

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

STATE OF SOUTH CAROLINA,

VS.

VIDEO GAMING MACHINE NUMBER 0399.

IN THE MAGISTRATES COURT

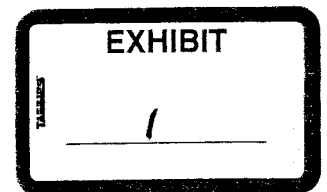
**MEMORANDUM IN SUPPORT OF THE
STATE'S SEIZURE OF VIDEO GAMING
MACHINE NUMBER 0399**

COMES NOW THE STATE OF SOUTH CAROLINA and by and through the undersigned counsel, respectfully submits the following memorandum to be considered along with, and in addition to, the testimony and argument presented by the State at the hearing conducted to determine whether the above-referenced seized machine is prohibited by law.

BACKGROUND

Products Direct, LLC ("PD") is a Georgia limited liability company which is seeking to promote and advertise the sale of certain products using its website. PD is represented by the law firm of Moore, Taylor & Thomas, P.A. PD wishes to use a certain video gaming machine, or "sweepstakes terminal" (as the machine is referred to by PD), in a sweepstakes to promote and advertise products which are listed on the PD website. This sweepstakes and promotion is to take place in Greenville County at one or more establishments which are licensed to sell beer or wine under Title 61 of the South Carolina Code. See S.C. Code Ann §§ 61-2-10-12-70.

PD placed the above-referenced machine into use to promote its products through the sweepstakes. The State has determined that the machine is the type of machine prohibited by S.C. Code Ann. § 12-21-2710 ("Types of Machines and Devices Prohibited by Law; Penalties"). As such, the machine was seized pursuant to S.C. Code Ann. § 12-21-2712 and brought before this court for a determination of whether or not it violates § 12-21-2710, or any other law of the State. If the court determines that the machine does violate § 12-21-2710 it will be destroyed



pursuant to § 12-21-2712.

Before the machine is destroyed pursuant to § 12-21-2712, the owner is afforded a “post-seizure opportunity . . . ‘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 Game Machines, 338 S.C. 176, 197 (2000) (quoting Moore v. Timmerman, 276 S.C. 104, 109, (1981)). The owner of this machine has taken the opportunity to come forward, thus, the narrow issue before the court is whether or not the machine which PD is using in its sweepstakes is a “type[] of machine[] [or] device[] prohibited by law” under § 12-21-2710 and, if so, is there an exception to § 12-21-2710 which allows the machine to be used legally. The State respectfully submits that the machine is prohibited by § 12-21-2710, and there is no applicable exception which would allow the machine to be used legally.

DISCUSSION

Section 12-21-2710 outlaws certain “types of machines and devices” and reads, in full:

It 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 or, 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 nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as 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.

S.C. Code Ann. § 12-21-2710. The State has determined, based on its examination of the machine, that the machine falls into the types of machines and devices prohibited by § 12-21-2710. Moreover, the State is informed and believes that PD will likely concede that the machine is prohibited by § 12-21-2710.

Absent a concession by PD that the machine is prohibited by § 12-21-2710, an analysis of the machine clearly reveals that the machine is indeed prohibited by § 12-21-2710. First, the machine is a “video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value” in which “is deposited a coin or thing of value” for the play of “poker, blackjack, keno, lotto, bingo or craps.” Id. Secondly, the machine is a “device” which “pertain[s] to games of chance of whatever name or kind.” Id.

Upon information and belief, PD will rely on S.C. Code Ann. § 61-4-580 which, according to PD, contains an “exception” to the prohibition contained in § 12-21-2710. The proposition that § 61-4-580 contains an exception to the prohibitions of § 12-21-2710 is misguided for three reasons. First, on its face, § 61-4-580 prohibits holders of beer and wine licenses from “permit[ting] any act . . . which constitutes a crime under the laws of this State.” Id. at § 61-4-580(5). Thus, the violation of § 12-21-2710, a criminal law, is not permitted under § 61-4-580. Secondly, the legislative history of both statutes makes it clear that had the General Assembly intended to make § 61-4-580(3) an exception to § 12-21-2710, it certainly would have done so. Finally, a criminal prohibition cannot be superseded by a civil licensing statute without express language from the General Assembly.

I. S.C. CODE ANN. § 61-4-580 PROHIBITS LICENSE-HOLDERS FROM PERMITTING CRIMINAL ACTIVITY ON THE PREMISES COVERED BY THE HOLDER’S PERMIT.

PD points to § 61-4-580(3) as the exception to the prohibitions contained in § 12-21-

2710. As such, PD has designed its sweepstakes, and the machines at issue, to comply strictly with the following guidelines contained in § 61-4-580(3):

No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit: . . .

(3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

Assuming, but not conceding the point, that the sweepstakes and machine which PD have designed both fit perfectly within the bounds set by § 61-4-580(3), and are considered a "legitimate promotion" as discussed by the South Carolina Supreme Court in Sun Light Prepaid Phonecard Co. v. State of South Carolina, 360 S.C. 49, 54-56 (2004), the machines would still be illegal under § 12-21-2710.

If PD relies exclusively on § 61-4-580(3), it overlooks the critical provision contained in § 61-4-580(5). It is instructive to look at the statute in its entirety. The complete text of § 61-4-580 reads as follows:

No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:

(1) sell beer or wine to a person under twenty-one years of age;

- (2) sell beer or wine to an intoxicated person;
- (3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:
 - (a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
 - (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and
 - (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.
- (4) permit lewd, immoral, or improper entertainment, conduct, or practices. This includes, but is not limited to, entertainment, conduct, or practices where a person is in a state of undress so as to expose the human male or female genitals, pubic area, or buttocks cavity with less than a full opaque covering;
- (5) **permit any act**, the commission of which tends to create a public nuisance or **which constitutes a crime under the laws of this State**; or
- (6) sell, offer for sale, or possess any beverage or alcoholic liquors the sale or possession of which is prohibited on the licensed premises under the law of this State; or
- (7) conduct, operate, organize, promote, advertise, run, or participate in a “drinking contest” or “drinking game”. For purposes of this item, “drinking contest” or “drinking game” includes, but is not limited to, a contest, game, event, or other endeavor which encourages or promotes the consumption of beer or wine by participants at extraordinary speed or in increased quantities or in more potent form. “Drinking contest” or “drinking game” does not include a contest, game, event, or endeavor in which beer or wine is not used or consumed by participants as part of the contest, game, event, or endeavor, but instead is used solely as a reward or prize. Selling beer or wine in the regular course of business is not considered a violation of this section.

A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit.

S.C. Code Ann. § 61-4-580 (emphasis added). In other words, according to § 61-4-580(5), a

permittee may not do or permit any criminal act. Clearly, if PD concedes that its machine is a prohibited machine under the language of § 12-21-2710, then if “any person keep[s] on his premises or operate[s] or permit[s] to be kept on his premises or operated within this State . . .” one of the machines at issue, a crime has been or is being committed. If a crime is being committed, the permittee is in violation of § 61-4-580(5).

The South Carolina Supreme Court has held that:

[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning.

Ward v. West Oil Co., Inc., 387 S.C. 268, 273 (2010) (internal citations omitted). Sections 580(3) and 580(5) are not contradictory and do not require any further analysis if the legislative intent can “be reasonably discovered in the language used.” Id. In this case, the legislative intent is clear, as long an activity does not constitute a crime, or violate any other provision of § 61-4-580, permittees are allowed to conduct the activities outlined in § 580(3). In the current case, the machine clearly violates § 12-21-2710 and thus, is prohibited, not allowed, by § 61-4-580.

II. HAD THE GENERAL ASSEMBLY INTENDED FOR § 61-4-580(3) TO BE AN EXCEPTION TO § 12-21-2710 IT COULD HAVE EASILY DONE SO.

Even assuming that the statutes at issue are not clear on their face, the legislative history of the two statutes at issue makes it clear that if the General Assembly had intended for § 61-4-580(3) to be an exception to the prohibitions of § 12-21-2710 it had ample opportunity to do so. The current versions of the two statutes at issue were drafted, and signed into law, during a time when issues involving video poker and other forms of electronic gaming were being hotly debated in the General Assembly and among the public. See generally Harriet P. Luttrell, Video Poker: A Survey of Recent Developments Surrounding the Legal & Moral Debate, 51 S.C. L.

Rev. 1065 (Summer 2000).

The General Assembly passed § 61-4-580(3) in its current form on May 26, 1999 and it was signed by the Governor on June 1, 1999. See 1999 South Carolina Laws Act 52 (H.B. 3951), *available at*, http://www.scstatehouse.gov/sess113_1999-2000/bills/3951.doc (last visited March 21, 2011). A month after the passage and approval of § 61-4-580(3), the General Assembly passed, and the Governor signed the current version of § 12-21-2710 (on July 1 & 2, 1999 respectively). See 1999 South Carolina Laws Act 125 (H.B. 3834), *available at*, http://www.scstatehouse.gov/sess113_1999-2000/bills/3834.doc (last visited March 21, 2011).

PD's contention that § 61-4-580 contains an "exception" to § 12-21-2710 fails completely on the merits because, if that were true, the exception would have been passed before the statute that it was an exception to. This conclusion is patently illogical. Moreover, if the General Assembly had intended for § 61-4-580(3) to be an exception to § 12-21-2710 it could have expressly stated so when it passed § 12-21-2710. Act 125, which contained the new language of § 12-21-2710, is over 65 pages long and contains over 24,000 words. Had the General Assembly intended for § 61-4-580(3) to be an exception to § 12-21-2710 it certainly could have added one more sentence to the 65 page bill.

III. A CIVIL LICENSING STATUTE CANNOT PROVIDE AN EXCEPTION TO A CRIMINAL PROHIBITION ABSENT SPECIFIC STATUTORY LANGUAGE.

At the most basic level, § 12-21-2710 is a criminal statute which mandates that any person who violates its provisions "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." Id. Conversely, § 61-4-580 is a civil statute which regulates a certain type of business. A violation of § 61-4-580 "is a ground for the revocation or suspension of the holder's permit." Id.


Section § 61-4-580 is part of a body of regulations which establish whether or not an individual or business may hold a permit to sell beer or wine, and establish what guidelines must be followed by permittees. That section only applies to those permittees or prospective permittees. Section § 12-21-2710 applies to every individual and business in the state, and forbids a specific activity under threat of criminal prosecution. A determination that § 61-4-580(3) is an exception to § 12-21-2710 would lead to a result which specifically exempts those with beer or wine permits from following a criminal law which all others must follow. This result would give these beer or wine permittees a status as a protected class who can use the mere fact that they hold permits under Title 61 as an excuse and justification for breaking a law that everyone else must follow.

Any conflict of laws or statutory preemption issues relating to the interplay of criminal prohibitions and civil regulations must be analyzed in light of greater public policy concerns. In the end, equal protection under the law must also mean equal application of the law. Absent specific legislative language, § 61-4-580(3) is not an exception to § 12-21-2710.

CONCLUSION

For the foregoing reasons, the court should rule that the machines at issue are those types of machines and devices which are prohibited by § 12-21-2710 and that § 61-4-580 does not offer an exception to this prohibition.

Respectfully submitted,


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Thirteenth Judicial Circuit

March 25, 2011
Greenville, South Carolina