

OPINION NO. 85-001

Syllabus:

A person who is authorized to sell alcoholic beverages is not prohibited by [1984-1985 Monthly Record] Ohio Admin. Code 4301:1-1-53(B) from having, employing, or allowing to be kept or used in, upon, or about the premises of the liquor permit holder, sports programs containing serial numbers which are drawn at random for the awarding of prizes, when there is no evidence indicating that individuals purchased the programs or otherwise gave valuable consideration with the intent of receiving a chance to win a prize.

To: Richard E. Carey, Director, Department of Liquor Control, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 13, 1985

I have before me your request for my opinion concerning certain promotional activities being conducted in ballparks throughout the state. You state in your letter of request:

[The Department of Liquor Control] has been informed of an activity that occurs at some of the ballparks in Ohio. Many of these same ballparks also have permits to serve beer or intoxicating liquor. The elements of this activity are comprised of a person coming to the particular stadium, purchasing a ticket to get in, and then if they so desire, purchasing a program such as you get at various athletic events, i.e. football, baseball and basketball. Some of the ads in these programs have serial numbers in them. These serial numbers are selected at random throughout the evening and announced over the stadium broadcast system with the winner claiming a prize.

...this particular activity requires two steps - 1) buying a ticket for entrance and 2) buying a program which in turn may have been bought solely for the use of the program and not an opportunity to win a prize with that opportunity merely being a gratuity bestowed upon the purchaser whom in fact may not even bother to verify the number. . . .

You wish to know whether the above-described activity is being conducted in violation of [1984-1985 Monthly Record] Ohio Admin. Code 4301:1-1-53.

Rule 4301:1-1-53 provides:

(A) Conviction in any court of competent jurisdiction of any holder of any permit, or of his agent or employee, or of any person, for keeping, exhibiting for gain, operating gambling devices, or conducting or permitting on such premises any games of chance, shall be grounds for suspension or revocation of such permit or permits.

(B) No person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess or employ or allow to be kept, exhibited or used in, upon or about the premises of the permit holder of any gambling device as defined in division (F) of section 2915.01 of the Revised Code which may or can be used for gambling offenses as defined in division (G) of section 2915.01 of the Revised Code.

...
(E) The foregoing paragraphs do not prohibit conduct by any person authorized to sell alcoholic beverages in the original container or for consumption on the permit premises to the extent that he may sponsor or conduct upon the permit premises promotional games or contests which are neither games nor schemes of chance and which do

not constitute gambling or public gaming as proscribed in Chapter 2915. of the Revised Code provided that:

- (1) The promotion or contest does not require the participant to pay money or something of value other than visiting the premises for the privilege or opportunity to participate in such promotions or contests or for receiving the award or prize therefrom, and
- (2) Alcoholic beverages are not an element of such a game or contest either directly or indirectly, and
- (3) The game or contest is sponsored or designed and run by a permit holder who is licensed for the sale of alcoholic beverages, a manufacturer whose main product line is not alcoholic beverages or their advertising agent or representative.

For the purposes of this rule, the phrase "something of value" means money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

Rule 4301:1-1-53 prohibits persons authorized to sell alcoholic beverages from "harbor[ing], keep[ing], exhibit[ing], possess[ing] or employ[ing] or allow[ing] to be kept, exhibited or used in, upon or about the premises of the permit holder" any type of gambling device, as defined in R.C. 2915.01(F), which may or can be used for gambling offenses, as defined in R.C. 2915.01(G). Thus, it must be determined whether, in conducting the above-described promotional activity, a permit holder is in any way keeping, possessing or allowing to be used upon the premises a type of gambling device which could be used for a gambling offense.

R.C. 2915.01(F) defines a "gambling device" to mean:

- (1) A book, totalizer, or other equipment for recording bets;
- (2) A ticket, token, or other device representing a chance, share, or interest in a scheme of chance, except a charitable bingo game, or evidencing a bet;
- (3) A deck of cards, dice, gaming table, roulette wheel, slot machine, punch board, or other apparatus designed for use in connection with a game of chance;
- (4) Any equipment, device, apparatus, or paraphernalia specially designed for gambling purposes. (Emphasis added.)

R.C. 2915.01(G) defines "gambling offense" to include a violation of R.C. 2915.02, and R.C. 2915.02 in turn, reads in pertinent part:

- (A) No person shall:
 -
 - (2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit;
 -
 - (5) With purpose to violate division (A)(1), (2), (3), or (4) of this section, acquire, possess, control, or operate any gambling device.

(B) . . . For purposes of division (A)(2) of this section, a person facilitates a scheme or game of chance conducted for profit if he in any way knowingly aids in the conduct or operation of any such scheme or game, including without limitation playing any such scheme or game.

R.C. 2915.01(C) defines "scheme of chance" as "a lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize," and R.C. 2915.01(E) defines a "scheme or game of chance conducted for profit" as "any scheme or game of chance designed to produce income for the person who conducts or operates the scheme or game of chance, but does not include a charitable bingo game." A determination of whether the ballpark activity

you have described is a "scheme of chance" within the meaning of R.C. 2915.01(C) is central to an analysis of your question. In making this determination, I bear in mind an axiom of criminal statutory construction that, criminal statutes must be strictly construed against the state and liberally construed in favor of an accused. R.C. 2901.04(A). See City of Washington Court House v. McStowe, 45 Ohio St. 2d 228, 343 N.E.2d 109 (1976); State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 124 N.E. 232 (1919); 1983 Op. Att'y Gen. No. 83-001.

The elements of a scheme of chance are the payment of valuable consideration by a participant for a chance to win a prize. R.C. 2915.01(C). Strictly construing the plain terms of R.C. 2915.01(C), I cannot conclude that the promotional activity you have described is a scheme of chance. It is unlikely and I cannot presume that, any person paid valuable consideration for either an admission ticket to a ballpark or a sports program in order to obtain a chance to win a prize. In the situation you have presented, ballpark patrons, in all likelihood, gave valuable consideration in order to gain admission to the ballpark and to receive a program containing, for example, information about the ballplayers. Patrons only incidentally received a chance to win a prize. In the absence of any indication that ballpark patrons paid valuable consideration with the intent of obtaining a chance to win a prize, I conclude that the promotional activity you have described is not a scheme of chance. Thus, the operation of the activity is not a gambling offense under R.C. 2915.01(G) and R.C. 2915.02.

As noted above, rule 4301:1-1-53(B) prohibits persons authorized to sell alcoholic beverages from "hav[ing], harbor[ing], keep[ing], exhibit[ing], possess[ing], or employ[ing] or allow[ing] to be kept, exhibited or used in, upon or about the premises of the permit holder" any gambling device as defined in R.C. 2915.01(F) which may or can be used for gambling offenses as defined in R.C. 2915.01(G). As set forth above, a gambling device includes a "ticket, token, or other device representing a chance, share, or interest in a scheme of chance." R.C. 2915.01(F)(2). Because I have concluded that the activity you have described is not a scheme of chance, and thus not a gambling offense, programs containing the serial numbers which are drawn for prizes are not gambling devices which may be used for a gambling offense. Thus, rule 4301:1-1-53 does not prohibit a person who is

¹ I note that in Kroger Co. v. Cook, 24 Ohio St. 2d 170, 265 N.E.2d 780 (1970), the Supreme Court of Ohio held that a scheme of chance existed in violation of Regulation 53, Section II of the Liquor Control Commission where a majority of the participants in a drawing purchased merchandise for a chance to win a prize, even though no purchase was necessary and a minority of participants made no purchase, since a portion of the purchase price of the merchandise bought went to support the game. I believe that Kroger Co. v. Cook is distinguishable from the situation which you have described. In Kroger, the Supreme Court construed Regulation 53, the predecessor to [1984-1985 Monthly Record] Ohio Admin. Code 4301:1-1-53. Regulation 53 provided as follows:

No person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess or employ or allow to be kept, exhibited or used in, upon or about the premises of the permit holder any device, machine, apparatus, book, record, forms, tickets, papers or charts which may or can be used for gaming or wagering or the recording of wagers, pools or chances on the result of any contest, or allow or conduct gaming or wagering on such premises on any game of skill or chance. . . .

Regulation 53 simply made reference to gaming and wagering and not to the criminal gambling statutes, whereas the present rule 4301:1-1-53(B) explicitly proscribes activity on a liquor permit premises in terms of the criminal gambling statutes of R.C. Chapter 2915 which, as previously noted, must be strictly construed. Thus, I do not find Kroger to be controlling with regard to the situation you have presented.

authorized to sell alcoholic beverages from keeping, possessing, or employing, or allowing to be kept or used, these programs on the premises of the liquor permit holder.

In conclusion, it is my opinion, and you are advised, that a person who is authorized to sell alcoholic beverages is not prohibited by [1984-1985 Monthly Record] Ohio Admin. Code 4301:1-1-53(B) from having, employing, or allowing to be kept or used in, upon, or about the premises of the liquor permit holder, sports programs containing serial numbers which are drawn at random for the awarding of prizes, when there is no evidence indicating that individuals purchased the programs or otherwise gave valuable consideration with the intent of receiving a chance to win a prize.