

December 28, 1960

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ARIZONA ATTORNEY GENERAL

Honorable Carl Austin
- Representative -
STATE OF ARIZONA
State Capitol Building
Phoenix, Arizona

Dear Mr. Austin:

Your request for an Opinion under date of November 17, 1960 involved the following question:

?Question: Would the giving of free games
 for the crane or digger machines
 constitute a prize?

Answer: No.

The definition of gambling is set forth in Boies vs. Bartell, 82 Ariz. 217, 310 Pac. (2d) 834; and Engle v. State, 53 Ariz. 458, 90 Pac. (2d) 993. Three factors must be present in order to constitute a gambling device:

1. A price;
2. A chance; and
3. A prize.

Boies v. Bartell, op. cit., states:

"Of course this definition is only relative to the element of chance in the more important definition of gambling. Generally, it may be said that the elements of gambling are payment of a price for a chance to gain a prize.

Your question involves only the third element, namely, the prize. Our law has a statutory provision relating to this element which reads as follows:

"A person who deals, carries on, opens or causes to be opened, or who conducts, either as owner, proprietor or employee, whether for hire or not, any slot machine, punchboard or machine of like character, whether played for

money, checks, credits or other representative of value is guilty of a misdemeanor punishable by a fine of not less than one hundred nor more than three hundred dollars, by imprisonment for not more than six months, or both."

Arizona Revised Statutes, Annotated (1956), Sec. 13-432.

Our question resolves itself into whether free games can be considered as "money, checks, credits or other representative of value" within the meaning of the above section. We think not.

We are dealing here with a criminal statute and must follow the rule which requires its strict construction. For reasons that stem from our fundamental concepts of individual human rights, a criminal statute should not be extended to embrace acts or conduct not clearly included within the prohibitions of the statutes.

See State v. Waite, (Kansas) 131, Pac. (2d) 708

From this point of view, free games*are not specifically included in the definition of a prize in our code.

Ex Parte Gray, 204 Pac. 1029 at page 1030, 23 Ariz. 461 deals with this specific question. In the Gray case, the question was whether the giving of candy was for "money, checks, credits or any other representative of value." The court said that it did not. Justice Flanigan stated:

"It is contended by appellant that as the game is alleged to have been played for candy, and as candy is neither "Money, checks, credits, or any other representative of value," within the meaning of the words as used in the section quoted, that no offense is stated. We agree with this contention, but in view of the disposition made of the case we shall not extend this opinion by discussing that phase of the matter at any length. The history of the enactment is persuasive to show that it was not intended by these words to prohibit the playing of these games for property when not used as a token of value. It is common knowledge that such games are usually played either for money, or for checks, credits, markers, or tokens representing money, or value in the form of money, and we may assume that the practice of playing these games for property, which in itself has value, was not sufficiently prevalent, or of such

*/(also referred to
as/free re-play)
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Potency for evil, as to call for condemnation in the statute quoted. However that may be, we are bound by the law as it is written. Eiusdem generis is the applicable principle. See Ex parte Williams, 7 Cal. Unrep. 301, 87 Pac. 565."

Free games, under the rule of eiusdem generis; would not be things of the same general class of kind set forth in the statute.

In the case of State v. Betti, a New Jersey case reported in 42 Atlantic Reporter, 2d Series at page 640, it was held that a pin ball machine was not a gambling device within the meaning of the New Jersey statute notwithstanding the fact that free games could be awarded on achievement of certain designated high scores, since such free games did not constitute a "valuable thing" as the statute defined the term. In reaching that conclusion, the court quoted extensively from Davies v. Mills Novelety Co., 8 Cir., 70 F. 2d 424, 426 wherein it was states:

"These machines are lacking in the essential elements necessary to make them gambling devices or gambling machines. There is no element of gain or loss, financial or otherwise, involved in the transaction."

We have reviewed many other similar cases reaching the same conclusion, the citation of which would add nothing to the reasoning of this opinion, but which have satisfied us that the balance of judicial opinion is on the side of not construing free games as a prize within the meaning of the various gambling statutes.

If this element of a prize were alone involved in the claw machine operation, and "free games"* were given, then, the third necessary element of a gambling device would be absent, and the machine would not be a gambling device within the meaning of our law and Statutes. It is of interest that the pinball machines are operated on the basis of free games, and this practice has not been questioned as constituting a prize.

Respectfully submitted,

Wade Church
Attorney General

* / free re-plays /