South Carolina Law Review

Volume 23 | Issue 1 Article 13

1971

Alcoholic Liquors--Effect of Lewis v. Gaddy on the South Carolina Brown Bagging Law

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ALCOHOLIC LIQUORS — EFFECT OF LEWIS V. GADDY ON THE SOUTH CAROLINA "BROWN BAGGING" LAW

I. INTRODUCTION

The controversial and much disputed "brown bagging"[1] law of South Carolina, which suffered from a lack of enforcement[2] has become under attack and has been further diluted by *Lewis v. Gaddy*,[3] decided by the South Carolina Supreme Court in April, 1970. The problem of unsatisfactory liquor legislation, enforcement, and the sale of liquor by the drink has plagued the people and the legislature for over one hundred years.[4]

The basic problem raised in *Gaddy* was validity of section 4-95 of the South Carolina Code of Laws which states in part:

> It shall be unlawful for any person to store or to have in possession any alcoholic liquors in his place of business other than a licensed liquor store. A place of business shall include:
>
> (1) Any place where goods, wares or merchandise are sold, offered for sale or distributed, and also places of business.[5]

The divided court held that owners or employees of a business establishment having a possession and consumption permit[6] could possess alcohol on the premises without violating the existing law. The court came to this conclusion by finding that section 4-95 had been impliedly repealed by the enactment of the "brown bagging" statute, which repeal rendered invalid any restrictions place upon licensees or their employees as to the

1. S.C. CODE ANN. § 4-29 (Supp. 1969).
2. When the Alcoholic Beverage Control Commission was established, 25 agents were assigned to enforce the "brown bagging" law, all under the control and direction of the Commission. Much controversy was raised by citizens who complained that the agents were too strict in their enforcement. Poltical pressure resulted in 10 of these agents being transferred to the State Law Enforcement Division, this leaving only a few agents to enforce these laws. The legislature accomplished this by reducing the budget of the A.B.C. Commission by $108,060.00 from 1968 to 1969. *See* LV S. C. STATS. AT LARGE 2945 (No. 1263 1968); LVI S.C. STATS. AT LARGE 533 (No. 349 1969).
3. Lewis v. Gaddy, 173 S.E.2d 376 (S.C. 1970).
4. Hibbard, *A History of South Carolina Liquor Regulation* 19 S.C.L. REV. 157 (1967).
5. S.C. CODE ANN. § 4-95 (Supp. 1969).
6. According to section 4-29, a possession and consumption permit allows the patron of a licensed establishment to bring his liquor in a brown bag and consume on the premises. The licensee is then allowed to mix the drink and sell "setups."

keeping of alcoholic liquors on the licensed premises. The *Gaddy* decision led to immediate speculation that open bars would be allowed in South Carolina,[7] a proposition which will be discussed below.

II. LEWIS v. GADDY

The respondent, the proprietress of a restaurant and bar known as "Gaddy's Owl Club," located at Myrtle Beach, South Carolina, had been issued a possession and consumption permit. Her husband, an employee, parked his automobile, containing twenty-four half-pints of legal liquor[8] in an adjacent parking lot. After agents of the Alcoholic Beverage Control Commission discovered this, the licensee had her license suspended and was fined after a hearing before the Commission. This action was taken under section 4-95, which made unlawful possession of legal liquor by a licensee or an employee on the premises of the establishment. On appeal to the trial court, this ruling was reversed because the automobile was found not to be "on the premises" within the meaning of section 4-95.[9]

The subsequent appeal to the Supreme Court was based mainly on the question of the *pro tanto*, or implied repeal of section 4-95 and not the "premises" question relied upon in the trial court.[10] Justice Bussey, for the majority, found that section 4-29 *pro tanto* repealed section 4-95. Section 4-29 states in part:

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7. The term, "open bars," means an establishment which is licensed to sell liquor by the drink to be lawfully consumed on the premises of the establishment. For a good definition of a "bar," *see* Commonwealth v. Everson, 140 Mass. 292, 2 N.E. 839 (1885). Liquor by the drink is expressly forbidden in Article VIII, section 11, of the South Carolina State Constitution.

8. "Legal liquor" is alcoholic liquor properly stamped with federal and state tax stamps as required by sections 4-91.1 and 65-1270 of the South Carolina Code of Laws.

9. The opinion of the trial court held that under section 4-29, the word, "premises," had acquired a new meaning and now "premises" meant only "the inside of the buildings where the licensee's business is carried on." Earlier cases in South Carolina construed "premises" as used in section 4-95 to mean all parts of one's place of business, including rooms, closets as well as yards or courts, used in connection with the place of business. *See* State v. Brandon, 210 S.C. 495, 43 S.E.2d 449 (1947); State v. Phillips, 210 S.C. 249, 42 S.E.2d 339 (1947); State v. Schumpert, 195 S.C. 387, 11 S.E.2d 523 (1939).

10. The "premises" argument was overshadowed by the *pro tanto* repeal argument apparently because of the greater impact of the latter one. In the trial court's opinion, only one sentence in the last paragraph made reference to *pro tanto* repeal where the court said "[i]nsofar as these sections and cases relate to businesses licensed under Section 10 of Act Number 398 of 1967, they were effectively repealed by said act because inconsistent therewith." The attorneys involved seized upon this sentence in planning the appeal, placing more emphasis on the implied repeal argument.

> A. *Notwithstanding any other provisions of law*, it shall be lawful . . . for *any person* who is at least twenty-one years of age to transport, possess or consume lawfully acquired alcoholic liquor in accordance with the following: (1) *Any person* may transport alcoholic liquors to and from any place where alcoholic liquors may be lawfully possessed or consumed * * * *. (4) *It shall be lawful for any person to possess or consume alcoholic liquors on the premises of any business establishment*, except on Sunday provided the business establishment meets the following requirements: (a) The business is bona fide engaged primarily and substantially in the preparation and serving of meals or furnishing lodging; and (b) The business has a permit from the Alcoholic Beverage Control Commission for this purpose . . . .[11]

In reaching this conclusion, the court found that the legislative intent was clear and unambiguous and allowed, no room for statutory construction:

> It is obvious, we think, from the plain and clear language of Sec. 4-29 that it was the legislative intent and purpose to allow both the possession and consumption of alcoholic liquors upon the premises of a business establishment . . . .[12]

The key phrase in which the legislative intent was found was that containing the words, "any person," as used in section 4-29. These words would allow anyone to possess or consume alcoholic liquors on the premises of a licensed establishment. Here the court said:

> [H]ad the General Assembly seen fit when it enacted Sec. 4-29 to prohibit possession, consumption and transportation by the proprietor or the employees of an establishment holding a possession and consumption permit, it could easily have done so. Instead, it repeatedly used the phrase "any person", excluding only persons under twenty-one years of age.[13]

In a strong dissent, Justice Littlejohn found that section 4-29 "did not repeal, expressly or by implication, any part of Section 4-95."[14] He found these two sections capable of reconciliation

11. S.C. CODE ANN. § 4-29 (Supp. 1969) (emphasis added).
12. 173 S.E.2d at 379.
13. *Id.*
14. *Id.*

and that it was clearly not the intent of the legislature "to legalize the possession of alcoholic liquors by employees of restaurant operators who have procured possession and consumption [permits] . . . ."[15] On the other hand it was clearly the intention of the legislature "that only customers at a licensed restaurant may possess and drink alcoholic beverages on the premises . . . ."[16]

The court had to overcome several obstacles in arriving at its conclusion. Repeal by implication is not favored in South Carolina.[17] It has long been the law of this state that a later statute will not be construed to repeal an earlier enactment by implication unless it is "plainly repugnant" to the earlier statute, or fully embraces the whole subject matter of the law. The dissent here found these two statutes reconcilable, because there was no clear intent of the legislature to allow possession and consumption of alcoholic liquors by the operators and employees of a licensed restaurant. It would, therefore, be the duty of the court to decide the proper interpretation, in effect reconciling the two statutes. The majority had found the intent so clear and the statutes so irreconcilable that no other construction could be followed and the latter statute must prevail.

One of the most important considerations noted in the dissent and by law enforcement officials, those most directly affected by the decision, is that repeal of section 4-95 would create, "a near hopeless law enforcement problem . . . and it is reasonable to assume that such was not intended."[18] Also, the dissent found important the fact that the legislature did not specifically repeal section 4-95, while it did expressly repeal several other sections with which section 4-29 conflicted.[19] If it had been the intent of the legislature to repeal section 4-95, this could have easily been done by the inclusion of this section in the "brown bagging statute." It seems evident from the exclusion of 4-95 that the legislature intended to retain those provisions of law which would make it unlawful for the owner or employees of a licensed establishment to possess liquor on the premises. On the other hand, the legislature repealed sections 4-96 and 4-402 be-

15. *Id.*
16. *Id.* at 380.
17. State v. Hood, 181 S.C. 488, 188 S.E. 134 (1936); State v. Moore, 128 S.C. 192, 122 S.E. 672 (1924).
18. 173 S.E.2d at 380.
19. The "brown bagging" statute found in LV S.C. STATS. AT LARGE 571 (No. 398, 1967) expressly repeals sections 4-96, 4-109, 4-110, and 4-402 of the Code.

cause these dealt with patrons drinking in restaurants, an act they intended to legalize.[20]

III. IMPLICATIONS OF LEWIS V. GADDY

Although much debated, South Carolina's liquor laws have been strictly construed through the years as prohibitory in nature. Following the *Gaddy* decision there was, however, much confusion in this area. This decision was contrary to the earlier attitude of the court[21] in that the court liberally construed the statute now making lawful the prior forbidden act of allowing a licensee to possess legal liquor. For years the legislature has had before it various attempts to "liberalize" our liquor laws, all failing before that body or the people.[22] Just prior to *Gaddy*, a "minibottle bill"[23] which would have allowed licensed establishments to sell "minibottles" containing an ounce and a half of liquor was defeated. After *Gaddy*, this bill was recalled[24] because, according to one state senator, the authorities were now left without power to "control, police, regulate, or tax the sale of alcohol in establishments which have permits . . . ."[25]

How "brown bagging" would be policed was a question raised by law enforcement officials and holders of possession and consumption permits.[26] As pointed out in the dissent in *Gaddy*, this would create a big problem in the enforcement of the liquor laws. Under the present rule, an ABC agent must actually *see* the sale or delivery take place between the seller and buyer before charges can be made under section 4-91.[27]

The real pandora's box opened by the court in *Gaddy* is the question of whether or not an owner of a licensed possession and consumption establishment would be able to "give away" his

20. 173 S.E.2d at 381.
21. The court earlier viewed liquor laws in a narrow sense and in favor of the state on all such questions. *See* State v. Brandon, 210 S.C. 495, 43 S.E.2d 449 (1947).
22. A proposed constitutional amendment to Article VIII, section 11, of the state constitution, which prohibits the sale of liquor in bottles less than one-half pint, and allows sale only in retail stores, was rejected by the voters of South Carolina in 1966.
23. The "minibottle bill" was a proposal to sell liquor in restaurants and bars in one to two ounce bottles, in effect selling a drink. This change would have been in the form of a constitutional amendment to Article VIII, section 11 of the state constitution.
24. The State, April 17, 1970, at 1B, col. 6.
25. The State, April 15, 1970, at 1C, col. 3 and 4.
26. The Attorney General's office received requests from law enforcement officials dealing with the sale or delivery of liquor after the Gaddy decision was announced. No official opinions were rendered.
27. 173 S.E.2d at 380 (by implication).

own lawfully possessed liquor to his customers.[28] By such a scheme the owner would either have a high "cover charge" or sell "set ups" at the price of a drink of liquor and then generously provide the liquor at no charge to his customer. This question will probably reach the supreme court in the near future.[29] It does not seem likely that the court intended such a strained construction to be placed on the *Gaddy* decision. The court, apparently unknowingly, extended itself too far and never suspected such controversy over this ruling. To allow a licensee to use such a subterfuge merely because he can now lawfully possess liquor on the premises could not have been the legislative intent under the "brown bagging" statute. This would surely undermine the whole purpose of the statute as well as be a judicial proclamation of "open bars" in South Carolina. The maxim—"You cannot do indirectly what you are forbidden to do directly"—seems appropriate here.

To allow the owners of a licensed establishment to conduct such a practice would be an open violation of section 4-91 of the Code. This section states:

> §4-91. *Unlawful manufacture, sale or transportation, etc.*—It shall be unlawful for any person to manufacture, store, keep, receive, have in possession, transport, ship, buy, sell, barter, exchange or deliver any alcoholic liquors, except liquor acquired in a legal manner, and except in accordance with the provisions of this chapter, or to accept, receive or have in possession any liquors for unlawful use under the provisions of this chapter.[30]

Section 4-91 was applied in *Pirates' Cove, Inc. v. Strom*[31] in a situation similar to the one where there is a giving away of liquor as explained above. In *Pirates' Cove*, a private club operated a bar where alcoholic liquors were sold to the members and provided professional entertainment for them. This liquor was purchased from licensed retail dealers, with South Carolina liquor taxes paid. The club contended that it was "a private club and, as such, . . . [could] sell liquor to its members and

28. This problem was ruled on in *Winter v. A.B.C. Comm'n,* ABC Order (1970) by the South Carolina Alcoholic Beverage Control Commission where the defendant was found to have violated section 4-91 of the Code. This case is now pending appeal to the state circuit court.
29. The Charleston Evening Post, July 9, 1970, at 12A, col. 1. *See* note 27 *supra.*
30. S.C.CODE ANN. § 4-91 (Supp. 1969).
31. 249 S.C. 270, 153 S.E.2d 900 (1967).

guests without a license, if the liquor was legally acquired."[32] The court held that section 4-91 makes it *unlawful* for any person to sell alcoholic liquor unless (1) the liquor is acquired in a legal manner and (2) in accordance with the provisions governing the sale of liquor.[33] Because the club in *Pirates' Cove* was not licensed to sell liquor as required by the law, their sale constituted a violation of section 4-91.[34] The club was in "[p]ossession for unlawful sale, that is, without a license, [and] would constitute possession for an unlawful use under the statute."[35]

The rule of possession for an unlawful use under section 4-91 is the proposition to be applied in the case of the licensed establishment "giving away" liquor with the "set ups." This licensee can possess the liquor on the premises and be within the *Gaddy* rule; however, when the possession is primarily to give away the liquor to patrons, the use becomes unlawful under section 4-91. This would clearly be within section 4-91 because this "giving away" would be a "sale," "exchange," or "delivery" under this statute. In connection with liquor traffic the word "sale" means the transfer of title from one party to another for some consideration.[36] Here the consideration element would be satisfied in that the customer receives the liquor and the licensee generates "good will"[37] with his clientele and more business.

As applied under section 4-91 the "give away" scheme would result in the licensee having violated the law. This would not conflict with the *Gaddy* rule which makes possession by the licensee lawful, nor with section 4-29 which allow "any person" to transport possess, or consume lawfully acquired liquor in licensed establishments. Section 4-91 carries these rules one step further in saying that the party in lawful possession may not use the liquor unlawfully by selling or delivering it.

The licensee, attempting the give away scheme, would, in effect, be acting contrary to the purpose of the "brown bagging" law which allows patrons to *possess* and *consume* alcoholic liquors on the premises, not *purchase* the liquor at the place of

32. *Id.* at 276.
33. *Id.*
34. *Id.*
35. *Id.*
36. 45 AM. JUR. 2d *Intoxicating Liquors* § 239 (1969).
37. Consideration may consist of some right, interest, profit, or benefit accruing to one party, or some forebearance, detriment, loss, or responsibility suffered or undertaken by another. Callahan v. Ridgeway, 138 S.C. 10, 135 S.E. 646 (1925).

consumption.[38] This type of scheme falls within the well settled rule that the courts, where the sale of liquor is illegal, "will refuse to countenance any trick, artifice or subterfuge intended to evade the law."[39]

Now that section 4-29 has been tested in the courts in relation to section 4-95, effectively *pro tanto* repealing a portion of it, what other statutes have arguably been *pro tanto* repealed? This question could be far reaching under our existing laws leaving them in a questionable state given the interpretation applied in *Gaddy* of the words, "any person," as used in section 4-29.

Because "any person" may now lawfully transport alcoholic liquors to and from any place where alcoholic liquors may be lawfully possessed and consumed,[40] it would seem that a person may now purchase liquor in another state or on a military reservation and lawfully bring it into South Carolina.[41] This is within the rule stated above because alcoholic liquors were lawfully purchased and transported within section 4-29.

According to section 4-92, it in unlawful for any person to transport any alcoholic liquor, even though properly stamped, in a taxi. The way "any person" is used applies only to taxi drivers as long as a passenger transports the liquor in his baggage. Under section 4-29, the taxi driver like "any person" should be able to carry his liquor and possess it within the rules set forth in section 4-29.[42] Apparently section 4-92 could have been repealed to this extent.

Section 4-99 as it relates to the drinking of alcoholic liquors on the premises of business establishments seems to have been repealed in part. Section 4-29 specifically provides that "any person may possess or consume alcoholic liquors in a private

38. 173 S.E.2d at 379, 380 (by implication). It is also unlawful for anyone to purchase alcoholic liquor other than that purchased from licensed dealers under section 4-94. *See* Pirates Cove v. Strom, 249 S.C. 270, 153 S.E.2d 900 (1967).

39. State v. Collins, 67 W. Va. 530, 68 S.E. 268 (1910).

40. 173 S.E.2d at 376; S.C. CODE ANN. § 4-91 (Supp. 1969).

41. According to the present rule, it is a violation of section 65-1270 of the Code to bring into South Carolina liquor not stamped with proper South Carolina revenue stamps. *See* State v. Kilgore, 233 S.C. 6, 103 S.E.2d 321 (1958).

42. Section 4-29(1) provides: "Any person may transport alcoholic liquors to and from any place where alcoholic liquors may be lawfully possessed or consumed; but if the cap or seal on the container has been opened or broken, it shall be unlawful to transport it in any motor vehicle, except in the luggage compartment or cargo area."

residence, hotel room or motel room."[43] These are certainly business establishments brought within the rule of *Gaddy*. Therefore, "any person" should be permitted to drink in licensed establishments as well as those even in unlicensed hotel and motel rooms which are business establishments.

One other questionable area is within section 4-100, which makes it unlawful for any person to "publically engage in the drinking of intoxicating liquors in the presence of passengers or in any passenger car in the State . . . ."[44] If a person is drinking publicly in his automobile while parked in the parking lot of a license establishment, he would be on the "premises" according to *Gaddy*.[45] Then, according to the court, "[i]t follows that mere possession of alcoholic liquors, in such an area, of necessity is expressly permitted by statute and is, therefore not illegal."[46] Possession and consumption are allowed by section 4-29; therefore, a person drinking his liquor in an automobile parked on the premises of a licensed establishment would not be within section 4-100.

IV. CONCLUSION

The South Carolina "brown bagging" law is "unique"[47] in that no other state has a similar law which could create the problem raised in *Gaddy*.[48] It is conceivable that the court could follow the liberal rule of *Gaddy* and through "judicial legislation" make liquor by the drink a reality. It is doubtful, however, that this will follow. It is a problem to be left to the people and the legislature, not the courts.

The vociferous clamor of the minority has appealed for open bars; this has been to no avail. Openly and reasonably they have stated:

> Neither brown bagging nor open bars, however, meet the state's needs. South Carolina should have a realistic law that will allow drinkers to do openly what they are going to do anyway, but under appropriate regula-

43. S.C. CODE ANN. § 4-29 (2)(a) (Supp. 1969).
44. S.C. CODE ANN. § 4-100 (Supp. 1969).
45. 173 S.E.2d 379.
46. *Id.*
47. *Id.* at 378.
48. The South Carolina statute was drafted using no other legislation as a model. It was the result of combining elements of the Texas and Virginia laws in addition to those sections written in by the drafters to meet the particular needs. Interview with C. T. Goolsby, Jr., Assistant Attorney General of South Carolina, in Columbia, September 4, 1970.

tion and revenue-raising provisions that will help state government to raise cash.[49]

As a result of the *Gaddy* decision, the liquor laws are left in a state of flux which could only be effectively dealt with by the enactment of new legislation either doing away with possession and consumption of alcoholic liquors, or allowing open bars with reasonable tools and methods of enforcement. To do away with alcoholic liquors would lead to insurmountable difficulties as already proven during the period of national prohibition. Obviously, this state can use the revenue from open bars, revenue which has been legislatively and judicially excluded so far by section 4-29 and *Gaddy*.

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49. The Charleston Evening Post, July 9, 1970, at 12-A, Col. 1.