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CARDS OBTAINED AT A SUPERMARKET FOR USE IN A TELEVISION GAME OF CHANCE DO NOT CONSTITUTE A LOTTERY—ARTICLE 15, SECTION 6, OHIO CONSTITUTION, §§2915.10 AND 2915.12, R.C.

SYLLABUS:

A plan whereby persons obtain cards by distribution to their homes, or by obtaining them free at a supermarket without passing through the checkout counter, which cards are used to participate in a television contest in which the winners are determined predominately by chance (numbered balls rolling out of a drum), and in which contest monetary prizes are given, does not constitute a lottery within the purview of Sections 2915.10 and 2915.12, Revised Code, as the element of consideration necessary to constitute a lottery is not present in such an operation.

Columbus, Ohio, December 21, 1962

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“An advertising firm plans to enter into contracts for the purchase of time on a local television station, supply ‘Domino’ cards having several rows of numbered squares, supply the prizes, and do the actual production for the TV show. Spot time on the

show will be sold to a local supermarket chain and to various manufacturers of food products and household goods which are generally available in supermarkets.

“Substantial numbers of ‘Domino’ cards will be distributed on a house to house basis in an area surrounding each outlet of the sponsoring chain without a cost or obligation. Cards will also be available at all of the local supermarket’s stores within the viewing signal of the TV station, to anyone, at no cost, and without the necessity of passing through the checkout counter or making any purchase as a condition of obtaining a card. The cards in the program will permit the holder to participate in the five daily games played during the course of the week.

“The game begins by numbered balls running out of a rotating drum, or some similar device, thereby determining the individual numbers to be selected. As the numbers are drawn and announced to the TV audience, the viewer checks his card and covers the corresponding number if it appears on his card. During the progress of the game, the viewer who first succeeds in covering a vertical, horizontal or diagonal row of numbers and who phones the number flashed on the screen and announced audibly, is the winner for that day, provided he properly answers the question on the back of his card. Each day’s winner is awarded a prize of \$100.00 and has an opportunity to participate in the weekly grand prize contest.

“Other contestants who also have winning cards but were not first to phone the station will receive \$5.00 in cash by presenting their winning cards at any one of the supermarket’s stores during the week in which they won.

“On the day following each game, the numbers which were called will be posted in all outlets of the supermarket in the form of a reproduction of the ‘Domino’ board which is seen throughout the TV show, thus allowing all numbers called throughout the previous day’s game to be checked at any one of several locations.

“Once five daily games are complete, a weekly grand prize contest offering a \$1,000.00 prize, is played in the studio during the latter part of one day’s regular program. Contestants are the five daily winners for the previous week. This contest consists of answering a question generally relating to housekeeping, such as estimating the weight of a bag of potatoes, estimating the length of a piece of ribbon, etc. The contestant coming closest to the correct answer will be declared the winner.

“In addition to the game, each day’s program (which is expected to take one hour) consists of approximately 45 minutes devoted to household hints, weather reports, beauty and cosmetics advice, etc., all of which is woven into a package so that the game time in the one hour program comprises only about 15

minutes, commercials about 12 minutes, and the balance of the time to the other material outlined above.”

As I understand it, you are requesting an opinion as to whether the operation which you describe constitutes a lottery under Ohio law and is therefore illegal.

Section 6 of Article 15, Ohio Constitution, reads:

“Lotteries and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this state.”

Section 2915.10, Revised Code, reads, in part, as follows:

“No person, for his own profit, shall vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a lottery or scheme of chance, by whatever name, style, or title denominated or known, located in or to be drawn, paid, or carried on within or without this state.

“* * * * * * * * *”

Section 2915.12, Revised Code, reads, in part, as follows:

“No person, for his own profit, shall establish, open, set on foot, carry on, promite, make, draw, or act as ‘backer’ or ‘vendor’ for or on account of a lottery or scheme of chance, by whatever name known, located in or to be drawn, paid, or carried on within or without this state, or by any of such means, sell or expose for sale anything of value.

“* * * * * * * * *”

Sections 2915.10 and 2915.12, *supra*, also contain criminal penalties for violations of their provisions.

In *Westerhaus v. Cincinnati*, 165 Ohio St., 327, the Ohio Supreme Court held, in the fifth, eighth and ninth paragraphs of the syllabus:

“5. In general, the elements of gambling are payment of a *price* for a *chance* to gain a *prize*.

“* * * * * * * * *”

“8. In order to have a lottery, the determination as to who gets a prize or how much of a prize he gets must be dependent at least predominately upon the element of chance.

“9. The term ‘gambling’ includes a lottery but is broader and may encompass more than the term ‘lottery.’”

Thus, in order for a particular operation to constitute a lottery, it must have the elements of consideration and prize, and the winning of the prize must be dependent predominately on chance.

In the operation here involved it is plain that the element of prize is present. It is also plain that since the first winners are determined by a selection of balls, with no skill at all being involved on the part of the contestants, such winners are determined predominately by chance. Although a question must be answered when the phone call is made, this would appear to be a mere formality requiring little, if any, skill since the question appears on the back of the card and the contestant would have had a clear opportunity to obtain the answer in advance. Further, those who have winning cards but do not make the first phone call receive a prize by merely presenting their winning cards.

Having determined that, as to chance and prize, the elements necessary to constitute the operation in question a lottery, are present, it remains to be determined whether said operation contains the necessary element of consideration.

It is clear that the contestants would not pay any pecuniary consideration to participate. All that they would need to do would be to obtain a card and watch the television program; and the card might be distributed to them or they could obtain one at no cost at the local super-market (without making a purchase).

While it is thus clear that no direct consideration is paid in the instant question, it must be considered whether the procedure involves an indirect consideration. On this point, it is stated in 35 Ohio Jurisprudence 2d, 64, Section 3:

“* * *, the strict consideration that is required in contracts is not the kind required as an element of a lottery, and what may appear on its face to be a gratuitous distribution of property or money has frequently been declared to be merely a device to evade the law. The element of advertisement and increased patronage is consideration sufficient to constitute a lottery, and where lottery tickets are given with meals, the consideration is adequate.”

The authorities cited for the above statement are the cases of *State v. Bader*, 24 N.P. (N.S.) 186 (1922), Municipal Court of Cincinnati, and *Troy Amusement Co. v. Attenweiler*, 64 Ohio App., 105.

The *Bader* case involved a situation where a restaurant held a drawing, with an automobile for a prize. Tickets for the drawing were given to persons who bought meals, and were also given to persons who just walked in but did not buy a meal. The evidence showed that few people walked in to get tickets and that most of the contestants were those who purchased meals. The court held that the necessary element of consideration to constitute a lottery was present, the opinion of Judge Eyrich, at page 192, stating:

“The tickets are not free in the sense of being given without consideration. To obtain them in the ordinary course a person was compelled to purchase a meal. A very few were compelled to walk seventy-six feet through the restaurant to get them.”

The *Troy Amusement* case dealt with a bank night at a theatre. Under the plan, a person would register his name in the lobby of the theatre free of charge and would be given a number. On a certain day a drawing would be held in the theatre and the person holding the number drawn would win a prize if he was present in the theatre or presented himself within a specified number of minutes after the drawing. At page 121 of the opinion by Judge Geiger it is said:

“The element of advertisement and increased patronage is sufficient consideration flowing to the operator to bring the transaction within the condemnation of promoting and advertising a scheme of chance. * * *”

As to increased patronage, Judge Geiger noted that many persons would pay to go to the theatre regardless of the bank night, but that additional persons would go because of bank night. He did not appear to base his conclusion on the premise that a consideration for the drawing was included in the price of admission.

In the case of *State v. Devroux*, 14 O.O., 283, Municipal Court of Cleveland, an opposite conclusion from that of the *Bader* and *Troy Amusement Co.* cases was reached. In *Devroux* the court considered the situation where the defendant operated a restaurant and operated a bingo game at the restaurant. Persons eating at the restaurant were allowed to play free of charge, and persons were allowed to come into another part of the building and play free of charge. The diners and the others were separated from each other and could not see each other. The operation was held

not to be a lottery and, referring to *State v. Bader, supra*, Judge Copeland said at page 285 of the opinion:

“As we view it, this case may well be distinguished from that of the instant one. This court is not inclined to believe that the defendant’s claim that the operation of his restaurant and a charge of fifty cents, for which the patron received luncheon and entertainment, was merely a smoke screen to conceal the real character of his undertaking. In fact, the conclusion is inevitable that the real business of the defendant is that of conducting a restaurant, supplying meals at a reasonable cost, with the addition of entertainment, and, incidentally thereto, and as an advertising feature for the purpose of attracting more people to his establishment, he gratuitously operated bingo. And one was not required to eat nor to spend or hazard any money in order to obtain a chance of winning a prize. Insofar as bingo was concerned, all people were treated alike—the patrons of the luncheon room and the outside world.

* * * * * * * * *

“In the case of *Horner v. U.S.*, 449, the Supreme Court held as follows:

‘Consideration paid or passed in exchange for the chance to secure a prize is an essential element of a lottery. There is no law which prohibits the gratuitous distribution of one’s property by lot or chance.’

“In conclusion, it may be accepted as the result of the majority of adjudicated cases that a valuable consideration must be paid, directly or indirectly, for a chance to draw a prize by lot, to bring the transaction within the class of lotteries or gift enterprises that the law prohibits as criminal.

“The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived, directly or indirectly, from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent.

“By reason of all of which the court finds the defendant not guilty.”

I have found no Ohio decisions pertaining to a game operated through a radio or television station, however, there have been decisions in other jurisdictions on this question. In the case of *Clark v. State*, 262 Ala.

462 (1955), the Alabama Supreme Court held that a scheme whereby prizes were given by the operator of a store to contestants whose names were drawn on a weekly television program without contestants being required to make any purchase or pay any money, was not a lottery, although the purpose of the scheme was to increase the store's business through television advertising. In the *Clark* case, the opinion by Simpson, J., states in part:

“Applying the facts of the case as disclosed by the opinion of the Court of Appeals to what we know of human psychology and merchandising techniques employed by furniture stores, we entertain the view that the purpose of the scheme used by Broyles was not to get people to the store but rather to get them to view the television program (on which merchandise was advertised) and to get them to talk about the store—in other words, advertise Broyles Furniture Company. This is a close case but by the weight of authority we do not think the scheme constituted a lottery. Cf. *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L. Ed. 699. We do not say that there was no consideration moving to the operation of this scheme. We do not say that the consideration must be a pecuniary one. We do not say that in order to carry on a lottery the operator need only to televise the drawing. What we do say is the consideration in this case was not sufficient to label the operation a lottery. If the purpose and effect of the operation had been to get people to the store to look at merchandise or to be subjected to any type of sales appeal, a different question would be presented and one on which this court is not committed.”

The case of *Federal Communications Commission v. American Broadcasting Co. Inc.*, 347 U.S. 284 (United States Supreme Court, 1954), cited in the *Clark* case, *supra*, considered whether the “give-away” programs on radio and television involving games similar to that here concerned) violated Section 1304, United States Criminal Code, which prohibits the broadcasting of “* * * any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance * * *.”

In finding that sufficient consideration to constitute a lottery was not present in the games in question, the Court said in its opinion, at page 293:

“* * * We find no decisions precisely in point on the facts of the cases before us. The courts have defined consideration in various ways, but so far as we are aware none has ever held that

a contestant's listening at home to a radio or television program satisfies the consideration requirements. Some courts—with vigorous protest from others—have held that the requirement is satisfied by a 'raffle' scheme giving free chances to persons who go to a store to register in order to participate in the drawing of a prize, and similarly by a 'bank night' scheme giving free chances to persons who gather in front of a motion picture theatre in order to participate in a drawing held for the primary benefit of the paid patrons of the theatre. But such cases differ substantially from the cases before us. To be eligible for a prize on the 'give-away' programs involved here, not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter's place of business; the only effort required for participation is listening.

"We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such a program a crime. * * *"

As noted earlier, the contestants in the plan here in question would not be required to purchase anything, or leave their homes to visit the advertising firm, the television station, the supermarket, or the manufacturers of the food products and household goods. Once such a contestant has obtained a card, he has only to sit at home and listen in order to participate. It is true that some cards might be obtained at the supermarkets but, under the plan, a person would not have to pass through the checkout counter to obtain a card; and it would appear that a person going to the supermarket to get a card would thus not be going to look at merchandise and would not be subjected to any type of sales appeal. I believe that the same assumption may be made as to a person going to the supermarket to collect a \$5.00 prize.

It thus appears that the instant matter falls within the reasoning of the *Clark* and *Federal Communications Commission* cases, *supra*, rather than that of the *Bader* and *Troy Amusement Co.*, cases, *supra*, and that the element of consideration necessary to constitute the operation in question a lottery, is not present. I might further note that the above conclusion is strengthened by the fact that Sections 2915.10 and 2915.12, *supra*, the lottery statutes, are criminal laws which must be strictly construed against the state and liberally in favor of the defendant. 15 Ohio Jurisprudence 2d, 254, Section 20. I thus conclude that the operation in question is not a lottery and is thus not illegal under Section 2915.10 or Section 2915.12, *supra*.

In summary, therefore, it is my opinion and you are advised that a plan whereby persons obtain cards by distribution to their homes, or by obtaining them free at a supermarket without passing through the checkout counter, which cards are used to participate in a television contest in which the winners are determined predominantly by chance (numbered balls rolling out of a drum), and in which contest monetary prizes are given, does not constitute a lottery within the purview of Sections 2915.10 and 2915.12, Revised Code, as the element of consideration necessary to constitute a lottery is not present in such an operation.

Respectfully,

MARK McELROY
Attorney General