislative Ban is unconstitutional, a declaration that 25 Texas Administrative Code § 300.104 is invalid immediately follows.” The next day, the trial court signed a temporary injunction order that

“GRANTS-IN-PART and DENIES-IN-PART [the Hemp Companies’] Application” and that enjoined the Department “from enforcing 25 Tex. Admin. Code § 300.104 (‘the Rule’), assessing any fines from violation of the Rule, or otherwise penalizing any entity in any way from violating the Rule.” The order notes that the Department stipulated that the Hemp Companies would suffer irreparable harm and challenged only the Hemp Companies’ probable right to relief, which the trial court found the Hemp Companies to have demonstrated. The Department now appeals from the temporary injunction order.¹

DISCUSSION

The Department raises two issues on appeal. First, the Department challenges the temporary injunction’s scope, arguing that the trial court abused its discretion in enjoining the enforcement of rule 300.104 in its entirety because the Hemp Companies’ petition never stated a ground for enjoining the enforcement of rule 300.104’s bans on manufacturing and processing. Second, the Department argues that the trial court abused its discretion in enjoining the enforcement of rule 300.104’s bans on distribution and retail sale because those bans are “a valid exercise” of the Department’s “broad rulemaking authority over the sale of consumable hemp products and consistent with the statutory limitations on that authority.”

To be entitled to a temporary injunction, the applicant “must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable imminent, and irreparable injury in the interim.” *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 916 (Tex. 2020)

¹ The Hemp Companies have not appealed the trial court’s denial of their request that the trial court “enjoin[] [the Department] from enforcing the Legislative Ban (Tex. Health & Safety Code § 443.204(4), and Tex. Agric. Code § 122.301(b)).”

(quoting *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)). We review a trial court’s decision to grant a temporary injunction for abuse of discretion. *Id.* A trial court does not abuse its discretion as to evidentiary matters if some evidence reasonably supports the ruling, but the trial court has no discretion to incorrectly analyze or apply the law. *Id.*

Scope of the Temporary Injunction

In its first issue, the Department argues that the Hemp Companies never provided a “plain and intelligible statement of the grounds for such relief” to enjoin the enforcement of rule 300.104’s ban on manufacturing and processing consumable hemp products for smoking. *See* Tex. R. Civ. P. 682 (“No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief.”). According to the Department, the Hemp Companies challenged rule 300.104’s validity by focusing only on the distribution and retail sale bans as exceeding statutory authorization, but never connected their constitutional challenge to the “Legislative Ban” as a ground for rule 300.104’s invalidity in its entirety.

The Hemp Companies noted in their email to the trial court after the hearing on the temporary injunction that “[i]f the Legislative Ban is unconstitutional, a declaration that [rule 300.104] is invalid immediately follows.” The “Legislative Ban” states, “Rules adopted by the executive commissioner regulating the sale of consumable hemp products must to the extent allowable by federal law reflect the following principles: . . . (4) the processing or manufacturing of a consumable hemp product for smoking is prohibited.” Tex. Health & Safety Code § 443.204(4). And rule 300.104 states, “The manufacture, processing, distribution, or retail sale of consumable hemp products for smoking is prohibited.” 25 Tex. Admin. Code § 300.104.

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