STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 14, 2018

Opinion No. 18-48

Legality of Sports Betting in Tennessee

Question

Does the General Assembly have the authority to legalize sports betting in the State of Tennessee solely through legislative action without a constitutional amendment?

Opinion

Article XI, section 5 of the Tennessee Constitution prohibits the General Assembly from authorizing any form of sports betting that constitutes a lottery. Whether a particular sports betting contest comes within the constitutional prohibition of lotteries would turn upon the particular facts of the contest as it is actually conducted. If chance is the dominant factor in determining the outcome of the contest, the contest constitutes a lottery and, absent an amendment to the Tennessee Constitution, the General Assembly may not authorize the contest solely through legislative action. If skill is the dominant factor in determining the outcome of the contest, the General Assembly may legalize the contest solely through legislative action without a constitutional amendment.

ANALYSIS

This Opinion addresses the authority of the General Assembly to legalize sports betting in this State.[1] Earlier this year, the United States Supreme Court removed a major impediment to legalized sports betting when it struck down the Professional and Amateur Sports Protection Act (PASPA). See Murphy v. National Collegiate Athletic Ass'n, 138 S.Ct. 1461 (2018). At issue in Murphy was PASPA's "most important" provision that generally made it "unlawful" for a State or any of its subdivisions to authorize or license sports gambling. Murphy, 138 S.Ct. at 1470 (citing 28 U.S.C. § 3702(1)). The Court determined that this provision was unconstitutional because it violated the anticommandering doctrine. Id. at 1478. Following this determination, the Court struck down the entire Act because PASPA's remaining provisions could not be severed. Id. at 1482-1484.

Accordingly, Murphy has paved the way for each State to decide for itself whether to legalize sports betting. Thus, the General Assembly may pass legislation authorizing sports betting in this State as long as such legislation does not run afoul of the Tennessee Constitution. See Perry v. Lawrence Cnty. Election Comm'n, 219 Tenn. 548, 551, 411 S.W.2d 538, 539 (1967) (citing Frazer v. Carr, 210 Tenn. 565, 585, 360 S.W.2d 449, 457 (1962)).

[1] For purposes of this Opinion, we assume that sports betting involves only the betting on actual sporting events. This Opinion does not address other forms of sports betting, such as fantasy sports betting or betting that involves amusement devices designed to simulate the playing of some sporting event.

Article XI, section 5 of the Tennessee Constitution generally provides that the General Assembly shall have no power to authorize "lotteries" for any purpose.[2] While this constitutional provision clearly prohibits lotteries, it does not prohibit all forms of gambling. *Secretary of State v. St. Augustine Church*, 766 S.W.2d 499, 500 (Tenn. 1989). Lotteries are only a species of gambling. *See France v. State*, 65 Tenn. 478, 481 (1873); *State v. Smith*, 10 Tenn. 272, 283 (1829); 38 Am.Jur.2d *Gambling* § 6 (2018). Therefore, the General Assembly may legalize and regulate any form of gambling that does not constitute a lottery. *St. Augustine Church*, 766 S.W.2d at 500.

The term "lottery," as used in article XI, section 5, 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." *Id*. at 501 (quoting *France*, 65 Tenn. at 483). Thus, "in order that a transaction may be a lottery, three elements must be present: consideration, prize and chance." *Id*. (quoting *State ex rel. Dist. Attorney Gen. v. Crescent Amusement Co*., 170 Tenn. 351, 357, 95 S.W.2d 310, 312 (1936)).

Almost every form of gambling involves the first two elements of consideration and prize because a bet is risked in the hopes of obtaining a larger reward. Thus, whether a gambling contest constitutes a lottery will generally turn on the role that the third element of "chance" plays in the outcome.

To determine whether the element of "chance" is present, most courts apply the "dominant factor" test, under which a scheme is deemed a lottery when chance dominates the distribution of prizes even though the exercise of some degree of skill, judgment, or research is present.[3] While no Tennessee court has expressly adopted the dominant factor test, the Tennessee Supreme Court has embraced the reasoning of this test because it does consider the amount of skill that a contest requires when determining whether the contest constitutes a lottery. *See*, *e.g.*, *St. Augustine Church*, 766 S.W.2d at 501 (Court found bingo to "clearly constitute[] a lottery," noting that bingo "demands less skill on the part of the player" than "dominoes, parcheesi, or any number of other perfectly innocent parlor games . . . and turns almost wholly on the random drawing of numbers");

[2] There are two circumstances in which article XI, section 5 of the Tennessee Constitution permits the General Assembly to authorize a lottery, but neither applies here.

[3] *See Ex parte Ted's Game Enters.*, 893 So.2d 376, 380 (Ala. 2004); *Morrow v. State*, 511 P.2d 127, 128-129 (Alaska 1973); *Finster v. Keller*, 18 Cal.App.3d 836, 843-844, 96 Cal.Rptr. 241 (1971); *In re Interrogatories of Governor regarding Sweepstakes Races Act*, 196 Colo. 353, 585 P.2d 595, 598 (1978); *Three Kings Holdings, L.L.C.*, 45 Kan.App.2d 1043, 255 P.3d 1218, 1223 (2011); *Commonwealth v. Lake*, 317 Mass. 264, 57 N.E.2d 923, 925 (1944); *United-Detroit Theatres v. Colonial Theatrical Enters.*, 280 Mich. 425, 273 N.W. 756, 757 (1937); *State ex inf. McKittrick v. Glove-Democrat Publ'g Co.*, 341 Mo. 862, 110 S.W.2d 705, 713 (1937); *State v. Ricciardi*, 18 N.J. 441, 114 A.2d 257, 259 (1955); *Joker Club, L.L.C. v. Hardin*, 183 N.C.App. 92, 643 S.E.2d 626, 629-630 (2007); *Middlemas v. Strutz*, 71 N.D. 186, 299 N.W. 589, 591 (1941); *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318, 338-339 (1956); *Commonwealth. v. Dent*, 2010 Pa. Super. 47, 992 A.2d 190, 195-196 (2010); *Roberts v. Communications Inv. Club of Woonsocket*, 431 A.2d 1206, 1211 (R.I. 1981); *Sherwood & Roberts-Yakima, Inc. v. Leach*, 67 Wash.2d 630, 409 P.2d 160, 162-163 (1965); *State v. Hudson*, 128 W.Va. 655, 37 S.E.2d 553, 558 (1946); *State v. Dahlk*, 111 Wis.2d 287, 330 N.W.2d 611, 617 (1983). *See also In re Request of Governor for Advisory Opinion*, 12 A.3d 1104, 1112 (Del. 2009) (noting that majority of jurisdictions in the United States apply the dominant factor rule). Only a few jurisdictions adhere to the "pure chance" rule, under which a scheme is considered a lottery when a person's judgment plays *no* part in the selection and award of the prize. *See* 38 Am.Jur.2d *Gambling* § 5 (2018). *See, e.g.*, *Braddock v. Family Finance Corp.*, 95 Idaho 256, 506 P.2d 824, 826 (1973).

Smith, 10 Tenn. at 281-282 (Court described many types of card games as lotteries because "cards are but numbered pieces of paper, and chances in getting certain numbers determine success"); *Bell v. State*, 37 Tenn. 507, 509 (1857) (Court observed that billiards is a game that depends on skill, lotteries are games that depend on chance, and backgammon is "of a mixed nature" of skill and chance).

Accordingly, this Office has applied the dominant factor test to various proposed contests to determine if the contests constituted lotteries. *See* Tenn. Att'y Gen. Op. 05-159 (Oct. 14, 2005) ("Texas Hold 'em" poker tournaments); Tenn. Att'y Gen. Op. 94-127 (Nov. 1, 1994) (video poker machines); Tenn. Att'y Gen. Op. 92-35 (Apr. 22, 1992) ("Riverboat Gambling"); Tenn. Att'y Gen. Op. 90-08 (Jan. 22, 1990) (turkey shoots and fishing tournaments). As these Opinions observe, the question of whether chance or skill predominates in a particular contest turns upon the specific facts of the contest. *See id*. In other words, it is the character of the contest, *i.e*., how the contest is conducted, and not the skill or want of skill of an individual participant that determines whether the game is one of chance or skill. *See id*.; 38 C.J.S. *Gaming* § 2 (2018). *Cf. State v. Netto*, 486 S.W.2d 725, 729 (Tenn. 1972) (court is to inquire into the game; whether a game is a lottery is not determined by the game's name). Thus, we have opined, for instance, that a fishing contest that awards prizes to contestants who catch specific tagged fish would be a game of chance. While the contest "arguably involv[es] an element of skill," ultimately "whether one of the tagged fish happens to take or hit the entrant's bait or lure, as opposed to any other fish in the lake, is not within the control of the entrant. It is a chance event" – and hence an impermissible lottery. Tenn. Att'y Gen. Op. 99-084 (Apr. 5, 1999); Tenn. Att'y Gen. Op. 90-08 n. 1 (Jan. 22, 1990) (same).

Application of the dominant factor test to sports betting works in the same manner. If a contest is based more on skill than it is on chance, the contest would not be a lottery. Thus, a contest that involves entrants placing bets on the outcome of an individual professional baseball game, for example, would appear to fall outside the parameters of Tennessee's lottery prohibition. Most States with a constitutional or statutory prohibition against lotteries that have considered whether betting on horse races constitutes a lottery have determined that they do not.[4] Courts have generally reasoned that chance does not control the outcome of horse races because the skill of the jockey and the condition, speed, and endurance of the jockey's horse are all factors that affect the result of the race. Moreover, bettors on horse races have sources of information that they may review before placing their bets. This information includes not only data on the actual race, but also previous records on the past performance of the jockeys and the horses. These sources allow the bettor to exercise his judgment and discretion in determining the horse on which to bet. Thus,

[4] *See Opinion of the Justices*, 373 So.2d 278 (Ala. 1979); *Engle v. State*, 53 Ariz. 458, 90 P.2d 988, 992-993 (1939); *Longstreth v. Cook*, 215 Ark. 72, 220 S.W.2d 433, 438 (1949); *People v. Postma*, 69 Cal.App.2d Supp. 814, 160 P.2d 221, 222 (1945); *Ginsberg v. Centennial Turf Club, Inc*., 126 Colo. 471, 251 P.2d 926, 929 (1952); *Oneida Cnty. Fair Bd. v. Smylie*, 86 Idaho 341, 386 P.2d 374, 391 (1963); *People v. Monroe*, 349 Ill. 270, 182 N.E. 439, 442 (1963); *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W.2d 987, 993-994 (1931); *Gandolfo v. Louisiana State Racing Comm'n*, 227 La. 45, 78 So.2d 504, 510 (1954); *Rohan v. Detroit Racing Ass'n*, 314 Mich. 326, 22 N.W.2d 433, 438 (1946); *Multnomah Cnty. Fair Ass'n v. Langley*, 140 Or. 172, 13 P.2d 354, 358 (1932); *Panas v. Texas Breeders & Racing Ass'n, Inc*., 80 S.W.2d 1020, 1024 (Tex. Civ. App. 1935); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 P. 1016, 109 (1926). *Contra State v. Nixon*, 270 Ind. 192, 384 N.E.2d 152, 160-161 (1979); *State ex rel. Moore v. Bissing*, 178 Kan. 111, 283 P.2d 418, 423-424 (1955); *State v. Ak-Sar-Ben Exposition Co*., 118 Neb. 851, 226 N.W. 705, 708-709 (1929).

courts generally reason that chance does not predominate.[5] In a like manner, the winner of a professional baseball game is primarily determined on the participants' skill. And persons who bet on such a game have a multitude of available sources of information to aid them in placing informed bets.

Conversely, a sports betting contest that is predominately chance-based would constitute a lottery. For instance, the Delaware Supreme Court examined three games that required players to select the winners of multiple professional football games. Because "the element of chance that enter[ed] each game [was] multiplied by a minimum of three and a maximum of fourteen games," the Court determined that the games constituted lotteries because chance was the predominant factor of the games. *In re Request of Governor for Advisory Opinion*, 12 A.3d 1104, 1113-1114 (Del. 2009) (citation omitted).

In sum, whether a particular sports betting contest comes within Tennessee's constitutional prohibition of lotteries would turn upon the particular facts of the contest as it is actually conducted. If chance is the dominant factor in determining the outcome of the contest, the contest constitutes a lottery and, absent an amendment to the Tennessee Constitution, the General Assembly may not authorize the contest solely through legislative action. If skill is the dominant factor in determining the outcome of the contest, the General Assembly may legalize the contest solely through legislative action without a constitutional amendment.

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[5] *See* note 4 *supra*.