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Criminal Law: Florida's Legal Lotteries

Robert P. Gaines

may choose to rely on a similar instruction submitted by defendant. Should this distinction be decisive in determining whether the defendant is in jeopardy on a subsequent trial?

The obvious guilt of the accused, together with the unappealable error of the trial judge in directing a verdict on an immaterial variance, is perhaps the real basis of the instant holding. Since the defendant could have been validly convicted on the first trial, however, he was certainly in jeopardy at the subsequent trial. In view of the fact that constitutional rights are at stake, the use of estoppel to circumvent a jeopardy situation is dangerous precedent.

YOUNG J. SIMMONS

CRIMINAL LAW: FLORIDA'S LEGAL LOTTERIES

Opinion of the Attorney General 055-289 (Oct. 31, 1955)

A national soap company mailed to persons in Florida free entry blanks upon which the recipients wrote their names and addresses. The blanks were then returned to the soap company, which held a drawing and awarded prizes to those whose names were drawn. A Florida supermarket advertised that it would award duplicate prizes to the winners whose blanks had been stamped at the supermarket. Does either of these schemes violate Florida's lottery laws?[1] The Attorney General held that the manufacturer was not conducting a lottery but that the supermarket was.[2]

The opinion of the Attorney General listed three elements of a lottery: prize, chance, and consideration. There was no consideration moving to the soap manufacturer, the opinion said, but the financial benefits accruing to the operator of the supermarket in attracting a large group of participants to its store constituted consideration.

Decisions of the Florida Supreme Court indicate that neither of these schemes violates Florida's lottery laws. In addition to the three essential elements named by the Attorney General,[3] the Florida Supreme Court has named a fourth — widespread effect. This require-

[1] FLA. CONST. art. III, §23 (1885); FLA. STAT. §849.09 (1953).

[2] Op. Att'y Gen. Fla. 055-289 (Oct. 31, 1955).

[3] *E.g.*, Op. Att'y Gen. Fla. 055-251 (Sept. 29, 1955); REP. ATT'Y GEN. FLA. 660-75 (1954).

ment is unusual; apparently in no other state must a lottery be of widespread effect to violate the law,[4] and at least one state has expressly rejected such a requirement.[5]

The requirement of widespread effect was first set forth by the Florida Court in *Lee v. Miami*,[6] involving the constitutionality of the licensing of slot machines. It was argued that the licensing act[7] contravened the constitutional prohibition of lotteries. The Court held that slot machines are lotteries but not the type of lottery prohibited by the constitutional provision. The Court said[8] that the Constitution prohibited only a lottery that, in the words of the United States Supreme Court, "infests the whole community"[9] and that in this instance there was no showing that the community was infested. Mr. Justice Buford dissented[10] on the basis that the Court should take judicial notice that the whole state was infested.

The *Lee* case was expressly followed in other cases involving slot machines,[11] and the requirement of widespread effect was mentioned in cases involving the legality of "bank night" held by various theatres.[12] In upholding a conviction for selling tickets for "New York Bond," a lottery based on quotations of the New York Stock Exchange, the Court stated that it was common knowledge that all Hillsborough County was "infected" by the lottery.[13] The Court also upheld the conviction of a "Cuba" lottery operator in an opinion stating that the statute upon which the conviction was based did not define "lottery."[14] The opinion cited the *Lee* case but did not further define "lottery." In a later lottery case[15] the Court did not discuss widespread effect at all.

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[4]*E.g.*, Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579 (C.C.E.D.N.Y. 1910); Grimes v. State, 235 Ala. 192, 178 So. 73 (1937); State v. Dorau, 124 Conn. 160, 198 Atl. 573 (1938); Grant v. State, 54 Tex. Crim. 403, 112 S. W. 1068 (1908).

[5]State v. Coats, 158 Ore. 122, 129, 74 P.2d 1102, 1105 (1938) (dictum).

[6]121 Fla. 92, 163 So. 486 (1935).

[7]Fla. Laws 1935, c. 17257.

[8]121 Fla. 92, 103, 163 So. 486, 490 (1935).

[9]Phalen v. Virginia, 49 U.S. (8 How.) 163, 168 (1850).

[10]121 Fla. 92, 104, 163 So. 486, 491 (1935).

[11]Gibson v. Robinson, 127 Fla. 88, 172 So. 476 (1937); Hardison v. Coleman, 121 Fla. 892, 164 So. 520 (1935); Lee v. Beck, 121 Fla. 114, 163 So. 495 (1935).

[12]See Little River Theatre Corp. v. State *ex rel.* Hodge, 135 Fla. 854, 185 So. 855 (1939); Gulf Theatres Inc. v. State *ex rel.* Ferguson, 135 Fla. 850, 185 So. 862 (1939); Dorman v. Publix-Saenger-Sparks Theatres, Inc., 135 Fla. 284, 184 So. 886 (1938).

[13]Victor v. State, 141 Fla. 508, 193 So. 762 (1940).

[14]Jarrell v. State, 135 Fla. 736, 185 So. 873 (1939).

[15]Vestre v. State, 142 Fla. 366, 195 So. 151 (1940).