RECEIVED
Feb 19 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

---

1 Dragon's Ascent Video Gaming
Machine; SC Games of Skill, LLC, ...Respondents,

v.

South Carolina Law
Enforcement Division, ... Appellant.

PETITION FOR REHEARING

Respondents 1 Dragon's Ascent Video Gaming Machine and SC Games of Skill, LLC, respectfully request rehearing of this Court's Opinion filed February 5, 2025. *See* Rule 221(a), SCACR. Rehearing is warranted because the Opinion overlooks and/or misapprehends multiple points of fact and law, proper consideration of which would have led to affirmance of the circuit court's order. In particular, the Court expanded the narrow holding of *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 737 S.E.2d 830 (2012), far beyond its context, thereby abandoning the long-established rule that where skill predominates over chance in determining the outcome of a game, it is not gambling.

BACKGROUND

This matter concerns a Dragon's Ascent Video Machine seized by Appellant South Carolina Law Enforcement Division ("SLED") on November 19, 2021. (R. 1.) The evidence

presented at the post-seizure hearing showed that Dragon's Ascent is an aim-and-shoot video game in which the player attempts to capture dragons of varying sizes, colors, and point values as they move across a screen. (R. 155-157, 379, 438-440.) Game play in Dragon's Ascent occurs according to rules that are established in advance, fully disclosed to the player, and do not change over the course of the game. (R. 397.) To begin playing, the player[1] inserts currency into a bill acceptor, establishing the credits the player uses to play the game. (R. 163.) The player selects a per-shot value of between 10¢ and $2, which can be adjusted between shots. (R. 218, 254.) The shot value has no bearing on the number of shots needed to capture a dragon. (R. 397.)

The player uses a turret controlled by a joystick to aim and a shot button for firing. (R. 379-380.) "Shot Power" is a graphic representation of five small vials, each filled with a different color of fluid. The player uses the level of fluid in each vial to determine the power of a shot when shooting in order to maximize the reward for capturing the targeted dragon. (*Id.*) The dragons are of different sizes, shapes, and most importantly colors. A key aspect of success in the game is the player's ability to match the color of his or her turret, which rotates through a repeating cycle of colors, to the color of the targeted dragon. (R. 292, 381.) The closer the color match at the moment a shot is accurately fired, the fewer shots will be required to capture the dragon and the greater the reward to the player. (R. 183, 293.) The amount awarded for capturing each dragon is determined according to a formula that is set in advance, involves no algorithms or random number generators, and is fully disclosed. (R. 160, 397-400.) Finally, the game also features a "Ticket Button" that the player uses to print a redeemable receipt which the player can exchange for cash. (R. 380.)

Contrary to SLED's primary argument that Dragon's Ascent was a game of chance, based

[1] Players must manually confirm that they are age 18 or older in order to play Dragon's Ascent. (R. 218, 379.)

on the overwhelming evidence, the magistrate found that Dragon's Ascent is a game in which skill predominates over chance. (R. 10.)[2] Nevertheless, the magistrate court ruled that the machine is an illegal gambling device under S.C. Code Ann. § 12-21-2710 because it is a machine required to be licensed under S.C. Code Ann. § 12-21-2720 "and used for gambling." (R. 11-14.) Respondents timely appealed to the circuit court. After briefing and a hearing, the circuit court reversed, holding that because Dragon's Ascent is a game of skill, it is legal under § 12-21-2710. SLED timely appealed the circuit court's ruling to this Court.

This Court issued its Opinion reversing the circuit court on February 5, 2025. The Court began its analysis by noting that it is undisputed that Dragon's Ascent is a game of skill. (Opinion at 4.) The Court then considered whether it was illegal under § 12-21-2710 because it was "used for gambling." (Opinion at 5.) Noting that § 12-21-2710 does not define "gambling," the Court "readily acknowledge[d] that most previous cases evaluating potential gambling devices focused on whether particular games were games of chance." (*Id.*) Nevertheless, based on "our legislature's longstanding prohibition against gambling," the Court concluded that § 12-21-2710 "includes in its prohibition any licensed device used for gambling." (Opinion at 6-7.) To find the definition of "gambling," the Court looked to the Supreme Court's decision in *Chimento*, concluding that *Chimento* redefined "gambling" or "gaming" as any game "when something of value is wagered on the outcome." (Opinion at 7.) On this basis, the Court held that Dragon's Ascent, despite being a game of skill, is illegal under § 12-21-2710. (Opinion at 9.)

ARGUMENT

Rehearing is warranted because this Court's decision erroneously relies on a novel wagering pay-to-play test derived from *Chimento*, which involved a criminal conviction under

---

[2] SLED did not contest this determination in the circuit court.

S.C. Code Ann. § 16-19-40 and which did not cite § 12-21-2710. Although *Chimento* is clearly limited to the context of § 16-19-40, this Court interpreted that decision to accomplish a result that effectively rewrites § 12-21-2710 and nullifies decades of court rulings, administrative decisions, statutes, and Attorney General opinions, ***all*** of which recognize the core principle that "gambling" or "gaming" requires three distinct elements: consideration, ***chance***, and reward.

I. *Chimento* Is Limited to S.C. Code Ann. § 16-19-40

No question of a machine's legality under § 12-21-2710 was presented in *Chimento*. Rather, the appellants in *Chimento* challenged their convictions for violating S.C. Code Ann. § 16-19-40 by playing "cards" in a "house used as a place of gaming." In a divided opinion, the Supreme Court reversed the circuit court order setting aside their convictions. Tracing the history of § 16-19-40, the Supreme Court concluded that this particular statute applied to the playing of certain ***specified, enumerated games*** (such as cards, dice, any roley-poley table, rouge et noir, or faro bank) in certain ***specified, enumerated locations*** (such as a kitchen, a barn, stable, open space, or a house used as a place of gaming), regardless of whether they were games of chance or skill. *See id.* at 531, 737 S.E.2d at 836 ("[Section] 16-19-40 criminalizes ***the playing of*** certain games and gambling." (emphasis added)).

The majority in *Chimento* repeatedly made clear that it was construing "gambling" or "gaming" in the specific context of § 16-19-40. *See Chimento*, 401 S.C. at 531, 737 S.E.2d at 836 ("The circuit court … [held] that 'gaming' ***as used in § 16-19-40*** applies only to betting on games of chance[.]" (emphasis added)); *id.* at 532, 737 S.E.2d at 837 (describing issue as "whether … betting on a card game … is unlawful gaming" and citing, *inter alia*, § 16-19-40); *id.* ("Under the plain language ***of § 16–19–40***, gambling on a game of skill is a violation if that gambling is being done ***in a prohibited location***." (emphasis added)); *id.* ("A violation ***of the gaming prohibition of § 16–19–40*** does not depend on whether the particular game involves more skill than chance."

(emphasis added)); *id.* at 533, 737 S.E.2d at 837 ("[T]here is precedent that indicates ***§ 16–19–40 is concerned with wagering*** regardless of the skill involved in the game wagered upon." (emphasis added)); *id.* ("We hold that one 'games' ***within the meaning of § 16-19-40*** when money is wagered on Texas Hold'em, even though it is a game in which skill predominates." (emphasis added)).

In deciding to rely on *Chimento*, this Court stated that "it is worth mentioning that section 16-19-40 similarly [to § 12-21-2710] criminalizes playing 'any machine or device licensed … and used for gambling purposes.'" (Opinion at 8.) This is merely coincidental, however, because the "any machine or device" language was not at issue in *Chimento*. The primary question presented in *Chimento* was whether a person's residence was a "house used as a place of gaming" under S.C. Code Ann. § 16-19-40 and thus a specifically identified prohibited location when used for the playing of a game of skill. *See Chimento*, 401 S.C. at 527, 737 S.E.2d at 832. In affirming the defendants' convictions, the *Chimento* Court held that it is the "prohibited location," not the character of the game being played, that determines illegality under § 16-19-40. *Chimento*, 401 S.C. at 532, 737 S.E.2d at 837. The *Chimento* majority made no reference whatsoever to the fact that both § 16-19-40 and § 12-21-2710 contain the phrase "any machine or device licensed … and used for gambling." In fact, the *Chimento* majority referenced the "any machine or device" language in § 16-19-40 only in quoting the statute as a whole, and it ***did not even cite § 12-21-2710***. In short, there is nothing at all in *Chimento* to support any kind of connection between the meaning of "gaming" in "a house used as a place of gaming" and the meaning of "machine or device used for gambling."

It is also noteworthy that the *Chimento* majority did not address Justice Hearn's dissent, which responded to Chief Justice Toal's concurrence by explicitly distinguishing between § 16-19-40 and § 12-21-2710. In her concurrence, Chief Justice Toal "agree[d] wholeheartedly" with the dissent's conclusion that § 16-19-40 is unconstitutionally void for vagueness because it delegates

too much discretion to law enforcement to decide whether the statute has been violated. *Id.* at 536, 737 S.E.2d at 839 (Toal, C.J., concurring); *see* 547-552, 737 S.E.2d at 845-847 (Hearn, J., dissenting). Chief Justice Toal nevertheless joined the majority because "we cannot sever the language, 'a house used as a place of gaming,' from section 16-19-40 without striking the provision in its entirety," which she feared would "open the door wide to *all* heretofore illegal gaming practices in this state, ***including video poker***." *Id.* at 537, 737 S.E.2d at 839-40 (Toal, C.J., concurring) (second emphasis added).

In her dissent, Justice Hearn explained why Chief Justice Toal's concern was misplaced:

> The prohibition of video poker is found in Section 12–21–2710 of the South Carolina Code (2000). This is a ***completely separate section (and title) of the code*** and makes no reference at all to section 16–19–40. In fact, ***it is entirely independent and separate from the general gambling prohibitions involved here***. Striking section 16–19–40 in whole or in part would have no impact on section 12-21–2710.

Id. at 552, 737 S.E.2d at 848 (Hearn, J., dissenting) (emphasis added). Notably, the majority opinion did not challenge Justice Hearn on this point. Indeed, § 12-21-2710 is not even cited in the majority opinion.

The Court cites *State v. Red*, 41 S.C.L. (7 Rich.) 8 (1853), as support for its conclusion that, post-*Chimento*, an activity is gambling even when skill determines the outcome. (Opinion at 8.) In *Red*, the defendant had been convicted of operating a bank for the play of a shell game called "Thimbles and Balls."[3] The defendant argued that the game was actually "an exhibition of his dexterity," and therefore was not illegal. *Id.* at 10. The court rejected this argument:

> If the prohibited games be confined to those alone in which the stake is won or lost by chance, the result would follow, that the gambler who relied

[3] *See* "Shell Game," at https://en.wikipedia.org/wiki/Shell_game ("The shell game (also known as thimblerig, three shells and a pea, the old army game) is a public gambling game that challenges players to follow the movement of a marker hidden under one of several covers (shells). In practice, the game is almost always run as a confidence trick that uses sleight of hand to transfer the marker between covers.") (*last visited* Feb. 16, 2025).

> on the practiced legerdemain of a juggler, ***whilst he professed that the stake depended on fortune,*** will escape punishment by ***playing falsely.***

Id. (emphasis added). In other words, the court's concern was that the game was a fraud: the defendant falsely ***claimed*** that the outcome was determined by chance, when in reality he used sleight of hand to ensure that the unsuspecting player victim would guess wrong most of the time. The holding in *Red* thus stands for the common sense proposition that skillful cheating based on false pretenses is still cheating and thus unlawful.

The *Chimento* majority also did not consider that numerous South Carolina statutes explicitly define "gambling" or "gaming" as requiring the predominance of ***chance***. As this Court noted (Opinion at 8), the *Chimento* majority cited S.C. Code Ann. § 32-1-10 and *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), as suggesting that the "statutory meaning of the word 'gambling' in South Carolina includes games in which skill outweighs chance." *Chimento*, 401 S.C. at 533, 737 S.E.2d at 837. Such a suggestion is totally misplaced. In *Berkebile*, the Supreme Court construed § 32-1-10, a remedial statute that allowed for recovery of gambling losses, as applying to video poker losses even though video poker by statute was then legal. *Berkebile*, 311 S.C. at 55, 426 S.E.2d at 763. The issue of legality in *Berkebile* did not involve a skill vs. chance analysis because at the time of this decision ***all*** video gambling devices, including games of chance, were legal.

Importantly, the General Assembly has enacted multiple South Carolina statutes explicitly defining "gambling" using the only word ***chance***. *See* S.C. Code Ann. § 3-11-100(2) (defining "Gambling" and "gambling device" to mean "any game of chance"); S.C. Code Ann. § 12-21-3920(1) (defining "bingo" or "game" as "a specific game of chance"); S.C. Code Ann. § 12-21-4130 (authorizing seizure of bingo cards that have been altered so that they are ***not*** games of chance); S.C. Code Ann. § 37-21-20(5)(a) (defining "prize promotion" as "a sweepstakes or other

game of chance”); S.C. Code Ann. § 52-1-20 (“No carnival to which games of chance or gambling devices are attached shall exhibit in this State.”); S.C. Code Ann. § 59-150-20(7) (“‘lottery’, ‘lotteries’, ‘lottery game’, or ‘lottery games’ means a game of chance….”). The General Assembly has thus repeatedly defined “gambling” as a game involving chance. This necessarily means that when chance does not determine the outcome—*i.e.*, when skill predominates—an activity is not “gambling” or “gaming.”

Moreover, the Court’s interpretation of *Chimento* as defining gambling for all purposes as including “games of skill when something of value is wagered on the outcome” has potentially far-reaching and unintended consequences. Based on the Court’s reasoning, all skill-based contests that require a pay-to-play entry fee and offer something of value to the winner—such as amateur and professional golf tournaments, NASCAR races, and local competitive events—are illegal, including events such as the following:

- Golf Tournaments:
    - Country club golf tournaments, such as that conducted by the Berkeley County Country Club: https://www.berkeleycc.com/25-uncategorized/40-invitational-3;
    - The Heritage Classic Golf Tournament: https://www.heritageclassicfoundation.com/;
    - “Closest to the pin”-type contests: *Op. S.C. Atty. Gen.*, 2011 WL 3918174, at *1 (S.C.A.G. Aug. 17, 2011) (stating that a golf promotion with $5.00 entry fee, where the player who landed a golf ball closest to the pin would win up to $10,000 “is not violative of South Carolina’s gambling laws” because the outcome was determined by skill); and
- Auto Racing:
    - The Southern 500: https://www.darlingtonraceway.com/events/2022-fall-nascar-race/.

II. The Dominant Factor Test Is Widely Recognized and Applied in South Carolina

That *Chimento* does not impact the application of § 12-21-2710 is indisputably confirmed by the Supreme Court’s ruling in *Richland County Sheriff’s Department v. Awde*, No. 2014-MO-024,

2014 WL 3016205 (S.C. July 2, 2014) (per curiam), decided by the ***same*** five justices who decided *Chimento* two years earlier. In *Awde*, the Court unanimously affirmed a magistrate court's "finding that two 'Chess Challenge II' devices before it were legal games of skill." *Id.* The parties' briefs raised arguments concerning, *inter alia*, the "used for gambling" prong of § 12-21-2710.[4] Additionally, the Attorney General submitted a letter of supplemental authorities specifically reminding the Supreme Court of its decision in *Chimento*. If the Supreme Court had intended *Chimento* to apply when determining the legality of a machine under § 12-21-2710, it surely would not have issued an affirmance in *Awde*. The fact that the Court affirmed—in an unpublished, per curiam opinion—demonstrates that the "wagering" test used in *Chimento* does ***not*** apply to the analysis of whether a game is legal under § 12-21-2710. Although *Awde* clearly undermines this Court's reasoning, it was not mentioned or addressed in the Opinion.

The Court's Opinion also does not address the fact that the Attorney General,[5] as well as courts at every level of South Carolina's court system,[6] have ***all*** applied ***the dominant factor skill vs. chance test*** to determine the legality of a video game, even ***after*** *Chimento* was decided in 2012. Simply put, *Chimento* has ***never*** been cited for the proposition that ***all*** video games that involve

---

[4] The briefs and other case materials are available through C-Track Public Access link on the main page of the website for the South Carolina Judicial Branch, https://www.sccourts.org/.

[5] *See* Op. S.C. Atty Gen., 2017 WL 4707542 (S.C.A.G. Oct. 11, 2017) (stating that "South Carolina gambling laws" prohibit "games of chance").

[6] *See* **Administrative Law Court**: *S.C. Dep't of Revenue v. Chestnut*, 2021 WL 4822858, at *6 (S.C. Admin. Law Ct. Oct. 8, 2021) (stating that "games of chance [are] prohibited by [S.C. Code Ann.] § 12-21-2710"); **Court of Common Pleas**: *Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *2 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) ("[A]n apparatus is a gambling device where there is anything of value to be won or lost as the result of chance[.]" (internal quotation marks omitted)); **Court of Appeals**: *S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 802 (Ct. App. 2016) ("[T]he Department showed the Products Direct and Gift Surplus machines contained games of chance in violation of section 12–21–2710[.]"); **Supreme Court**: *Richland Cty. Sheriff's Dep't v. Awde*, No. 2014-MO-024, 2014 WL 3016205, at *1 (S.C. July 2, 2014) (affirming magistrate court's finding "that two 'Chess Challenge II' devices before it were games of skill").

consideration and a potential prize or reward are illegal, even if the outcome is determined by the player's skill. Rather, South Carolina courts at every level have ***only*** cited *Chimento* for the entirely unrelated subject of standards for constitutional challenges to statutes.[7] Notably, one of these cases involved a determination of whether a video machine was legal under § 12-21-2710, which the circuit court decided under ***the dominant factor test*** and ***did not*** hold that the machine was illegal under *Chimento* simply because it involved payment of consideration. *See Smith v. S.C. Law Enf't Div.*, 2013 WL 8477943, at *2-3 (S.C. Ct. Com. Pl., Anderson County, Nov. 6, 2013) (finding game illegal under § 12-21-2710 as a device "pertaining to games of chance").

III. The *Chimento* Majority Did Not Overrule Decisions Applying the Dominant Factor Test to Determine Legality Under § 12-21-2710

The Court recognized (Opinion at 9) that its prior decision in *South Carolina Law Enforcement Division v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 99-100, 723 S.E.2d 809, 812 (Ct. App. 2011), held that if skill predominates over chance, no further inquiry is necessary to determine the legality of the machine under § 12-21-2710. *Id.* at 100, 723 S.E.2d at 812. *Speedmaster* clearly held that "the term gambling" as used in § 12-21-2710 "***necessarily encompasses the element of chance***." *Id.* (emphasis added). Because the Speedmaster game was predominantly one of skill, "we conclude the circuit court properly affirmed the magistrate's ruling ***the Speedmaster was not 'used for gambling***.'" *Id.* at 100, 723 S.E.2d at 812 (quoting § 12-21-2710; emphasis added).

Nevertheless, the Court declined to follow *Speedmaster* on the basis that *Chimento* was

[7] **Supreme Court:** *S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) (vagueness); *State v. Legg*, 416 S.C. 9, 14 n.4, 785 S.E.2d 369, 371 n.4 (2016) (facial challenge); *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506–07, 757 S.E.2d 388, 392–93 (2014) (facial challenge). **Court of Appeals:** *Rutter v. City of Columbia Design/Dev. Rev. Comm'n*, 2021 WL 2701549, at *3 (S.C. Ct. App. June 30, 2021) (vagueness). **Circuit Courts:** *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 2014 WL 12692755, at *2 (S.C. Com. Pl., Aiken County, May 29, 2014) (as-applied challenge); *Smith*, 2013 WL 8477943, at *11 (citing vagueness). **Administrative Law Courts:** *Hyndman v. Charleston Cty. Assessor*, 2013 WL 1786476, at *3 (S.C. Admin. Law Ct. Apr. 18, 2013) (as-applied challenge).

decided later, even though it did not explicitly overrule *Speedmaster*. (Opinion at 9.) However, when the Supreme Court overrules precedent, it clearly states that it is doing so. *See, e.g.*, *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) ("We overrule precedent that requires the pleading of special damages and return to the traditional definition of civil conspiracy in this state."); *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 320, 778 S.E.2d 888, 890 (2015) ("We find our Legislature has enacted specific gambling loss statutes as the exclusive remedy for a gambler seeking recovery of losses sustained by illegal gambling. Accordingly, we now overrule our decisions that have implicitly authorized recovery beyond these statutes."); *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000) (stating "we overrule our cases which apply the traditional approach" and listing specific cases in a footnote); *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196–97, 525 S.E.2d 872, 883 (2000) ("We overrule *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), to the extent it permits the destruction of allegedly illegal property without any opportunity for the owner to contest the magistrate's determination of illegality.") *Chimento* did not state or even imply that it was overruling *Speedmaster* or any other case applying the skill vs. chance test. Moreover, the same five Justices *applied* the skill vs. chance test a mere two years later in deciding *Awde*.

CONCLUSION

The dominant factor skill vs. chance test has historically been recognized and applied in South Carolina and is reflected in numerous statutes and court decisions. By erroneously extending the narrow holding in *Chimento* to the context of § 12-21-2710, the Court has effectively eliminated the second element—skill or chance—from the established law. Instead of consideration, chance, and reward, it is now just consideration and reward. But there is nothing whatsoever in *Chimento*—which was expressly limited to application to specific games being played in specific places enumerated in § 16-19-40—to suggest such a sweeping change in the

law. Accordingly, the Court should grant rehearing.

Respectfully submitted,

s/ William W. Wilkins

William W. Wilkins, SC Bar No. 6112
BILLY WILKINS LAW LLC
212 E. Park Ave.
Greenville, SC 29601
Telephone: 864.616.9866
Billy@billywilkinslaw.com

Kirsten E. Small, SC Bar No. 75681
MAYNARD NEXSEN PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
Telephone: 864.370.2211
KSmall@maynardnexsen.com

Christopher J. Murphy, SC Bar No. 8903
MURPHY LAW FIRM, LLC
136 West Richardson Ave.
Summerville, SC 29483
Telephone: 843.832.1120
chris@murphylawfirmllc.com

Peter M. McCoy, Jr., SC Bar No. 73866
MCCOY LAW GROUP, LLC
15 Prioleau Street
Charleston, SC 29401
Telephone: 843.459.8835
peter@mccoylawgrp.com

February 19, 2025
Greenville, South Carolina

Attorneys for Respondents

RECEIVED
Feb 19 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000783

---

1 Dragon's Ascent Video Gaming Machine;
SC Games of Skill, LLC, ... Respondents,

v.

South Carolina Law Enforcement Division, ... Appellant.

PROOF OF SERVICE

I certify that on February 19, 2025, the foregoing **Petition for Rehearing** was served on Appellant South Carolina Law Enforcement Division by emailing a copy to the counsel of record using the primary email address listed in the Attorney Information System, as set forth below:

Adam L. Whitsett, General Counsel
South Carolina Law Enforcement Division
awhitsett@sled.sc.gov

s/Kirsten E. Small
Kirsten E. Small, SC Bar No. 75681