

Nos. 1050625 & 1050857
(Consolidated)

IN THE SUPREME COURT OF ALABAMA

DAVID BARBER, IN HIS CAPACITY AS DISTRICT ATTORNEY
OF JEFFERSON COUNTY, ALABAMA,
Appellant,

v.

JEFFERSON COUNTY RACING ASSOCIATION, INC. D/B/A
THE BIRMINGHAM RACE COURSE, ET AL.
Appellees.

DAVID BARBER, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY
FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA,
Appellant,

v.

JEFFERSON COUNTY RACING ASSOCIATION, INC. D/B/A
THE BIRMINGHAM RACE COURSE, ET AL.
Appellees.

Appeal from the
Circuit Court of Jefferson County, Alabama
Civil Action No. CV-05-7684

**BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT
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STATEMENT REGARDING ORAL ARGUMENT

Amicus does not request oral argument in this case.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONCLUDING THAT THE VIDEO MACHINE OPERATION AT THE BIRMINGHAM RACE COURSE IS A "SWEEPSTAKES" RATHER THAN A "LOTTERY."	4
A. Principles of Interpretation	4
B. The trial court erred in concluding that no chance is involved in the video machine operation.	7
C. The trial court erred in concluding that no consideration was provided in exchange for the Sweepstakes entries.	10
(1) Plaintiffs promote the operation as gambling	11
(2) Sweepstakes customers consider the activity to be gambling	12
(3) The appearance and design of the operation purposefully portray gambling ..	14
(4) The existence of consideration is implied by the circumstances.	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Bibb v. Pope, 43 Ala. 190 (Ala. 1869) 17

Billingsley v. State, 96 Ala. 114,
11 So. 408 (1892)..... 18, 19

Grimes v. State, 235 Ala. 192,
178 So. 73 (1938)..... 4

Jefferson County Racing Association v. Hale,
(Jefferson Cir. Jan. 31, 2006)..... *passim*

Marcus v. State, 89 Ala. 23,
8 So. 155 (1890)..... 17, 18

Op. Att’y Gen. 99-28 (1998) 16

Opinion of the Justices No. 83,
249 Ala. 516, 31 So. 2d 753 (Ala. 1947)..... 6

Opinion of the Justices No. 277,
397 So. 2d 546, 547 (Ala. 1981)..... 6

Opinion of the Justices No. 373,
795 So. 2d 630 (Ala. 2001)..... 5

Yellow-Stone Kit v. State,
88 Ala. 196 7 So. 338 (1890)..... 6

CONSTITUTIONAL PROVISIONS

Ala. Const. of 1901, Art. IV, § 65 2, 4, 5, 19

STATUTES

Ala. Code of 1975, § 8-19D-1(4) 4, 10

Ala. Code of 1975, § 13A-12-20 4, 8, 9

STATEMENT OF THE ISSUE

Whether the video machine operation at the Birmingham Race Course constitutes an illegal lottery under Alabama law.

SUMMARY OF THE ARGUMENT

Alabama law forbids lotteries or "any scheme in the nature of a lottery." Art. IV, § 65, Ala. Const. 1901. The Birmingham Race Course ("BRC") has installed 1,300 video gambling machines designed to simulate the Las Vegas-style gambling experience. The court below ("the trial court") concluded that these machines do not constitute a violation of Alabama's anti-gambling laws, and in particular that they do not violate the anti-lottery provision of the Alabama Constitution.

The trial court erred in reaching this conclusion because the gambling operation at the BRC has all of the elements of a lottery: prizes, chance, and consideration. There can be no doubt that chance exists and predominates in the game because skill plays no part in whether a customer wins a prize. Consideration becomes apparent when the court looks at the substance of the entire transaction at issue rather than the smokescreen designed to hide the true nature of the gambling activity.

The trial court's own findings of fact demonstrate that the BRC operation is contrary to Alabama law and was properly thwarted by the Jefferson Count Sheriff.

Accordingly, the decision should be reversed and the cause remanded for issuance of an injunction to stop the BRC's illegal operation.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONCLUDING THAT THE VIDEO MACHINE OPERATION AT THE BIRMINGHAM RACE COURSE IS A "SWEEPSTAKES" RATHER THAN A "LOTTERY."

Alabama law forbids lotteries but permits sweepstakes operations within the state. Compare Art. IV, § 65, Ala. Const. 1901, with § 8-19D-1(4), Ala. Code 1975. The key difference between the two is that a lottery involves payment of consideration, *i.e.*, payment of something of value, for a prize; whereas, no consideration is present in a sweepstakes. Contrary to the trial court's ruling, the Quincy's Sweepstakes operation at the BRC ("the operation") constitutes an illegal lottery.

This Court has defined a "lottery" as "(1) [a] prize, (2) awarded by chance, (3) for consideration." *Grimes v. State*, 235 Ala. 192, 193, 178 So. 73, 74 (1938); *see also*, § 13A-12-20 (6), Ala. Code 1975. It is undisputed that the operation at issue awards prizes; thus, the only elements in issue are chance and consideration.

A. Principles of Interpretation

The fundamental flaw in the trial court's analysis which causes it to reach erroneous conclusions of law is an

overly narrow approach to interpreting Alabama's anti-lottery provisions.

Article IV, § 65 of the Alabama Constitution states in pertinent part that, "The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in *any scheme in the nature of a lottery*" (Emphasis added). The "any scheme" language in section 65 indicates that this is a broad prohibition, as this Court has repeatedly affirmed. *See, e.g., Opinion of the Justices No. 373, 795 So. 2d 630, 640 (Ala. 2001)* ("the Constitution's broad prohibition on all lotteries is evident because the Constitution explicitly condemns 'any scheme' containing elements that would make the scheme resemble a lottery.").

Time and again this Court has emphasized that Section 65 is to be interpreted broadly so as to prevent "evasion or subterfuge" of the ban on lotteries.

"In *Try-Me Bottling Co. . . .* this court expressly called attention to the broad conception set forth in § 65 showing that the prohibition is not only against lotteries but also *against any scheme in the nature of a lottery. The very purpose of this broad declaration was to put a ban on any effort*

at evasion or subterfuge. Whatever may be the view of the courts of other states on the subject of lotteries, [these] cases show that this court had adopted a broad view of the meaning of the constitutional provision which does not admit of quibbling or narrow construction."

Opinion of the Justices No. 83, 249 Ala. 516, 518, 31 So.2d 753, 755 (Ala. 1947) (emphasis added). Sometimes this broad approach requires looking to what is happening behind the veneer of a seemingly legal activity.

"[T]he courts have shown a general disposition to bring within the term 'lottery' every species of gaming, involving a disposition of prizes by lot or chance, and which comes within the mischief to be remedied regarding always the substance and not the semblance of things, so as to prevent evasions of the law"

Opinion of the Justices No. 277, 397 So. 2d 546, 547 (Ala. 1981) (quoting Yellow-Stone Kit v. State, 88 Ala. 196, 200, 7 So. 338, 339 (1890) (emphasis added)).

Instead of applying the law broadly by looking at the substance of the operation to prevent subterfuge, the trial court applied the law to the facts in as narrow a fashion as possible, with the result being a technical victory for Plaintiffs. The law and common sense dictate the opposite result.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT NO CHANCE IS INVOLVED IN THE VIDEO MACHINE OPERATION.

The trial court concluded that because "the evidence is undisputed that the outcomes of the Sweepstakes entries are predetermined before they are given to the purchasers of Internet time" and "[a]fter the purchase, there is no contest of chance or future contingent event impacting whether the customer wins or loses," there is no element of chance involved in the transaction. *Jefferson County Racing Association v. Hale*, slip op. 1874, 1886 (Jefferson Cir. Jan. 31, 2006). The court erred, however, because it failed to evaluate the entire transaction in looking for chance.

It is technically accurate that, standing alone, the electronic reader machines ("reader machines") do not perform any function involving chance because the MegaSweeps entry tickets are already fixed to be winners or losers before the customer puts the ticket into a reader machine. When a customer purchases Internet time and receives MegaSweeps entries, however, chance occurs at this point of sale.

"'Chance' came to be defined as a lack of control over events or the absence of 'controllable causation'--'the

opposite of intention.'" *Opinion of the Justices No. 373*, 795 So. 2d at 635 (quoting *Black's Law Dictionary* 231 (6th ed. 1990)). Whether a customer receives winning Sweepstakes entries is determined entirely by a "fortuitous method," not through any sort of skill possessed by the customer. Section 13A-12-20(6)(b), Ala. Code 1975. Purchasers of Sweepstakes entries win only by chance.

The only difference between this activity and a traditional lottery is how the winning ticket is revealed. In a traditional lottery, the winning ticket is determined by a drawing held sometime after the sale of tickets. In the Sweepstakes, the winning tickets are *determined* at the point of sale when the customer receives them, but they are not *revealed* until a customer places the entries into a reader machine. Chance is not just the dominant factor in whether a customer wins a prize, it is the *only* factor. The fact that "the Readers are 'dumb terminals' that only read the electronic entries" simply underscores the fact that there is no skill involved in this activity and that winning entries are determined by chance. *Hale*, slip op. at 1887.

The trial court arbitrarily focused potential gambling activity on whether the reader machines choose the winning entries rather than broadening its scope to include the entire transaction as part of the gambling activity. Yet, there is nothing in the definition of a lottery which requires that *determination* of a winning entry and *revelation* of a winning entry must occur at exactly the same time. See § 13A-12-20(6), Ala. Code 1975. Likewise, the definition of "gambling" does not preclude such a separation. In part, a gambler "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence," Section 13A-12-20(4), Ala. Code 1975. In this case, the future event not under the customers' control is whether they will receive one or more winning entries after purchasing Internet time. In short, Sweepstakes winners are awarded their cash prizes by chance and not by skill--regardless of whether the reader machines perform the action of determining the winning and losing tickets.

In fact, the trial court's own conclusions of law concede that the element of chance exists in the operation. The trial court concluded that "the Quincy's Sweepstakes as

represented to this Court during trial is a lawful *sweepstakes promotion* and is not illegal under Alabama law." *Hale*, slip op. at 1889 (emphasis added). Alabama law defines a "sweepstakes" as "[a] legal contest or game where anything of value is distributed by lot or chance." Section 8-19D-1(4), Ala. Code 1975. Thus, by definition, the operation involves the element of chance in awarding of its prizes. The trial court committed reversible error in concluding otherwise.

C. THE TRIAL COURT ERRED IN CONCLUDING THAT NO CONSIDERATION WAS PROVIDED IN EXCHANGE FOR THE SWEEPSTAKES ENTRIES.

The trial court concluded "as a matter of law that the element of consideration is lacking in the Quincy's Sweepstakes" because "[n]either the Sweepstakes system nor the operations were designed to impose, and did not impose, a charge on customers for the entries they received in connection with their purchase of Internet time." *Hale*, slip op. at 1886. This conclusion overlooks how Plaintiffs treat the operation, how Sweepstakes customers treat the operation, and the appearance and design of the operation. When considered as a whole, these facts lead to the conclusion that customers do, in fact, give consideration

in exchange for chances to win prizes in the Sweepstakes, which makes the operation an illegal lottery.

(1) Plaintiffs promote the operation as gambling.

The findings of the trial court leave no doubt that Plaintiffs intend the Sweepstakes operation to be a gambling operation. The trial court found that Plaintiffs, by "advertising through television commercials and billboards promoted playing MegaSweeps as an alternative to attending *gambling establishments* at Greentrack, or Philadelphia and Biloxi, Mississippi." *Hale*, slip op. at 1887 (emphasis added). Obviously, if the operation was being advertised as an alternative to other gambling establishments, it is considered a gambling establishment by its owners and is promoted that way to customers.

Given the way the operation has been advertised, it should not be surprising that the trial court concluded that "the plaintiffs undertook this promotion to attract customers who wanted to gamble" *Id.* The way to attract customers who want to gamble is to have a gambling operation, even if one calls it by another name as Plaintiffs did here in order to attempt to evade Alabama law.

Based on the evidence at trial, it is clear that Plaintiffs intend and offer the operation to customers as a gambling activity.

(2) Sweepstakes customers consider the activity to be gambling.

The behavior of the customers reveals even more starkly the true nature of the activity in issue. The way the operation works for a customer is that he or she buys Internet time from the BRC and receives Sweepstakes entries at the same time. Every time a customer purchases additional Internet time, he or she receives more MegaSweeps entries. There are three ways for a customer to determine whether he holds a winning Sweepstakes entry: "[1] by accessing a website remotely, [2] by calling a toll-free telephone number, or [3] by going to an electronic Reader." *Id.* at 1878.

The trial court concluded that because the customers buy Internet time and receive Sweepstakes entries without incurring an additional charge, the Sweepstakes entries received by the customers are "a gratuity as opposed to a purchase for consideration." *Id.* at 1886. If this conclusion is correct, one would expect customers to place their primary focus on the service which they purchased,

i.e., Internet time. The opposite was, in fact, actually the case: customers spent vastly more time at the reader machines than at the Internet terminals.

"The evidence shows that during the brief period the plaintiffs were operating the promotion, few customers were using the CyberCenter; however they were lined up at all hours to use the Readers. It is obvious that most of the customers are more interested in getting MegaSweeps entries than they are in using the CyberCenter."

Hale, slip op. at 1879; see also *id.* at 1885 ("usage of the CyberCenter was scant during the six days of operation"). In other words, in the minds of the customers, they were not purchasing Internet time, but rather were purchasing chances to win cash prizes through the Sweepstakes.

That this is the case is reinforced by the fact that the vast majority of customers did not use the Internet time or the free telephone number to determine whether they held winning Sweepstakes entries. "The most popular way to learn the result of an entry is through the use of the more than 1,300 electronic Readers that display winning and losing entries." *Id.* at 1879. So, the vast majority of customers do not use their Internet time at all but they spend all kinds of time at the reader machines to discover whether they won cash prizes with their MegaSweeps entries.

The trial court discounts these facts with the observation that, "What the customers of the Quincy's Sweepstakes do with the Internet time they have purchased does not contradict the fact that they actually purchased a valuable service or product." *Id.* at 1886. While this may be true, it sidesteps the issue of whether this service is what customers are actually intending to buy at the point of sale. The trial court selects Internet time as the service that customers are purchasing, which thus allows the Sweepstakes entries to be categorized as a gratuity, but the behavior of the customers suggests that the transaction is the other way around, *i.e.*, customers are purchasing Sweepstakes entries and are receiving Internet time as a bonus that some may use, but most do not.

(3) The appearance and design of the operation purposefully portray gambling.

The intentional appearance and design of the operation create the atmosphere for the gambling activity. The trial court's findings leave no doubt about what kind of atmosphere exists at the facility and how the reader machines are designed to look. "The demonstration and other evidence makes it clear to the court that these Readers are designed and arranged so that they look and

sound like slot machines at a gambling casino." *Id.* at 1879. "[The Readers] look, sound and act like a gambling machine" *Id.* "[I]t is clear that the Sweepstakes promotion . . . appears to be a lottery, . . . it appears to be gambling, . . . [and] the Readers appear to be slot machines," *Id.* at 1887. "The operation looks and sounds like a gambling casino" *Id.*

For the trial court, the "sham" aspects of the operation underscored its finding that "the plaintiffs have taken advantage of weaknesses in the law" *Id.* at 1887. However, given that the evidence shows Plaintiffs intended the operation to be like a gambling facility and the customers treated the operation as a gambling activity, the "sham" aspects of the operation actually indicate that the operation **is** a gambling establishment.

The methods of obtaining MegaSweeps entries further support the idea that customers do give consideration in exchange for chances to win a prize, and not for Internet time. Sweepstakes entries are obtained either by purchasing Internet time or by mailing in a request to the BRC for a free entry. *Id.* at 1886. The trial court makes much of the fact that MegaSweeps entries can be obtained

for free by mail, favorably comparing it to the situation in *Op. Att'y Gen.* 99-28 (1998), in which the Attorney General determined that a scratch and win game piece with the purchase of a pre-paid phone card did not constitute an illegal lottery because the game pieces were free to consumers at certain retailers or obtained by mailing in a self-addressed, stamped envelope to the company.

However, this comparison ignores the significant disparity between the number of MegaSweeps entries a customer obtains with an on-site purchase versus the number of entries a mail-in customer receives. By mailing in a request, a customer will receive only *one* free MegaSweeps entry. *Hale*, slip op. at 1880, 1886. In contrast, a customer at the BRC receives *100 MegaSweeps entries* for each \$1.00 spent obtaining 4 minutes of Internet time. *Id.* at 1878. In other words, two 39-cent stamps (one to send away for the entry, one to receive it) will yield only one Sweepstakes entry, while \$1.00 spent on-site will yield 100 entries. The disparity is so large as to make the mail-in offer a meaningless promotion that will be used by almost no one. It is obvious that the focus of the operation is on the purchasing of MegaSweeps entries at the facility.

(4) The existence of consideration is implied by the circumstances.

Given that Plaintiffs advertise and treat the operation as a gambling operation, that the customers only show interest in the Sweepstakes entries rather than the Internet time and they use reader machines designed to look and feel like casino-style machines, and that the methods of distributing the Sweepstakes entries overwhelmingly favor their purchase at the BRC, it is clear that the transaction which occurs at the point of sale is an exchange of money for Sweepstakes entries. The Internet time is in reality a smokescreen designed to hide the true nature of the transaction.

"[W]hat it is illegal to do directly, is also illegal if done indirectly." *Bibb v. Pope*, 43 Ala. 190, 1869 WL 499, *6 (Ala. 1869). In *Marcus v. State*, 89 Ala. 23, 8 So. 155 (1890), the facts showed that defendant, a butcher by trade, did not have a license to sell alcohol, yet he delivered to a witness a certain amount of whisky and the witness paid the defendant 35 cents for it. As a result, the defendant was tried and convicted of selling alcohol without a license. On appeal, the defendant contended that the charge could not be sustained because he claimed that

he "sold some beef to [the witness], and gave him whiskey without consideration." *Id.* at 155. This Court rejected the argument, finding that "the undisputed facts clearly showed the transaction to be a sale of the whisky, and not the beef" *Id.* This Court agreed with the trial court that "the pretended sale of the beef [was] a device and a sham to cover the actual sale of the whisky." *Id.* The Court examined the conduct of the parties to reach this conclusion. *See Marcus*, 8 So. at 156.

Similarly, in *Billingsley v. State*, 96 Ala. 114, 11 So. 408 (1892), a defendant had sold a customer liquor without a license, but through a round-about transaction. The customer bought "a little round pasteboard check, with the figures '25' on it, for which he paid [the defendant] 25 cents; . . . the witness then gave the check back to the defendant, and the defendant gave the witness a bucket of lager beer." *Id.* at 408. This Court unequivocally concluded:

"This transaction was a sale of the beer by the defendant. Obviously, the beer was delivered for the money. The byplay with the check between the receipt of the money by the defendant and his delivery of the beer to the witness cannot be permitted to hide the true nature of the transaction. It was a clumsy device, intended to cover up an actual sale. *The law disregards such*

a mere sham or subterfuge, and looks to the result which was plainly intended and accomplished by the parties."

Id. (emphasis added).

Just as in *Marcus*, Plaintiffs contend that the consideration paid by customers was for something other than the Sweepstakes entries, but the behavior of the parties and the nature of the operation indicate otherwise. Just as in *Billingsley*, Plaintiffs have concocted a scheme "intended to cover up the actual sale" involved so as to avoid the prohibition on lotteries in Art. IV, § 65, Ala. Const. 1901.

Plaintiffs have attempted indirectly to establish what Alabama law forbids them to do directly--maintain a lottery scheme--by using a sham transaction to disguise the illegal activity. As this Court stated in *Billingsley*, "[t]he law disregards such a mere sham or subterfuge, and looks to the result which was plainly intended and accomplished by the parties." *Billingsley*, 96 Ala. at 114, 11 So. at 408.

In this case, the customers clearly want to buy chances to win cash prizes in the MegaSweeps game, and Plaintiffs clearly want the customers to buy MegaSweeps entries. The Internet time tack-on is a device intended to shield

Plaintiffs from this illegal activity, and the trial court perpetuated the sham through its decision.

The trial court should have examined every facet of the operation in light of the broad prohibition in Alabama law against "any scheme in the nature of a lottery," Art. IV, § 65, Ala. Const. 1901, and ruled that the operation is indeed a lottery because it (1) awards prizes, (2) by chance, (3) for consideration. Ruling otherwise perpetuates the sham and enables a blatant evasion of the law.

CONCLUSION

The trial court erred in concluding that the Quincy's Sweepstakes at the BRC is a lawful sweepstakes and is not an illegal lottery scheme under Alabama law. This Court should reverse the trial court's judgment and remand for imposition of an injunction against Plaintiffs' illegal gambling operation.

Respectfully submitted this 1st day of June, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 31(b), Ala. R. App. P., I have this date served a copy of the above and foregoing *Brief of Amicus Curiae* on the office of counsel for each party separately represented by placing a copy of same in the United States Mail, postage prepaid and addressed to the following mail addresses on this 1st day of June, 2006:

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