

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Richland County Sheriff's Department,

Appellant,

vs.

Nizar Awde,

Respondent.

FINAL REPLY BRIEF OF APPELLANT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

RECEIVED
JUN 03 2013
SC COURT OF APPEALS

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Richland County Sheriff's Department,

Appellant,

vs.

Nizar Awde,

Respondent.

FINAL REPLY BRIEF OF APPELLANT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

RECEIVED
JUN 03 2013
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUES ON APPEAL	1
ARGUMENT	
I. The circuit court erred in affirming the magistrate’s determination that the video machines were not illegal vending machines.	2
II. The circuit court erred as a matter of law in finding that section 12-21-2710 requires a showing that a machine with a free play feature must be used for gambling to be prohibited	4
III. The circuit court erred in affirming the magistrate court’s findings that the machines were games of skill... ..	6
IV. The Chess Challenge II machines are machines licensed and used for gambling and therefore violate section 12-21-2710	9
V. The circuit court erred in affirming the magistrate’s findings concerning whether the Sheriff had probable cause to seize the machines where assuming seizure of machines without probable cause, return of the machines, as contraband per se, is unavailable as a remedy	11
CONCLUSION.....	12

TABLE OF AUTHORITIES

Cases:

Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20 (1939)..... 10

Allendale County Sheriff’s Office v. Two Chess Challenge II,
361 S.C. 581, 606 S.E.2d 471 (2004).....6

Bowers v. Thomas, 373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007).....6

Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm’n, 451
S.E.2d 306 (N.C. Ct. App. 1994)7-8

Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929).....2, 3

Mims Amusement Company v. South Carolina Law Enforcement Division,
366 S.C. 141, 621 S.E.2d 344 (2005).....5, 7

Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004)7

South Carolina Law Enforcement Division v. One Speedmaster,
397 S.C. 94, 723 S.E.2d 809 (Ct. App. 2011) 10

Squires v. SLED, 249 S.C. 609, 155 S.E.2d 859 (1967)9

State v. 192 Coin-Operated Video Game Machines,
338 S.C. 176, 525 S.E.2d 872 (2000).....4, 9, 11

State ex Inf. McKittrick v. Globe-Democrat Publishing Co.,
110 S.W.2d 705 (Mo. 1937)8

State v. Ted’s Game Enterprises, 893 So.2d 355 (Ala. Civ. App. 2002).....8

Union County Sheriff’s Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665 (2011)5

Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2d 516 (2010)9

Other Authorities:

S.C. Code Ann. § 12-21-2710	2, 3, 5, 9, 11
S.C. Code Ann. § 18-7-170.....	7
Attorney General Opinion letter dated August 28, 2002 to the Honorable James H. Harrison 2002 WL 31341812 (S.C. A.G.).....	4
Attorney General Opinion letter dated April 29, 2005 to Major Mark A. Keel 2005 WL 1024601 (S.C. A.G.).....	4

STATEMENT OF ISSUES ON APPEAL

I.

The circuit court erred in affirming the magistrate's determination that the video machines were not illegal vending machines.

II.

The circuit court erred as a matter of law in finding that section 12-21-2710 requires a showing that a machine with a free play feature must be used for gambling to be prohibited.

III.

The circuit court erred in affirming the magistrate court's findings that the machines were games of skill.

IV.

The Chess Challenge II machines are machines licensed and used for gambling and therefore violate section 12-21-2710.

V.

The circuit court erred in affirming the magistrate's findings concerning whether the Sheriff had probable cause to seize the machines where assuming seizure of machines without probable cause, return of the machines, as contraband per se, is unavailable as a remedy.

ARGUMENT

I.

The Circuit Court erred in affirming the magistrate's determination that the video machines were not illegal vending machines.

In his brief, Respondent contends that the machines are not vending machines because they do not dispense "mints, phonecards, or any product." Br. of Resp. p. 8. However, the machines dispense red tickets, which Respondent fails to acknowledge in his brief. These red tickets are tradable for merchandise and are dispensed in variable amounts based on success of play ROA. pp. 161-162. Further, the testimony established an element of chance in playing the machines.

Under S.C. Code Ann. § 12-21-2710, vending machines are expressly prohibited unless the machines "give a certain uniform and fair return in value for each coin deposited **and** in which there is **no element of chance.**" (Emphasis added). The uncontroverted evidence is that the tickets are issued in variable amounts and not in uniform value. So as a matter of law, the machines violate this provision. See Harvie v. Heise, 150 S.C. 277, 148 S.E. 66, 69 (1929) (discussing the vending machine provision and finding "we are satisfied that the checks or tokens have some monetary or trade value, and, in view of the fact that they are released by the machine at irregular intervals and in uncertain numbers, the element of chance is always present and there is no certain and uniform return in value for the coin deposited in the machine. In these respects, the operation or possession of the machine clearly violates the statute in question.").

In the instant case, Respondent seeks to differentiate his machines from the

vending machine in Harvie on the basis that it does not dispense mints. But the machines in Harvie violated the statute, not because it dispensed mints in a uniform manner, but because it dispensed tokens in varying amounts. The machine in the instant case dispenses tickets with some trade value in varying amounts, just like the vending machine in Harvie vended variable amounts of tokens.

Further, while the predominate factor test is likely to apply to the catch-all provision of section 12-21-2710, which prohibits devices pertaining to games of chance, the vending machine provision specifically requires **no** element chance. Here, Respondent's expert agreed that chance infected various aspects of play on the machine. See ROA. pp. 58-60 (testifying that in fifth field of play, the "grid", the player has a one in four chance of attaining a particular row, even though the player might be able to use skill in selecting the optimal column); pp. 61-62 (play in the vault is random); pp. 80-81 (testifying vault play is probably luck); pp. 68-69 (agreeing there is no exercise of skill utilizing the "stop-all" button to play).

Accordingly, the machines are illegal as a matter of law and the magistrate and circuit court's findings should be reversed.

II.

The circuit court erred as a matter of law in finding that section 12-21-2710 requires a showing that a machine with a free play feature must be used for gambling to be prohibited.

The magistrate court and circuit court erred as a matter of law in finding the machines were not prohibited as video games with a free play feature, due to mistakenly finding that Appellant was required to show the machines were used for gambling to be prohibited under this provision. Mere possession of prohibited machines and devices are illegal, regardless of their use or intended use. See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

The only authority outside of the statute itself that Respondent relies on is an Attorney General's Opinion, a letter opinion to the Honorable Representative James H. Harrison, dated August 28, 2002 (2002 WL 31341812). Respondent claims that the opinion letter takes the position that the only test of illegality under section 12-21-2710 is the predominant factor test. However, the opinion was concerned with defining the catch-all "other device pertaining to games of chance" provision but notes the statute includes prohibition of specifically enumerated devices such as slot machines and punch boards.

Subsequently, the free-play feature clause is discussed in length in the Attorney General Opinion letter dated April 29, 2005 to then Major Mark A. Keel. 2005 WL 1024601 (S.C. A.G.). The opinion, consistent with arguments presented on behalf of the Sheriff in this case, opines as follows: "Certain devices, such as slot machines, **video**

games with a free play feature operated by a slot, punch boards and pull boards are expressly outlawed by statute.” Respondent chose not to cite this opinion in his brief.

While Respondent attempts to argue that the magistrate’s ruling is supported by evidence, in fact the record is clear that the video game has a free-play feature with a knock off feature and it is proper for this Court to review the issue de novo. The meaning and application of the free-play feature clause found in section 12-21-2710 is a novel issue of law that has not yet been interpreted by the appellate courts. Accordingly, a de novo review of this issue is appropriate. Mims Amusement Company v. South Carolina Law Enforcement Division, 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005), 366 S.C. at 146, 621 S.E.2d at 346 (“In a case raising a novel question of law, the Court is free to decide the question with no particular deference to the lower court”).

Additionally, both the magistrate and the circuit court’s rulings are controlled by an error of law, as they found that Appellant was required to show the machines were used for gambling in order to rely on the free-play feature provision. ROA p. 359.

As noted in Appellant’s Brief, their expert established that the machine had a free-play feature and the uncontroverted evidence was the machines had a knock-off feature to pay out tickets redeemable for merchandise. The machines also had two hard meters to measure the money paid into the machine and the number of tickets dispensed from the machine. ROA. p. 158. The machines are illegal for the free play feature alone based on the plain language of the statute.

Accordingly, the circuit court erred as a matter of law in affirming the magistrate’s finding that the machines were not video machines with a prohibited free

play feature and the finding should be reversed.

III.

The circuit court erred in affirming the magistrate court's findings that the machines were games of skill.

The circuit court erred in affirming the magistrate court's findings that the Chess Challenge II machines were games of skill. A *de novo* review is proper to determine if a circuit court's affirmance of a magistrate's ruling is controlled or affected by an error of law. Bowers v. Thomas, 373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007).

First, the magistrate and the circuit court misapplied the holding of Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.C. 581, 606 S.E.2d 471 (2004), which resulted in the magistrate's court and circuit court erroneously shifting the burden to the Sheriff to show that the machines were different from machines from years ago that were not present in the courtroom at the time of the hearing.

The circuit court affirmed the magistrate's findings that "Snyder testified that games before [the magistrate] operated in an identical manner to those seized in the Allendale case. Magistrate Davis received no testimony that the games before him had been manipulated or changed in any manner to distinguish them from the Chess Challenge II games deemed lawful by the Supreme Court, Judge Buckner, and Magistrate Love." ROA pp. 358-359. The Circuit Court's order turned the holding of Allendale on its head, eviscerating the Supreme Court's mandate for magistrates to conduct a machine by machine review and ignoring the Supreme Court's broad language finding "nothing" prevented a law enforcement agency from seizing the very two machines seized in that

case, much less two other machines seized in a separate county years later. This also effectively shifted the burden from the owner to the Sheriff to show the seized machines were different from other machines seized years ago.

Further, the circuit court erred in failing to apply the correct standard of review on appeal from magistrate's court. South Carolina Code Section 18-7-170 provides that on appeal from Magistrate's Court, the Circuit Court may make its own findings of fact. See Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2004). "In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact." § 18-7-170.

In contrast to applying the proper standard, the circuit court stated: "but the issue is an issue – I'm determining the issue of law from the lower court as to the judge's ruling." ROA. p. 273, lines 22 - 25. In its Order affirming the magistrate's determination, the circuit court indicated it relied on the magistrate's orders, the submitted memorandums and arguments of counsel, but failed to indicate it was relying on the transcript of the magistrate's proceedings or the evidence offered in magistrate's court. Cir. Ct. Order. p. 5. Further, the circuit court refused to view the machines brought to court, which are properly part of the record since they are the *res* of the action in an *in rem* proceeding.¹ ROA. pp. 273-274.

"A game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at

¹ See Mims Amusement Company v. South Carolina Law Enforcement Division, 366 S.C. 141, 150, 621 S.E.2d 344, 348 n.4 (2005).

all, or are thwarted by chance.” Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm’n, 451 S.E.2d 306 (N.C. Ct. App. 1994) (emphasis added, internal quotations omitted).

The Alabama Court of Civil Appeals artfully explains: “As long as chance matters – as long as chance makes a meaningful difference in the outcome – the activity differs in kind, not just in degree, from a game of skill.” State v. Ted’s Game Enterprises, 893 So.2d 355, 374 (Ala. Civ. App. 2002).

As discussed in the Brief of Appellant, chance plays a part in several aspects of play and a player can win without the exercise of any skill, be denied a matching icon despite of the exercise of skill, and become subject to random play, all admitted by Respondent’s expert. Indeed the stop-all button, which stops play in each of the four windows that contain revolving icons, irrefutably allows a player to win or lose based solely on chance. ROA. pp. 68-69. Certainly, a player cannot win a true game of skill without deploying any skill. Further, evidence fails to indicate that a member of the general public is in a position to exercise any skill. As discussed in the Brief of Appellant, Snyder gained his “skill” through video tape analysis.

“[W]hether chance or skill was the determining factor in the contest must depend upon the capacity of the general public – not experts – to solve the problems presented.” State v. Ted’s Game Enterprises, 893 So.2d 355, 372 n.12 (Ala. 2002) (quoting State ex Inf. McKittrick v. Globe-Democrat Publishing Co., 110 S.W.2d 705, 717 (Mo. 1937)).

As a matter of law, the machines play a game of chance and therefore, the magistrate and circuit court’s rulings should be reversed.

IV.

The machines are machines licensed and used for gambling and therefore violate section 12-21-2710.

The stop-all button, as admitted by Snyder, allowed successful play based solely on chance. ROA. p. 69. Respondent has avoided answering one question: why the machines that allegedly play a game of skill contain a stop-all button that allows a player to win or lose based solely on chance? The question remains unanswered in Respondent's brief but the inescapable conclusion is that the machines are designed with a stop-all button to allow gambling.

The machines take consideration, pay out prizes in the form of red tickets, and allow a player, by the machines' design, to win or lose solely on chance. The machines are licensed through the Department of Revenue. The machines therefore possess all the elements of gambling, and both the magistrate and the circuit court erred as a matter of law in finding that they did not violate section 12-21-2710 as machines licensed by the Department of Revenue and used for gambling.

"An apparatus is a gambling device where there is anything of value to be won or lost as a result of chance, no matter how small the intrinsic value". Ward v. West Oil Co., 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010) (quoting with approval 38 C.J.S. *Gaming* § 10 (Supp. 2010)); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 188-189, 525 S.E.2d 872, 879 (2000) (Supreme Court reaffirms Squires v. SLED, 249 S.C. 609, 155 S.E.2d 859 (1967), which held that subparts of illegal machines were contraband per se, noting "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.”). “Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to unlawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs.” Alexander v. Martin, 192 S.C. 176, 6 S.E.2d 20, 25 (1939). In the instant case, a player utilizing the stop-all button is gambling, even if the court was to accept Respondent’s claim that the machines are not intended for such use.²

Since the machine is licensed and readily capable in its design to be used for gambling, it is illegal. Accordingly, the magistrate’s court and circuit court erred as a matter of law in not finding the machines illegal.

² Respondent cites South Carolina Law Enforcement Division v. One Speedmaster, 397 S.C. 94, 723 S.E.2d 809 (Ct. App. 2011), but relies on language in the Court of Appeals’ withdrawn opinion that the “and used for gambling” provision contemplated a situation where two parties bet or wager on a game. That language was removed in the substituted opinion.

V.

The circuit court erred in affirming the magistrate's findings concerning whether the Sheriff had probable cause to seize the machines where assuming seizure of machines without probable cause, return of the machines, as contraband per se, is unavailable as a remedy.

The Magistrate found the Sheriff did not have probable cause to seize the machines. The circuit court affirmed this finding. To the extent the Magistrate's order required the Sheriff to return the machines on this ground, this ruling is in error as a matter of law. For reasons previously articulated in this brief, the machines are illegal under section 12-21-2710 and therefore are contraband *per se*. Under State v. 192 Coin Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000), the exclusionary rule explicitly does not apply to illegal machines due to their status as contraband *per se*. Therefore, since these machines violate S.C. Code § 12-21-2710, the failure of the deputy to have probable cause before seizing the machines does not implicate the remedy of returning the machines.

CONCLUSION

For all of the foregoing reasons, the circuit court and magistrate court's rulings should be reversed and the gaming machines should be destroyed.

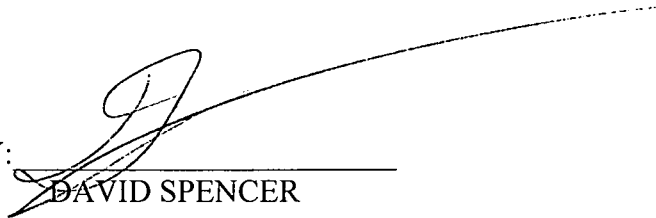
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

BY:



DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

June 3, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
DeAndrea G. Benjamin., Circuit Court Judge

RECEIVED
JUN 03 2013
SC Court of Appeals

Richland County Sheriff's Department

Appellant,

vs.

Nizar Awde,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief and Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DAVID SPENCER
Assistant Deputy Attorney General

By: 

DAVID SPENCER

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

June 3, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED
JUN 03 2013
SC Court of Appeals

RICHLAND COUNTY SHERIFF'S DEPARTMENT, Appellant,

vs.

NIZAR AWDE, Respondent.

PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief and Final Reply Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Jonathan S. Altman, Esquire, 1529 Laurel St., Columbia, SC 29201 and Jonathan S. Gasser, Esquire, P.O. Box 600, Charleston, SC 29402.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of June, 2013


NORMA BIGBEE
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727