



TIM GRIFFIN

ATTORNEY GENERAL OF ARKANSAS

Opinion No. 2023-008

February 28, 2023

The Honorable Ashley Hudson
State Representative
Post Office Box 241205
Little Rock, Arkansas 72223-0004

Dear Representative Hudson:

This is in response to your request for an opinion on the proper interpretation and application of Arkansas laws regarding amusement devices. Your request contends that:

This is an issue that I believe requires clarity for my constituents and business owners around the State, who are often unjustly subjected to searches and seizures of machines that qualify as lawful amusement devices under Arkansas Code Annotated § 26-57-401. Your opinion is also necessary to relieve law enforcement and local officials from the burden of interpreting the law themselves, which results in unnecessary time and expense investigating activity that, often times, is lawful.

In this regard, you have asked the following questions:

1. Does Arkansas Code Annotated § 26-57-401 exempt “amusement devices” from the State’s prohibitions on “gambling devices” so long as such devices do not include an automatic payoff and the prizes for winning are nonmonetary and have a value of less than \$5.00?
2. If a coin-operated machine requires some level of skill, does not include an automatic payoff, and is operated entirely within the limitations contained in Arkansas Code Annotated § 26-57-401, can it nevertheless be considered an unlawful “gaming device” under Arkansas Code Annotated § 5-66-104?
3. If the owner of an “amusement device” authorized under Arkansas Code Annotated § 26-57-401 leases the device to a merchant who uses the machine illegally (e.g., the merchant or her employees gives cash to a customer for using the machine) can the machine be seized by law

enforcement and destroyed pursuant to Arkansas Code Annotated § 5-5-101 et seq. without a civil forfeiture action?

RESPONSE

The answer to each of your questions is “no.”

DISCUSSION

A general overview of the applicable law may be helpful before turning to your specific questions. The Arkansas Code prohibits gambling and gaming.¹ While “gambling” and “gaming” are not defined by statute, the Arkansas Supreme Court has used these terms interchangeably and has defined “gambling” as “the risking of money between two or more persons, on a contest or chance of any kind, where one must be loser and the other gainer.”²

The Arkansas Code also makes it “unlawful for a person to set up, keep, or exhibit any gaming table or gambling device..., either: (1) [a]dapted, devised, or designed for the purpose of playing any game of chance; or (2) [a]t which money or property may be won or lost.”³ However, the so-called “Chuck E. Cheese” law exempts certain “coin-operated amusement devices” from the gambling statutes.⁴ Specifically, § 26-57-402 limits the definition of the money, property, and other valuables mentioned in the antigambling statutes to exclude free amusement features and toys, novelties, candy, or “representations of redeemable value” (e.g., tokens or tickets) for these items if their wholesale value is not more than ten times the cost charged to play the amusement device one time or \$5.00, whichever is less.⁵

If a device qualifies as an “amusement device” under § 26-57-402 and certain criteria are met, the owner pays a privilege tax and licensing fee, and the device is excluded from the antigambling statutes.⁶

With this general overview of the law in mind, I turn to your specific questions.

¹ A.C.A. § 5-66-101 *et seq.* (Repl. 2016).

² *Sharp v. State*, 350 Ark. 529, 534, 88 S.W.3d 848, 851–52 (2002) (quoting *Portis v. State*, 27 Ark. 360, 362 (1872)).

³ A.C.A. § 5-66-104(a).

⁴ A.C.A. § 26-57-401 *et seq.* (Repl. 2020 and Supp. 2021).

⁵ A.C.A. § 26-57-402(2)(A) (Repl. 2020).

⁶ *See, e.g.*, A.C.A. §§ 26-57-404 (Repl. 2020) (imposing a privilege tax on amusement devices), 26-57-408 (Repl. 2020) (imposing a privilege fee on amusement devices), 26-57-409 (Repl. 2020) (providing for an annual license fee for amusement devices).

Question 1: Does Arkansas Code Annotated § 26-57-401 exempt “amusement devices” from the State’s prohibitions on “gambling devices” so long as such devices do not include an automatic payoff and the prizes for winning are nonmonetary and have a value of less than \$5.00?

No, the conditions you have listed are necessary but not sufficient for a device to be exempt from the antigambling statutes. Several other conditions must also be met.

First, the nature of the device is important. Arkansas law defines an “amusement device” as “a coin-operated machine, device, or apparatus that provides amusement, diversion, or entertainment....”⁷ Examples of permissible games include radio rifles, miniature sports, shooting galleries, pool tables, shuffleboard, pinball tables, cranes, video games, claw machines, novelty arcade machines, and other similar games that require some level of skill.⁸ By contrast, the definition of “amusement device” explicitly excludes “a machine, device, or apparatus that constitutes a casino-gambling-style game,” including mechanical or electronic draw games, slot machines, roulette wheels, craps, video poker, and casino-gambling style games where the outcome is determined substantially by chance.⁹ Furthermore, an amusement device cannot contain any sort of jackpot or automatic money payoff mechanism.”¹⁰

Second, any reward given for playing the amusement device must exclusively consist of a free amusement feature or merchandise limited to toys, novelties, candy, or some type of ticket or token than can be redeemed for those items.¹¹ The items must have a wholesale value of not more than ten times the cost charged to play the amusement device one time or \$5.00, whichever is less.¹² Rewards that meet these requirements do not constitute money or property for purposes of the antigambling statutes.¹³

Other restrictions set forth in the “Chuck E. Cheese” law include the requirement that toys and novelties be located solely on the premises where the amusement device is played¹⁴

⁷ A.C.A. § 26-57-402(1)(A).

⁸ *See id.*

⁹ A.C.A. § 26-57-402(1)(B).

¹⁰ A.C.A. § 26-57-403(a) (Repl. 2020).

¹¹ *See* A.C.A. § 26-57-402(2)(A).

¹² *Id.*

¹³ *Id.*

¹⁴ A.C.A. § 26-57-402(2)(B)(iv).

and that they be displayed in a single area.¹⁵ Furthermore, each operator must maintain records confirming the wholesale value of the toys and novelties.¹⁶ A toy, novelty, or candy given or awarded to a player as a reward cannot be re-awarded to another player by the amusement device operator,¹⁷ and it cannot be traded, redeemed, sold, leased, or otherwise exchanged for money, property, or other valuable thing to any person on the premises who is associated with the amusement device operator or for the purpose of circumventing the antigambling statutes.¹⁸ If a player accumulates redeemable tickets or tokens, any toy or novelty awarded by an amusement device operator or redeemed by a player cannot have a wholesale value of more than \$12.50.¹⁹ If the toy or novelty is offered in a facility that meets certain listed requirements,²⁰ its wholesale value may not exceed \$500.²¹ Finally, the owner of an amusement device must pay a privilege tax, a privilege fee, and a license fee.²² Failure to do so can result in the amusement device being declared a public nuisance that is subject to seizure.²³

Question 2: If a coin-operated machine requires some level of skill, does not include an automatic payoff, and is operated entirely within the limitations contained in Arkansas Code Annotated § 26-57-401, can it nevertheless be considered an unlawful “gaming device” under Arkansas Code Annotated § 5-66-104?

No, a machine that operates entirely within the limitations of § 26-57-401 *et seq.* would not be unlawful under § 5-66-104. As the Arkansas Supreme Court has observed, it is quite possible for a machine to be *properly licensed* under § 26-57-401 *et seq.* but still be illegal under § 5-66-104.²⁴ However, if a machine fully complies with *all* the requirements set forth in § 26-57-401 *et seq.*, it cannot, by definition, also constitute an illegal gaming device. That is because an illegal gaming device is one “adapted or designed for the purposes of playing any game of chance or at which any money or property may be won

¹⁵ A.C.A. § 26-57-402(2)(B)(ii).

¹⁶ A.C.A. § 26-57-402(2)(B)(iii).

¹⁷ A.C.A. § 26-57-402(2)(D)(ii).

¹⁸ A.C.A. § 26-57-402(2)(D)(i).

¹⁹ A.C.A. § 26-57-402(2)(B)(i).

²⁰ *See* A.C.A. § 26-57-402(2)(C).

²¹ A.C.A. § 26-57-402(2)(B)(i) and (2)(C).

²² *See, e.g.,* A.C.A. §§ 26-57-404, 26-57-408, 26-57-409.

²³ *See* A.C.A. §§ 26-57-406 (Repl. 2020), 26-57-414 (Repl. 2020).

²⁴ *Sharp*, 350 Ark. at 530, 88 S.W.3d at 849 (noting that whether video arcade machines were properly licensed was not relevant in determining whether they constituted illegal gaming devices).

or lost.”²⁵ But a game in which the outcome is substantially determined by chance cannot be considered a lawful amusement device.²⁶ And the limited toys, novelties, candy, tickets, or tokens that may be won by the player of an amusement device do not fall within the definition of “money or property” for purposes of the antigambling statutes.²⁷ Therefore, a machine that meets all the statutory requirements of a lawful amusement device under § 26-57-401 *et seq.* cannot also be an unlawful gaming device under § 5-66-104.

Question 3: If the owner of an “amusement device” authorized under Arkansas Code Annotated § 26-57-401 leases the device to a merchant who uses the machine illegally (e.g., the merchant or her employees gives cash to a customer for using the machine) can the machine be seized by law enforcement and destroyed pursuant to Arkansas Code Annotated § 5-5-101 et seq. without a civil forfeiture action?

No, § 5-5-101 *et seq.* would not permit law enforcement to seize and destroy the machine without a civil forfeiture action.

A device may constitute a prohibited gaming device in one of two ways: it may be a per se gaming device, or it may be a gaming device by actual use.²⁸ A per se gaming device is one that is adapted or designed to determine the winner and loser in a game of chance and whose “only reasonable and profitable use ... is use in a game of chance.”²⁹ The “mere possession” of a per se gaming device is punishable under § 5-66-104.³⁰ By contrast, a gaming device by actual use is a device that may be used for lawful purposes but has been converted or used for gambling.³¹ Unlike a per se gaming device, there must be evidence presented that the device has actually been used for gambling before a violation will be upheld.³²

²⁵ *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 321–322, 34 S.W.3d 360, 362–63 (2001) (internal citation omitted); *see also* A.C.A. § 5-66-104(a).

²⁶ *See* A.C.A. § 26-57-402(1).

²⁷ A.C.A. § 26-57-402(2)(A).

²⁸ *See State v. 26 Gaming Machines*, 356 Ark. 47, 145 S.W.3d 368 (2004).

²⁹ *Steed v. State*, 189 Ark. 389, 390, 72 S.W.2d 542, 543 (1934).

³⁰ *26 Gaming Machines*, 356 Ark. at 52, 145 S.W.3d at 371.

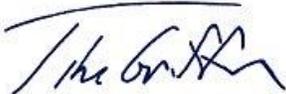
³¹ *See, e.g., Bostic v. City of Little Rock*, 241 Ark. 671, 409 S.W.2d 825 (1966) (holding that a pinball machine was a gaming device, as operated, because the owner paid winners for every free game won); *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1943) (holding that teletype machines were gaming devices, as operated, because they were used for betting on horse races); *Johnson v. State*, 101 Ark. 159, 141 S.W. 493 (1911) (holding that dice and a cloth pinned to the ground were used as gaming devices).

³² *26 Gaming Machines*, 356 Ark. at 56, 145 S.W.3d at 374 (citing *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975)).

I understand that you are asking about a situation in which a merchant lessee has converted a lawful amusement device into a gaming device by actual use, and law enforcement has seized the device. This situation is governed by A.C.A. § 5-5-101 and Rule 15 of the Arkansas Rules of Criminal Procedure, which address the disposition of contraband and seized property.³³ Under § 5-5-101, “[a]ny seized property shall be returned to the rightful owner or possessor of the seized property except contraband owned by a defendant.”³⁴ Rule 15.2 sets forth the procedures for implementing § 5-5-101,³⁵ and it allows the rightful owner or possessor of the seized property to file a motion for return or restoration of the things seized things.

Assistant Attorney General Kelly Summerside prepared this opinion, which I hereby approve.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Griffin", with a horizontal line above it.

TIM GRIFFIN
Attorney General

³³ A.C.A. § 5-66-108 previously provided for the disposition of seized gaming devices, but that section was repealed in 2013. *See* Act 1348 of 2013, § 15.

³⁴ A.C.A. § 5-5-101(a) (Repl. 2013).

³⁵ *See Wilburn v. Topeka Corp.*, 265 Ark. 141, 577 S.W.2d 406 (1979).