

OFFICIAL OPINION NO. 91-04, Validity of Video Lottery Legislation.

January 30, 1991

The Honorable George S. Mickelson
Governor
State Capitol
Pierre, SD 57501

OFFICIAL OPINION NO. 91-04

Validity of video lottery legislation

Dear Governor Mickelson:

You have requested an official opinion from this office regarding the following factual scenario:

FACTS:

In 1986, a statewide referendum was passed to amend the state Constitution making it lawful for the legislature to authorize by law a state lottery which is regulated, controlled, owned and operated by the state of South Dakota, either separately, jointly, or in cooperation with one or more other states. During the 1987 legislative session, Senate Bill No. 254 was passed establishing the South Dakota Lottery as an independent state agency under the direction of a seven-member commission appointed by the Governor and confirmed by the Senate. SDCL 42-7A-2; 42-7A-17. The administration of the South Dakota Lottery was placed with the executive director, appointed by the Governor, confirmed by the Senate, and under the supervision of the South Dakota Lottery Commission. SDCL 42-7A-2; 42-7A-3. The overall management of the state lottery and control over the operation of its games were placed solely with the South Dakota Lottery. SDCL 42-7A-2. The legislature in SDCL ch. 42-7A set forth comprehensive requirements to preserve the integrity and security of the state lottery including, but not limited to: qualification standards and background investigations of vendors and licensees; management responsibilities of the executive director; lottery ticket sale and redemption restrictions; the transfer of net proceeds to the state general fund; penalties for violations of lottery laws; and the rule-making authority of the Commission.

The 1987 legislation authorized only an instant lottery game. In 1989, the legislature passed Senate Bill No. 129, "An Act to authorize product diversification of the South Dakota Lottery to offer video games and provide penalties for violation thereof." The legislation authorized video lottery games to be played on video lottery machines authorized by the Commission. SDCL 42-7A-1(13).

The Legislature set forth the requirements to license video lottery machines which include: randomness of play; operation of video games licensed and authorized by the Commission; meters and accounting software that maintain permanent records of play transactions; ticket voucher printing and dispensing criteria; coin and bill mechanisms designed to prevent manipulation; and, the capability to communicate and be linked under a central communication system to provide auditing and security control functions as approved by the Commission. Legislation places restrictions on the amounts that can be wagered and won on a game; the placement of video lottery machines; the age limit and legal hours of operation for video lottery machines; and, penalties for tampering and intent to manipulate the operation of a machine. See SDCL 42-7A-37, 38, 44, 46, 47 and 48.

The legislation also expanded the South Dakota Lottery Commission's rule-making authority to include additional mechanical and electronic specifications for each video lottery machine. ARSD 48:02:07 and ARSD 48:02:08. The South Dakota Lottery thoroughly tests and examines prototypes of video lottery machines submitted by licensed manufacturers to ensure that all machines meet all statutory and regulatory requirements. SDCL 42-7A-40. No video lottery machine may be transported into the state unless its prototype has been approved by the Commission. Each video lottery machine licensed for placement in the state must conform to the exact specifications of the tested and approved prototype. ARSD 48:02:07:02 and :06.

In order to carry out its statutory requirements, the South Dakota Lottery has installed and implemented a video lottery central control system. The central control system is comprised of computer hardware and software programs that are designed to extract, store and assimilate monetary and game play transactions of each video lottery machine located in the state on a daily basis. The central control system provides the Lottery with complete control over the operational status of each video lottery machine located in licensed establishments statewide. All computer hardware of the central control system and the nontransferable and perpetual license in the internal video lottery audit and terminal control system software are owned by the South Dakota Lottery.

As a prerequisite to licensure and approval, each video lottery machine must be capable of properly communicating with the central control system. This is accomplished by a sophisticated communications protocol program used to communicate with the central control system and provide all the required information. The protocol program is a protected property right of the South Dakota Lottery. Licensed video lottery machine manufacturers are given permission to use the communications protocol program, but have no right of ownership. The protocol may not be transferred to any person or other entity nor can it be used for the manufacturing of any machine not intended for the South Dakota video lottery market. Further, to restrict availability of the games, all manufacturers with approved video lottery games have agreed to not knowingly distribute or make available the software and hardware to any person or entity for use or participation in the South Dakota video lottery unless such person is licensed and approved by the South Dakota Lottery. All manufacture agreements are effective from the date a game is approved by the Commission.

These video lottery machines are inoperable without direct linkage and enrollment to the central control system. These machines are of no value without linkage with the central control system which, as stated above, is owned, controlled and operated by the South Dakota Lottery. In addition, the Lottery holds total control over the enrollment of a machine onto the central control system to enable its operation and also the control to disable the operation of a machine from the main Lottery office in Pierre. The video lottery control system also ensures that only approved games may be played on video lottery machines. Absent linkage with the control system, approved game hardware and software cannot be activated. In addition, the control system can detect if a nonapproved game is being played on a video lottery machine.

Operators who purchase video lottery machines from distributors for placement in establishments are required to be licensed by the South Dakota Lottery. An operator license authorizes a person to purchase licensed and approved video lottery machines for placement in a licensed establishment.

The State receives 22.5 percent of of the income after winnings generated from each machine in the State, which will be increased to 25 percent on January 1, 1991.

Based upon the above factual information, you have asked the following question:

QUESTION:

Does the legislative and regulatory scheme authorized in implementing video lottery in the state of South Dakota satisfy the requirement of Article III, 25 of the South Dakota Constitution that a state lottery be regulated, controlled, owned and operated by the state of South Dakota?

IN RE QUESTION:

The Attorney General normally does not issue official opinions concerning the constitutionality of legislative enactments. This in part is due to the fact that it is the duty of the Attorney General to defend legislative enactments when their constitutionality is raised in courts of this State. Given the fact that you, as the chief executive officer of the state of South Dakota, have requested the opinion, that the issue is of great public importance, and that the legal issues before me specifically concern an agency under your branch of government, I will make an exception and render my opinion on the constitutionality of the legislative scheme.

In 1986, the people passed an amendment to Article III, 25 of the South Dakota Constitution that stated:

However, it shall be lawful for the legislature to authorize by law, a state lottery which is regulated, controlled, owned and operated by the state of South Dakota, either separately by this state or jointly or in cooperation with one or more other states. The entire net proceeds of such lottery shall be devoted to the operation of state government or such other purposes as the legislature shall determine.

Since the passage of the above constitutional amendment, the state legislature has enacted legislation establishing the South Dakota Lottery, a governing commission and a detailed statutory scheme. The statutory scheme authorizes certain types of lottery games to be conducted by the state lottery and sets forth guidelines on how those games shall be conducted and controlled. See SDCL ch. 42-7A. The state legislature also authorized the South Dakota Lottery Commission to enact further rules and regulations in carrying out its statutory mandates. The Commission has carried out this function. See ARSD 48:01, and 02.

As indicated in your extensive factual statement, one type of lottery game authorized by the legislature is video lottery. In determining whether the video lottery is constitutional, I will apply the standard of review utilized by the South Dakota Supreme Court.

In reviewing constitutional amendments, the Court presumes that the people adopted the constitutional amendment in view of and with the understanding of prior law. *Kneip v. Herseth*, 214 N.W.2d 93 (S.D. 1974). In addition, the Court has determined that a constitutional amendment will prevail over previously adopted provisions of the constitution with which it conflicts and with which it cannot be harmonized. *South Dakota Auto Club, Inc. v. Volk*, 305 N.W.2d 693 (S.D. 1981). Constitutional amendments are usually adopted for the purpose of making a change in the existing system. As such, "[t]he courts are under the duty to consider the old law, the mischief, and the remedy, and to interpret the constitution broadly to accomplish the manifest purpose of the amendment." *South Dakota Auto Club, Inc.*, *supra* at 697.

In applying the above standard of review, it is my opinion that the 1986 constitutional amendment to Article III, 25 was passed to allow the legislature to authorize a state lottery. Given the fact that the Constitution is not a grant, but a limitation, upon the law-making power of the legislature, I must determine the question of the constitutionality of the legislative scheme by inquiring whether the constitutional limitations have been violated. *McDonald v. School Board of Yankton, Etc.*, 246 N.W.2d 93 (S.D. 1976). In reviewing the constitutionality of a legislative enactment, the South Dakota Supreme Court in *Independent Community Bankers Association v. State*, 346 N.W.2d 737, 739 (S.D. 1984) stated:

Any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the constitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles. [Citation omitted.] Legislative action is also accorded the presumption in favor of validity and propriety and no statute should be held unconstitutional by any court unless its infringement of constitutional restrictions is so plain and palpable as to admit of no reasonable doubt. [Cite omitted.]

It is my opinion, based upon a review of the video lottery statutory scheme, that the legislation passes constitutional muster. The legislature through its enactments has created a video lottery that is regulated, controlled, owned and operated by the state of South Dakota.

First, it is my opinion that the video lottery scheme does constitute a lottery. A lottery is defined as "an event or affair whose outcome is or seems to be determined by chance."

Webster's New Collegiate Dictionary (1981). The video lottery games that are legislatively authorized definitely constitute games of chance.

Second, there can be no dispute that the video lottery is regulated, controlled and operated by the state of South Dakota. The detailed factual information provided to me clearly sets forth that the legislature has enacted a scheme to be enforced by the South Dakota Lottery Commission. The legislature has set forth how the video lottery is to be operated and provides provisions that ensure video lottery is regulated, controlled and operated by the South Dakota Lottery.

Based upon the review of the information you have provided and legislative and regulatory provisions, the only question of constitutionality that can be raised is whether the video lottery is "owned" by the state of South Dakota. It is my opinion that the legislature has established a video lottery that is state-owned. It is clear that the key component of the video lottery scheme is the video lottery central control system. It is clear that the key hardware and software of the central control system are owned by the State. It is also clear that without these components no person can participate in the State video lottery as a machine manufacturer, distributor, operator or player.

I do not interpret the constitutional amendment to require a state proprietary ownership interest in each and every item that is necessary to conduct the video lottery. Though the legislative scheme is such that private individuals own the machines upon which the lotteries are played and the physical premises in which the machines are located, I nonetheless conclude the video lottery is owned by the State. This is due to the fact that no video lottery machine may be operated or provide pecuniary benefit to any private individual without connection to the central control system. Accordingly, I conclude that the statutory scheme is constitutional, when considered in the context of the strong presumption of constitutionality expressed by our Supreme Court.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

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