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Opinion No. 03-058

Permissible Games under Lottery Amendment

QUESTIONS

Article XI, Section 5 of the Tennessee Constitution provides that the General Assembly may authorize a state lottery if certain conditions are met. The provision states:

> 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.

1. What lottery games existed in Georgia, Virginia, and Kentucky in 2000?

2. What lottery games that existed in Virginia, Georgia, and Kentucky in 2000 are "games of chance associated with casinos" and therefore may not be authorized as a state lottery under the Tennessee Constitution?

3. Is keno a game of chance associated with casinos that may not be authorized as a state lottery under the Tennessee Constitution?

OPINIONS

1. Preliminary research indicates that the games operated by Georgia, Kentucky, and Virginia in 2000 include the following:

> Georgia: Lotto Georgia[1]; Big Game; Cash 3; Cash 4; Fantasy 5; Quick Cash[2]; and Instant Ticket (scratch-off cards).

[1] Georgia, Kentucky, and Virginia have now combined their state lotto games into a single multistate game called Lotto South.

[2] This game is now referred to as "Quick Cash Keno," and is further discussed in Questions 2 and 3.

Kentucky: Powerball; Lotto Kentucky; Pick 3; Pick 4; Cash 5; and Instant Ticket (scratch-off cards and pull-tabs).

Virginia: Lotto Virginia; Big Game; Kicker; Pick 3; Pick 4; Cash 5; and Instant Ticket (scratch-off cards).

2. Our research indicates that most of the games listed above involve the sale of tickets or shares, with prizes awarded based on a drawing of randomly selected numbers. As a general matter, it is unlikely that the average person voting on the 2002 amendments would regard this type of game as associated with casinos in the same manner as are slot machines and roulette wheels. Nor do we think that the average person would regard scratch cards and pull-tab devices as associated with casinos in the same manner as are slot machines and roulette wheels. But the determination will require an examination of the rules and manner in which each game is played and public perception of the game. This issue should be addressed by the Tennessee Lottery Corporation when it is establishing games that it will operate. For example, the Corporation may wish to conduct a survey, compile evidence, and make factual findings regarding whether any particular game is permissible under Article XI, Section 5 of the Tennessee Constitution.

3. Preliminary research indicates that the game of keno is frequently played in casinos. Whether keno is a game of chance associated with casinos, however, is an issue of fact that can only be conclusively determined by a court of law after considering all relevant evidence. Before authorizing the operation of keno, the Tennessee Lottery Corporation should compile evidence and make factual findings to support its conclusion that the game is not prohibited by Article XI, Section 5 of the Tennessee Constitution.

ANALYSIS

1. Games Operated in Georgia, Virginia, and Kentucky in 2000

This opinion addresses the range of games that the Tennessee General Assembly may authorize as a state lottery. Under Article XI, Section 5, the General Assembly may authorize a state lottery if the net proceeds of the lottery's revenues are allocated for specified educational purposes. Article XI, Section 5 also provides:

> 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.

The first question is what lottery games existed in Georgia, Kentucky, and Virginia in 2000. This is a factual question, and ordinarily this Office does not conduct factual research in

rendering AG opinions. In any case, we do not think that the phrase "a lottery *of the type* such as in operation in Georgia, Kentucky, and Virginia in 2000" includes only those games actually operated by the state lotteries in those states in 2000. In our opinion, the phrase also includes games "of the type" similar to those games.

Preliminary research indicates that the games operated by Georgia, Kentucky, and Virginia in 2000 include the following:

> Georgia: Lotto Georgia[3]; Big Game; Cash 3; Cash 4; Fantasy 5; Quick Cash; and Instant Ticket (scratch-off cards).
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> Kentucky: Powerball; Lotto Kentucky; Pick 3; Pick 4; Cash 5; and Instant Ticket (scratch-off cards and pull-tabs).
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> Virginia: Lotto Virginia; Big Game; Kicker; Pick 3; Pick 4; Cash 5; and Instant Ticket (scratch-off cards).

2. "Games of Chance Associated with Casinos"

The next question is which of these games, if any, would be included in the category of "games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like." In the context of this phrase, "associated" means "closely related, especially in the mind: allied, accompanying." *Webster's Third New International Dictionary of the English Language, Unabridged* 132 (1986). Even though they can appear at other places, slot machines and roulette wheels are most typically found in casinos. 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). Thus, the question is whether the average person voting on the 2002 amendments to Article XI, Section 5 of the Tennessee Constitution would feel that any particular game is associated with casinos in the same manner as are slot machines and roulette wheels. Our research indicates that most of the games listed above involve the sale of tickets or shares, with prizes awarded based on a drawing of randomly selected numbers. As a general matter, it is unlikely that the average person voting on the 2002 amendments would regard this type of game as associated with casinos in the same manner as are slot machines and roulette wheels. Nor do we think that the average person would regard scratch cards and pull-tab devices as associated with casinos in the same manner as are slot machines and roulette wheels. But the determination will require an examination of the rules and manner in which each game is played. This issue should be addressed by the Tennessee Lottery Corporation when it is establishing games that it will operate. For example, the Lottery Corporation may wish to conduct a survey, compile evidence, and make factual findings regarding whether any particular game is permissible under Article XI, Section 5 of the Tennessee Constitution.

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[3] Since 2000, Georgia, Virginia, and Kentucky combined their state lotto games into a single multistate game called Lotto South.

We note that pending legislation that would implement a state lottery contains the following definitions:

> "Lottery," "lotteries," "lottery game," or "lottery games" means any game of chance approved by the board [of the Lottery Corporation] and operated pursuant to this chapter, including, but not limited to, instant tickets and on-line games. For the purposes of this chapter, "lottery," "lotteries," "lottery game," or "lottery games" does not include:
>
> (A) Casino gambling or games of chance associated with casinos and prohibited pursuant to Article XI, Section 5 of the Constitution of Tennessee. For the purposes of this item, "casino gambling" means a location or business for the purpose of conducting illegal gambling activities, excluding the sale and purchase of lottery tickets or shares as authorized by this chapter;

Senate Bill 1, as amended and passed by the Senate April 23, 2003, Section 2, proposed Tenn. Code Ann. § 4-51-102 (8). This definition of "casino gambling" is based on the Georgia lottery law. Article 1, Section 2, Paragraph VIII of the Georgia Constitution provides in part that "[e]xcept as herein specifically provided in this Paragraph VIII, all lotteries, and the sale of lottery tickets, and all forms of pari-mutuel betting and casino gambling are hereby prohibited; and this prohibition shall be enforced by penal laws." Ga.Const. Art.1, § 2, ¶ VIII(a).

The phrase "all forms of . . . casino gambling" prohibited by the Georgia Constitution is not necessarily synonymous with "games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like[,]" prohibited by the Tennessee Constitution. The definition in Senate Bill 1 focuses on where gambling takes place, and defines "casino gambling" to include a business *for the purpose of conducting illegal gambling activities.* But we think the phrase "games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like[,]" prohibits a particular class of games associated with casinos, regardless of where the State may authorize them to be played. For this reason, Georgia case law interpreting games permissible under the Georgia Constitution is not necessarily reliable authority for games permissible under the Tennessee Constitution. *See Jackson v. Georgia Lottery Corporation*, 228 Ga.App. 239, 491 S.E.2d 408 (1997), *reconsideration denied* (1997), *cert. denied* (1998). In that case, the Georgia Court of Appeals found that the Georgia Lottery Corporation was authorized to operate "Cash Three" and "Quick Cash." The Court noted that in "Cash Three" a player marks three numbers on a lottery ticket in one sequential order and/or in numerical combinations; drawings are daily. 491 S.E.2d at 413, n. 6. In "Quick Cash", the Court noted that a player selects from one to ten numbers on a lottery ticket which is then read by a computer at the time of selection. Every five minutes, ten winning numbers are randomly chosen by the computer and displayed on a video monitor connected to the computer terminal. The amount of prize money depends on the total of correctly selected numbers. 491 S.E.2d at 413, n.7. The Court cited the

statutory definitions of "lottery" and "casino gambling" and concluded that neither game fell within the statutory definition of casino gambling. The Court noted that each game constituted the purchase of lottery tickets and that there was no contention that the games were played in locations operated for the *purpose* of conducting illegal gambling activities within the meaning of the statute. *Id.*, at 413. By contrast, under the Tennessee Constitution, we think a reviewing court would have to examine the rules governing a game, the manner in which it is played and public perception of the game to determine whether it falls within the class of "games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like[,]" within the meaning of the Tennessee Constitution.

3. Keno

The last question is whether keno is a game associated with casinos and, therefore, prohibited under Article XI, Section 5 of the Tennessee Constitution. Georgia currently operates a game called "Quick Cash Keno." It is not clear whether this is the same game referred to as "Quick Cash" that the state operated in 2000. The rules for "Quick Cash" described by the Georgia Court of Appeals in *Jackson*, discussed above, are similar to the rules for "Quick Cash Keno" described in current Georgia Lottery advertising materials. An individual wishing to play obtains a Quick Cash playslip from the retailer, and chooses up to ten numbers from a field of one through eighty. Every four minutes, twenty numbers from the field of one through eighty are selected and displayed on the Quick Cash monitor. Winnings are based on how many numbers match each draw. According to the "Frequently Asked Questions" page on the Georgia Lottery website:

> The Quick Cash Keno game was designed to attract those players who would like to have some fun in a social setting where they can linger and spend a few hours. Typical establishments would be restaurants, bars, bowling alleys, salons, etc. Many traditional retailers also offer Quick Cash.

Research indicates that keno is frequently played in casinos. *See, e.g.,* L. Miller, *The Gambling Times Guide to Casino Games,* 77 (1983) ("As any frequent visitor to Las Vegas knows, one of the most enduring and popular diversions in the strip hotels and the downtown casinos is the game of keno.") Whether keno is a game of chance associated with casinos, however, is an issue of fact that can only be conclusively determined by a court of law after considering all relevant evidence. Before authorizing the operation of keno, the Tennessee Lottery Corporation should compile evidence and make factual findings to support its conclusion that the game is not prohibited by Article XI, Section 5 of the Tennessee Constitution.

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