



Briefs from The Birmingham News

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Judge Scott Vowell's ruling allowing sweepstakes at Birmingham Race Course
IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CIVIL DIVISION

JEFFERSON COUNTY RACING)
ASSOCIATION, INC. d/b/a THE)
BIRMINGHAM RACE COURSE,)
and INNOVATIVE SWEEPSTAKES)
SYSTEMS, INC.,)

PLAINTIFFS,) CIVIL ACTION NO.
CV 05-7684 JSV
()

MIKE HALE, IN HIS OFFICIAL)
CAPACITY AS SHERIFF OF)
JEFFERSON COUNTY, ALABAMA,)

DEFENDANT.)

DECLARATORY JUDGMENT AND INJUNCTION
I.

THE CASE

This action was brought by the plaintiff, the Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course (the Race Course), whose primary business activity is pari mutual wagering on live and simulcast greyhound racing and on simulcast horse racing at the Race Course facility located in the eastern area of Birmingham. This entity has been referred to as Milton McGregor's company. The intervenor, who has been aligned by the court as a plaintiff, is Innovative Sweepstakes Systems, Inc., (Innovative), the owner of the gaming equipment which is at the center of this litigation. Innovative is a wholly owned subsidiary of Multimedia Games, Inc., (Multimedia), a publicly traded company, which provides computer equipment and software to promote gaming activities. The defendant is Mike Hale, in his official capacity as Sheriff of Jefferson County, Alabama.

It is undisputed that the Race Course's pari mutual wagering is legal under current Alabama law, but on December 15, 2005, the Race Course opened a "CyberCenter" and began an activity it called "Quincy's Sweepstakes." After six days of operation, deputies of the Jefferson County Sheriff's Department obtained a search warrant and, on December 22, 2005, raided the facility. They began seizing the equipment used to operate the Sweepstakes on the grounds that the Sweepstakes constituted an illegal lottery or gambling

scheme.

While the raid was progressing, the Race Course filed this action and sought a temporary restraining order to require the Sheriff to cease and desist the seizure, alleging that the Sweepstakes was a legal sweepstakes promotion under Alabama law. This court conducted an expedited hearing on the application for a T.R.O. and by agreement of the parties issued a preliminary injunction to preserve the status quo and to allow the parties to brief and prepare their case for trial. The court also suspended further operation of the Sweepstakes until the merits of the case could be considered. Because of the intervening holidays, the case was set for trial on January 3, 2006.

On January 3, 2006 the court again heard arguments of counsel and the Sheriff agreed that he no longer required physical possession of the seized equipment. Therefore, the equipment was ordered to be returned to the Race Course and the disputed issue of responsibility for payment of the moving expenses was reserved by the court. The parties jointly requested additional time to try to narrow the disputed issues of fact and former Supreme Court Justice Ralph Cook agreed to facilitate their negotiations. The trial was continued for two weeks.

The court conducted a bench trial on January 17 and 18, 2006, and the stipulated facts were submitted as Joint Exhibit Number 1. As a result, there are few remaining issues of disputed fact. II.

THE ISSUE

The fundamental issue this Court must decide is the legality of the Sweepstakes. The Sheriff contends that the Sweepstakes promotion at the Race Course facility constitutes an unlawful lottery and/or gambling scheme under Alabama law. The Sheriff asserts that the CyberCenter being promoted by the Race Course is a "sham," and that patrons are actually paying consideration for sweepstakes entries.

On the other side, the plaintiffs deny that the CyberCenter is a sham and contend that the Sweepstakes is a lawful sweepstakes promotion under Alabama law because no consideration is required to participate in the Sweepstakes. Plaintiffs also deny that the operation involves gambling or gambling devices. Plaintiffs assert that the Sweepstakes is a promotional plan designed to attract patrons to the Race Course facility, to promote the CyberCenter, and to enhance the pari mutuel activities, thereby increasing income. Plaintiffs further contend that the Alabama gambling statutes are unconstitutionally vague as applied to the facts of this case.

II.

THE FACTS

In 2005 the Race Course engaged Multimedia to develop a sweepstakes promotion as part of a marketing plan to promote the Race Course. During the development process, both the Race Course and Multimedia sought opinions from those it considered to be experts in the area of sweepstakes promotions to help them determine whether or not their proposed operation complied with applicable Alabama law.

On May 25, 2005 plaintiffs demonstrated the Sweepstakes operation to the Alabama Attorney General's office. After seeing the demonstration and being furnished with additional requested documentation, the Attorney General's office advised the plaintiffs that sweepstakes promotions are legal in Alabama and that the promotion would be lawful if the Sweepstakes were operated as demonstrated. The Attorney General's office informed the plaintiffs that they would give the same opinion if other law enforcement agencies were to inquire.

The stipulations also reflect that representatives of the plaintiff had discussions with the Sheriff and the District Attorney and offered to demonstrate the Sweepstakes to them prior to beginning operations. The plaintiffs proceeded with the promotion plans and the Race Course's Sweepstakes began on December 15, 2005.

During the trial the court was given a courtroom demonstration of the Sweepstakes at the Race Course.

To play the Sweepstakes at the Race Course, a patron must first open an account to obtain a plastic account access card containing an encoded magnetic strip similar to that on a

credit card. To open an account the customer presents his/her driver's license to a Race Course attendant who scans the license into the Race Track's computer system. The patron then receives the access card at no charge as well as an individual account number similar to a PIN. Plaintiffs call the card a "Qcard."

After obtaining the Qcard, the patron moves to a Point of Sale Terminal where he/she may purchase Internet time (cyber time). The sale of cyber time also triggers the system to give the customer promotional Sweepstakes entries. For each \$1.00 spent the patron receives four minutes of Internet time and is given 100 MegaSweeps entries, each of which represents a separate chance to win a cash prize. The rate charged for access to the CyberCenter is comparable to rates charged by providers of similar computer services and is "fair market value." There is no separate charge for the Sweepstakes entries.

In the CyberCenter there are 116 state-of-the-art computers. The customer swipes his/her Qcard and logs onto a computer that tracks the amount of Internet time available to the customer, deducting the used time from the customer's account. The computers provide the customers with broadband Internet connections allowing the user to browse the Internet, to access email and to obtain many of those services that are available on the Internet. The CyberCenter can also be used to make telephone calls via the Internet, to make copies, to print digital photographs, to send faxes, and so forth. The computers can be used to gain access to online information about greyhound and horse races and the customer can access pari-mutuel tip sheets and other information used for handicapping live and simulcast racing sites around the country.

As stated, when the customer buys Internet time he/she also gets Sweepstakes entries in Quincy's MegaSweeps. Whether or not the customer has a winning or losing entry is predetermined at the time the customer purchases Internet time. Once the customer has been given the Sweepstakes entry, it cannot be changed and the customer cannot tell by looking at the card whether he/she has drawn a winning entry. The customer may determine whether the Sweepstakes entries are winners or losers at the CyberCenter, by accessing a website remotely, by calling a toll-free telephone number, or by going to an electronic Reader.

The most popular way to learn the result of an entry is through the use of the more than 1,300 electronic Readers that display winning and losing entries. To learn the result of an entry from a Reader, the customer swipes his Qcard to activate the Reader and then presses a button on the Reader to see the results. The customer may select one entry or a batch of entries to be read at the same time.

The demonstration and other evidence makes it clear to the court that these Readers are designed and arranged so that they look and sound like slot machines at a gambling casino. But while they look, sound and act like a gambling machine, the evidence shows that they are not gambling machines. These machines do not determine who wins or who loses. There is no chance involved. The Reader simply reads and displays the results of the predetermined sweepstakes entries. As plaintiff contends, these Readers are "dumb terminals" that only read the electronic entries.

Another machine demonstrated as part of the promotion was the Recharger Kiosk, located near the Readers. This is an automated station that allows the card holder to purchase additional cyber time and to add cyber time to his/her account. If the patron has won a cash prize in the MegaSweeps, he/she can go to the Recharger and use those winnings to purchase additional cyber time. Of course the customer also gets additional MegaSweeps entries when he/she purchases more cyber time.

The evidence shows that during the brief period the plaintiffs were operating the promotion, few customers were using the CyberCenter; however they were lined up at all hours to use the Readers. It is obvious that most of the customers are more interested in getting MegaSweeps entries than they are in using the CyberCenter. This court has no way of knowing whether the customers think they are playing real slot machines or whether they are aware that the Readers simply look like slot machines.

The evidence also shows that there are methods under the rules adopted by the Jefferson County Racing Commission, by which a customer can obtain a free Sweepstakes entry

without making a purchase of cyber time. The customer can request and receive a free entry in the Sweepstakes by mail. There was also evidence that the plaintiffs plan to offer some MegaSweeps entries to patrons at the Race Course even if they do not buy cyber time. Once the results of the entries have been read by the Reader the customer's account is updated. When the customer decides to "cash in," the customer is paid cash for the winning entries by a cashier.

IV.

THE LAW

A.

LOTTERIES

Lotteries are prohibited in Alabama. The Alabama Constitution of 1901 provides:

"65. Lotteries; prohibited

"The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided." Ala. Const. Art. IV 65 (1901).

The Supreme Court has stated that "the broad conception set forth in § 65 showing that the prohibition is not only against lotteries but also against any scheme in the nature of a lottery. The very purpose of this broad declaration was to put a ban on any effort at evasion or subterfuge." Opinion of the Justices No. 83, 31 So. 2d 753, 755 (Ala. 1947).

The Alabama Legislature has specifically defined the term "lottery:"

"(6) lottery or policy. An unlawful gambling scheme in which:

"a. The players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated by the winning ones; and
"b. The winning chances are to be determined by a drawing or by some other fortuitous method; and
"c. The holders of the winning chances are to receive something of value."

Ala. Code (1975) 13A 12 20(6) (1975) (emphasis added).

B.

GAMBLING AND GAMBLING DEVICES

The promotion of gambling or the possession of a gambling device is also unlawful under Alabama law. Ala. Code (1975) 13A 12 22 and 27. The Code of Alabama defines "gambling" and "gambling device" in relevant part as follows:

"(4) gambling. A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome....

"(5) gambling device. Any device, machine, paraphernalia or equipment that is normally used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition."

13A 12 20(4) and (5) (emphasis added). A slot machine is one form of a gambling device.

Ala. Code (1975) 13A 12 20(10).

The promotion of gambling and the possession of a gambling device both require that "something of value" be risked. "Something of value" is defined as:
"(11) something of value. Any money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating

transfer of money or property or of any interest therein, or involving extension of a service entertainment or a privilege of playing at a game or scheme without charge."

Ala. Code 13A 12 20(11).

The Alabama Legislature has specifically exempted "sweepstakes" from illegal gambling activities, including a lottery. A "sweepstakes" is defined as "[a] legal contest or game where anything of value is distributed by lot or chance." Ala. Code (1975) 8-19D-1(4) (1989). Unlike a lottery, a "sweepstakes" does not include the payment of consideration for a chance to win a prize. Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co., 534 So. 2d 295, 296 (Ala. 1988).

"The three elements of a lottery are (1) a prize, (2) awarded by chance, and (3) for a consideration." Pepsi, 534 So. 2d at 296. See Opinion of the Justices No. 277, 397 So. 2d 546, 547 (Ala. 1981); State ex rel. Tyson v. Ted's Game Enters., 893 So. 2d 376, 378 (Ala. 2004); Grimes v. State, 235 Ala. 192, 193, 178 So. 73 (Ala. 1937). All three elements must be present. "This three pronged definition of 'lottery' was based on definitions of that term used by a vast number of authorities, both judicial and nonjudicial, and it is still accepted by the overwhelming majority of jurisdictions, as well as the United States Supreme Court."

Opinion of the Justices No. 373, 795 So. 2d 630, 634 35 (Ala. 2001).

In Pepsi, supra, the Alabama Supreme Court held that Pepsi's bottle cap instant cash promotion did not constitute a prohibited lottery because the element of consideration was absent. The court found that, although the elements of a prize and award by chance were present, "the 'Pepsi Instant Cash' game is not a lottery, because participants were not required to purchase cards in order to play." Id. at 297. Moreover, "[a]ny incidental profit or benefit to Pepsi in the sale of the soft drinks containing the 'under the crown' chance neither provides the consideration to make the game a lottery nor negates the free participation aspect of the game." Id.

Following the Pepsi decision, an Alabama Attorney General concluded that a promotional program which distributed a tear off "scratch and win" game piece with the purchase of a prepaid phone card did not constitute a prohibited lottery because the element of consideration was lacking. Op. Att'y Gen. 99 28 (1998). In return for \$1, the purchaser of a phone card received two minutes of prepaid long distance service. Each two-minute phone card contained a tear off "scratch and win" game piece that gave the purchaser the opportunity to win a monetary prize ranging from \$1 to \$50,000. In addition to selling the phone card, the company made game pieces available for free to consumers at certain retailers, or by mailing a self addressed, stamped envelope to the company. The Attorney General acknowledged that the proposed program satisfied the prize and award by chance elements of a lottery, but concluded that because the program "allows for the free distribution of game chances through a mail in option," there is no element of consideration:

"A plan that offers game pieces in conjunction with the purchase of a product, like the Phone Card plan proposed, must also provide for free distribution of game pieces or it will be deemed a lottery. . . . The Phone Card program proposed, which allows for the free distribution of game chances through a mail in option, does not constitute a prohibited lottery." Op. Att'y Gen. 99 28 (1998).

Although lotteries are forbidden in Alabama, sweepstakes are not. Section 65 of the Alabama Constitution "does not prohibit the Legislature from authorizing gambling." Opinion of the Justices No. 373, 795 So. 2d 630, 641 (Ala. 2001). Even before the adoption of the Alabama Constitution of 1901, a distinction was made between lotteries and sweepstakes. See Yellow-Stone Kit v. State, 88 Ala. 196, 7 Ala. 338 (1889); Buckalew v. State, 62 Ala. 334, 335 36 (1878). The Alabama Legislature recognized the historical legality of sweepstakes in Section 8-19D-1(4) – where the payment of consideration for a chance to win a prize is lacking. See, e.g., Pepsi, 534 So. 2d 295; Op. Att'y Gen. 99 28 (1998); Op. Att'y Gen. 2005 173 (2005).