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Commonwealth v. Breakaway Sports Lounge

COMMONWEALTH OF PENNSYLVANIA v. BREAKAWAY SPORTS LOUNGE, Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch

*18 Pa. C.S.A. § 5513(a); Gambling Devices Per Se; Skill/Chance, Reward*

1. In order to sustain a conviction under 18 Pa. C.S.A. § 5513(a), there must be evidence that the machines were gambling devices per se.
2. Gambling devices per se could be established by a showing beyond a reasonable doubt that consideration was received, a result determined by chance rather than skill, and the player received some reward for his efforts.
3. The mere fact that a machine involves a substantial element of chance is insufficient to find a machine a gambling device per se.
4. While skill plays a role in the outcome of the game, there could be no doubt that chance ultimately determines the outcome because chance determines the positions of the winning symbols and chance determines whether the player will achieve a successful winning play.
5. The Commonwealth must show a player could win an amount of equal or greater value than he placed into the machine.
6. The potential for reward does not satisfy the Commonwealth's burden of proof.
7. There is no evidence that either of the two machines were fixed with a "knock-down" button which enabled players to knock-off free games for cash.

Appearances:

John F. Nelson, Esq., *District Attorney*

Keith A. Noll, Esq., *Counsel for Defendant*

OPINION

Walker, P.J., March 28, 2003

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Factual Summary

On or about March 7, 2002, Officer H.B. Royer of the Pennsylvania State Police Bureau of Liquor Enforcement entered the premises of the Breakaway Sports Lounge, Inc., to conduct an open inspection. Breakaway Sports Lounge, Inc., is owned and operated by Defendant Paul Adolini. Officer Royer, along with his partner, Officer J.T. Botchie, conducted the inspection and found two New Fruit Bonus 96 video slot machines on the premises set up for play.

Both machines contained a ticket dispensing apparatus that dispensed sequentially numbered tickets. These sequentially numbered tickets aided the club owner (Mr. Adolini) and the owner of the machines (Gsell Vending) in keeping track of the tickets to ensure that the club owner would only redeem tickets dispensed from these two machines. Players accumulate the tickets dispensed from the machines

and redeem them for prizes. Prizes included pins, ashtrays, key chains, billiard balls, and pool cues ranging in values of \$2.95 to \$700.00.

The machines were operated by placing money into the machine. For one dollar, a player would receive 20 credits/points. A player would play with these credits/points until the total reached at least 100 or 0. A player would then set the simulated reels in motion by pressing a button located on the front of each cabinet, much like the slot machines in casinos. The resulting combination of symbols displayed would determine whether the player was successful and how many points were rewarded for successful play.

The Commonwealth argued that the resulting combination of symbols that came to rest at the conclusion of play was purely by chance. Absolutely no skill was necessary for a player to have a successful hand. On the other hand, the defendant argued that the two machines contained skill stops, which allowed the player to stop the simulated reels at specific times. The defendant argued that a skilled player could take advantage of the skill stops and win every single time.

The two video slot machines were seized by Officers Royer and Botchie. Officer Botchie, after conducting surveys of the video slot machines, concluded that both of the machines contained features which would classify them as gambling devices per se. Subsequently, Paul Adolini was charged with a misdemeanor under § 5513(a) of the Pennsylvania Criminal Code. On November 6, 2002, he waived his right to a jury trial and a bench trial was set for January 23, 2003.

On January 23, 2003, a bench trial was held whereby the Commonwealth had the burden of establishing that these two New Fruit Bonus 96 video slot machines were gambling devices per se under § 5513(a) of the Pennsylvania Criminal Code. At the trial, the Court heard testimony from Officer Royer, Officer Botchie, Brad Gsell (Owner of Gsell Vending) and Shawn Robinson (Technician for Gsell Vending).

Officers Royer and Botchie presented the Commonwealth's principal case. The Commonwealth argued that these two New Fruit Bonus 96 video slot machines were gambling devices per se because a player had to give consideration to play, the results were determined by chance rather than skill and rewards were given to players for successful play.

The Commonwealth argued that rewards were received by players because players were able to redeem points for prizes of value. The Commonwealth offered testimony that a player could receive a prize after playing for a short period of time. The Commonwealth also offered testimony that the machines contained "knock-down" buttons which enabled a player to win free games and knock them off the machine. Officer Botchie testified that the machines contained this feature.

The defendant offered the testimony of Brad Gsell and Shawn Robinson to poke holes in the Commonwealth's case. Mr. Robinson, who works on these machines for a living, testified that the "knock-down" buttons on the machines enabled a player to get tickets to redeem for the prizes. They did not allow players to cash in these tickets for cash. A player had to redeem them for prizes from the store. As such, the defendant argued that a reward was not given to players for successful play.

At the conclusion of the trial, the parties agreed to waive the seven-day return of verdict requirement under Rule 622 of the Pennsylvania Rules of Criminal Procedure to enable the Court to get a better understanding of the facts and evidence. The Court also asked the parties to submit letter briefs in support of their respective positions. The Court has reviewed the facts and evidence, the letter brief of the defendant, the letter brief of the Commonwealth and the applicable law.

This opinion and order results from such review.

#### Discussion

Defendant Paul C. Adolini, as owner/operator of Breakaway Sports Lounge, Inc., is charged with possession of gambling devices and allowing such gambling devices to be used on his premises under § 5513(a)(1), (2) & (4) of the Pennsylvania Criminal Code.

Section 5513(a) of the Pennsylvania Criminal Code states, in relevant part:

A person is guilty of a misdemeanor of the first degree if he:

(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing card;

(2) allows persons to collect and assemble for the purpose of unlawful gambling at any place under his control;

(3) solicits or invites any person to visit any unlawful gambling place for the purpose of gambling; or

(4) being the owner, tenant, lessee or occupant of any premises, knowingly permits or suffers the same, or any part thereof, to be used for the purpose of unlawful gambling.

18 Pa. Con. Stat. Ann. § 5513(a)

A trial on the charges was set and heard by this Court on January 23, 2003. At the trial, the Commonwealth proffered that the two New Fruit Bonus 96 video slot machines constituted gambling devices per se.

In order to sustain a conviction under § 5513(a), there must be evidence that the Commonwealth established that the machines were gambling devices per se. Commonwealth v. Twelve Dodge City Video Poker Machines, 537 A.2d 812, 813, 217 Pa. 363, 366 (Pa. 1988), citing Commonwealth v. Two Electronic Poker Machines, 465 A.2d 973, 977, 502 Pa. 186, 194 (Pa. 1983). Gambling devices per se could be established by a showing beyond a reasonable doubt that consideration was received, a result determined by chance rather than skill, and the player received some reward for his efforts. See Twelve Dodge City Video Poker Machines, 537 A.2d at 813, 517 Pa. at 366.

In the first instance, neither side disputes that the Commonwealth established the first element under § 5513(a). Both Officer Royer and Officer Botchie testified that patrons were required to insert money into the machine to receive credit. A player inserting one dollar would receive 20 credits/points. The defendant readily admits that consideration was received by the machines in order for patrons to play. Thus, the element of consideration is present.

The other two elements (chance and reward) cannot so easily be established. The Commonwealth was required to establish that the results of the game were determined by chance rather than skill. See Twelve Dodge City Video Poker Machines, 537 A.2d at 813, 517 Pa. at 366. This is not to say that the Commonwealth had to establish that a successful play was entirely a matter of chance. See Commonwealth v. Two Electronic Poker Machines, 465 A.2d 973, 977, 502 Pa. 186, 194 (Pa. 1983). On the other side of the spectrum, it is also important to note that the mere fact a machine involves a substantial element of chance is insufficient to find a machine a gambling device per se. See Two Electronic Poker Machines, 465 A.2d at 977, 502 Pa. at 194. To be sure, the Court's analysis should be focused on case by case basis.

The Commonwealth maintained that the combination of symbols coming to rest at the conclusion of play was purely determined by chance. A player placed one dollar to receive twenty credits. The machine had a simulated reel, which was set in motion by pressing a button located on the front of the cabinet. The resulting images would determine the number of credits/points the player would receive if the resulting image was a successful play. The Commonwealth maintained that absolutely no skill was necessary to win credits/points. As such, the Commonwealth believed that the results were determined by chance rather than skill.

In contrast, the defendant maintained that because the machines were equipped with "skill stops," the results of the play were determined by skill rather than chance. To support this contention, the defendant offered the testimony of Shawn Robinson, a technician for Gsell Vending. Mr. Robinson testified that both New Fruit Bonus 96 video slot machines were equipped with skill stops. A skill stop enables a player to stop the simulated reels at a specific time. A player could stop one column or all the columns at once using the skill stop device. In essence, a player could become so skillful that he/she could come up with a winning combination every time by "guessing" the timing of the columns. Mr. Robinson stated, "if a player knows how to use them (skill stops), he/she could take advantage of them."

As much as the Court was impressed by Mr. Robinson's working knowledge of the "ins and outs" of these two New Fruit Bonus 96 video slot machines, the Court believes that the Commonwealth established that the results of the machine were determined by chance rather than skill. On cross examination, Mr. Robinson admitted that chance does still play a role in the outcome. Just like in the Supreme Court's discussion of Commonwealth v. Electro-Sport, a random element of chance exists. See Two Electronic Poker Machines, 465 A.2d at 978, 502 Pa. at 195. Additionally, these skill stops only come into effect after a player masters the patterns of the machines. There could be no doubt that a player would be taking "chances" on the outcome until, at the very least, he/she learns the machine. Regardless, Mr. Robinson admitted that even skilled players were required to "guess" when the machine should stop. It seems to this Court that skilled players are taking educated guesses, and not completely mastering the machines.

As the Supreme Court stated in its discussion regarding the Electro Sport machine as a gambling device per se, "skill can improve the outcome, it cannot determine it." Two Electronic Poker Machines, 465

A.2d at 978, 502 Pa. at 196. While skill plays a role in the outcome of the game, there could be no doubt that chance ultimately determines the outcome because chance determines the positions of the winning symbols and chance determines whether the player will achieve a successful winning play. See Two Electronic Poker Machines, 465 A.2d at 978, 502 Pa. at 195. Accordingly, the Commonwealth has established that the results are determined by chance rather than skill.

Lastly, and where this Court believes that Commonwealth's case falters, the Commonwealth was required to establish that a reward was given to a player for winning combinations. See Twelve Dodge City Video Poker Machines, 537 A.2d at 813, 517 Pa. at 366. A reward is considered anything of value. Id. As admitted by the defendant, a player is given credits/points for successful winning combinations. These points can be redeemed for prizes. Prizes included pins, ashtray, key chains, billiard balls and pool cues ranging in values of \$2.95 to \$700.00. A player must accumulate a certain amount of points to redeem them for a prize.

Although the Commonwealth failed to introduce evidence establishing how many points a player had to accumulate before being eligible to redeem for a certain prize, Mr. Robinson testified that it cost a player approximately \$15 in successful winning plays to receive a prize that cost the club \$2.95. He also testified that clubs purposely mark the prizes up to five times the cost of that particular item in order to maintain their profits.

Now, the Commonwealth maintained that the redeeming of the tickets for prizes constituted a reward for successful play. Tickets that could be redeemed for prizes do not automatically equal a reward. Commonwealth v. Irwin, 636 A.2d 1106, 1108, 535 Pa. 524, 528 (Pa. 1993). The Commonwealth must show that a player could win an amount of equal or greater value than he placed into the machine. See Irwin, 636 A.2d at 1108, 535 Pa. at 529. The potential for reward does not satisfy the Commonwealth's burden of proof. See Twelve Dodge City Video Poker Machines, 537 A.2d at 814, 517 Pa. at 367.

Here, the Commonwealth failed to meet its burden. The Commonwealth failed to introduce any evidence that a player would receive something of greater value than he put in. In this case, the evidence, introduced by the defendant, showed that these prizes were marked up five to ten times their actual cost in order to prevent the club from losing money. This cannot be a reward under the laws of the Commonwealth. If anything, people would stop playing these games if news spread and people found out that they were playing for items of lesser value than the money they put into the machine. Based upon the evidence presented here, that's exactly what is happening.

This does not prevent the Commonwealth and/or the Liquor Control Board, in the future, from prosecuting machine owners where there is evidence that the redemptive tickets are actually being used for impermissible purposes. Perhaps, if Officer Royer or Officer Botchie witnessed themselves a reward for successful play, this Court may have viewed the case in a different light and come up with a different outcome. But, the Court holds, as the case stands and based upon the evidence presented, the Commonwealth failed to show that a reward was received by a player for successful winning plays.

The Commonwealth also maintained that the existence of a "knock-down" button established that these machines were gambling devices per se. A "knock-down" button enables a player to place money in the machine, win free games, knock them off the machine and then be paid off by the owner for the number of free games won. See Irwin, 636 A.2d at 1107-1108, 535 Pa. at 528.

The Court believes that the Commonwealth misinterpreted Pennsylvania law. The ability to knock off anything by itself does not constitute a thing of value. Pennsylvania law dictates that a "knock-down" button which enables a player to receive a return that is more than the cost of what he/she has played constitutes a reward or a thing of value. Irwin, 636 A.2d at 1108, 535 Pa. at 529. The Commonwealth failed to establish that a player was able to receive a return that was more than or equal to the cost of what he/she had played. There is no evidence that either of the two machines were fixed with a "knock-down" button which enabled players to knock off free games for cash. A player does have the ability to knock off credits/points and redeem them for prizes. But, as stated earlier, the Commonwealth failed to establish that the redemption of the tickets in this case constituted a reward.

Accordingly, the Commonwealth failed to establish that the redemption of tickets at the Breakaway Sports Lounge for prizes constituted a reward, and failed to establish that the "knock-down" button enabled a player to knock off free games or credits/points for cash under Pennsylvania law.

### Conclusion

After reviewing the facts and evidence, the letter brief of the defendant, the letter brief of the Commonwealth and the applicable law, this Court holds that, although the Commonwealth established consideration was given, and the results were determined by chance rather than skill, the Commonwealth

failed to establish that the redemption of tickets at the Breakaway Sports Lounge for prizes constituted a reward, and that the "knock-down" button enabled a player to knock off free games or credits/points for cash under Pennsylvania law.

Accordingly, this Court finds Defendant Paul C. Adolini NOT GUILTY under 5513(a) of the Pennsylvania Criminal Code.

#### ORDER OF COURT

March 28, 2003, after a review of the facts and evidence, letter briefs submitted by the Commonwealth and the defendant, and the applicable law, the Court finds Defendant Paul C. Adolini NOT GUILTY under 5513(a) of the Pennsylvania Criminal Code.