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OPINION	:	No. 84-706
	:	
of	:	<u>DECEMBER 21, 1984</u>
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THE HONORABLE MICHAEL D. BRADBURY, DISTRICT ATTORNEY, COUNTY OF VENTURA, has requested an opinion on the following question:

May an organization licensed to conduct bingo games under Penal Code section 326.5 install and utilize player- operated computerized electronic video machines for this purpose?

CONCLUSION

An organization licensed to conduct bingo games may not install and utilize player-operated computerized electronic video machines for this purpose.

ANALYSIS

Article IV, section 19, subdivision (c) of the California Constitution provides that "the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes." The Legislature has implemented this provision in Penal Code section 326.5. (Pen. Code § 326.5 is set out in full in the appendix to this opinion.) We will summarize the relevant provisions of this law.

Bingo must be authorized by a local ordinance which allows games to be conducted only by certain tax-exempt organizations, mobile home park associations and senior citizens organizations. The receipts are to be used only for charitable purposes. No person except security personnel employed by the organization conducting the games may receive a wage. No minors may participate in the games. The bingo games must be conducted on property owned or leased by the organization or on certain donated property. The games shall be open to the public and operated, staffed, promoted and supervised only by members of the organization, except for hired security personnel. No individual, corporation, partnership or other legal entity except the organization shall hold a financial interest in the conduct of the games. Profits and proceeds must be kept in special accounts and not commingled with other accounts. Except in the case of an organization exempt from tax under Revenue and Taxation Code section 23701d, the lesser of 20 percent or \$1,000 per month of the proceeds may be used for rental of property and for overhead. Proceeds may be used for prizes, not exceeding \$250 in value for each separate game, and for fees.

What is bingo? The Legislature has defined bingo as "a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random." As an express exception to the statute prohibiting punchboards, it has defined a variety of bingo played with "cards having numbers or symbols which are concealed and preprinted in a manner providing for distribution of prizes." (Pen. Code, § 326.5, subd. (o).) The court in *People v. 8,000 Punchboard Card Devices* (1983) 142 Cal.App.3d 618, in finding punchboard bingo constitutionally authorized, discussed the game of bingo at pages 621-622:

"Appellant argues that the 'traditionally understood' definition of bingo is that of a game that involves 'drawing numbers at random and covering spaces on a card.' Various sources indicate, however, that the term 'bingo' may include any number of different but related games. One source identifies bingo as '[a] game of the same general class as 'Tango' or 'Tango Games.'" Tango games are said to include a number of similar games (including 'Beano,' 'Bingo,' 'Bonanza,' 'Horse Racer,' 'Keno,' 'Monaco,' 'Plaza B,' 'Plaza 7,' 'Ritz,' 'Skill Ball,' and 'Wheel O') in which the winner covers a

required number of figures in a row on a card, with the figures to be covered determined in a variety of ways. (38 C.J.S., Gaming, 1, pp. 38, 43.) Another source states that the term 'bingo' has previously been used to describe raffles run by motion picture houses (in which moviegoers were given a numbered slip of paper, and a duplicate was placed in a paper bag and subject to a drawing or a wheel was spun to determine the winning number), as well as a 19th century game played with dominoes. (Scarne, Scarne's New Complete Guide to Gambling (1974) p. 209.) In 1951 the California Attorney General determined a number of games to be 'variations of the game commonly called Bingo,' including 'Canast-O,' 'Black-Out,' 'Vogue,' 'Jade,' 'Cameo,' and 'Shamrock' (in which numbers on a card are filled as determined by players' tosses of balls into numbered cups), and 'Skill Quiz Lecture,' 'Skill Quiz Game,' and 'Klu Quiz Game' (in which players are required to fill a row of numbers on a card and then answer a quiz question correctly.) (17 Ops.Cal.Atty.Gen. 63, 64 (1951); see also *People v. Shira* (1976) 62 Cal.App.3d 442, 464, [133 Cal.Rptr. 94] [declaring game of 'Ringo' to be an illegal lottery].) The Attorney General suggested that these games were created in an attempt to evade the prohibition against bingo 'by slightly varying the activity with the claim that something different and legal has resulted.' (17 Ops.Cal.Atty.Gen., *supra*, at p. 68.) No common meaning of the term bingo emerges."

While the game bingo may have several variations, bingo is usually played by placing markers over numbered squares on a card according to the numbers randomly drawn and announced by the caller. (See *West Knoxville Am. Legion, Etc. v. Jenkins* (Tenn. Cr.App. 1982) 637 S.W.2d 899, 901; *Loder v. City of Canton* (Ohio Ct. of Com. Pleas 1951) 111 N.E. 2d 793, 795.) However, the game has also emerged in pinball machines (*In re Return of Trombetta* (Pa. Super. 1959) 149 A.2d 483, 487, app. dis. 363 U.S. 720) and in computerized electronic video machines (*Treasure State Games, Inc. v. State of Montana* (Mont. 1976) 551 P.2d 1008, 1009). This opinion involves the latter form of the game.

As described to us, the single player inserts a coin or token into the machine and the machine's video screen displays a facsimile of a typical bingo card, i.e., a square subdivided into smaller squares. Additional coins or tokens will produce up to four such images on the same screen. Without any manipulation by the player, numbers will light up in the squares. If these lighted numbers form a winning pattern for bingo the player receives a coupon which may be redeemed for additional plays, cash or prizes. The lighted numbers, we are informed, are randomly selected by the machine's computer and the player has no control over this selection process.

Is this machine an illegal slot machine? Under Penal Code sections 330a, 330b and 330.1 there are three basic elements to the definition of an illegal slot machine: (1) operation by money, coin or object; (2) the element of chance; (3) something of value offered. (66 Ops.Cal. Atty.Gen. 276, 279 (1983).) The machine just described is activated by a coin or token, recreates the game of bingo which is legislatively defined as a game of chance, and rewards a winning player with additional plays, cash or prizes. No skill is involved which would even suggest that the device fits into the "predominantly games of skill" exception to the illegal gambling device laws. (See Pen. Code, § 330b, subd. (4), and 330.5; 66 Ops.Cal. Atty.Gen. 276, *supra*; 65 Ops.Cal. Atty.Gen. 123 (1982).) In our view, the machine described to us is a slot machine and an illegal gambling device under California law.

This opinion involves an organization which under a local ordinance has been licensed to conduct bingo games. Since Penal Code section 326.5 would allow the organization to conduct bingo games by selling cards or punchboards to players, would that organization also be allowed to install and utilize computerized electronic video bingo machines as described above?

Penal Code section 326.5, subdivision (o), provides as follows:

"As used in this section "bingo" means a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random. Notwithstanding Section 330c, as used in this section, the game of bingo shall include cards having numbers or symbols which are concealed and preprinted in a manner providing for distribution of prizes. The winning cards shall not be known prior to the game by any person participating in the playing or operation of the bingo game. All such preprinted cards shall bear the legend, 'for sale or use only in a bingo game authorized under California law and pursuant to local ordinance.' It is the intention of the Legislature that bingo as defined in this subdivision applies exclusively to this section and shall not be applied in the construction or enforcement of any other provision of law."

Penal Code section 330c, referred to in the above statute, makes a punchboard an illegal gambling device. A punchboard is "any card, board or other device which may be played or operated by pulling, pressing, punching out or removing any slip, tab, paper or other substance therefrom to disclose any concealed number, name or symbol." (Pen. Code, § 330c.) In authorizing punchboard bingo in Penal Code section 326.5, subdivision (o), the Legislature made an express exception to section 330c. This legislative approval of punchboard bingo was upheld in *People v. 8,000 Punchboard Card Devices*, *supra*, 142 Cal.App.3d 618, 621-622.) The Legislature has not made similar exceptions to Penal Code

sections 330a, 330b and 330.1 which statutes outlaw slot machines. We find no legislative declaration that bingo for charitable purposes may be played on an otherwise illegal slot machine.¹

Penal Code section 326.5 authorizes certain organizations "to conduct" bingo games. The word conduct, like the words manage and direct, suggests control. (*Ciro's of S.F. v. State Bd. of Equalization* (1956) 142 Cal.App.2d 636, 639.) By installing and using player-operated computerized electronic video bingo machines the organization relinquishes control over the game itself. The machine conducts the game. Indeed, the machine described to us is barely distinguishable from a "one-armed bandit" or other illegal slot machines which demand little more than the insertion of coins. Section 326.5 expressly provides that the games be played with "numbers or symbols on a card"; it does not provide for play on an electronic screen. Moreover, the inclusion of mobile home park associations and senior citizen organizations among the organizations eligible for licenses indicates that the game was to be conducted with cards as a social event and not played as an isolated individual activity on a machine.

In *West Knoxville Am. Legion, Etc. v. Jenkin, supra*, 637 S. W. 2d 899 the sheriff seized from an American Legion post a green felt-top table which was "built and kept for use as a blackjack table and for bingo and raffle activities" and slot machines. Under Tennessee law bingo, raffles and "similar games of chance" may be conducted by a post or organization of war veterans. In this case the post argued that blackjack and slot machines were games of chance similar to bingo and raffles. The court rejected the contention (637 S.W.2d at p. 901):

"The phrase 'similar game of chance' as contained in § 39-2039(a)(1) embraces only games involving the same principles and substantially the same method of play as bingo and raffle. The card game of blackjack (or 21) and 'one-armed bandit' type slot machines are wholly dissimilar to bingo and raffle in principles and methods of play."

Likewise, we do not perceive player-operated electronic video bingo machines to be consistent with the principles and methods of bingo as set down in Penal Code section 326.5.

In re Return of Trombetta, supra, 149 A.2d 483, app. dis. 363 U.S. 720, involved the seizure of a bingo type pinball machine. The machine had an inclined horizontal playing field under glass consisting of pegs, bumpers, rubber rings, spring

¹ Although a video machine may be labeled "electronic punchboard" or "pull tab bingo" it is still a slot machine. (See *Hendrix v. McKee* (Ore. 1978) 575 P.2d 134, 138-139.)

bumpers, lights and numbered holes. Contact between the ball propelled by the player and these obstacles caused a vertical scoreboard, depicting a large square subdivided into smaller squares, to record the progress of the game. The purpose of the game was to illuminate a line of squares on the scoreboard. The court, in finding that the game was an illegal gambling device, expressed concern about the integrity of a game which was conducted by electronic circuitry unknown to the player (149 A.2d at p. 487):

"The odds are continually against him [the player]. And there are evidences of electronic engineering in this case which challenge and nurture the gambling instinct in a player and at the same time limit the amount that can be won. How substantial the profit may be to a proprietor exploiting the machines is suggested by the testimony of the witness Ann Pratt. Over an extended period she played one of the Bally type machines during her lunch period at Carmen's Restaurant, where two of the machines here involved were seized. She lost \$86 during one day and she quit playing the machines entirely when her total losses amounted to \$3,000. There is a factual false pretense in the tacit appeal of these Bally machines; they pretend to be on the level, but they are nothing of the sort. They are craftily designed, artfully constructed, and ingeniously deceptive in their appeal, and in our opinion clearly are gambling devices per se."

In contrast, bingo as conducted live with cards or with punchboards is an open and simple game not easily manipulated. The operation of video game bingo would not be subject to similar scrutiny and protection. As we observed in 65 Ops.Cal.Atty.Gen. 123, 128-129 (1982) in discussing electronic blackjack:

"The player is confronted with a computer program the nature of which is unknown to him. With the pressing of a button, the user does not know what the intricate electric circuitry will produce on the video screen . . . only the machine and its predetermined program knows the real cause and effect."

In *Treasure State Games, Inc. v. State*, *supra*, 551 Pac.2d 1008 the court found electronic keno legal when it was substantially indistinguishable from live keno. However, the Montana statute permitted keno to be played "however" operated. Moreover, the electronic game had to be played in strict compliance with other Montana gaming laws. (*State v. Johnson* (Mont. 1983) 660 P.2d 101, 103.) In any event, we do not believe that the California Legislature intended to legalize a slot machine if it is programed to display its win or loss outcome in a bingo format.

At the November 1984 general election Proposition 37 was approved thereby amending the California Constitution by adding subdivision (d) to section 19 of article IV (authorizing a California State Lottery) and adding chapter 12.5 to division 1 of title 2 of the Government Code (California State Lottery Act of 1984; Gov. Code, §§ 8880-8880.71). The act specifically provides that "[n]o Lottery Game may use the theme of bingo, roulette, dice, baccarat, blackjack, Lucky 7's, draw poker, slot machines, dog racing, or horse racing." (Gov. Code, § 8880.28, subd. (b).) Consequently, the principles and methods of bingo and slot machines may not be used in implementing the California State Lottery Act of 1984.

We conclude that an organization licensed to conduct bingo games may not install and utilize player-operated computerized electronic video games for this purpose.

APPENDIX

PENAL CODE SECTION 326.5

(a) Neither this chapter nor Chapter 10 (commencing with section 330) applies to any bingo game which is conducted in a city, county, or city and county pursuant to an ordinance enacted under section 19 of article IV of the state Constitution, provided that such ordinance allows games to be conducted only by organizations exempted from the payment of the bank and corporation tax by sections 23701a, 23701b, 23701d, 23701e, 23701f, 23701g, and 237011 of the Revenue and Taxation Code and by mobile home park associations and senior citizens organizations; and provided that the receipts of such games are used only for charitable purposes.

(b) It is a misdemeanor for any person to receive or pay a profit, wage, or salary from any bingo game authorized by section 19 of article IV of the state Constitution. Security personnel employed by the organization conducting the bingo game may be paid from the revenues of bingo games as provided in subdivisions (j) and (k).

(c) A violation of subdivision (b) of this section shall be punishable by a fine not to exceed ten thousand dollars (\$10,000), which fine shall be deposited in the general fund of the city, county, or city and county which enacted the ordinance authorizing the bingo game. A violation of any provision of this section, other than subdivision (b), is a misdemeanor.

(d) The city, county, or city and county which enacted the ordinance authorizing the bingo game may bring an action to enjoin a violation of this section.

(e) No minors shall be allowed to participate in any bingo game.

(f) An organization authorized to conduct bingo games pursuant to subdivision (a) shall conduct a bingo game only on property owned or leased by it, or property whose use is donated to the organization, and which property is used by such organization for an office or for performance of the purposes for which the organization is organized. Nothing in this subdivision shall be construed to require that the property owned or leased by or whose use is donated to the organization be used or leased exclusively by or donated exclusively to such organization.

(g) All bingo games shall be open to the public, not just to the members of the authorized organization.

(h) A bingo game shall be operated and staffed only by members of the authorized organization which organized it. Such members shall not receive a profit, wage, or salary from any bingo game. Only the organization authorized to conduct a bingo game shall operate such game, or participate in the promotion, supervision, or any other phase of such game. This subdivision does not preclude the employment of security personnel who are not members of the authorized organization at such bingo game by the organization conducting the game.

(i) No individual, corporation, partnership, or other legal entity except the organization authorized to conduct a bingo game shall hold a financial interest in the conduct of such bingo game.

(j) With respect to organizations exempt from payment of the bank and corporation tax by section 23701d of the Revenue and Taxation Code, all profits derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Such profits shall be used only for charitable purposes.

(k) With respect to other organizations authorized to conduct bingo games pursuant to this section, all proceeds derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Proceeds are the receipts of bingo games conducted by organizations not within subdivision (j). Such proceeds shall be used only for charitable purposes, except as follows:

(1) Such proceeds may be used for prizes.

(2) A portion of such proceeds, not to exceed 20 percent of the proceeds before the deduction for prizes, or one thousand dollars (\$1,000) per month, whichever is less, may be used for rental of property, overhead, including the purchase of bingo equipment, administrative expenses, security equipment, and security personnel.

(3) Such proceeds may be used to pay license fees.

(4) A city, county, or city and county which enacts an ordinance permitting bingo games may specify in such ordinance that if the monthly gross receipts from bingo games of an organization within this subdivision exceed five thousand dollars (\$5,000), a minimum percentage of the proceeds shall be used only for charitable purposes not relating to the conducting of bingo games and that the balance shall be used for prizes, rental of property, overhead, administrative expenses and payment of license fees. The amount of proceeds used for rental of property, overhead, and administrative expenses is subject to the limitations specified in paragraph (2) of this subdivision.

(1) (1) A city, county, or city and county may impose a license fee on each organization which it authorizes to conduct bingo games. The fee, whether for the initial license or renewal, shall not exceed fifty dollars (\$50) annually, except as provided in paragraph (2). If an application for a license is denied, one-half of any license fee paid shall be refunded to the organization.

(2) In lieu of the license fee permitted under paragraph (1), a city, county, or city and county may impose a license fee of fifty dollars (\$50) paid upon application. If an application for a license is denied, one-half of the application fee shall be refunded to the organization. An additional fee of 1 percent of the monthly gross receipts over five thousand dollars (\$5,000) derived from bingo games shall be collected monthly by the city, county, or city and county issuing the license.

(m) No person shall be allowed to participate in a bingo game, unless the person is physically present at the time and place in which the bingo game is being conducted.

(n) The total value of prizes awarded during the conduct of any bingo games shall not exceed two hundred fifty dollars (\$250) in cash or kind, or both, for each separate game which is held.

(o) As used in this section "bingo" means a game of chance in which prizes are awarded on the basis of designated numbers or symbols on a card which conform to numbers or symbols selected at random. Notwithstanding section 330c, as used in this section, the game of bingo shall include cards having numbers or symbols which are concealed and preprinted in a manner providing for distribution of prizes. The winning cards shall not be known prior to the game by any person participating in the playing or operation of the bingo game. All such preprinted cards shall bear the legend, "for sale or use only in a bingo game authorized under California law and pursuant to local ordinance." It is the intention of the Legislature that bingo as defined in this subdivision applies exclusively to this section and shall not be applied in the construction or enforcement of any other provision of law.