

6919 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

May 8, 2000

Robert M. Stewart, Chief
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Chief Stewart:

You have asked for guidance concerning the ban on video poker which takes effect July 1, 2000. You wish "to be clear as to action SLED should take to enforce the [prohibition] statute." In that regard, you request an opinion upon the following:

[a]s of July 1, 2000, are video game machines as described in 12-21-2710, South Carolina Code of Laws, as amended, subject to seizure and destruction as contraband per se and if so, must they be operational and in complete repair or are even component parts and sub-assemblies also subject to seizure and destruction?

Additionally, this statute is criminal in nature imposing a penalty of not more than \$500.00 or imprisonment for a period of not more than one (1) year, or both. The statute reads, "it is unlawful for any person to keep on his premises or operated in this state ...". Some machines are owned by persons operating establishments and others are leased to persons operating establishments and others are leased to persons operating various businesses. In both cases, employees other than the owners may be operating the businesses. Who is subject to arrest?

Robert M. Stewart

Law / Analysis

Pursuant to Act No. 125 of 1999, S.C. Code Ann. Section 12-21-2710, which makes certain gambling devices illegal, was amended by the General Assembly to include video gambling machines. Such provision was to take effect July 1, 2000 unless the voters in a statewide referendum voted to continue video gambling as legal in South Carolina. Prior to any election being held, the Supreme Court of South Carolina declared in Joytime Distributors and Amusement Co. v. State, 1999 WL 969280 (October 14, 1999) that the referendum portion of the statute is unconstitutional as an unlawful delegation of legislative authority to the voters of South Carolina. The Court also ruled that the statute was severable and that Part 1 of Act No. 125 survived intact. Thus, § 12-21-2710, as amended by Act No. 125, becomes effective at midnight on June 30, 2000. Such Section provides as follows:

[i]t is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards or other devices that display different pictures, words or symbols, at different plays or different numbers, whether in words or figures, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayment pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both. (Emphasis added).

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Your first question concerns whether video poker machines become illegal per se and thus contraband as of July 1, 2000. It is our opinion that at the stroke of midnight on June 30, 2000, all video gambling machines became illegal and thus are contraband. These video poker machines will be contraband as of July 1 regardless of whether they are operating, operational or incapable of operation.

The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Most often, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mut. Ins. Co., 256 S.C. 577, 183 S.E.2d 451 (1971). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). Courts must apply the clear and unambiguous terms of a statute according to their literal meaning. State v. Blackman, 304 S.C. 270, 403 S.E.2d 660 (1991).

In a recent decision, State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), the South Carolina Supreme Court issued a comprehensive opinion as to the meaning of § 12-21-2710. While the Court's decision construed the statute as written prior to Act No. 125's amendment thereof becoming effective, nevertheless, the Court's analysis is of great significance and considerable guidance in resolving your questions.

In 192 Coin-Operated Video Game Machines, the Court held that § 12-21-2710 is not preempted by federal law and is a valid statute. In addition, the Court addressed at length the question of whether the machines enumerated in the statute were contraband per se or, instead, whether the Legislature required the machines to be operational to violate the law. The appellant argued to the Court that "due to the sophisticated nature of modern video machines, a machine cannot be illegal unless it is fully operational." The Court referenced Squires v. S.C. Law Enf. Div., 249 S.C. 609, 155 S.E.2d 859 (1967), which had earlier held that the predecessor statute to § 12-21-2710 required that gambling devices need not be operational or in complete repair before they are subject to seizure and destruction. The Court thus rejected appellant's argument that Squires "is outdated and should be overruled." In the Court's view, Squires required that "component parts, subassemblies, and dies and molds used to make such parts are also subject to destruction."

The Court elaborated upon the point that § 12-21-2710 makes gambling devices listed therein illegal per se as follows:

[a]lthough slot machines have changed since the 1960's, the substance of the statute has not. The relevant portions of the current version outlaw the same conduct as its predecessor If the General Assembly considered Squires outdated, it could have changed the statute to outlaw only the operation, not the mere possession, of gambling machines when it last amended the statute in 1997

The plain language of the statute makes clear the legislature's intent to outlaw mere possession of such machines. ... The circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation

The State asserts the machines are contraband per se, such that their mere possession, without more constitutes a violation. Appellant asserts that coin-operated video games are not inherently illegal, so the machines are therefore only derivative contraband. We conclude the machines are contraband per se

These illegal gambling machines cannot be considered derivative contraband because they are themselves the subject of the statute's prohibition. In light of the statute's clear proscription of mere possession of the machines, ... the machines are clearly contraband per se.

Id. at 878-879. Thus, the Supreme Court has forcefully and clearly reiterated that § 12-21-2710 makes machines specified therein contraband per se. Accordingly, simply disabling the machine or removing parts thereof makes no difference whatever. The machines specified in § 12-21-2710 are inherently illegal.

The only question is whether the Legislature intended to treat video gambling machines differently from other illegal gambling devices such as slot machines. Section 12-21-2710 as amended by Act No. 125 of 1999 included the words "any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which there is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo or craps" It is clear that the General Assembly intended these words as an all-inclusive description of every video gambling

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machine in South Carolina. The Legislature's inclusion as of July 1, 2000 of these video gambling machines in the very same statute as illegal per se slot machines is thus highly significant. In other words, as of July 1, 2000 video gambling machines, such as video poker machines, are contraband per se in South Carolina. Removing a part or parts of a video gambling machine such as a logic board, random generator or a slot does not make the machine itself any less illegal or any less contraband. The General Assembly did not intend to play games here. The Legislature did not leave open any door or crack which would make a stripped down or disabled version of these machines somehow cease to be illegal. An illegal video game machine will remain illegal regardless of what parts are removed therefrom or what parts remain thereof.

Likewise, we reject any argument that the Legislature in using the words "and used for gambling" in § 12-21-2710, as amended, intended such words to apply to video gambling machines such as video poker, thereby requiring such machines to be used for gambling before they become illegal. It is important to note that the description of video poker and other video gambling machines is completely separated by commas from other portions of the statute. Indeed, it is clear that the words "and used for gambling" relate only to "any machine or device licensed pursuant to § 12-21-2720" Significantly, by virtue of Act No. 125's amendment of § 12-21-2720, on July 1, 2000, the words "video game[s] with free play feature operated by a slot in which is deposited a coin or thing of value" is removed completely from § 12-21-2720. Removal of video gambling machines from the licensure provision of § 12-21-2720, and simultaneous insertion thereof in § 12-21-2710 rendering such video gambling machines contraband as of July 1, 2000, makes it doubly clear that the Legislature intended to make those machines or parts of subassemblies thereof contraband per se and thus subject to seizure and destruction upon that date. In short, if the Legislature had not intended to make video gambling machines contraband as of July 1, 2000, it would not have inserted the long recognized description of these machines into the very statute making slot machines and other such devices illegal per se.

With respect to the criminal aspect of § 12-21-2710, the statute makes it "unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State" video gambling machines as of July 1, 2000. In the 192 Coin-Operated Video Game Machines case, the Supreme Court said that "[t]he plain language of the statute makes clear the legislature's intent to outlaw mere possession of such machines." Thus, anyone possessing the illegal video gambling machines on or after July 1, 2000 would be subject to criminal prosecution pursuant to § 12-21-2710.

It is helpful to consult the Supreme Court's decision in State v. Halyard, 274 S.C. 397, 264 S.E.2d 841 (1980) with respect to what constitutes "possession" for purposes of criminal statutes prohibiting possession of certain items or things such as illegal drugs. In Halyard, the Court observed that

[t]his court has repeatedly recognized that a conviction for possession of contraband drugs requires proof of actual or constructive possession, coupled with the knowledge of the presence of the drugs. To prove constructive possession the State must show a defendant had dominion and control, or the right to exercise dominion and control over the substance.

Such possession may be established by circumstantial as well as direct evidence. More than one person may possess the same personal property simultaneously. State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976); see also State v. Wise, 272 S.C. 384, 252 S.E.2d 294 (1979); State v. Ellis 263 S.C. 12, 207 S.E.2d 408 (1974); State v. Tabory, 260 S.C. 355, 196 S.E.2d 111 (1973).

Our Supreme Court recently held that the Legislature is clearly empowered to ban video gambling. The United States Supreme Court's refusal to hear the Joytime appeal emphasizes that this is a matter for the state legislature to handle and it has done so. In Mibbs, Inc. v. S.C. Dept. of Revenue, 377 S.C. 601, 524 S.E.2d 626 (1999), the Court found that "an interest that depends totally upon regulatory licensing is not a property interest that is compensable under the takings clause." In Mibbs, the Court leaves no doubt that so long as the General Assembly's prohibition of video gambling is accomplished statewide rather than county by county, compare Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996), it is constitutionally free to take whatever steps it desires to end this gambling activity. The Legislature has done so. Now the law must be carried out.

Conclusion

The law will only wait until the midnight hour of June 30 in permitting video gambling. Just after the stroke of midnight June 30, 2000, a video gambling machine will be no different in terms of its illegality than a kilo of cocaine. The Legislature left no doubt when it banned video poker in 1999 that it intended not only to ban video gambling payouts, but to outlaw video gambling machines. Therefore, as of July 1, these machines will be

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contraband, subject to confiscation and destruction and their possession will be a criminal offense, subject to arrest and prosecution.

Sufficient notice to the video gambling industry is no longer an issue. Those in the video gambling business have had warning of the approaching illegality of video gambling since last October's Joytime ruling from the Supreme Court. The industry has had more than eight months to prepare. That is time enough.

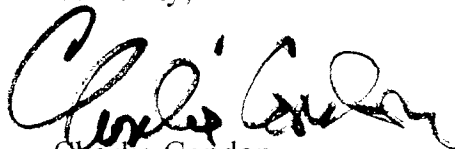
Therefore, SLED and all other state and local law enforcement agencies should enforce the law beginning on July 1.

All video gambling machines will be illegal contraband as of midnight, June 30. Unplugging the machine will not be enough. Disabling the machine will not be enough. Removing key parts of the machine such as the logic board, random generator or slot is not enough. The machines must be out of the State by July 1, or they are subject to confiscation.

All persons possessing video gambling machines as of July 1 will also be subject to arrest and prosecution. While each case must be evaluated on its own merits depending upon the particular facts, as a general rule, the owner of the machine itself, as well as the owner of the establishment where the contraband machine is found should be the persons arrested.

The message, therefore, is clear: as of July 1, video gambling machines cannot be played, possessed or permitted in any form. By July 1, the machines must not just be out of working order or out of sight, but out of state.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlie Condon". The signature is stylized and cursive.

Charlie Condon
Attorney General

CC/an