

October 19, 2006

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

SYLLABUS:

2006-045

Wagering on a videotaped horse race at a “Night at the Races” fund-raising event is a “scheme of chance,” as defined in R.C. 2915.01(C), when the person making the wager is assigned a horse randomly selected by the charitable organization conducting the fund-raising event.



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OFFICE OF THE ATTORNEY GENERAL

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October 19, 2006

OPINION NO. 2006-045

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

Dear Prosecutor Will:

You have requested an opinion whether wagering on a videotaped horse race at a “Night at the Races” fund-raising event¹ is a “game of chance,” as defined in R.C. 2915.01(D), or a “scheme of chance,” as defined in R.C. 2915.01(C), when the person making the wager is assigned a horse randomly selected by the charitable organization conducting the fund-raising event. For the reasons that follow, this type of wagering activity is a “scheme of chance,” as defined in R.C. 2915.01(C).

Before addressing your specific question, we must first examine the prohibitions against charitable organizations and other persons² conducting “schemes of chance” and “games of

¹ You have informed us that charitable organizations are holding fund-raising events called a “Night at the Races,” which are centered around wagering on videotaped horse races, as described in 1990 Op. Att’y Gen. No. 90-032. A promoter will provide a charitable organization, for a set fee, videotapes of actual horse races and appropriate fixtures and related furnishings that, when assembled, are intended to simulate the environs that one would find at a horse racing track where betting is permitted. A person attending such an event is either randomly assigned, upon the payment of an admission fee to the event, a horse for each race by the charitable organization conducting the event, or is permitted to purchase a ticket, token, or other device that corresponds to a horse that the person believes will win the race in which the horse is entered. A person who is assigned or correctly selects a horse that wins a race receives a cash prize of a predetermined amount.

² The term “person,” as used in R.C. Chapter 2915, includes an individual, corporation, business trust, estate, trust, partnership, association, firm, or other legal entity, however, organized. R.C. 1.59(C); R.C. 2915.01(MM).

chance” prescribed by R.C. 2915.02, which establishes the criminal offense of gambling.³ R.C. 2915.02 provides, in part, as follows:

- (A) *No person shall do any of the following:*
 - ...;
 - (2) *Establish, promote, or operate* or knowingly engage in conduct⁴ 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*;
 - ...;
 - (5) With purpose to violate division (A)(1), (2), (3), or (4) of this section, acquire, possess, control, or operate any gambling device.⁵
- (B) 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.* (Emphasis and footnotes added.)

³ R.C. 2915.02(F) states: “Whoever violates [R.C. 2915.02] 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.”

⁴ R.C. 2915.01(T) states that “conduct,” as used in R.C. Chapter 2915, means “to back, promote, organize, manage, carry on, sponsor, or prepare for the operation of bingo or a game of chance.”

⁵ For purposes of R.C. Chapter 2915, R.C. 2915.01(F) defines a “gambling device” as any of the following:

- (1) A book, totalizer, or other equipment for recording bets;
- (2) A ticket, token, or other device representing a chance, share, or interest in a scheme of chance or evidencing a bet;
- (3) A deck of cards, dice, gaming table, roulette wheel, slot machine, or other apparatus designed for use in connection with a game of chance;
- (4) Any equipment, device, apparatus, or paraphernalia specially designed for gambling purposes;
- (5) Bingo supplies sold or otherwise provided, or used, in violation of this chapter.

R.C. 2915.02 thus prohibits a charitable organization or other person from conducting a game of chance conducted for profit or scheme of chance when the scheme or game is not expressly permitted by law.

No statute permits a charitable organization or any other person to conduct a scheme of chance. R.C. 2915.02(D) authorizes a charitable organization to conduct games of chance in certain circumstances:

[R.C. 2915.02] 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 organization⁶ 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

⁶ As used in R.C. Chapter 2915, the term “charitable organization” is defined as follows:

Except as otherwise provided in this chapter, “charitable organization” means any tax exempt religious, educational, veteran’s, fraternal, sporting, service, nonprofit medical, volunteer rescue service, volunteer firefighter’s, senior citizen’s, historic railroad educational, youth athletic, amateur athletic, or youth athletic park organization. An organization is tax exempt if the organization is, and has received from the internal revenue service a determination letter that currently is in effect stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code, or if the organization is a sporting organization that is exempt from federal income taxation under subsection 501(a) and is described in subsection 501(c)(7) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer fire fighter’s organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding either the making of an application for a bingo license under [R.C. 2915.08] or the conducting of any game of chance as provided in [R.C. 2915.02(D)]. A charitable organization that is exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code and that is created by a veteran’s organization, a fraternal organization, or a sporting organization does not have to have been in continuous existence as such in this state for a period of two years immediately preceding either the making of an application for a bingo license under [R.C. 2915.08] or the conducting of any game of chance as provided in [R.C. 2915.02(D)].

R.C. 2915.01(H).

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.

....

(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 [R.C. 2915.12].

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. (Footnote added.)

A charitable organization may thus conduct a game of chance when the conditions set forth in R.C. 2915.02(D)(1)(a)-(e) are satisfied.

The classification of a charitable fund-raising activity as a "game of chance" or "scheme of chance" is critical to determining whether a charitable organization may conduct the activity. If a particular fund-raising activity is classified as a "scheme of chance," a charitable organization may not conduct the activity. If the fund-raising activity is a "game of chance," a charitable organization may conduct the activity when the conditions set forth in R.C. 2915.02(D)(1)(a)-(e) are satisfied.

R.C. 2915.01 defines the terms "scheme of chance" and "game of chance," as used in R.C. Chapter 2915, as follows:

(C) "Scheme of chance" means 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.

(D) “Game of chance” means 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.

As you explain in your letter, a question similar to yours was considered by the Attorney General in 1990 Op. Att’y Gen. No. 90-032. At the time the 1990 opinion was issued, R.C. 2915.02 permitted a charitable organization to conduct games of chance *and* schemes of chance as fund-raising activities, provided the charitable organization adhered to the conditions imposed by the General Assembly for the operation of one or the other. In 2003, however, the General Assembly enacted amendments to R.C. Chapter 2915 that, *inter alia*, (1) revised the definitions of game of chance and scheme of chance, and (2) made it unlawful for any person, including a charitable organization, to operate a scheme of chance. *See* 2001-2002 Ohio Laws, Part V, 9852 (Am. Sub. H.B. 512, eff. Apr. 3, 2003). Because of these legislative developments, you ask us to review the analysis used by the 1990 opinion to distinguish a scheme of chance from a game of chance, and advise you whether wagering on a videotaped horse race at a fund-raising event is a scheme of chance, as defined in R.C. 2915.01(C), when the person making the wager is assigned a horse randomly selected by the charitable organization conducting the fund-raising event.

We will first summarize the findings in 1990 Op. Att’y Gen. No. 90-032. That opinion addressed whether the Ohio Department of Liquor Control (Department) (now the Division of Liquor Control within the Ohio Department of Commerce) could properly issue temporary F or F-2 liquor permits to charitable organizations that wished to serve alcoholic beverages at their “Night at the Races” fund-raising events. Rules of the Department imposed “certain limitations and restrictions with respect to conducting on liquor permit premises activities that” were prohibited as criminal gambling offenses by R.C. Chapter 2915. 1990 Op. Att’y Gen. No. 90-032 at 2-119. Essentially, the rules prohibited (and still prohibit) gambling on the premises of a liquor permit holder. *See* [2005-2006 Monthly Record] Ohio Admin. Code 4301:1-1-53, at 148.

Those same rules included an exception, however, in the case of games of chance and schemes of chance conducted as fund-raising activities by charitable organizations. The rules permitted a charitable organization that had been issued a liquor permit to conduct a “scheme of chance” or “game of chance,” as defined in former R.C. 2915.01(C) and (D), respectively, upon its premises, provided that the charitable organization complied with the conditions applicable to each activity, as were set forth in former R.C. 2915.02(D)(1) and (D)(2), respectively. *See* 1990 Op. Att’y Gen. No. 90-032 at 2-123 (“rule 4301:1-1-53(D) states that rule 4301:1-1-53’s prohibitions against gambling on liquor permit premises shall not be construed to prohibit the ‘conducting of schemes of chance and certain games of chance by charitable organizations as defined in [R.C. 2915.02(H)] so long as there is strict compliance with [R.C. 2915.02(D)]’” (emphasis in original)).⁷

⁷ Rule 4301:1-1-53(D) currently provides that the administrative regulation against gambling on liquor permit premises “shall not prohibit the conducting of games of chance by

At the time that the 1990 opinion was issued, the definitions of “scheme of chance” and “game of chance” in R.C. 2915.01 read as follows:

(C) “Scheme of chance” means a lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize.

(D) “Game of chance” means poker, craps, roulette, a slot machine, a punch board, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely or wholly by chance.

See 1981-1982 Ohio Laws, Part I, 282, 282 (Sub. S.B. 91, eff. Oct. 20, 1981). R.C. 2915.02(D)(1) and R.C. 2915.02(D)(2) specified the conditions under which a charitable organization could conduct schemes of chance and games of chance, respectively. The conditions for conducting games of chance were slightly more rigorous than those applicable to the conduct of schemes of chance. The relevant question in 1990 Op. Att’y Gen. No. 90-032, therefore, was whether the “Night at the Races” fund-raising activity, as described therein, was a game of chance or scheme of chance for purposes of the Department’s issuance of liquor permits in accordance with the terms of the agency’s administrative rule.

In response the Attorney General advised that he was “inclined to classify the wagering activity in question as a game of chance[,]” for the reason that the fund-raising activity in question appeared to come within the definition of “game of chance” in R.C. 2915.01(D), rather than the definition of “scheme of chance” in R.C. 2915.01(C). 1990 Op. Att’y Gen. No. 90-032 at 2-125. The opinion evaluated the relevant issue in the following manner:

[A] “[s]cheme of chance” and a “[g]ame of chance,” as defined in R.C. 2915.01(C) and R.C. 2915.01(D) respectively, share the elements of valuable consideration, chance, and gain or prize. *The single feature that distinguishes a game of chance from a scheme of chance appears to be a certain element of either choice, or skillful participation, albeit unspecified, on the part of the bettor, which is present or occurs in conjunction with, or as part of, the event or action that is the subject of such person’s wager....* The wagering activity at issue here does appear to involve elements of control and choice on the part of each bettor sufficient to warrant a characterization of that activity as a game of chance. In that regard each bettor may, for each race, choose from among a field of several horses and may make his wager upon whichever horse (or horses) he believes will be more likely than not to win that race. The bettor’s choice may be based upon nothing more than a hunch or guess, or perhaps an affinity for the name of the horse he selects, but it is, nonetheless, a deliberate choice closely analogous to that made by one who purchases a chance on a punch board. To that extent,

charitable organizations as defined in [R.C. 2915.01(H)] so long as there is strict compliance with [R.C. Chapter 2915].”

therefore, such wagering activity constitutes a “[g]ame of chance,” as defined in R.C. 2915.01(D). (Footnote omitted and emphasis added.)

Id. at 2-125 and 2-126.

The Attorney General cited *State v. Beane*, 52 Ohio Misc. 115, 118, 370 N.E.2d 793 (Franklin County Mun. Ct. 1977), which observed that, “[i]f there is any recurring feature that separates ‘scheme of chance’ from ‘game of chance’ in this court’s analysis, it would seem to lie in an element of control, sometimes nebulous, on the part of the participant.” The court continued:

In a “scheme” the player has no apparent conscious control over his input. He buys his ticket or slip in the blind as to the potential result of that purchase. On the other hand, in a “game” such as craps for money, or roulette, the participant can make his bet selectively and base that selection upon a calculation of ascertainable odds. Even on a punch board operation, the player may choose the area on the board where his choice may be dictated by a hunch or guess.

State v. Beane, 52 Ohio Misc. at 118, 370 N.E.2d 793. On the basis of these statements 1990 Op. Att’y Gen. No. 90-032 concluded that the existence of “choice” or “skillful participation” on the part of the player distinguishes the statutory definition of game of chance from the statutory definition of scheme of chance.

We do not believe that the elements of choice or control identified in the 1990 opinion accurately reflect the General Assembly’s current understanding of what constitutes a game of chance or a scheme of chance. Rather, we are of the view that the essential characteristic that distinguishes a “scheme of chance,” as defined in R.C. 2915.01(C), from a “game of chance,” as defined in R.C. 2915.01(D), is the opportunity that a game of chance offers a person to exercise skill and knowledge in a way that will improve his chances of making a successful wager.

As we noted earlier in this opinion, Am Sub. H.B. 512 amended the statutory definitions of these terms effective April 3, 2003. Am. Sub. H.B. 512 amended the definition of “game of chance” in R.C. 2915.01(D) to specify that the outcome of such a game is determined “largely by chance,” as opposed to being determined “largely or wholly by chance.” R.C. 2915.01(C)’s definition of “scheme of chance” remained, in pertinent part, unaltered by Am. Sub. H.B. 512: a scheme of chance is one in which a participant gives a valuable consideration “for a chance” to win a prize.

Insofar as the outcome of a “game of chance” is determined “largely by chance,” R.C. 2915.01(D), it is reasonable to surmise that the statutory definition of this term reflects an understanding on the part of the General Assembly that a player in a game of chance must have the opportunity to exercise some degree of skill or knowledge that enables him to increase his chances of being successful with his wager. *See, e.g., Lavery v. Ohio Liquor Control Comm’n*, 112 Ohio App. 3d 494, 499, 679 N.E.2d 57 (Summit County 1996) (“there are at least some elements of skill involved in most games of chance, whereas schemes of chance typically

involve a blind choice by the purchaser”); *Progress Vending, Inc. v. Dep’t of Liquor Control*, 59 Ohio App. 2d 266, 276, 394 N.E.2d 324 (Franklin County 1978) (“[i]t appears to be the present public policy of Ohio not to prohibit gambling where the outcome is determined largely or wholly by the skill of the players where the players are the ones who stand to win the prize that may be attained. On the other hand, where others hazard something of value upon the outcome of a game in which they do not personally participate, the conduct is prohibited as betting, as defined by R.C. 2915.01(B)”); *Progress Vending, Inc. v. Dep’t of Liquor Control*, No. 77AP-769, 1978 Ohio App. LEXIS 10370, at *18 (Franklin County Apr. 18, 1978) (same as the previous parenthetical).

Unlike the definition of “scheme of chance,” the definition of “game of chance” specifically lists gaming activities that require a person to employ skillful and knowledgeable betting and playing strategies in order to be successful at those games, *i.e.*, poker, craps, and roulette. *See generally* John Marchel, *K-I-S-S Guide to Gambling* 100, 164 (2001) (“[c]raps tables are often the noisiest and most action-intensive places in the casino, but don’t be intimidated: Craps is an easy and fun game to play if you take the time to learn the right bets to make”; “[b]ecause playing poker requires at least 50 percent skill, it only stands to reason that a player needs to do a lot of reading, studying, and practicing before any real success can be expected” (emphasis and bold omitted)); Marten Jensen, *Secrets of Winning Roulette* 14-15 (2nd ed. 2002) (“changes in the American roulette scene have made the game much more approachable for the average player. Now is definitely the time to learn the vulnerabilities of roulette as it is clearly developing into a very winnable game—especially for knowledgeable players.... For those players who are willing to put in the necessary time and effort, roulette can be a profitable venture”).

In contrast, the definition of scheme of chance in R.C. 2915.01(C) requires a participant to give “a valuable consideration *for a chance* to win a prize.” (Emphasis added.) The difference in the language used in the definitions of “game of chance” and “scheme of chance” thus indicates that the likelihood of success when participating in a scheme of chance is dependent entirely upon chance, with no opportunity afforded a person to exercise skill and knowledge so as to improve his chances of winning.

This premise is supported by the General Assembly’s explicit inclusion in the definition of scheme of chance examples of activities—slot machine, lottery, numbers game, and pool conducted for profit—in which skill and knowledge play no role in determining whether a person will win or lose. *See generally* John Marchel, *K-I-S-S Guide to Gambling* 204, 253 (2001) (the reel spins on all new slot machines “are controlled by a computer chip called a random number generator (RNG). It makes absolutely no difference if you pull the handle, push the button, or insert one or five coins – the RNG will control the entire reel outcome”; in order to win a lottery, “[y]ou don’t need to study odds, strategy, or a complex set of variables to win. You just put up your money, pick a few numbers, and take your chances” (emphasis omitted)). In this regard, it is significant to note that, prior to 2003, the definition of “game of chance” in R.C. 2915.01(D), rather than the definition of “scheme of chance” in R.C. 2915.01(C), included slot machines. *See* 1995-1996 Ohio Laws, Part II, 2150, 2156 (Sub. H.B. 143, eff. May 15, 1996, with certain

sections effective on other dates). With the enactment of Am. Sub. H.B. 512 on April 3, 2003, the General Assembly designated a slot machine as a “scheme of chance,” instead of a “game of chance.” The General Assembly has thus indicated that a person’s opportunity to exercise skill and knowledge when participating in an activity is the essential characteristic that distinguishes a scheme of chance from a game of chance.

In addition, the omission of the word “wholly” from R.C. 2915.01(D)’s definition of “game of chance,” *see* Am. Sub. H.B. 512, further demonstrates that the General Assembly considers an activity to be a scheme of chance, as opposed to a game of chance, when the activity does not avail a player any opportunity to exercise some degree of skill or knowledge so as to increase the chances of winning. *See generally Lynch v. Gallia Cty. Bd. of Comm’rs*, 79 Ohio St. 3d 251, 254, 680 N.E.2d 1222 (1997) (“[w]hen confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law”). This change to the definition of game of chance was necessary because the former definitions of game of chance and scheme of chance overlapped. Put simply, under the former definitions, an activity, the outcome of which was determined “wholly” by chance, could be classified as either a game of chance or scheme of chance. *See generally* Sub. H.B. 143 (under former R.C. 2915.01(C), a scheme of chance was one in which a participant gave a valuable consideration “*for a chance*” to win a prize” and, under former R.C. 2915.01(D), a game of chance was one in which a player gave anything of value in the hope of gain, the outcome of which was determined “largely or *wholly by chance*” (emphasis added)); *Merriam-Webster’s Collegiate Dictionary* 1430 (11th ed. 2005) (“wholly” means “to the full or entire extent : COMPLETELY ... to the exclusion of other things : SOLELY”).

The enactment of Am. Sub. H.B. 512, however, has eliminated the overlap between the definitions of “scheme of chance” and “game of chance.” If the outcome of an activity is determined largely by chance, but not wholly by chance, the activity is a game of chance, as defined in R.C. 2915.01(D). *See generally Merriam-Webster’s Collegiate Dictionary* 701 (11th ed. 2005) (“largely” means “in a large manner; *esp* : to a large extent : MOSTLY, PRIMARILY”). If the outcome of an activity is determined wholly by chance, the activity is a scheme of chance, as defined in R.C. 2915.01(C), since participants are giving valuable consideration “for a chance to win a prize.” Accordingly, if a person making a wager on a videotaped horse race as part of a charitable fund-raising event does not have an opportunity to exercise his skill and knowledge in making his wager so as to increase his chances of winning, the person is participating in a scheme of chance.

With respect to your specific inquiry, a charitable organization’s selection and assignment of horses to patrons, without *any* opportunity for the patrons to exercise their skill and knowledge in choosing a horse and making their wagers for a videotaped race, leads to the conclusion that such wagering activity at a “Night at the Races” fund-raising event is a scheme

of chance, as defined in R.C. 2915.01(C). Absent such an opportunity,⁸ the wagering activity is nothing more than the purchase of a chance to win a cash prize, and thus, a scheme of chance, as defined in R.C. 2915.01(C), rather than a game of chance, as defined in R.C. 2915.01(D). *See Lavery v. Ohio Liquor Control Comm'n*, 112 Ohio App. 3d at 499, 679 N.E.2d 57; *Progress Vending, Inc. v. Dep't of Liquor Control*, 59 Ohio App. 2d at 276, 394 N.E.2d 324; *Progress Vending, Inc. v. Dep't of Liquor Control*, No. 77AP-769, 1978 Ohio App. LEXIS 10370, at *18.

In conclusion, it is my opinion, and you are hereby advised that wagering on a videotaped horse race at a "Night at the Races" fund-raising event is a "scheme of chance," as defined in R.C. 2915.01(C), when the person making the wager is assigned a horse randomly selected by the charitable organization conducting the fund-raising event.

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro", written in a cursive style.

JIM PETRO
Attorney General

⁸ Whether patrons at a "Night at the Races" fund-raising event have an opportunity to exercise their skill and knowledge in choosing a horse for a race and making their wagers is a question of fact that must be answered by local law enforcement officials and prosecutors or, ultimately, by the judiciary. *See generally* 1993 Op. Att'y Gen. No. 93-033 (syllabus, paragraph one) (questions of fact "cannot be determined by means of an Attorney General opinion); 1983 Op. Att'y Gen. No. 83-057 at 2-232 (the office of the Attorney General "is not equipped to serve as a fact-finding body; that function may be served by your office or, ultimately, by the judiciary").