1979

Albertson's Inc. v. Honorable Robert B. Hansen et al : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

ALBERTSON'S, INC.,

Plaintiff and Appellant,

vs.

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,

Case No. 15775

REPLY BRIEF OF APPELLANT

On Appeal from a Judgment of the District Court of the Third Judicial District, The Honorable David K. Winder, District Judge.

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APPELLANT'S REPLY BRIEF ON APPEAL

STATEMENT OF THE CASE

The account of the facts and proceedings and the review of the content and history of Utah's gambling statutes, set forth at pages 1-9 of the Opening Brief of appellant, Albertson's, Inc. (hereinafter "Albertson's"), have not been disputed in Appellees' briefs. Therefore, appellant's Statement of the Case must be deemed accepted by all parties.

ARGUMENT

"DOUBLE CASH BINGO" IS NOT UNLAWFUL UNDER THE TERMS OF UTAH CODE ANN. §76-10-1101, ET SEQ. (1977 SUPP.)

1. Participants in Double Cash Bingo did not risk "anything of value", nor give "valuable consideration", as a condition of receiving a prize or return.

At pages 10-13 of its Opening Brief, appellant pointed out that UTAH CODE ANN. §76-10-1101(3) (1977 Supp.) limits the term "value" to items of discernible monetary value and that the canon of ejusdem generis, compels extention of the same definition to all other portions of the gambling statute (Title 76, Chapter 27, Part 11, UTAH CODE ANNOTATED (1977 Supplement) on "Part 11"). Appellant further pointed out that §76-10-1101(3) had not been enacted at times relevant to Geis v. Continental Oil Co., 29 Utah 2d 452, 511 P.2d 725 (1973). Appellees have not disputed Albertson's' construction of the present statute. Further, appellees have not disputed that nothing of discernible monetary value was risked by Double Cash Bingo participants who--if they risked anything at all--risked no more than a few mintues' time in playing the game.

Even if §1101(c) were not part of the present statute, Albertson's' customers' minimal investment could not constitute "risking anything of value", within the terms of UTAH

CODE ANN. §76-10-1101(1), (2), The Attorney General himself stated in his Opinion Letter to University of Utah President David P. Gardner, cited at footnote 2, pp. 10-11 of the Opening Brief, that "a minimal amount of time, attention, thought and energy" does not constitute "risking anything of value" under the gambling statute. The Attorney General has not explained, in his brief herein, why he has elected one construction of the statute for the University and another for Albertson's.

Albertson's, at pages 13-14 of its Opening Brief, pointed out that the great weight of authority, as well as common sense, compels a finding that the minimal time and attention involved in Double Cash Bingo did not constitute "risking of anything of value" on the players' part and that the Geis decision, if it holds to the contrary, should be reversed. Further, at pages 18-26 of its Opening Brief, Albertson's explained in detail that Geis did not hold to the contrary. Neither appellee has seriously disputed the propriety of Alberton's position. Appellee Hansen says nothing on the subject; appellee Van Dam suggests that Double Cash Bingo participants' being "exposed to ... a shopping environment" (Van Dam Br., p. 6) and shoppers' good will toward Albertson's (Id., p. 7) amount to valuable consideration. It is sufficient

to note that exposure to a "shopping environment" never has been deemed particularly dangerous and that good will, although it is valuable to a merchant, costs a customer nothing. Further, neither has attempted to demonstrate how Albertson's' construction of Geis is faulty. Appellees simply have restated their construction of Geis ex catherda without any supporting analysis. Hansen Br., p. 9; Van Dam Br., pp. 10-12. Appellee Hansen further has cited Blair v. Lowham, 73 Utah 599, 276 Pac. 292 (1929) as holding that no payment of monetary value was necessary for a raffle to constitute unlawful gambling. Appellee's citation of Blair is incorrect: participants in that raffle were required to purchase tickets in order to participate. 73 Utah at 601.

2. Double Cash Bingo is exempt from Part 11's prohibition on the ground that it is a lawful business transaction.

Albertson's, at pages 14-18 of its Opening Brief, explained in detail why the "lawful business transaction" exemption of UTAH CODE ANN. §76-10-1101--which was not in effect at times relevant to Geis--must be construed to exempt Double Cash Bingo from the statute's prohibition and that appellees' claim that the exemption is addressed to such transaction as stock purchases and real estate speculation is completely inconsis-

tent with proper statutory interpretation. Appellee Hansen has not attempted to dispute Albertson's' position. Appellee Van Dam has restated his construction of the exemption (Van Dam Br. p. 8) without authority (other than a privately printed "Utah Criminal Code Outline" by one Loren Dale Martin) or analysis.

3. Double Cash Bingo is not criminal by reason of the terms of Article VI, Section 28 of the Utah Constitution. Albertson's pointed out, at pp. 26-27 of its Opening Brief that Article VI, Section 28 of the Utah Constitution prohibits only acts by the Legislature, not by private parties. Appellee Van Dam simply has stated that he disagrees--without citing authority. Appellee Hansen has responded with repeated miscitations of authorities.

Article VI, Section 28 of the Utah Constitution provides:

> The legislature shall not authorize any game of chance, lottery or give enterprises under any pretense or for any purpose.

Section 28, by its terms, prohibits only acts by the Legislature; it does not prohibit acts by private parties--much less make private parties acts' criminal. At least eight sections of the Constitution--Article XII, Section 5, 7, 9, 10, 13, 16, 19 and 20--specifically prohibit acts by private

parties. For example, Article XII Section 5 provides:

> Corporations shall not issue stock, except to bona fide subscribers thereof or their assignees, nor shall any corporation issue any bond... for the payment of money, except for money or property received, or labor done... .

When the drafters of the Utah Constitution wished to prohibit private parties from engaging in certain activities, they said so! They did not circumlocute by stating that the Legislature may not authorize corporations to issue stock to other than bona fide subscribers, etc. The drafters' election to use very different phrasiology in prohibiting the Legislature from "authorizing" lotteries must be deemed intentional and meaningful. E.g., Roy L. Houck & Sons v. Ellis, 229 Or. 21, 336 P.2d 166, 171 (1961).

Appellee Hansen has cited the debates in the Constituional Convention to support his argument that the draftsmen wished to prohibit private lotteries by the Section. He quotes Mr. Eichnor, a member of the Convention, as stating:

> "... I do not think that there is any danger that the State of Utah wants to establish lotteries, or authorize anyone to establish a lottery."

Hansen Br., p. 3. Hansen urges that "Mr. Eichnor's statement represents a desire by the Convention to prohibit both public and private lotteries alike."

Mr. Eichnor's statements are set forth in their entirety at page 937 of the Convention's proceedings. In fact, Mr. Eichnor stated:

> "Mr. President, I move to strike out Section 28. It is a known fact that the United States has made war on lotteries, that it is the next thing to impossibility to get a legislature to authorize the establishment of a lottery in the State of Utah. I know a number of states have that provision, but it is simply a dead letter. The United States would step in and punish every one connected with the affair. Not in the local matters, but as far as the mails are concerned. You could not use the mails for any purpose of that kind. I do not think that there is any danger that the State of Utah wants to establish lotteries, or authorize any one to establish a lottery.

Mr. Eichnor did not say a word about private games of chance. Indeed, he moved to strike the provision upon which Hansen now relies, on the ground that the Federal prohibitions of use of the mails for a lottery which would make a state lottery impossible. Obviously, the mail is not integral to conducting a private raffle, bingo game or even a gambling casino. Mr. Eichnor was addressing himself to one of the few forms of gambling in which the mails do play a major role--state-wide lotteries of the type which had led to scandals in Louisanna and elsewhere. Indeed, the limited scope of Section 28 is clear from the following exchange:

> Mr. HAMMOND. Let me ask the gentleman from Weber a question? Will this prohibit horse

racing. I never bet much on it, but I am fond of it.

Mr. EVANS (Weber). No; it will not according to the construction of the courts.

Mr. HAMMOND. Then I am satisfied.

Proceedings of the Constitutional Convention, 1-p.938, April 12, 1895.

Neither Section 28's language nor its legislative history lends the slightest support to appellee Hansen's construction.

The only court which has construed a constitutional provision similar to Utah's as prohibiting private gambling is State ex rel. Schillberg v. Safeway Stores, Inc., 75 Wash. 2d 94, 450 P.2d 949 (1969). (The Texas constitutional provision, which Hansen cites at page 11 of his brief, specifically prohibited all lotteries.) That decision is poorly reasured and, further, cannot be persuasive upon this Court because of the different intent reflected in the Utah Convention and the very different language used in those sections of the Utah Constitution which do prohibit private conduct.

Finally, even if Section 28 prohibited private lotteries, it does not follow that games such as Double Cash Bingo come within that prohibition. The great weight of authority holds that games in which the player risks nothing of sub-

stance are not conduct contemplated by anti-gambling or anti-lottery statutes. Cudd v. Aschenbrenner, 233 Or. 272 377 P.2d 150, 158-159 (1962); Affiliated Enterprises, Inc. v. Rock-Ola Mfg. Corp., 23 F. Supp. 3, 6, (N.D. Ill. 1937); Post Publ. Co. v. Murray, 230 Fed. 773, 776 (1st Cir. 1916), People v. Cardas, 137 Cal. app. 2d 788, 28 P.2d 99, 101 (1933); State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 Mont. 52, 132 P.2d 689, 696-697 (1942). (The foregoing cases are discussed at pages 15-16 and 23-26 of the Opening Brief.)

CONCLUSION

Appellees have not meaninfully answered the Opening Brief. For the reasons stated above, Albertson's urges that the decision below be reversed.

Respectfully submitted this 8th day of December, 1978.

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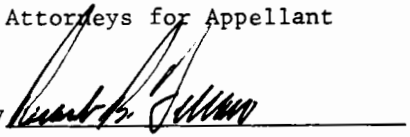
By 

CERTIFICATE OF SERVICE

I CERTIFY that copies of the foregoing Reply Brief of Appellants were served upon the following counsel of record by mailing a copy to each at the appropriate address indicated below, first class mail, postage prepaid, this 8th day of December, 1978.

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