

IN THE SUPREME COURT OF OHIO

PICKAWAY COUNTY SKILLED GAMING, LLC., ET AL.,	:	Case No. 2009-1559
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Franklin County Court of
	:	Appeals, Tenth Appellate District
	:	
v.	:	Court of Appeals
	:	Case No. 08AP-1032
RICHARD CORDRAY, OHIO ATTORNEY GENERAL	:	
	:	
Defendant-Appellant.	:	

MERIT BRIEF OF PLAINTIFFS-APPELLEES PICKAWAY COUNTY SKILLED GAMING, L.L.C. AND STEPHEN S. CLINE

Gail M. Zalimeni, Esq. (0047301)
(COUNSEL OF RECORD)
N. Gerald DiCuccio, Esq. (0017015)
Alphonse P. Cincione, Esq. (0017685)
BUTLER, CINCIONE & DICUCCIO
2200 West Fifth Ave, 3rd Floor
Columbus, Ohio 43215
614.221.3151-Phone
614.221.8196-Facsimile
gzalimeni@bcdlaws.com

Melissa R. Lipchak, Esq. (0055957)
7335 East Livingston Avenue
Reynoldsburg, Ohio 43068
614.367.9922-Telephone
614.367.9926-Facsimile
Melesq10@aol.com

Counsel for Plaintiffs-Appellees
Pickaway County Skilled Gaming, L.L.C.
and Stephen S. Cline

Richard Cordary (0038034)
Ohio Attorney General

Benjamin C. Mizer, Esq. (0083089)
Solicitor General
(COUNSEL OF RECORD)
Stephen P. Carney, Esq. (0063460)
Deputy Solicitor
Christopher P. Conomy, Esq. (0072094)
Assistant Solicitor
Randall W. Knutti, Esq. (0022388)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980-Telephone
614.466.5087-Facsimile
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendant-Appellant
Richard Cordray, Ohio Attorney General

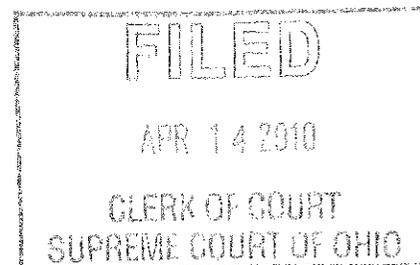


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INTRODUCTION

Chapter 2915 of the Ohio Revised Code defines and criminalizes gambling in the State of Ohio. First and foremost, this case presents the question of whether Ohio citizens shall be found to have committed a criminal act solely on the basis of one cent. The present action is not about skeeball or carnival games or family fun centers or the regulation of economic conduct. This case is about the complete lack of any rational basis for determining whether or not a criminal act has been committed. No rational basis exists for defining criminal conduct by considering the wholesale value of a merchandise prize given for a single play of a skill-based amusement machine. The complete lack of any basis for defining criminal conduct in this manner is violative of the Equal Protection Clause of the United States and Ohio Constitutions.

In fact, a thorough review of the Merit Brief of The Ohio Attorney General supports the conclusion that the statute lacks a rational basis. Initially, the Attorney General ignores the significant events surrounding the enactment of the statute. Next, the Attorney General engages in a strained attempt at statutory construction in order to isolate R.C. §2915.01(AAA)(1) from the rest of the statutes governing gambling in an effort to convince the Court that the provision is a regulation of skill-based amusement games. Further, the Attorney General proffers the argument that only machines are being classified rather than individuals. This argument is made despite the fact that this Court did not accept this proposition of law for review. Finally, the Attorney General attempts to convince this Court that the legislature had a rational basis for imposing an arbitrary limit not grounded in any research or justification.

The Attorney General's version of the events surrounding the passage of the statute include an observation that a law passed in 2003 allowing skill-based amusement machines as long as the outcome was not determined largely or wholly by chance necessitated the passage of

Am.Sub.H.B. No. 177 in 2007 (four years later). In fact, the Attorney General points out that on August 22, 2007 Governor Strickland signed Executive Order 2007-28S stating that the spread of illegal gambling machines in Ohio created an emergency. This Executive Order was signed only eighteen days after the regulations became effective for Ohio's new lottery game, Ten-OH, an on-line Keno game. See Ohio Administrative Code §3770:1-9-54. As this Court is aware, Governor Strickland announced, in January of 2008, three months after Am.Sub.H.B. No. 177 was signed, that the Ohio Lottery should offer a Keno game that would be available to citizens in bars and restaurants and would generate income for the State of Ohio (as opposed to generating income for private individuals). Thus, the competition from the skill-based amusement machines having been eliminated the Ohio Lottery's Keno machines could be placed as substitutes.

In addition to ignoring the factual circumstances surrounding Keno and the passage of Am.Sub. H.B. No. 177, the Attorney General also strains the construction of the statutes governing gambling in an attempt to spin a rational basis for R.C. §2915.01(AAA)(1). The Attorney General contends that "...the prize limit is rational, both as a regulation of non-gambling activity *and* as a prophylactic measure against actual gambling." See Merit Brief of Defendant-Appellant Richard Cordray, Ohio Attorney General at page 2. This statement wholly misperceives that statutory scheme of Chapter 2915. Under the gambling laws, games of chance conducted for profit and schemes of chance are illegal activities subjecting an individual to criminal prosecution. A skill-based amusement machine is excluded from the definition of "scheme of chance." See R.C. §2915.01(C). Under R.C. §2915.01(AAA)(1), however, a machine is not a skill-based amusement machine if an individual is awarded a merchandise prize with a wholesale¹ value of more than \$10.00 (Ten Dollars). The prize limit defines criminal

¹ The \$10.00 limit is determined by the wholesale value of the prize, not the retail value.

activity; it does not regulate non-gambling activity. The application of the provision either makes an activity gambling or not gambling. It has no further operation than to define the act. Therefore, it does not regulate non-gambling activity in any manner.

The latter part of the Attorney General's argument is that the provision acts as a prophylactic measure against actual gambling. This contention cannot be supported based upon the Attorney General's interpretation of R.C. §2915.01(AAA)(2). If R.C. §2915.01(AAA)(2) permits only games that are based upon skill, then the application of R.C. §2915.01(AAA)(1) does not result in any further limitation on the elimination of chance-based games. The flaw in this argument is the same as the flaw in the previous argument. The provision makes the awarding of a merchandise prize with a wholesale value of more than \$10.00 (Ten Dollars) an illegal gambling act. The provision is not a prophylactic measure against actual gambling; the provision defines actual gambling under Chapter 2915.

Further, the Attorney General argues that there is no classification under the statute and the Equal Protection analysis does not apply. This Court did not accept this issue for review, but the Plaintiffs-Appellees will respond to this argument. In order to make his assertion, the Attorney General focuses only on R.C. §2915.01(AAA)(1) and does not consider the operation of this provision in the context of the entire statutory scheme criminalizing gambling. The Attorney General applies the reasoning set forth in *Burnett v. Motorist Mut. Ins. Co.* (2008), 118 Ohio St. 3d 493, 2008-Ohio-2751 to argue that no classifications of individuals exist. This argument fails as individuals are convicted under the statutory scheme, not machines.

Most importantly, the Attorney General ignores well-established legislative enactments and judicial interpretations that define gambling under Ohio Law in arguing that R.C. 2915.01(AAA)(1) does not violate the Equal Protection Clauses of the Federal and State

Constitutions. The Attorney General argues that the Legislature may define limits regarding skill-based amusement games separate from criminalizing certain actions as gambling. Even if the Court were to accept this argument, R.C. §21915.01(AAA)(1) does not regulate skill-based amusement machines; it defines criminal conduct. Under this provision, the conduct is criminal regardless of whether the machine being operated or played is a skill-based amusement machine or a scheme of chance. The Tenth District Court of Appeals appropriately relied upon the distinction between games of skill and games of chance as nothing in the case law or statutes has changed the skill/chance distinction.

The Attorney General also attempts to support the constitutionality of the statute by proffering that games involving prizes of more than \$10.00 (Ten Dollars) for a single play "...are likely to involve illegal chance-based gambling, without triggering all of the difficulties involved in proving the existence of a chance element." See Merit Brief of Defendant-Appellant Richard Cordray, Ohio Attorney General at page 22. This statement blatantly shows that the prize limit is intended to criminalize conduct. In fact, the Attorney General has all but admitted that no one will ever be convicted applying the provisions of R.C. §2915.01(AAA)(2) governing whether a machine is skill-based, with the exception of whether cash is being paid. No law enforcement officer will ever be able to formulate a reasonable suspicion that a machine is not skill-based relying on the operation of the machine because all of the factors under R.C. §2915.01(AAA)(2) can only be determined by examining the internal operation of the machine. In essence, the Attorney General advocates the criminalization of receiving a teddy bear with a wholesale value in excess of \$10.00 (Ten Dollars) for a single play. This criminalization occurs regardless of whether a machine is a legal skill-based amusement machine or an illegal game of chance or scheme of chance. This serves no legitimate state interest.

STATEMENT OF THE CASE AND FACTS

Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline own and operate Spinners, an amusement game arcade located in Circleville. Spinners is a members-only organization that requires members to pay an annual fee in exchange for membership rights and privileges. The arcade contains 150 skill-based amusement machines for use by its members.

The Attorney General, in coordination with the Governor's office, devised a ban on these lawful skill-based amusement machines declaring the machines "illegal" under an Administrative Rule promulgated by the Attorney General. The Attorney General attempted to justify the promulgation of the rule under the Ohio Consumer Sales Practices Act. On August 22, 2007, Mr. Cline received from the Attorney General an Order to Cease and Desist the operations of the games in Spinners. Mr. Cline voluntarily ceased operations and attempts were made to resolve this matter; however a resolution could not be reached. Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline filed Case No. 07-CVH-09-11902, *Pickaway County Skilled Gaming, LLC. v. Marc Dann, Attorney General*. Cross-Appellees sought and received a Temporary Restraining Order and, until Tuesday, October 23, 2007, Spinners remained opened for business. That action was dismissed as moot.

Also during this time, Sub.H.B. No. 177, introduced on April 24, 2007 was pending in the Ohio House of Representatives. The bill amended R.C. §3769.07, an anti-trust provision, and proposed increasing the number of horse racing tracks that one person could own. The bill remained pending and no action was taken with respect to the bill until October 10, 2007. On that day, the Ohio House of Representatives voted to pass Sub.H.B. No. 177 with amendments proposed that day. The amendments added an Emergency Clause to the bill, enacted R.C. §§2915.06 and 2915.061, and amended R.C. § 2915.01(AAA) using language virtually identical

to that used in the administrative rule that the Attorney General had promulgated. Fifteen days later, on October 25, 2007, the bill was signed into law by Governor Strickland.

Spinners re-opened after substantial alterations were made to the operation of the business based upon the provisions of Am.Sub.H.B. No. 177. Spinners continues to operate while this action is pending, however, the amount of members and the frequency of visiting Spinners has decreased substantially since the bill was passed.

On October 31, 2007, Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline filed the present action seeking a declaration that Am.Sub.H.B. No. 177 was unconstitutional in whole or part and seeking a permanent injunction against the Attorney General enjoining enforcement of Chapter 2915 as amended. Cross-motions for summary judgment were filed by the parties as to all claims. On October 30, 2008, the Trial Court granted the Attorney General's Motion for Summary Judgment and denied Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline's Motion for Summary Judgment. Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline appealed this decision to the Tenth District Court of Appeals.

On July 16, 2009, the Court of Appeals held that R.C. §2915.01(AAA)(1), which provided that prizes awarded for playing skill-based amusement machines could not exceed a wholesale value of \$10.00 (Ten Dollars) for a single play, violated the Equal Protection Clauses of the Ohio and Federal Constitutions as there was no rational relationship between limiting the value of the prize to \$10.00 (Ten Dollars) and furthering the governmental interest in regulating gambling. (Appendix of Defendant-Appellant, p. 26 (hereinafter "Def. Appx.>") The remaining assignments of error asserted by Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline were overruled. (Def. Appx., p. 33.)

Both parties sought review of this Court. On December 2, 2009, this Court accepted the Attorney General's Cross-Appeal with respect to Proposition of Law No. II, "The limit on the value of merchandise prizes in R.C. 2915.01(AAA)(1) does not violate the equal protection clauses of the United States and Ohio Constitutions."

ARGUMENT

I. THE PRIZE-VALUE LIMIT ESTABLISHES A CLASSIFICATION BETWEEN INDIVIDUALS WHO ENGAGE IN CRIMINAL ACTIVITY AND INDIVIDUALS WHO DO NOT ENGAGE IN CRIMINAL ACTIVITY AND THE PRIZE-VALUE LIMIT IS SUBJECT TO REVIEW UNDER THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS.

The Attorney General seeks to have this Court determine that R.C. §2915.0(AAA)(1) does not classify individuals, but rather, machines. The first time that this proposition was raised by the Attorney General was in his Memorandum in Support of Jurisdiction. None of the courts below considered this issue.

The Attorney General relies on a case recently decided by this Court, *Burnett v. Motorists Mut. Ins. Cos.* (2008), 118 Ohio St. 3d 493, 2008-Ohio-2751. *Burnett* is not applicable to this case as it addresses an entirely different statute and set of circumstances.

In *Burnett*, this Court determined that former R.C. 3937.18(K)(2) did not create an actual classification of persons in the plaintiff's situation and the Equal Protection Clause was not applicable. *Id.* at ¶42. The statute created a distinction between a motor vehicle owned, furnished or available for use by an insured (or a family member) seeking uninsured motorist benefits for personal injuries due to the negligence of a driver and a motor vehicle not owned, furnished or available for the regular use of an injured insured (or family member). *Id.* at ¶34.

The plaintiff had argued that the statute created a classification between "injured persons related to the tortfeasor and living in the household of the insured versus all other injured

persons.” *Id.* at ¶42. This Court reasoned that this was not the distinction that was being made as the statute would apply regardless of whether a family member of the injured plaintiff negligently operated the owned auto or a friend of the injured plaintiff operated the owned auto. *Id.* at ¶¶33-38. The most important statement of the case for consideration here is: “Under R.C. 3937.18(K)(2), it doesn't matter who the tortfeasor is.” *Id.* at ¶34, quoting *Morris v. United Ohio Ins. Co.*, 160 Ohio App. 3d 663, 2005 Ohio 2025, P15.

The glaring difference between *Burnett* and the present case is that in *Burnett*, the negligent driver of the vehicle has no consequences from the application of the statute. The plaintiff in *Burnett* was seeking uninsured motorist coverage. The application of the statute in one manner or another would not have affected the liability of the negligent driver or changed the amount of damages for which the negligent driver was liable. In fact, the driver of the owned auto had absolutely nothing to do with the statute. In the present case, the application of R.C. §2915.01(AAA)(1) has consequences for the individuals who receive the prizes. One individual is a criminal and the other individual is not a criminal. The application of the statute also has consequences for the owner of the machines. One owner is a criminal and the other owner is not a criminal. The difference between the former and the latter is one cent (\$.01) under the statute.

While the plaintiffs in *Burnett* failed to identify a classification, clearly the plaintiffs in this case have identified a classification and it was entirely proper for the lower courts to apply the Equal Protection analysis to the statute.

Like the plaintiffs in *Burnett*, the Attorney General also fails to use the proper classification. The Attorney General contends that the classification is among skill-based amusement machines. This is incorrect as the provision applies to the value of the prize and does not depend on whether the machines are skill-based or chance-based. Either type of machine

will result in a criminal prosecution or a “safe harbor” depending on whether the prize rewarded has a wholesale value of more than \$10.00 (Ten Dollars) or does not have a wholesale value of more than \$10.00 (Ten Dollars), respectively. Under the Attorney General’s argument, pursuant to R.C. §2915.01(AAA)(1), chance-based machines that reward a player with a prize with a wholesale value of less than \$10.00 (Ten Dollars) are legal in the State of Ohio. The Attorney General attempts to circumvent this conclusion on the basis that R.C. §2915.01 (AAA)(2) applies to determine whether machines are skill-based. However, an individual may be charged with a crime solely on the basis of the value of the prize and whether the machine is skill-based or chance-based will never be considered. In fact, this would be the most-likely circumstances as a law enforcement official would be unable to determine whether a machine is skill-based or chance-based by any external observation of the machine. On page 22 of his Merit Brief, the Attorney General admits that the above set of circumstances is correct:

That is not to say the skill-versus-chance assessment was impossible—indeed, it *could* be done at trial, albeit at great expense. Rather, the distinct concern was, **and still is**, that such assessments are so burdensome so as to create a barrier to effective law enforcement that enabled unscrupulous operators. Worse yet, the case of re-programming meant that even if law enforcement gained a conviction or an injunction against a particular brand of machines, its vendors and operators could alter the machines and start the process anew.

These concerns provide a rational basis for enacting the separate prize limit, thus addressing a different element of the gambling problem and bypassing the need to resolve the skill-versus-chance issue in many cases. (Bold emphasis added).²

The failure of the Attorney General’s classification also renders irrelevant his argument that the Tenth District Court of Appeals based its decision on “labels.” Only the Attorney General pretends to not understand that the statute addresses criminal conduct and that the application of the Consumer Sales Practices Act to the gambling statutes is inappropriate.

² This statement is an admission that the provision is unconstitutionally void-for-vagueness.

Whether or not a merchandise prize has a wholesale value of over \$10.00 (Ten Dollars) or not defines criminal conduct by an individual. The inapplicability of the Attorney General's argument that the Tenth District Court of Appeals based its decision on labels is addressed below in the section regarding the application of the Equal Protection Clause and incorporated herein.

II. THE PRIZE-VALUE LIMIT IS NOT RATIONALLY RELATED TO ANY STATE INTEREST INCLUDING ANY INTEREST IN REGULATING SKILL-BASED GAMES INDEPENDENT OF ANY CONNECTION TO CHANCE-BASED GAMBLING OR ANY CONNECTION TO CHANCE-BASED GAMBLING.

It is well-settled that “[u]nder the rational basis test, a challenged statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective.” *McKinley v. Ohio Bureau Workers’ Compensation* (2006), 170 Ohio St. 3d 161, P33 (citations omitted). “When a fundamental right is not involved, a statute comports with due process under the Ohio Constitution ‘if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.’” *Dickman v. Elida Community Fire Co.* (2001), 141 Ohio App. 3d 589, 591-592 (citation omitted). In its simplest terms, the Equal Protection Clause of both the Ohio and Federal Constitutions prevents the government from treating people differently under its laws on an arbitrary basis; those in similar circumstances must be treated similarly. *State v. Snyder* (2003), 155 Ohio App. 3d 453, P42.

Initially, the Attorney General erroneously attempts to justify R.C. §2915.01(AAA)(1) on the basis that the provision is related to the General Assembly's interest in regulating the amount of money involved in skill-based games, thus regulating the economics of a product. The cross-appellant attempts to justify his position by pointing out that the consumer sales practices act restricts unconscionable prices and other terms of a contract. As the Attorney General is aware,

this case involves the criminal gambling statutes of the State of Ohio, not the Consumer Sales Practices Act. In fact, the Attorney General's attempt at using the Consumer Sales Practices Act was determined to be an unconstitutional violation of the separation of powers. Next, the Attorney General incorrectly argues that R.C. §2915.01(AAA)(1) serves the State's interest in prosecuting and deterring gambling despite the fact that the Attorney General contends that R.C. §2915.01(AAA)(1) only applies to skill-based games. Neither argument is supported by a review of the gambling statutes.

Chapter 2915 of the Ohio Revised Code defines and criminalizes gambling in the State of Ohio. R.C. §2915.02(A)(2) provides, "No person shall...[e]stablish, promote, or operate or knowingly engage in conduct that facilitates any game of chance conducted for profit or any scheme of chance." (Appx. p. 3). R.C. §2915.02(F) makes the violation of the statute a misdemeanor of the first degree and a felony of the fifth degree if a person has been convicted of a previous gambling offense. (Appx. p. 4). R.C. §2915.04(A) provides, "No person, while at a hotel, restaurant, tavern, store, arena, hall or other place of public accommodation, business, amusement, or resort shall make a bet or play any game of chance or scheme of chance." (Appx. p. 5). R.C. §2915.04(D) makes the violation of this section a minor misdemeanor and a misdemeanor of the fourth degree if the person was previously convicted of any gambling offense. (Appx. p. 5). Thus, in order to find that a person has committed a gambling offense, it must first be determined whether a game of chance or any scheme of chance exists.

A "game of chance" is defined as "...poker, craps, roulette, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely by chance, but does not include bingo." See R.C. §2915.01(D) (Def. Appx., p. 53). Pursuant to

R.C. §2915.01(E), a “game of chance conducted for profit” is one designed to produce income for the operator of the game. (Def. Appx., p. 53.)

A “scheme of chance” is “...a slot machine, lottery, numbers game, pool conducted for profit, or other scheme in which a participant gives a valuable consideration for a chance to win a prize, but does not include bingo, a skill-based amusement machine, or a pool not conducted for profit.” See R.C. §2915.01(C) (Def. Appx., p. 53).

“Slot machine” is further defined in R.C. §2915.01 as follows:

(VV)(1) “Slot” machine means either of the following:

(a) Any mechanical, electronic, video, or digital device that is capable of accepting anything of value, directly or indirectly, from or on behalf of a player who gives the thing of value in the hope of gain;

(b) Any mechanical, electronic, video, or digital device that is capable of accepting anything of value, directly or indirectly, from or on behalf of a player to conduct or dispense bingo or a scheme or game of chance.

(2) “Slot machine” does not include a skill-based amusement machine.³
(Def. Appx., p. 61.)

The only definition of “skill-based amusement machine” is contained in R.C. §2915.01(AAA)(1). R.C. §2915.01(AAA)(3) and R.C. §2915.01(AAA)(4) provide further explanations regarding the definition of a “skill-based amusement machine.” (Def. Appx., p. 63.) Neither of these provisions apply to R.C. §2915.01(AAA)(2). R.C. §2915.01(AAA)(2) provides, in part, that “[a] device shall not be considered a skill-based amusement machine and shall be considered a slot machine if it pays cash or one of more of the following apply...” (Def. Appx., pp. 62-63.) Thus, R.C. §2915.01(AAA)(2) defines the characteristics of a slot machine. The only purpose of R.C. §2915.01(AAA)(1) is to define a skill-based amusement machine. It

³ Cross-Appellee believes that R.C. §2915.01(VV)(2) is unnecessary as R.C. §2915.01(C) already distinguishes a skill-based amusement machine from a slot machine by stating that a skill-based amusement machine is not a scheme of chance.

does not and cannot act as a regulation of economic activity because it does nothing more than define a crime.

The statutory scheme of Chapter 2915 criminalizes conducting or participating in schemes of chance and games of chance. Both schemes of chance and games of chance continue to be defined as containing an element of chance. Am.Sub.H.B. No. 177 did not remove the chance/skill distinction and the Tenth District Court of Appeals did not, as the Attorney General contends, impose the chance/skill distinction by judicial fiat. It is the plain language of the statutes that states that chance remains an essential element of a gambling offense.

A scheme of chance includes a slot machine, but excludes a skill-based amusement machine. A skill-based amusement machine is defined as a machine that awards merchandise prizes with a wholesale value of less than \$10.00 (Ten Dollars) for a single play or redeemable vouchers for the same. The Tenth District Court of Appeals was entirely correct in determining that no rational relationship exists between the goal of regulating gambling and distinguishing between rewarding players with prizes worth ten dollars or less.

While this Court has viewed legislation that does not involve a fundamental right with every deference to the Legislature, this Court does not hesitate to find that a law violates the Equal Protection Clause when the violation is as obvious as the one in the present case. In fact, this Court found that the Equal Protection Clause was violated where the amount of benefits received from the Firemen and Policemen's Death Benefit Fund by a widow were not adjusted upward due to her minor children reaching the age of majority. *Roseman v. Firemen and Policemen's Death Benefit Fund* (1993), 66 Ohio St. 3d 443 (Syllabus). The benefit fund is funded by money from the State and any gifts to the fund. There are no employee contributions. *Id.* at 445. The intent was to provide the “full monthly salary” of a fireman or policeman killed

in the line of duty. *Id.* at 448. The statute divided the benefits between the surviving spouse and minor children. However, when a minor child reached the age of majority or ceased attending college, the surviving spouse's share was not adjusted upward for the benefits no longer received by the child. A widow without children received a full benefit. *Id.* at 448-449. This Court concluded that:

We can conceive of no reasonable justification for the statute to operate in this manner. For a surviving spouse in appellee's situation, the statutory scheme abandons the overall purpose of continuing the income stream as if the decedent had lived. Whether the statute operates this way through a calculated decision of the General Assembly or through an oversight, the classification as it affects appellee bears no rational relationship to any legitimate state purpose. *Id.* at 449.

This Court considered and rejected a number of proposed legitimate state purposes offered by the Fund. Initially, the Fund contended that the lack of an adjustment in the spouse's benefits was justified because R.C. §3333.26(B) provided for a tuition-free education at a state university and there were other benefits available that justified the lack of an adjustment. The Court noted that there was no indication that the statutes were intended to work together and to make this conclusion would be to "engage in pure speculation." *Id.* at 449-450. The Court concluded that the "argued justification is not reasonable." *Id.* at 450. The Fund also argued that the classification furthered the legitimate state purpose of preserving funds. The Court stated that this was not a valid justification when the preservation was accomplished by an arbitrary classification. *Id.* Ultimately, this Court stated that "The classification created by the operation of R.C. 742.63(H) bears no rational relationship to any discernible legitimate governmental interest. Therefore, the classification is irrelevant to achievement of the state's purpose." *Id.*

The reasoning in *Roseman* is applicable to the present case. The Court is not required to blindly accept any justification that the Attorney General sets forth. The Attorney General's argument that R.C. §2915.01(AAA)(1) only address the "amusement" part of a skill-based amusement machine can only be accepted if this Court totally ignores the use of the term "skill-based" in R.C. §2915.01(AAA)(1). Ignoring "skill-based" would violate the well-settled rules of statutory construction.

The role of the judiciary is to interpret statutes and give meaning to every word used by the legislature....As emphasized in *E. Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St. 3d 295, 299, 530 N.E.2d 875, it is 'a basic rule of statutory construction -- that words in statutes should not be construed to be redundant, nor should any words be ignored.' *Id.*, citing 50 Ohio Jurisprudence 2d (1961) 207, Statutes, Section 227.

Hyle v. Porter (2008), 117 Ohio St. 3d 165, 174; 2008 Ohio 542, P33 (Emphasis added).

The purported purpose of the amendments to the law was to clarify the definition of skill-based amusement machines, which were previously defined as machines where the outcome was not determined largely or wholly by chance. R.C. §2915.01(AAA)(1) sets forth the definition of "skill-based amusement machines." R.C. §2915.01(AAA)(3) and R.C. §2915.01(AAA)(4) refer to R.C. §2915.01(AAA)(1) and make no reference to R.C. §2915.01(AAA)(2). Whether a machine is a skill-based amusement machine that is excluded from the definition of scheme of chance cannot be determined by the value of the prize as the value of the prize does not address the skill/chance distinction essential, as determined by the General Assembly, to determining whether gambling is occurring.

The Tenth District Court of Appeals appropriately rejected the Attorney General's stated purpose of determining whether the machine was being played for amusement which the Court specifically stated that:

The essential ingredient that differentiates merely playing a game for amusement (which can include the added amusement of a prize) and playing a game for amusement that constitutes gambling, is whether the outcome is determined in whole or in part by chance.
(Def. Appx., p. 26.)

Ohio Courts long ago established that “amusement” itself has value.

Amusement has value and added amusement has additional value, and where added amusement is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game the elements of gambling, namely, price, chance and a prize. (*Kraus v. Cleveland*, 135 Ohio St. 43, approved and followed.)
Stillmaker v. Dept. of Liquor Control (1969), 18 Ohio St. 2d 200 (Syllabus Number Two)

This Court went on to say that “[t]he prize, then, is added amusement without additional cost.”
Id. at 204 (emphasis in original).

The statute cannot rationally use the value of a prize to determine whether or not a game is being played for amusement because additional amusement itself awarded as a prize is sufficient to find that gambling occurred. Thus, the monetary value of the prize cannot be determinative of whether or not one is gambling. The long-established distinction between skill and chance must be used to determine whether an individual is gambling. This must be the requirement as this is contained in the plain language of the statute. If this were not the requirement, an individual could play a chance-based machine as long as the prize did not have a value over \$10.00 (Ten Dollars). The gambling laws prohibit the playing of a chance-based machine, and, thus, the classification does not further any legitimate state purpose.

The rationale of the Attorney General also fails as the statute permits the awarding of a merchandise prize or redeemable voucher for a merchandise prize with a wholesale value that does not exceed \$10.00 (Ten Dollars) per single play. See R.C. §2915.01(AAA)(1)(a)(b) and (c)

(Def. Appx., p. 62.) A person could play the skill-based amusement machine 10 (ten) times and receive redeemable vouchers worth \$100.00 (One Hundred Dollars). Playing the machine 20 (Twenty) times could result in receiving redeemable vouchers worth \$200.00 (Two Hundred Dollars). Playing the machine 100 (One Hundred) times could result in receiving redeemable vouchers worth \$1,000.00 (One Thousand Dollars). These are high-value prizes. An individual could continue to amass redeemable vouchers endlessly and redeem them for diamonds or cars. Thus, any argument that R.C. §2915.01(AAA)(1) deters over-spending is disproven by the language of the statute itself.

Both of the Attorney General's proffered justifications for the statute fail to meet the requirement of the Equal Protection Clause. R.C. §2915.01(AAA)(1) is not a regulation of economic activity, it is a definition used to determine whether a criminal act was committed. Further, the rewarding of a merchandise prize of a certain value or a redeemable voucher for a merchandise prize of a certain value has no rational relationship to whether a machine is a skill-based amusement machine or not as it does not determine whether the machine is a machine that requires skill or a machine that operates on chance. Thus, the definition does not further any interest under the gambling statutes and the Tenth District Court of Appeals was completely correct in finding that provision unconstitutional.

III. IF THIS COURT SHOULD DECIDE THAT R.C. §2915.01(AAA)(1) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE, THEN THIS COURT SHOULD CONSIDER THIS ISSUE OR REMAND THIS CASE TO THE TENTH DISTRICT COURT OF APPEALS FOR A DETERMINATION OF WHETHER THAT PROVISION IS UNCONSTITUTIONAL UNDER THE VOID-FOR-VAGUENESS DOCTRINE.

The Tenth District Court of Appeals never considered Pickaway County Skill Gaming, L.L.C. and Stephen S. Cline's assignment of error that the Trial Court erred in finding that R.C.

§2915.01(AAA)(1) was violative of the Due Process Clauses of the Ohio and United States Constitutions under the void-for-vagueness doctrine. The Court of Appeals determined that this issue was moot as the Court already held that §2915.01(AAA) (1) violated the Equal Protection. (Def. Appx. p. 27.) The Trial Court summarily dismissed the argument stating that while one can envision a situation in which the application of the statute is unconstitutional, that did not show that the statute was vague in violation of the constitution on its face. (Def. Appx., p. 40)

The crux of the void-for-vagueness doctrine is that a statute's prohibitions must be clearly defined. This requirement enables individuals to conform their conduct and allows law enforcement officials to perform their duties using an objective standard. The statute is void-for-vagueness due to the inability of individuals and law enforcement officials to determine the "wholesale value" of a merchandise prize in every application.

The Franklin County Court of Common Pleas has previously stated that:

Inasmuch as the owner of the furniture is Glick's Furniture Store, the value to be placed upon the furniture would be the wholesale replacement value to Glick's. This appellee concedes. Even though the jury might possibly have some knowledge of the retail value of furniture, the average juror [that is, the person of ordinary intelligence] would be in no position to know the wholesale value of such furniture.

State v. Leibowitz, 1978 Ohio App. LEXIS 8571, *5 (10th Dis., September 28, 1978).

The Due Process Clause of the Fourteenth Amendment of the Constitution states, "[no State shall] deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV, §1. Similarly, the Ohio Constitution provides, "every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law." Ohio Const., Art 1, §16. The analysis under the Due Process clauses of the Federal and State Constitutions are identical.

'Due process requires that the terms of a criminal statute be reasonably clear and definite and that there be ascertainable standards of guilt on which citizens,

courts, and the police may rely. A person cannot be punished simply because the state believes that he or she is *probably* a criminal. *City of Akron v. Rowland* (1993), 67 Ohio St. 3d 374, 381-382 (citing *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed. 2d 222, 227-228).

The pivotal issue in the determination of whether the statute is void-for-vagueness that was never addressed by the Trial Court or the Court of Appeals is whether the wholesale value of a merchandise prize is sufficiently definite to allow a person of ordinary intelligence a reasonable opportunity to know what is prohibited.

The Attorney General has already admitted that the law is void for vagueness. When asked to admit that the wholesale value of a merchandise prize cannot be determined by externally viewing the prize, the Attorney General answered as follows:

Deny. The market value of an item of merchandise may be determined by the purchase price paid for the item or by comparing the item to similar items.

The Attorney General could only answer the Request for Admission by altering the request. The statute provides that the wholesale value of a merchandise prize cannot exceed \$10.00 (Ten Dollars) per single play. The Attorney General never addressed the method by which an individual can determine the wholesale value. The wholesale value and market value of an item are two different values. Neither Chapter 2915 nor any other provision of the Ohio Revised Code defines “wholesale value.”

Clearly, there is absolutely no method available to the individual playing a skill-based amusement machine to know whether the merchandise prize he or she is receiving per single play is worth \$9.99 or \$10.01 as the former is permitted under the statute while the latter is not. This example is applicable to all ranges of value. A person cannot determine whether the wholesale value is \$2.00 or \$15.00, \$5.00 or \$20.00. This determination cannot be made because a person of ordinary intelligence is not expected to know the wholesale value of an item.

With respect to a business owner of a skilled-based amusement machine establishment, if that owner purchases an item for a merchandise prize from a wholesaler for \$9.75 and then the price rises so that at the time the business owner gives the prize as a reward for a single play on a skill-based amusement machine, the wholesale price for purchasing from the same wholesaler is \$10.25, the business owner would be in violation of the statute at the time of the awarding of the merchandise prize. If the business owner is giving a reward for fifteen (15) plays, and the wholesale value of the merchandise at the time of purchase, which was \$145.00, has risen to \$155.00, the business owner would also be in violation of the statute. Since the statute prohibits the distribution of a prize with a certain value, the value would have to be determined at the time of the distribution. The business owner can not know the wholesale value of the wholesale prize at the time of the distribution, and, therefore, neither the business owner nor law enforcement officials can determine whether his actions are permitted or prohibited by the statute.

In *State v. Cunningham* (1990), 67 Ohio App. 3d 366, the Court determined that conviction of the theft of property of a value of \$300.00 was against the manifest weight of the evidence. *Id.* at 367-368. While the property had price tags that totaled in excess of \$300.00 (three hundred dollars), the store was discounting the merchandise at least 20% (twenty percent) so that the discounted value of the property was less than \$300.00 (three hundred dollars). Therefore, the Court held that the defendant could be convicted of theft, but not of theft of property of a value of \$300.00 (three hundred dollars). *Id.* at 368. The Court noted "...that the value of goods offered for sale to the public could be demonstrated by evidence as to the price at which such property is offered to and purchased by the market **at the time in question.**" *Id.* (internal citation omitted) (emphasis added).

Despite the clear mandate that the wholesale value of a merchandise prize be determined at the time of the awarding of the prize, the Attorney General contends that the relevant point in time is when the business owner purchases the prize. When asked to admit whether the wholesale value of a merchandise prize may be different at the time of purchase and the time of the award of the prize, the Attorney General again reworded the request for admission and responded as follows:

Deny. The purchase price of an item of merchandise is determined at the time of the purchase.

The term “wholesale prize” is no different than the term “prowling” considered by this Court in a case involving a municipal ordinance. In that case, this Court reasoned that:

The ordinance essentially prohibits prowling in circumstances ‘which warrant a reasonable man to believe that the safety of persons or security of property * * * is threatened.’ It elucidates ‘prowling’ by describing it as ‘lingering, lurking, or standing idly around...’ However, such elucidation of the proscribed activity describes no certain, definite action or type of action that would stamp such activity with an element of criminality. So a person merely waiting on a street corner for a ride would not have ‘fair notice’ that his activity constituted ‘prowling.’

The qualifying clause of ‘prowling,’ which requires that people or property be threatened, does not save the ordinance; for this qualification still permits the law enforcement officer to make a judgment that is without adequate guidelines and is too subjective.

There are many ordinary acts that could be criminally proscribed, depending upon the interpretation of an individual officer. This violates the mandate of *Harris* that ‘no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’

City of Cincinnati v. Taylor (1973), 36 Ohio St. 2d 73, 75-76.

The municipal ordinance under consideration had additional language that attempted to define the term “prowling,” yet that additional language was insufficient to define the term in a manner that satisfied the constitutional requirements. The term “wholesale value” does not have any additional language defining the term and this Court has already held that “...the average juror

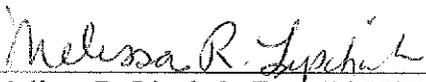
[that is, the person of ordinary intelligence] would be in no position to know the wholesale value...” *Leibowitz*, supra.

If this Court determines that R.C. §2915.01(AAA)(1) does not violate the Equal Protection Clauses, then the issue of whether that provision is violative of the Due Process Clauses will not have been addressed on appeal and the issue will no longer be moot. Therefore, Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline respectfully request that this issue be considered.

CONCLUSION

Cross-Appellees, Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline, respectfully request that this Court affirm the judgment of the Tenth District Court of Appeals granting Cross-Appellees’ Motion for Summary Judgment. The Tenth District Court of Appeals correctly determined that R.C. §2915.01(AAA)(1) violates the Equal Protection Clauses of the United States and Ohio Constitutions. The statute creates a classification between individuals. No rational basis exists for allowing the wholesale value of a merchandise prize or value of a redeemable voucher for a merchandise prize to determine whether or not an individual has committed a gambling offense. The element of chance remains as one of the defining elements of gambling and the values of the prize rewarded bears no rational relationship to whether a machine is skill-based or chance-based. This distinction is essential under the statutory scheme of Chapter 2915 as evidenced by the plain language of R.C. §§2915.01(C), 2915.01(D), 2915.02(E), 2915.02(A)(2) and 2915.04(A).

Respectfully submitted,


Melissa R. Lipchak, Esq. (0055957)
7335 East Livingston Avenue
Reynoldsburg, Ohio 43068
614.367.9922-Phone
614.367.9926-Facsimile
Attorney for Plaintiffs-Appellees

BUTLER, CINCIONE & DiCUCCIO

Gail M. Zalimeni, Esq. (0047301)
(Counsel of Record)
N. Gerald DiCuccio, Esq. (0017015)
Alphonse P. Cincione, Esq. (0017685)
2200 West Fifth Ave, 3rd Floor
Columbus, Ohio 43215
614.221.3151-Phone
614.221.8196-Facsimile
Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify the a true copy of the foregoing Merit Brief of Plaintiffs-Appellees
Pickaway County Skilled Gaming, L.L.C. and Stephen S. Cline was duly served upon the
following counsel of record via U.S. Ordinary Mail on April 14, 2010:

Richard Cordray
Ohio Attorney General

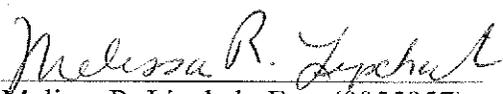
Benjamin C. Mizer, Esq.
Solicitor General

Stephen P. Carney, Esq.
Deputy Solicitor

Christopher P. Conomy, Esq.
Assistant Solicitor

Randall W. Knutti, Esq.
Assistant Attorney General

150 E. Gay St.; 17th Floor
Columbus, Ohio 43215
Attorneys for Defendant-Appellant


Melissa R. Lipchak, Esq. (0055957)
Attorney for Plaintiffs-Appellants

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appx. 1

§ 2. Right to alter, reform, or abolish government, and repeal special privileges.

Ohio Constitution**Article I. Bill of Rights**

Current through the November, 2009 Election

§ 2. Right to alter, reform, or abolish government, and repeal special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Appx. 2

2915.02 Gambling.

(A) No person shall do any of the following:

- (1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;
- (2) Establish, promote, or operate or knowingly engage in conduct that facilitates any game of chance conducted for profit or any scheme of chance;
- (3) Knowingly procure, transmit, exchange, or engage in conduct that facilitates the procurement, transmission, or exchange of information for use in establishing odds or determining winners in connection with bookmaking or with any game of chance conducted for profit or any scheme of chance;
- (4) Engage in betting or in playing any scheme or game of chance as a substantial source of income or livelihood;
- (5) With purpose to violate division (A)(1), (2), (3), or (4) of this section, acquire, possess, control, or operate any gambling device.

(B) For purposes of division (A)(1) of this section, a person facilitates bookmaking if the person in any way knowingly aids an illegal bookmaking operation, including, without limitation, placing a bet with a person engaged in or facilitating illegal bookmaking. For purposes of division (A)(2) of this section, a person facilitates a game of chance conducted for profit or a scheme of chance if the person in any way knowingly aids in the conduct or operation of any such game or scheme, including, without limitation, playing any such game or scheme.

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law.

(D) This section does not apply to any of the following:

(1) Games of chance, if all of the following apply:

(a) The games of chance are not craps for money or roulette for money.

(b) The games of chance are conducted by a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)

(3) of the Internal Revenue Code.

(c) The games of chance are conducted at festivals of the charitable organization that are conducted either for a period of four consecutive days or less and not more than twice a year or for a period of five consecutive days not more than once a year, and are conducted on premises owned by the charitable organization for a period of no less than one year immediately preceding the conducting of the games of chance, on premises leased from a governmental unit, or on premises that are leased from a veteran's or fraternal organization and that have been owned by the lessor veteran's or fraternal organization for a period of no less than one year immediately preceding the conducting of the games of chance.

A charitable organization shall not lease premises from a veteran's or fraternal organization to conduct a festival described in division (D)(1)(c) of this section if the veteran's or fraternal organization already

Appx. 3

has leased the premises four times during the preceding year to charitable organizations for that purpose. If a charitable organization leases premises from a veteran's or fraternal organization to conduct a festival described in division (D)(1)(c) of this section, the charitable organization shall not pay a rental rate for the premises per day of the festival that exceeds the rental rate per bingo session that a charitable organization may pay under division (B)(1) of section 2915.09 of the Revised Code when it leases premises from another charitable organization to conduct bingo games.

(d) All of the money or assets received from the games of chance after deduction only of prizes paid out during the conduct of the games of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code;

(e) The games of chance are not conducted during, or within ten hours of, a bingo game conducted for amusement purposes only pursuant to section 2915.12 of the Revised Code.

No person shall receive any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of any game of chance.

(2) Any tag fishing tournament operated under a permit issued under section 1533.92 of the Revised Code, as "tag fishing tournament" is defined in section 1531.01 of the Revised Code;

(3) Bingo conducted by a charitable organization that holds a license issued under section 2915.08 of the Revised Code.

(E) Division (D) of this section shall not be construed to authorize the sale, lease, or other temporary or permanent transfer of the right to conduct games of chance, as granted by that division, by any charitable organization that is granted that right.

(F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender previously has been convicted of any gambling offense, gambling is a felony of the fifth degree.

Effective Date: 07-01-2003

Appx. 4

2915.04 Public gaming.

(A) No person, while at a hotel, restaurant, tavern, store, arena, hall, or other place of public accommodation, business, amusement, or resort shall make a bet or play any game of chance or scheme of chance.

(B) No person, being the owner or lessee, or having custody, control, or supervision, of a hotel, restaurant, tavern, store, arena, hall, or other place of public accommodation, business, amusement, or resort shall recklessly permit those premises to be used or occupied in violation of division (A) of this section.

(C) Divisions (A) and (B) of this section do not prohibit conduct in connection with gambling expressly permitted by law.

(D) Whoever violates this section is guilty of public gaming. Except as otherwise provided in this division, public gaming is a minor misdemeanor. If the offender previously has been convicted of any gambling offense, public gaming is a misdemeanor of the fourth degree.

(E) Premises used or occupied in violation of division (B) of this section constitute a nuisance subject to abatement under Chapter 3767. of the Revised Code.

Effective Date: 04-03-2003