

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
v.	:	No. 2184 C.D. 2007
	:	
VFW Post,	:	Argued: October 14, 2008
	:	
Appellant	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: November 6, 2008

VFW Post (VFW) petitions for review of the order of the Court of Common Pleas of Allegheny County (trial court) denying VFW’s summary appeal and adjudging VFW guilty on five counts of the summary offense of operating a mechanical amusement device without a license, in violation of the municipal ordinances of the Borough of Wall (Borough).¹

VFW maintains five or more video amusement devices. These devices include two “Cherry Master” machines, a “Dyna Bar” machine, a “Fruit Bonus” machine and a “Championship” machine. (Trial Ct. Hr’g Tr. at 29-31.) None of

¹ While this case involves a statutory criminal offense and is captioned Commonwealth of Pennsylvania v. VFW Post, the brief on behalf of the Commonwealth was submitted by the solicitor for the Borough.

these machines display playing cards. (Trial Ct. Hr'g Tr. at 29-31.) Some of the devices resemble slot machines. (Trial Ct. Hr'g Tr. at 29-31.) Borough Ordinance No. 00-2 provides for the licensing of juke boxes, pool tables, and video and mechanical amusement devices. Under Section 11 of Ordinance No. 00-2, the fee schedule was as follows:

Video Poker	\$200.00
Pool Table	\$25.00
All Other	\$75.00

(Ordinance No. 00-2 § 11.) Between 2000 and 2004, VFW paid the \$200.00 video poker licensing fee for each of its video amusement devices. In 2004, Ordinance No. 00-2 was amended by Ordinance No. 04-1 (collectively with Ordinance No. 00-2, Amusement Tax Ordinance), which set forth the following fee schedule:

Video Poker	\$500.00
Pool Tables/Pin Ball Machines and other Video Games	\$100.00
Juke Boxes, Cigarette Vending Machines	\$75.00

(Ordinance No. 04-1). From 2004 onward, VFW disputed with Borough whether VFW's video amusement devices were video poker machines and stopped paying the video poker licensing fee. On December 8, 2005, Borough's code enforcement officer, Keith Evers (Evers), issued citations to VFW, stating that VFW had failed to obtain the necessary permit for 2005 for the five machines described above. A Magisterial District Judge found VFW guilty of the violations. VFW appealed to the trial court, which heard the matter de novo.

Before the trial court, VFW argued that the \$500 licensing fee for video poker was unreasonable, that the term “Video Poker” was not defined in the Amusement Tax Ordinance, and that its machines were not video poker machines. The trial court dismissed VFW’s summary appeal and found VFW guilty of violating the Amusement Tax Ordinance. In its opinion, the trial court stated that it rested its decision on the determination that substantial evidence, including Evers’ testimony, supported a finding that VFW had not paid the licensing fee as required and that VFW had not previously challenged the Amusement Tax Ordinance. The trial court specifically stated that it was not making a finding as to the reasonableness of Borough’s fee structure. VFW now appeals to this court.²

Before this Court, VFW argues: (1) that the Amusement Tax Ordinance is void for vagueness because it does not define the term “Video Poker” and whether that term includes the machines at issue in this case; (2) that VFW was improperly convicted of violating Section 11 of Borough’s Amusement Tax Ordinance when it was only charged with violating Section 7; and (3) that the licensing fee set forth in the Amusement Tax Ordinance is illegal because it is not reasonably related to the costs of regulating such machines.³

First, we address VFW’s argument that the Amusement Tax Ordinance is void for vagueness. In arguing this issue, both parties largely conflate the issues of whether the Amusement Tax Ordinance is unconstitutionally vague and whether

² “Our scope of review of a trial court’s summary conviction is limited to determining whether an error of law occurred or whether the trial court’s findings are supported by substantial evidence.” Commonwealth v. Snyder, 688 A.2d 230, 231 n.3 (Pa. Cmwlth. 1996).

³ In the interests of clarity and judicial economy, we have reordered VFW’s arguments.

VFW's devices qualify as video poker machines. "An ordinance is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited by law." Commonwealth v. Brandon, 872 A.2d 239, 243 (Pa. Cmwlth. 2005) (quoting Commonwealth v. Asamoah, 809 A.2d 943, 946 (Pa. Super. 2002)). Here, VFW argues that because the Amusement Tax Ordinance does not define "video poker," VFW does not know what licensing fee it must pay for its devices.

Borough argues that, read as a whole, the Amusement Tax Ordinance is clearly intended to tax casino-style games at a higher rate than other game machines. Section 5 defines "amusement device" as a broad term encompassing various kinds of machines used to play games. Section 5 defines "video or mechanical amusement device" as a subset of "amusement devices," with its distinguishing feature being that such devices "require the insertion of a 'coin, currency, metal disc, slug or token' to operate." (Borough's Br. at 10 (quoting Ordinance 00-2 § 5).) Finally, Section 5 defines "gambling devices" as a subset of "video or mechanical amusement device" whose members allow the playing of traditional casino games. Borough argues that, after reading these definitions, a person of average intelligence would be able to distinguish gambling machines from other regulated devices such as pool tables, juke boxes, or arcade games.

Further, Borough argues that a person of average intelligence would understand that games traditionally associated with gambling require more regulation to protect the public. The Amusement Tax Ordinance reflects this concern in various sections. According to Borough, the risk of illegal gambling is lesser in games which are not traditionally associated with gambling. Borough

does not believe that special knowledge is required to tell the difference between the casino-style games and other games. Finally, Borough argues that Evers' testimony also demonstrated that enforcement of the Amusement Tax Ordinance is not arbitrary—indeed, he testified that he interprets the term “Video Poker” as including slot machine-style games.

VFW is correct that the Amusement Tax Ordinance does not define the term “video poker.” We agree with Borough that the term is not ambiguous, but we do not agree that the term “Video Poker” encompasses all casino-style games. “Video” is defined as “1: being, relating to, or used in the transmission or reception of the television image . . . 2: being, relating to, or involving images on a television screen or computer display.” Merriam-Webster's Collegiate Dictionary 10th ed. 1312. “Poker” is defined as:

any of several *card games* in which a player bets that the value of his or her hand is greater than that of the hands held by others, in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot.

Merriam-Webster's Collegiate Dictionary 10th ed. 897 (emphasis added). A person of common intelligence, then, would understand “Video Poker” to, at a minimum, involve the representation of a card game on a television or computer display. While this is not ambiguous, it certainly does not include *all* casino-style games, as Borough argues. It is true that the Amusement Tax Ordinance does include a definition for “gambling device”; however, this only highlights the point that had the fee schedule been intended to levy the higher fee upon all gambling devices, rather than just video poker, the drafters of the Amusement Tax Ordinance could have *used* the term “gambling device.” Evers testified that none of the

machines at issue in this appeal displayed representations of playing cards. (Trial Ct. Hr'g Tr. at 29-31.) There is no evidence, therefore, that these machines constitute video poker. Because VFW's video amusement devices are not "Video Poker," it should have only been required to pay the licensing fee for "other Video Games." (Ordinance No. 04-1 § 11.)

Finally, Borough argues that by paying the video poker fee for its devices in the past, VFW somehow waived its right to argue that it should not have to pay those fees now, or assert that it believes its machines are not video poker machines. Borough cites no authority in support of this argument, nor has this Court's research revealed any such authority. It is reasonable to assume that a party may comply with a law for any number of reasons, only one of which is that he considers the law to be legitimate.

Because we hold that Borough failed to prove that VFW's video gaming devices qualify as "Video Poker" under Section 11 of the Amusement Tax Ordinance, we must reverse the trial court's order. Due to our disposition on this issue, we do not reach VFW's additional arguments.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, November 6, 2008, the order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge