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Opinion No. 03-049

Reverse Raffle and Auction as Lottery

QUESTION

Are reverse raffles or auctions lotteries that are prohibited under state law unless approved by a two-thirds vote of the members of each House of the General Assembly as required under Article XI, Section 5 of the Tennessee Constitution?

OPINION

Under Tennessee case law, a lottery is a transaction in which the three elements of prize, chance, and consideration must be present. Whether any particular activity is a lottery under state law depends on the particular facts and circumstances surrounding the activity. An organization, charitable or otherwise, may lawfully conduct a cash or prize giveaway if all persons wishing to participate are given an opportunity to do so without being required to pay any money, make any donation, or purchase any product or service. But where, as in the specific event described in the attachment to the request, an individual must purchase a ticket in order to be eligible to participate, the activity is an illegal lottery unless it is part of an annual event held for the benefit of a 501(c)(3) organization approved by a two-thirds vote of the members of each House of the General Assembly.

Ordinarily, an auction is simply a competitive sale of goods and would not be an illegal lottery. The auction transactions described in the attachment to the request, however, each involve the three elements of prize, chance, and consideration. For this reason, they are lottery activities that are illegal unless they are part of an annual event held for the benefit of a 501(c)(3) organization approved by a two-thirds vote of the members of each House of the General Assembly.

ANALYSIS

This opinion addresses whether certain activities would constitute a lottery within the meaning of state criminal statutes. Under Tenn. Code Ann. § 39-17-506(a), a person commits an offense who knowingly makes or aids in the making of any lottery. The term "lottery" means the selling of anything of value for chances on a prize or stake. Tenn. Code Ann. § 39-17-501(5). This provision must be read together with subsection (1) of the same statute, which provides:

> Gambling is contrary to the public policy of this state and means risking anything of value for a profit whose return is to any degree

> contingent on chance, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels and the like. For the purposes of this chapter, gambling does not include:
>
> (A) A lawful business transaction;
>
> (B) Annual events operated for the benefit of charitable § 501(c)(3) organizations that are authorized pursuant to a two-thirds (2/3) approval of the general assembly, so long as such events are not prohibited by the state constitution; or
>
> (C) A state lottery of the type such as is in operation in Georgia, Kentucky, and Virginia in 2000 and authorized by amendment to the Constitution of Tennessee, if such lottery is approved by the general assembly.

Tenn. Code Ann. § 39-17-501(1).

Article XI, Section 5 of the Tennessee Constitution, as recently amended, prohibits the General Assembly from authorizing a lottery except in two circumstances. First, the General Assembly may authorize a state lottery if the net proceeds are allocated for specific purposes. Second, Article XI, Section 5 provides:

> All other forms of lottery not authorized herein are expressly prohibited unless authorized by a two-thirds vote of all members elected to each house of the General Assembly for an annual event operated for the benefit of a 501(c)(3) organization located in this state, as defined by the 2000 United States Tax Code or as may be amended from time to time.
>
> A state lottery means a lottery of the type such as in operation in Georgia, Kentucky and Virginia in 2000, and the amendment to Article XI, Section 5 of the Constitution of the State of Tennessee provided for herein does not authorize games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like.

An "annual event" that the General Assembly may authorize under these paragraphs may not include casino-type gambling. Op. Tenn. Atty. Gen. 01-064 (April 24, 2001). Under state law, however, it is not a crime to conduct a lottery if that lottery is part of an annual event operated for the benefit of a 501(c)(3) organization authorized by a two-thirds vote of the General Assembly, as allowed under Article XI, Section 5 of the Tennessee Constitution.

The request asks whether "reverse raffles" and auctions are lotteries prohibited under state law unless they are approved by a two-thirds vote of the General Assembly under this constitutional provision. We assume the question refers to activities carried on by private organizations, and not to the state lottery referred to in the first part of Article XI, Section 5. Amendments to Article XI, Section 5 did not change the constitutional definition of lottery as interpreted by the courts of this State. As used in Article XI, Section 5 of the Tennessee Constitution, the term "lottery" refers to a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles. *Secretary of State v. St. Augustine Church*, 766 S.W.2d 499, 501 (Tenn. 1989) (quoting *France v. State*, 65 Tenn. 478, 483 (1873)). In order that a transaction may be a lottery three elements must be present: consideration, prize and chance. *Id. (*quoting *State ex rel. District Attorney General v. Crescent Amusement Co.*, 170 Tenn. 351, 357, 95 S.W.2d 310, 312 (1936)). As noted above, the statutory scheme prohibiting lottery activity defines the term "lottery" as "the selling of anything of value for chances on a prize or stake." Tenn. Code Ann. § 39-17-501(5). The statutory and constitutional definitions, therefore, coincide.

Whether any particular transaction contains the three elements of consideration, prize, and chance depends on the specific facts and circumstances. Further, enforcement of the gaming statutes that prohibit lotteries falls within the jurisdiction of the District Attorneys General. Tenn. Code Ann.§ 8-7-103(1). Accordingly, the opinion of this Office on whether any particular activity is a prohibited lottery is merely advisory, and it is a matter for the District Attorney General to make any enforcement decision with respect to the issue.

A. Reverse Raffle as a Lottery

The request does not define the term "reverse raffle" or "auction," but includes a description of a fundraising event. The legality of the reverse raffle and the auction must be analyzed separately. As described in that material, an organization would sell a total of 350 tickets for a dinner. Each ticket would have a number. Stubs from each ticket sold would be placed in a container, and a drawing would be conducted. Various prizes would be awarded to the holder of tickets drawn, depending on the order in which they are drawn. The holder of the last ticket to be drawn would win a car donated to the organization. We assume that this transaction is the "reverse raffle" to which the question refers. After 340 tickets have been drawn, there will also be a drawing from the previously drawn tickets for special door prizes.

In 1989, this Office concluded that an organization, charitable or otherwise, may lawfully conduct a cash or prize giveaway if all persons wishing to participate are given an opportunity to do so without being required to pay any money, make any donation, or purchase any product or service. Op. Tenn. Atty. Gen. 89-72 (May 3, 1989). This opinion overruled earlier inconsistent opinions, including Op. Tenn. Atty. Gen. 84-221 (July 18, 1984) on reverse raffles.

As described, only people who buy a ticket to the dinner will be eligible to participate in the drawing. The three elements of consideration, chance, and prize, therefore, are all present in the transaction. As described, therefore, the proposed "reverse raffle" is a lottery prohibited by state law

unless it is part of an annual event for the benefit of a 501(c)(3) organization approved by a two-thirds vote of the members of each House.

B. Auction as a Lottery

The statutory scheme regulating auctioneers defines the term "auction" as follows:

> "Auction" means a sales transaction conducted by means of oral or written exchange between an auctioneer and members of the audience, which exchange consists of a series of invitations for offers for purchase of goods or real estate made by the auctioneer and offers to purchase made by members of the audience culminating in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.

Tenn. Code Ann. § 62-19-101(2). Generally, a transaction that falls within this definition lacks the three elements of prize, chance, and consideration requisite for a lottery.

The auction of tickets as described in the attachment to the request, however, is a lottery. Under the rules, as tickets are drawn, the holders of tickets that have not been drawn may auction off their tickets. The minimum bid for a ticket will be one hundred fifty dollars. Twenty percent of the selling price of a ticket put up for auction is a donation to a charitable organization. Presumably, the individual who sells the ticket retains the remaining eighty percent of the selling price. A ticket seller who refuses to sell a ticket that is bid upon must pay twenty-five dollars to the organization holding the event. A holder of one of the last ten tickets who receives a bid and refuses to sell must pay a five percent fee, apparently based on the bid price. Under all these transactions, an individual is paying money for a chance to win a prize. As described, therefore, the auction has the three elements of prize, chance, and consideration. For this reason, these transactions are each an illegal lottery unless they are part of an annual event held for the benefit of a 501(c)(3) organization approved by a two-thirds vote of the members of each House of the General Assembly.

We think the phrase "for the benefit of" a 501(c)(3) organization means an event where the net proceeds — that is, the money raised at the event less the expenses of holding it — are donated to the 501(c)(3) organization. Where, as described, individuals auctioning off their tickets retain some of the proceeds, it can be argued that the event is not "for the benefit of" a 501(c)(3) organization within the meaning of Article XI, Section 5 of the Tennessee Constitution. We think it can be argued, however, that the eighty percent retained by the person selling the ticket is analogous to a prize purchased out of ticket proceeds. For this reason, the premium to the ticket seller can be regarded as part of the expense of holding the event. The fact that the ticket seller retains most of the selling price, therefore, does not prevent the event from being "for the benefit of" a 501(c)(3) organization that the General Assembly may approve under Article XI, Section 5 of the Tennessee Constitution.

As discussed above, under Article XI, Section 5, the General Assembly may not authorize "games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like." This limit applies both to the state lottery and to events held for the benefit of a 501(c)(3) organization. The question then becomes whether a "reverse raffle" or an auction of the type described in the attachment to the request is a game of chance associated with casinos within the meaning of this provision. In this context, "associated" means "closely related, especially in the mind: allied, accompanying." *Webster's Third New International Dictionary of the English Language, Unabridged,* 132 (1986). Courts must give effect to the intent of the people who adopted a constitutional provision. *Gaskin v. Collins,* 661 S.W.2d 865 (Tenn. 1983). We think the average person voting on the provision would not consider a reverse raffle or an auction of the type described to be associated with casinos in the same manner as slot machines and roulette wheels.

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