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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 23, 2004

The Honorable Becky D. Richardson
Member, House of Representatives
P. O. Box 3469
Fort Mill, South Carolina 29708

Dear Representative Richardson:

You have requested an opinion concerning raffles. By way of background, you state the following information:

> [i]t is my understanding that the changes to the Constitution and South Carolina Code relating to lotteries has led to confusion concerning whether churches and non-profit organizations can conduct raffles for the purposes of fund raising.
>
> I would like to know whether raffles conducted by these groups are legal under current South Carolina law. Further, are there procedures which, if followed, would make such raffles legal, such as advertising the raffle as a donation?

Law / Analysis

Art. XVII, § 7 of the South Carolina Constitution provides:

> [o]nly the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must first be used to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the 'Education Lottery Account', and the earnings on this account must be credited to it. Education Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law.
>
> The game of bingo, when conducted by charitable, religious, or fraternal organizations exempt from federal income taxation or when conducted at recognized annual state or county fairs, is not considered a lottery prohibited by this section.

Reuel Smith

We have consistently concluded that a raffle is a lottery prohibited by Art. XVII, § 7 of the Constitution. For example, in an opinion dated December 4, 1997, we reviewed this Office's disposition of this question over the years, summarizing our conclusions as follows:

> [t]his Office has issued countless opinions which have concluded that raffles generally contain each and every one of the elements of a lottery. In an opinion dated June 2, 1983, we stated:
>
> > [n]otwithstanding Mrs. Burns' contention that some non-profit organizations conduct raffles, I am satisfied that raffles, when conducted in the traditional manner, contain all of the elements of a lottery. The three elements are (1) the offering of a prize (2) for payment of some consideration (3) with the winner determined by chance. Darlington Theatres v. Coker, et al., 190 S.C. 282, [2 S.E.2d 782 (1939)] ... very plainly defines the elements of a lottery, and the law is well settled. As you are aware, lotteries are prohibited under State law. Section 16-19-10, CODE OF LAWS OF SOUTH CAROLINA, 1976. The penalty for violation of § 16-19-10, includes a fine of $1,000.00 and a term of imprisonment for one year. Additionally, the purchaser of lottery tickets is liable under § 16-19-20, CODE, for a fine of $100.00. The present laws provide no exception for lotteries conducted by or on behalf of charitable organizations. There is an old case, Oliveros v. Henderson, 116 S.C. 77 (1921), 106 S.E. 855 which holds, in the context of Sunday work laws, that you look at the nature of the work, not the disposition of the proceeds.
>
> > It does not appear that a raffle may be legitimatized by merely referring to the consideration as a 'donation.' While the issue has not been specifically addressed by our Supreme Court, courts in other jurisdictions have recognized that the mere characterization of consideration as a "donation" does not necessarily avoid the laws which prohibit lotteries. The Courts have looked to the actual facts of the case to determine if consideration, by whatever name exists. Our Court has recognized that even indirect consideration is sufficient to sustain violation of the statute. Roundtree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1913).

The same conclusion was reached in the following opinions Op. Atty. Gen., June 2, 1977 ["(t)he fact that your lottery is to be held for humanitarian purposes is, unfortunately, immaterial."]; Op. Atty. Gen., March 17, 1975 ["under the Constitution of this State raffle schemes would be deemed a lottery and illegal."];

> Op. Atty. Gen., January 21, 1974 [raffle whereby no fee would be charged for the raffle tickets, however all persons who desire to participate in the raffle would be requested to make a donation, is a lottery]; Op. Atty. Gen., September 21, 1972 [raffling of a television set would constitute a lottery if a prize is offered, value is paid for a ticket, and chance is involved in selection of the prize winner]; Op. Atty. Gen., February 21, 1970 ["a raffle as commonly undertaken is a lottery and is therefore prohibited by the laws of this State"].

In Johnson v. Collins, 333 S.C. 96, 508 S.E.2d 575 (1998), our Supreme Court discussed at some length the meaning of the term "lottery" for purposes of Art. XVII, § 7 of the South Carolina Constitution. The Court, in concluding that video poker machines did not constitute a "lottery" as intended by the framers of Art. XVII, § 7, held that such term was meant in its narrowest sense. Rather than including all games of chance, reasoned the Court, the word "lottery" was thought of by the framers in its classic sense – a "'scheme for raising money by selling chances to share in a distribution of prizes ... .'" 333 S.C. at 103, quoting Darlington Theatres, supra, 190 S.C. at 292-293. That a raffle constitutes a "lottery" even under the narrower definition which the Court adopted for purposes of Art. XVII, § 7 is made clear by the following passage from the Johnson v. Collins decision:

> [a] "lottery" in its narrowest sense is commonly defined as "a gambling game ... in which a large number of tickets are sold and a drawing is held for certain prizes." ... Since its original ratification in 1868 the constitutional provision has specified "tickets" as part of the prohibited lottery activity. See 1868 S.C. Const. art. XIV, § 2. Use of the word "tickets" indicates the framers' narrow conception of a lottery as commonly understood, i.e. gambling involves "tickets" and a drawing by lot.

Id. at 103. Thus, Johnson's holding is consistent with the following statement by one court that

> Webster defines "raffle" as "a lottery in which each participant buys a ticket for an article put up as a prize with the winner being determined by a random drawing." Webster declares "chance" to be a synonym for "random." "Raffle" and "lottery" are synonymous. State of West Virginia v. Hudson, 1946, 128 W.Va. 655, 37 S.E.2d 553, 559, 163 A.L.R. 1265. The simplest form of a lottery is the raffle, a game of chance. United States v. Baker, 3 Cir. 1966, 364 F.2d 107, 111, cert. den. 385 U.S. 986, 87 S.Ct. 596, 17 L.Ed.2d 448. The three elements of a lottery are consideration, chance and prize. Morrow v. State, Alaska, 1973, 511 P.2d 127; State v. Nelson, 1972, 210 Kan. 439, 502 P.2d 841, 846; Cudd v. Aschenbrenner, 1962, 233 Or. 272, 377 P.2d 150, 153. A raffle as a lottery is a game of chance ... .

Williams v. Weber Mesa Ditch Extension Company, 572 P.2d 412, 414 (Wyo. 1977).

Of course, Art. XVII, § 7 of the Constitution was amended recently to authorize (together with certain forms of bingo, which were authorized by constitutional amendment in 1974) the South Carolina Education Lottery as an exception to South Carolina's continuing constitutional prohibition against lotteries. A favorable vote was conducted in 2000 and the General Assembly ratified the people's decision the following year.

The fact that the State-run lottery and bingo are the only exceptions contained in Art. XVII, § 7 reinforces the conclusion that other forms of lottery are clearly prohibited by South Carolina law. It is well recognized that "the canon of construction 'expressio unius est excluso alterius' holds that to express or include one thing implies the exclusion of another, or the alternative." Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

By analogy, the South Carolina Supreme Court determined in Bingo Bank, Inc. v. J. P. Strom, 268 S.C. 498, 234 S.E.2d 881 (1977) that the game of "Bingo Bank" was not the "game of bingo" as authorized by the exception for bingo contained in Art. XVII, § 7. Therefore, such game violated the State Constitution. In the Court's opinion, the "game of bingo," as a recognized exception to the constitutional prohibition against lotteries, is the game customarily played "by charitable organizations throughout the State." Inasmuch as there were "material differences" between the game of "Bingo Bank" and the traditional game of bingo as so defined, the Court held that "Bingo Bank" was not a form of bingo authorized by the Constitution. 268 S.C. at 501-502. As the Court held in Fraternal Order of Police v. S.C. Dept. of Revenue, 352 S.C. 420, 574 S.E.2d 717 (2002), "[t]he 1974 amendment to Article XVII simply makes a limited exception for bingo, as a lottery, from this State's constitutional prohibition against lotteries." 352 S.C. at 429.

Similarly, decisions in other jurisdictions have held that the exception contained in the state constitution for state-run lotteries is exclusive. See Miller v. Radikopf, 51 Mich. 393, 214 N.W.2d 897 (1974); Poppen v. Walker, 520 N.W.2d 238 (S.D. 1994). In Poppen, the Court held that a video lottery was not an authorized "lottery" under the State Constitution, but was, instead, an unauthorized game of chance. In Miller, the Court held that authorization of a state-run lottery in the Michigan Constitution was the only legal lottery to be conducted in the State and that other lotteries remained prohibited. As the Court in that case observed, "... since the state lottery has as its purpose the raising of revenue for the state, ... it would seem incongruous that the Legislature would allow private lotteries to compete with the public lottery and thereby reduce the revenues earned for the state." 214 N.W.2d at 898.

Accordingly it is our opinion that adoption of the amendment to Art. XVII, § 7 authorizing the South Carolina Education Lottery, which has among its contests, state-run raffles, reinforces the conclusion that all other raffles are constitutionally prohibited by Art. XVII, §7. Only recently, the people approved an amendment which continued the absolute prohibition against lotteries with only certain forms of bingo and a state-operated lottery excepted.

However, we must also consider the effect of S.C. Code Ann. Sec. 61-2-180. Such provision states that

> [n]otwithstanding any other provision of law, a person or organization licensed by the department [of revenue] under this title may hold and advertise special events such as bingo, raffles and other similar activities intended to raise money for charitable purposes.

On its face, § 61-2-180 thus authorizes raffles "to raise money for charitable purposes" if the person or organization conducting the raffle is "licensed by the department [of revenue] under this title ... ."

Of course, any statute enacted by the General Assembly must be presumed to be constitutional. As we recently observed in Op. S.C. Atty. Gen., March 23, 2004,

> "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits ...." Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unless limited by the Constitution, unlike the federal Congress, whose powers are specifically enumerated. State ex rel. Thompson v. Seigler, 2320 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While we may comment upon what we deem an apparent constitutional defect, we may not declare an act void as unconstitutional. Put another way, a statute, if enacted, "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

At the same time, it must be recognized that "the General Assembly may not permit what the Constitution expressly prohibits." Op. S.C. Atty. Gen., December 4, 1997. While the Supreme Court has recognized that a legislative construction of the Constitution is entitled to weight, Bradford v. Richardson, 111 S.C. 205, 97 S.E. 58 (1918), at the same time it must be recognized "[t]hat which is prohibited by the Constitution cannot be authorized by the legislature ... ." Beatty v. Wittekamp, 171 S.C. 326, 172 S.E. 122 (1933). As the Court noted in Scroggie v. Bates, 213 S.C. 141, 48 S.E.2d 634 (1948), "[u]nder no circumstances can this Court agree to the suggested proposition that by repeated violations of the Constitution, the Legislators may thus amend that instrument." And, as the Court stated in Richardson v. Town of Mt. Pleasant, 350 S.C. 291, 566 S.E.2d 523 (2002), words used in the State Constitution must be given their "plain and ordinary" meaning.

Several decisions in other jurisdictions have concluded that statutes which attempt to create exceptions to the state constitutional prohibition against lotteries are unconstitutional. In State ex rel. Evans v. Brotherhood of Friends, 41 Wash.2d 133, 247 P.2d 787 (1952), the Supreme Court of Washington held that a statute which exempted non-profit clubs from provisions penalizing possession, use or operation of slot machines was unconstitutional as authorizing a lottery. Following its analysis and conclusion that a slot machine constituted a lottery for purposes of the state Constitution, the Court concluded:

> [i]t is our judgment that the attempted exemption as to clubs, contained in chapter 119, is in direct conflict with Art. II § 24, of the Washington constitution, and the statute in that respect is thereby held to be unconstitutional.

247 P.2d at 798.

Similarly, the Kentucky Court of Appeals held in Commonwealth v. Malco-Memphis Theatres, 293 Ky. 531, 169 S.W.2d 596 (1943) that a statute which provided that the words "lottery or gift enterprise" are not to apply to a gift of money or property awarded by lot or drawing by theaters to their patrons without charging any price or collecting fees in order to participate in the drawing was unconstitutional. An indictment was issued against a theater for operating a lottery and the theater demurred to the indictment on the basis that the statute in question was valid and served to invalidate the indictment. Rejecting this argument, the Kentucky Court of Appeals reasoned:

> [t]he clearly expressed purpose of the 1938 amendment to section 2573 of Carroll's Kentucky Statutes was to exempt theatres from the prohibition of conducting lotteries. The amendment is in direct contravention of the mandatory language of section 226 of the Constitution, and, consequently is void.

169 S.W.2d at 598. See also, Otto v. Kosofsky, 476 S.W.2d 626 (Ct. App. Ky. 1972) ["Bingo Licensing Act" providing that cities could in certain instances license certain bingo games with the net proceeds of the games to be donated to educational, charitable, patriotic or religious uses was invalid under constitutional provision prohibiting lotteries; "[t]he plain fact is that our constitution forbids all lotteries and gift enterprises. This prohibition can be repealed by a constitutional amendment but not by legislative enactment."]

In addition, our Supreme Court has held that a license to operate a game or machine otherwise illegal does not serve to legalize such activity. See, State v. One Coin-Operated Video Game Machine, 321 S.C. 176, 467 S.E.2d 443 (1996) ["licensing requirement in no way affects the legality or illegality of the Cherry Master."]; Ingram v. Bearden, 212 S.C. 399, 404, 47 S.E.2d 833, 835 (1948) ["the licensing of any machine shall not make lawful the operation of any gambling machine or device the operation of which is made unlawful under the laws of the State."; Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630 (1941) [same]; Cannon v. Odom, 196 S.C. 371, 13 S.E.2d 633 (1941) [same].

Of course, as noted above, only a court may declare § 61-2-180 to be in conflict with Art. XVII, § 7 of the State Constitution. Until such time as a court so declares this statute to be unconstitutional, it remains a part of the statutory law of South Carolina. Indeed, we are aware of at least one Solicitor who has cited § 61-2-180 in concluding that the conduct of a raffle could not be prosecuted as a lottery under § 16-19-10 because § 61-2-180 could be asserted as a defense by a person who met the requirements thereof.

Our Supreme Court has not spoken with one voice concerning the question of whether a statute subsequently declared unconstitutional may be relied upon prior to such time as the law is adjudicated to be invalid. In Dillon County v. Md. Casualty Co., 220 S.C. 204, 67 S.E.2d 306 (1951), the State Supreme Court quoted Chicot Co. Drainage Dist. v. Md. Casualty Co., 308 U.S. 71 (1940) in stating that "[t]he actual existence of a statute, prior to ... a determination [of unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." 67 S.E.2d at 308, quoting 308 U.S. at 74.

On the other hand, the Court, in a recent decision, Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 596 S.E.2d 42 (2004), concluded that a statute which is subsequently declared unconstitutional is void ab initio. In the words of the Court,

> [w]e have not often addressed the issue of the retroactivity of a declaration of the unconstitutionality of a statute. A review of our cases, as well as foreign cases, reveals that such a ruling generally means the statute is void ab initio, absent special circumstances ....
>
> Statutes are presumed to be constitutional and will not be found to violate the constitution unless their invalidity is proven beyond a reasonable doubt [citations omitted] .... When a statute is found unconstitutional, we have recognized the "general rule that an adjudication of [the] unconstitutionality of a statute ordinarily reaches back to the date of the act itself...." Trustees of Wofford College v. Burnett, 209 S.C. 92, 102, 39 S.E.2d 155, 159 (1946) ... .
>
> Generally, "when a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; ... it constitutes a protection to no one who has acted under it." Atkinson v. Southern Express Co., 94 S.C. 444, 453, 78 S.E. 516, 519 (1913) (holding that portions of criminal statute which prohibited importation of alcoholic beverages into South Carolina from another state for personal use were unconstitutional when enacted as statute violated interstate commerce principles); Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1885) (issuance of $2 million in "fire loan" bonds under a city ordinance, which later was ratified by an act of Legislature, was for private purposes and thus violated constitutional requirement that taxes be levied only for public purposes; city's

> ordinance and Legislature's act were unconstitutional and void when enacted, which meant the bonds were not a valid debt of city and no action could be maintained to enforce their payment ... .
>
> Section 44-7-50, which was declared unconstitutional in 1992, was unconstitutional from the date of its enactment in 1977 and thus void ab initio. A close reading of the few South Carolina cases discussing the general rule indicates it is followed except in special or unusual circumstances, such as when doing so would create widespread havoc involving a great number of people or transactions, spawn unnecessary litigation, or result in flagrant injustice. ... None of these situations is presented in the instant case.

596 S.E.2d at 47-48. Thus, although arguably § 61-2-180 could serve to limit § 16-19-10 by affording a statutory defense to any prosecution for operating a lottery by means of a raffle, it would appear that the Bergstrom case severely undermines such argument. Bergstrom indicates that if § 61-2-180 is indeed struck down by a court, any reliance upon § 61-2-180 would be misplaced. Thus, we cannot advise that any comfort may be taken from the existence of this statute as a possible defense to the unconstitutionality of conducting a raffle. Of course, prior to any adjudication of unconstitutionality, a prosecutor might well determine that the existence and applicability of § 61-2-180 makes prosecution for operation of a lottery by means of a raffle difficult, if not virtually impossible. Such decision would be a matter for the prosecutor to determine in a given case.

Conclusion

We herein reaffirm our earlier opinions which have consistently concluded that "raffles generally constitute a lottery (because elements of prize, chance and consideration are present) and are thus prohibited by the Constitution of South Carolina." Op. S.C. Atty. Gen., December 4, 1997. The adoption of the amendment to Article XVII, § 7 of the Constitution authorizing the South Carolina Education Lottery does not undermine this conclusion. Indeed, it reinforces it. Any lottery, such as a raffle, which is not operated by the State is in conflict with the constitutional authorization and thus unconstitutional. Cf., Bingo Bank, supra. The Constitution provides no exceptions for raffles conducted by charitable organizations or for charitable purposes. And, as we have consistently concluded, characterization of any payment as a "donation" cannot serve to make the game constitutional.

We note that § 61-2-180 of the Code authorizes raffles to raise money for charitable purposes by any organization licensed to sell alcoholic beverages pursuant to Title 61. However, as we have previously concluded, this provision is in conflict with the Constitutional provision forbidding lotteries. While such a statutory provision is presumed constitutional until set aside by a court, we are of the opinion that a court would declare such provision to be unconstitutional. If so, such provision would likely be deemed void ab initio, i.e. from the date of the statute's enactment.

Accordingly, a raffle is a constitutionally prohibited lottery under Art. XVII, § 7 of the South Carolina Constitution. No exception exists to authorize a raffle to be conducted for charitable purposes or to characterize payment to participate as a "donation."

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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