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Albertson's Inc. v. Honorable Robert B. Hansen et al : Brief of Defendants-Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

ALBERTSON'S, INC.,

Plaintiff and Appellant,

vs.

Case No. 15775

HONORABLE ROBERT B. HANSEN,
Attorney General of the State
of Utah, and HONORABLE R. PAUL
VAN DAM, County Attorney of
Salt Lake County, Utah,

Defendants and Respondents.

BRIEF OF DEFENDANTS - RESPONDENTS
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STATEMENT OF CASE

This is an action by Albertson's, Inc. (hereinafter "Albertson's") against Honorable Robert B. Hansen, Attorney General of Utah, and Honorable R. Paul Van Dam, County Attorney of Salt Lake County, seeking a declaratory judgment that its retail sales promotion known as "Double Cash Bingo" is not subject to prosecution as "gambling" or a "lottery" within the terms of Title 76, Chapter 10, Part 1101, Utah Code Annotated (1977 Supplement).

STATEMENT OF THE CASE BELOW

This action was commenced by plaintiff filing a complaint and, later, an amended complaint for declaratory judgment. Defendant Van Dam filed a motion to dismiss (R.44). Defendant Hansen also filed a motion to dismiss (R.59). Plaintiff filed a motion for summary judgment that "it is not subject to prosecution for violation of the Utah Penal Code for conducting 'Double Cash Bingo' " (R.95). There was no dispute among the parties as to any material fact. On April 4, 1978, after a hearing on the cross-motions, the District Court entered judgment dismissing plaintiff's action and denying plaintiff's motion for summary judgment (R.149-150).

RELIEF SOUGHT ON APPEAL

The respondent requests that the judgment of the lower court be affirmed.

THE PROCEEDINGS BELOW

Respondent Van Dam takes no substantial exception to the facts as stated in the Appellant's statement entitled "Events Leading to the Actions Commencement" (4.A.). The Respondent does, however, take issue with the Appellant's interpretation of "the statutes" (4.B). The Respondent will address the issue of statutory construction under Point I of his argument entitled "Double Cash Bingo" IS UNLAWFUL UNDER THE TERMS OF UTAH CODE ANNOTATED §76-10-1101, ET SEQ. (1977 Supp.) infra. In addition the Respondent takes issue with the Appellant's statement entitled "Defendant's Motions" (4.D.). As this statement related to the interpretations of the principal case (Geis v. Continental Oil Co., 29 Utah 2d 452, 511 P2d 725) relied on by the Respondent and tends to be argumentative, this point will be covered under Point I of his argument.

ARGUMENT

THE DISTRICT COURT PROPERLY ENTERED
JUDGMENT IN FAVOR OF DEFENDANTS AND
DENIED PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT.

POINT I.

"DOUBLE CASH BINGO" IS UNLAWFUL UNDER
THE TERMS OF UTAH CODE ANNOTATED
SECTION 76-10-1101, ET SEQ. (1977 SUPP.)

1. Participants in Double Cash Bingo Provided Valuable Consideration Anticipated by the Plaintiff, by Appearing at the Plaintiff's Place of Business and Thereby Subjecting Themselves

to the Sales Appeal of the Plaintiff's Assorted Merchandise. Respondent Van Dam maintains that the Utah case of Geis v. Continental Oil Company, 29 Utah 2d 452, 511 P.2d 725 (1973) speaks directly to the issues raised by the Plaintiff (R.45). Both the Plaintiff and the Defendants agree that three elements are necessary in order for a lottery to exist: (1) a prize, (2) an element of chance; and (3) consideration. The Geis case addressed a promotional contest similar to "Double Cash Bingo". The plaintiff, claiming to be a winner under the terms of the contest, brought suit to enforce the "contract". The Utah Supreme Court examined the elements of the contest and determined that the three necessary elements - prize, chance and consideration were present. The Court addressed the issue of consideration by referring to a Washington State case, Shillberg v. Safeway Stores, Inc., 75 Wash. 2d 339, 450 P.2d 949 (1969). The Washington Court, relying on State v. Danz, 140 Wash. 546, 250 P.37, found that a visit to a Safeway Store and exposure to the promoter's advertising amounted to consideration.

"The players wagered their time, attention, thought, energy and money spent in transportation to the store for a chance to win a prize - all of which constituted a valuable consideration moving from the players to the promoter."

In discussing the consideration element, the Utah court noted that sufficient consideration to enforce a contract existed

but held that being a lottery, the contract was illegal and, therefore, unenforceable.

"...this court would be engaging in some type of sophistry to hold that there was consideration present to support a bargain but not to provide the element of consideration to constitute a lottery."

In addition, the Utah court noted in the Geis decision, that the Danz interpretation of consideration was adopted in the earlier Utah case of Blair v. Lowham, 73 Utah 599, 276 P. 292 (1929). It is, therefore, possible to conclude that Utah precedence exists for the proposition that sufficient consideration exists to support a lottery where prizes attract patrons to a business and to its advertising.

Gambling activities prior to 1973 were governed by Title 76, Chapter 27 of the Utah Code Annotated (1953). The chapter was entitled "Gaming" and prohibited card games, roulette, dice and "other gambling devices of any nature or kind whatsoever used or kept for the purpose of playing for money, or for tokens redeemable in money, at any of the games mentioned in this chapter...". "Lottery" was separately defined in Section 76-27-9, Utah Code Annotated (1953), as "...any scheme for the disposal or distribution of property by chance among persons who have paid, or promised to pay, any valuable consideration for the chance of obtaining such property..." The card games and mechanical devices outlined in Section 76-27-1, Utah Code Annotated (1953), were punishable as a felony, whereas the lotte

was punishable as a misdemeanor, Section 76-27-10, Utah Code Annotated (1953).

In 1973 the legislature revised the State's criminal code including the gambling statutes. Part 11 created a single misdemeanor known as "Gambling". Gambling is defined to include "...risking anything of value for a return or risking anything of value upon the outcome of a contest, game, gaming scheme or device when the return or outcome is based upon an element of chance..." The new definition includes the games specifically outlined in the previous Section 76-27-1, Utah Code Annotated (1953) and "lotteries" which maintains the same definition as that provided in the previous statute. Part 11 is similar to the preceding statute in the most critical of provisions, specifically:

(1) "Lottery" means any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining property..."

The new statutory provisions, §76-10-1101(2), Utah Code Annotated (1977 Supp.) and the previous statutory provision, §76-27-9, Utah Code Annotated (1953), are identical.

(2) The concept of "value" remains the same in the new statute as in the old:

"...any game played with cards, dice or any other device, for money, checks, credit or any other representative of value is guilty of a felony..." U.C.A., §76-10-1101(3) (1977 Supp.)

Although participants in Double Cash Bingo were not required to make any purchase or otherwise pay for the opportunity to play bingo, the participants nonetheless provided a valuable consideration sufficient to support a lottery. The Second Restatement of Contracts Section 75 provides:

"(1) To constitute consideration, a performance or a return promise must be bargained for, (2) A performance or return promise is bargained for if it is sought by the promisee or in exchange for his promise and is given by the promisee in exchange for that promise..."

Under the rules of Double Cash Bingo, the player was required to enter an Albertson's store in order to obtain the necessary "bingo" playing card and bingo disks. The necessary playing pieces were not sent out through the mail nor could they be obtained in newspaper advertisements by Albertson's. Once the playing card was obtained, repeated trips to an Albertson's store were necessary for a player to increase the chances of winning. Under this scheme, the thing that Albertson's "bargained for" was the presence of the individual in an Albertson's store. The presence of the individual in an Albertson's store was of "value", in that once in the store the individual was exposed to in-store advertising, displays and a shopping environment designed to encourage the purchase of goods. The presence in the store itself is, without question, consideration to support the contract.

Another way to look to the "value " of consideration, after establishing a "benefit" to the promisor (plaintiff), is to determine if there is a "detriment" to the promisee (patron). Certainly the elements outlined in Shillberg, can be classified as a "detriment":

"The players wagered their time, attention, thought, energy and money spent in transportation to the store for a chance to win a prize..."

All of these elements are measurable, of value and are exactly what the promisor (Albertson's) bargained for. The promisee (patron) was put to a disadvantage (detriment), in the form of lost opportunity to patronize other supermarkets and perhaps save money.

The Plaintiff claims that the benefit realized from the participants presence in an Albertson's store is "too remote" to constitute consideration. This defense lacks support that the cases cited by the Plaintiff can be distinguished on the facts. In addition, the Plaintiff claims in its "Statement of the Case" (Plaintiff's Brief on Appeal) that:

"...Albertson's discontinued the game on March 3 and has lost substantial sales and good will as a result."

It is, therefore, clear that "valuable consideration" did, in fact, exist and that Plaintiff's scheme was, in fact, a lottery.

2. Double Cash Bingo is not a lawful business transaction exempted by Part 11.

The new statute, Section 76-10-1101, Utah Code Annotated

(1977 Supp.), enacted in 1973, departed from its predecessor by providing two exceptions:

- (a) A lawful business transaction, and
- (b) Playing an amusement device that confers only by an immediate and unrecorded right of replay not exchangeable for value.

The Plaintiff contends that the term "lawful business transaction" is not defined by the statute and, therefore, ought to be construed liberally in its favor, in that Double Cash Bingo is the type of business transaction anticipated by the exemption.

Although the term "lawful business transaction" is not defined within the statute itself, the term has been interpreted in a commentary on the revised criminal code. Mr. Loren Dale Martin writes in "Utah Criminal Code Outline",¹ that the term "lawful business transaction" was intended to exclude such activities as investing in the stock market, speculating in real estate and other similar business transactions where an element of unpredictability exists. Obviously, this exemption was intended to apply only to recognized, legitimate transactions within the business world and not to sporadic advertising schemes camouflaged to evade the lottery statute.

It must be noted, in conclusion, that notwithstanding the definition of "lawful business transaction" the punctuation and sentence construction of Section 76-10-1101, Utah Code Annotated

¹ "Utah Criminal Code Outline", Loren Dale Martin (1973).

(1977 Supp.) clearly indicates that a "lawful business transaction" cannot include a lottery".

(1) "Gambling" means risking anything of value for a return or risking anything of value on the outcome of a contest, game, gaming scheme, or gaming device when the return or outcome is based upon an element of chance and is in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome, and gambling includes a lottery; ..."

The semi-colon indicates the conclusion of a thought ". . . gambling includes a lottery; ..." The statute then continues to list what gambling is not. A "lawful business transaction" is excluded but, note, that even if a lottery were part of a business transaction it would be invalid under the statute, as "gambling includes a lottery..."

The Plaintiff further claims that Double Cash Bingo is not accompanied by the vices generally associated with gambling. Certainly, it would be naive and an over-reaction to maintain that such an enterprise would lead to the extremes associated with organized crime and gambling, but it is important to recognize that such schemes appeal to the same "something for nothing" attraction that gambling anticipates. Perhaps the Washington State Supreme Court best stated the inequity of such schemes in the Schillberg case:

"The anti-gambling laws are designed not only to prevent loss but to preclude some kinds of gain to the promoter of a lottery

from reaping an unearned harvest at the expense of his players; to prevent the wary from preying upon the unwary; and to discourage the overly-shrewd from exploiting the natural yearning in most everyone to get something for nothing; and to put a damper on the actions of those who receive from the vice much more than they part with in prizes. If, under our mores, it is bad for a man to lose his property on pure chance or lot, it is equally bad for a man to gain property on the same pure chance or lot."

Similarly, in State v. Fox Kansas Theater Co., 144 Kan. 687, 62 P.2d 929 (1936), (Citing Central States Theatre Corporation v. Patz (D.C.) 11F. Supp 566, the court stated:

"Conducting in motion picture theatre of advertising scheme called "Bank Night" held to appeal to cupidity of public and spirit of gambling and speculation, to be unfair and contrary to public safety, and so closely border on conducting of a lottery as not to entitle theatre corporation to injunction to restrain interference with operation of scheme."

It is this disparity between what is given for a "chance" of a return and that many may give while few will receive, which makes the lottery such a socially distasteful and hence prohibited enterprise. Double Cash Bingo exploits the individual to the advantage of the promoter.

3. Double Cash Bingo is a Violation of the Utah Penal Code by Reason of the Geis Decision.

A. The Geis Decision is applicable to this case. Although the Geis case was decided upon the previous gambling statute - Section 76-27-1, et seq. Utah Code Annotated (1953), which was subsequently replaced by Section 76-10-110, et seq. Utah Code

Annotated (1977 Supp.), the case remains just as applicable as before. As explained earlier, the revised statute did not change the concept of "value" from that defined in the prior statute. In addition, the "lawful business" exemption, although not present in the previous statute, does not apply to the lottery scheme employed by the Plaintiff.

It is important at this point to determine exactly what the Utah Supreme Court considered when it decided the Geis case. The original action was brought by Mrs. Geis against Conoco to recover a prize in a promotional contest similar to that conducted by Albertson's. Mrs. Geis claimed that she had fully complied with the rules and requirements set out by Conoco. The trial court found for Mrs. Geis, and Conoco appealed the findings to the State Supreme Court claiming that Mrs. Geis did not properly accept Conoco's offer as required by the contest rules. Upon review the Utah Supreme Court considered the legality of a contest and, hence, the contract in issue. It reviewed the statutory elements of a lottery and discussed the impact of the Washington State case of Shillberg (citing Danz) in regard to consideration. The Washington Court found that consideration existed in the form of time, attention, thought, energy and money spent in transportation for a chance to win a prize. Although the Utah Supreme Court did not accept the language of the Washington Court specifically, the only logical determination can be that the Utah Supreme Court tacitly adopted the language, as the sentence

which follows the consideration discussion reads:

"It is true that in some jurisdictions, it has been held that a lottery is a special kind of contract, which requires a special kind of consideration, such as money or its equivalent, which will impoverish the individual who parts with it. However, in light of this state's constitutional mandate and legislative enactments pursuant thereto, this court would be engaging in some type of sophistry to hold that there was consideration present to support a bargain but not to provide the element of consideration to constitute a lottery."

The Utah Supreme Court held the contract was a lottery and, therefore, unenforceable. The contract was a lottery because all of the necessary statutory elements, including consideration were present. The only reasonable conclusion is that the Utah Supreme Court adopted the Washington State Supreme Court's interpretation of consideration.

B. The reasoning set forth in the Geis case to the effect that time, attention, thought, energy and other costs such as transportation related to a promotional scheme should constitute "valuable consideration" is well-founded and should be adopted by this Court. It has been demonstrated in the previous sections of this brief, that promotional schemes such as Double Cash Bingo are not exempted by Part 11 under the "business transaction" exclusion. In addition, the concept of "valuable consideration" remains the same under the revised statute - Section 76-10-1101 et seq. Utah Code Annotated (1977 Supp.), as under the previous gambling statute - Section 76-27-1 et seq. Utah

Code Annotated (1953). Therefore, the Geis decision should be applied to Double Cash Bingo and all other promotional schemes of the same or similar nature.

The Plaintiff cites a number of cases in support of its contention that the Shillberg decision regarding consideration, "flies in the face of common sense and has been rejected by one jurisdiction after another." The Plaintiff does cite one case - Cudd v. Aschenbrenner, 233 Or. 272, 377 P.2d 150 (1962), which is similar to the case in question, as it involves a supermarket promotional scheme. It is possible to distinguish the two cases on the facts, however. The Cudd case, for instance, involved a drawing conducted in the parking lot adjacent to the supermarket, thus avoiding the advertising exposure present in the Albertson's case. Aside from the factual differences, it must be recognized that the Cudd case was decided by an Oregon Court and the Utah court is not bound by Oregon precedent, especially where the Utah Court has established its own precedent on the question of valuable consideration.

In addition to Cudd, the Plaintiff cites a number of other cases from foreign jurisdictions concerning a promotional scheme popular with movie theaters in the 1930's called "Bank Night", People v. Cardas, 137 Cal. App. Supp. 788, 28 P.2d 100 (1933), State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 Mont. 52, 137 P.2d 689 (1949), etc. The "bank night" cases differ from each other factually and in the results of the

decisions. Regardless of this split in decisions, the cases are of little, if any, assistance in evaluating the Double Bonus Bingo scheme. In all of the "bank night" cases cited by the Plaintiff, not one was from Utah. The Utah Court, therefore, is not bound to follow the decisions of other jurisdictions, especially in light of the more recent Geis case.

4. Double Cash Bingo is a criminal act by reason of the terms of the authority stated in Article VI, Section 28 of the Utah Constitution.

Article VI, Section 28 of the Utah Constitution provides:

"The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose."

Section 28 prohibits not only acts by the Legislature but acts by any person, as demonstrated by the action of the legislature in passing the previous gambling statute - Section 76-27-1 et al Utah Code Annotated (1977 Supp.). The constitutional prohibition against lotteries does not provide criminal penalties, but the mandate that the legislature "shall not authorize..." delegates sufficient authority to the legislature to enact criminal laws to punish lottery schemes.

POINT II

THE REVISED GAMBLING STATUTE IS NOT VOID
FOR VAGUENESS.

Section 76-10-1101, Utah Code Annotated (1977 Supp) defines "gambling" as:

"...risking anything of value for a return
or risking anything of value upon the out-

come of a contest, game, gaming scheme, or gaming device when the return or outcome is based upon an element of chance and is in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome, and gambling includes a lottery..."

The Plaintiff rightly states that "every event in life is based upon an 'element of chance'". The Plaintiff then claims that the statute provides no hint as to what an "element of chance" may be. This statement is merely a subterfuge on the part of the Plaintiff to avoid the obvious. The statute is clearly directed to schemes and devices which allow the promoter to exploit the unwary through appealing to the "something for nothing" yearning in almost everyone. The statute is necessarily broad in order to encompass the variety of schemes and devices invented by the creative mind of the clever promotor and allow for future developments in this area. The statute is not overbroad, however, as it provides exemption for lawful business transactions where both parties to the transaction deal on equal footing. It also provides exemption for amusement where there is no exchange of value. The terms of the statute are by no means so vague that reasonable men could not determine their intended meaning, therefore, there is not violation of the due process clause of either the United States Constitution nor the Utah Constitution.

CONCLUSION

Double Cash Bingo is a "lottery" within the prohibition of the "gambling" terms of the present Utah Penal Code. The revised gambling statute - Section 76-10-1101 et seq. Utah Code Annotated (1977 Supp.) is clear in its provisions and is not unconstitutionally vague in any manner. The statute is enforced against the appellant and the judgment of the lower court should be upheld.

Respectfully submitted,

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