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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Case No.: 2008-CP-44-210

Union County Sheriff's Office..... Respondent,

vs.

Jesse Henderson and Robert Baldwin,

In Re: Willard Farr, owner and Seven Video Machines..... Appellant.

INITIAL BRIEF OF RESPONDENT

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ISSUES ON APPEAL

- I. Did the lower court err in affirming the holding of the Magistrate when the state failed to show at the hearing below that any of the machines contained an illegal game that could in fact be played on the machine as presented to the court?
- II. Did the circuit court err in affirming the holding of the magistrate when the circuit court failed to consider the fact that the state was not able to identify which machine the informant played when she was in the place of business?

STATEMENT OF THE CASE

This matter arises from the seizure of seven video gaming devices from a place of business located at 212 Beltline Road in Union, South Carolina. Union County used a confidential informant who went to the location on Beltline Road with video equipment. The video showed her going to the location, where she was required to ring the doorbell to get in. She paid \$40.00 and played the Magic Balloons game. Prior to leaving the location, she received a payout of \$15.00 based on her remaining credits. The machines were subsequently seized.

After the seizure, the machines were presented to the Union County Magistrate who signed an Order of Destruction/Notice of Post-Seizure Hearing on October 24, 2007 (Order of Destruction). In its Order of Destruction, the Magistrate Court found that the machines were in violation of S.C. Code Ann. § 12-21-2710 (2000) and ordered their destruction. Appellant requested a post-seizure hearing in compliance with the Order of Destruction. A hearing into the matter was convened on June 3, 2008. Judge Crocker affirmed his previous ruling.

Appellant subsequently filed an appeal with the Court of Common Pleas for Union County. A hearing was held before the Honorable John C. Hayes (Judge Hayes), and on September 16, 2008, Judge Hayes entered an order affirming Judge Crocker's ruling. Appellant filed a Rule 59(e) motion on September 26, 2008, which was subsequently denied by order dated September 29, 2008.

This appeal follows.

ARGUMENT

- I. The lower court did not err in affirming the Magistrate's holding because Respondent did not have to show that any of the machines contained an illegal game that could be played as presented to the court.**

Appellant argues that Respondent failed to show the machines in question contained any illegal games at the time of the post- seizure hearing. He submits, therefore, that the lower court erred in affirming the Magistrate's ruling in light of Respondent's inability to access the illegal games. Simply stated, this is not the criteria for determining whether or not a machine is illegal in South Carolina.

At the hearing, SLED Agent Brad Godfrey (Agent Godfrey), who was qualified as an expert in the area of video gaming devices, testified for the State. Tr. p. 26, ll. 11- 23. Agent Godfrey testified that the machines accept multiple denominations, do not give change, and have a power interrupt feature, all of which are characteristics of a gambling device. Tr. P. 27, l. 13- p. 29, l. 15. Agent Godfrey testified that he was not able to demonstrate the Magic Balloons game, which was the game the confidential informant played. However, he explained that the machines could be manipulated such that games can be easily removed. Tr. p. 29, l. 18- p. 30, l. 15. He showed the Court the administrative screen for the machines, and this screen showed that the Magic Balloons game was on the machine, as well as Balloon Show and Sweep 21. Tr. P. 30, ll. 17- 20. Agent Godfrey explained that Magic Balloons is a poker game and that the dominant factor in a player's success in this game is not within his own control. He explained that the game has a free

play feature. The Balloon Show is a blackjack game, and Sweep 21 is similar to a blackjack game. In each of these games, the dominant factor in a player's success is not within his own control and a player's ability to win or lose these games depends on chance. Tr. p. 31, l. 1- p. 33, l. 16.

Respondent also called SLED Agent Wes Bickley (Agent Bickley) to testify. During his testimony, Agent Bickley described a computer printout, which was printed from a CD seized at the scene. Agent Bickley noted that the document specifically mentioned the Magic Balloons game. Tr. p. 45, l. 6.

Respondent's final witness was Deputy Timothy Gaston (Deputy Gaston). Deputy Gaston was present when the machines were seized. Deputy Gaston identified eight photographs, which showed the machines at the time they were seized. The photographs also showed the marked money that the confidential informant used when she played the machines. Tr. p. 41, ll. 3-4.

Furthermore, at the hearing both parties agreed that, of the seven machines involved in the hearing, five were identical, a sixth machine contained Flip 21, and the seventh machine also contained a bingo game and Flip 21, which were accessible at the time of the hearing.

Pursuant to S.C. Code Ann. § 12-21-2712 (2000), Respondent presented the machines to the Magistrate following the seizure. Once Respondent has satisfied its burden of showing the machines are illegal at the pre-seizure hearing, the burden shifts to the machine owner to show why the machines should not be forfeited. "The most due process requires is a post-seizure opportunity for an innocent owner to come forward and show, if

he can, why the res should not be forfeited and disposed of as provided for by law.” State v. 192 Coin-Operated Video Games Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). See also Mims Amusement Co. v. SLED, 366 S.C. 141, 621 S.E.2d 344 (2005) (finding that although it may later be shown in a post-seizure hearing to be lawful, a machine found to be in violation of section 12-21-2710 is contraband per se at the moment of seizure). In other words, it is not whether or not the illegal game can be accessed during the post-seizure hearing, but whether or not the machines contained the illegal games at the time of seizure. The evidence in this case is overwhelming that the machines in question were illegal at the time of seizure. Appellant offered no witnesses or evidence at the post-seizure hearing to indicate otherwise.

In the present case, the machines were working machines, although some of the games that could be operated at the time the machines were seized were not accessible at the time of the hearing. As the video introduced into evidence showed, the Magic Balloons game, which the irrefutable evidence indicates is a poker game, was on the machines. Appellant argues that because the illegal games could not be played on all of the machines, the Court erred in finding they were illegal. The Supreme Court addressed this issue in State v. 192, which, contrary to Appellant’s argument, is applicable to this case. The appellant asserted in State v. 192 that a machine could not be illegal unless it is fully operational. This Court specifically stated that gaming devices need not be operational or in complete repair before they are subject to seizure and destruction. In addition, the Court held that “component parts, subassemblies, and dies and mold used to make such parts are also subject to seizure and destruction.” Id.

In the present case, the machines were operational when they were available to customers. If appellants were allowed to prevail under a theory that the machines are legal because the games could not be accessed at the time of the hearing, then video poker machines would be legal as long as they were password protected or somehow configured or manipulated so they could not be examined in Court. This certainly is not the intent of the Legislature. Moreover, the appropriate time for analysis is when the machines are seized, and, in this case, the machines contained illegal games at the time they were seized. See Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004).

Therefore, Respondent submits that the lower court correctly affirmed the Magistrate Court's holding that the machines were illegal for the following reasons: (1) they contained poker and blackjack; (2) they contained games of chance; (3) they contained games with a free play feature; and (4) they were used for gambling. Both the confidential informant and Agent Godfrey testified that the machines had the Magic Balloons game, which both stated was a poker game. Agent Godfrey also stated that the machines contained Balloon Show, a blackjack game, and Sweep 21, which is similar to blackjack. The uncontradicted evidence was that the machines have a free play feature. The lower court properly affirmed the ruling that these machines were illegal because, at the time of seizure, they contained games that section 12-21-2710 specifically enumerates as illegal, and because they had a free play feature.

II. The lower court did not err in affirming the Magistrate's holding because the court did not fail to consider the fact that Respondent was not able to identify which machine the informant played when she was in the place of business.

The informant testified at the hearing that she entered the business at 212 Beltline Road where she was required to ring a doorbell to enter. Tr. p. 11, ll. 18- 20. She testified that she paid forty (\$40.00) dollars and played the Magic Balloons game. Tr. p. 12, l. 8- p. 13, l. 12.. The informant and Agent Godfrey testified that Magic Balloons is a poker game. Such games are prohibited under section 12- 21- 2710. The informant further testified that she cashed out her remaining credits for fifteen (\$15.00) dollars. Tr. p. 19- p. 14, l. 4. In addition, the informant wore a video device on her person and recorded herself playing Magic Balloons. Other evidence before the lower court included the computer printout that Agent Bickley testified to, which referenced Magic Balloons, and Agent Godfrey's demonstration that he could access a screen on the machines that listed Magic Balloons as one of the featured games. Additionally, both parties agreed at the hearing that the machines were identical with the exception of two of the machines having additional games. One machine had Flip 21, and another contained a bingo game and Flip 21, in addition to the games that all seven had in common.

Respondent did not need to identify the specific machine the informant played because the evidence, coupled with Appellant's concession as to the similarities of the machines, was overwhelming that all of the machines seized contained illegal games at the time of seizure and were contraband per se.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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January 28, 2009