

1968 O. A. G.

OFFICIAL OPINION NO. 32

August 23, 1968

**CRIMINAL LAW AND ENFORCEMENT—Pinball
Machines as Gambling Devices.**

Opinion Requested by Superintendent Robert A. O'Neal, Indiana State Police.

Your inquiry of March 8, 1968, raises several questions regarding the applicability of Acts 1955, ch. 265, section 2(4) as last amended by Acts 1957, ch. 205, § 1(4), the same being Burns IND. STAT. ANN. § 10-2330(4), to the operation of pinball machines. More specifically, you have asked what constitutes "an immediate and unrecorded right to replay mechanically conferred on players" which will except a given machine from the penalties prescribed for those who knowingly own, manufacture, possess, buy, sell, rent, lease, store, repair or transport gambling devices. Acts 1955, ch. 265, § 4, Burns § 10-2332, *supra*.

On the question of the legality of maintaining pinball machines, the court in *Peachey v. Boswell*, 240 Ind. 604, 167 N.E. 2d 48, 89 A. L. R. 2d 801 (1960), clearly distinguished those machines which conferred upon players *recorded* free games from those which granted *unrecorded* free games. Citing *Tinder, v. Music Operating Inc.*, 237 Ind. 33, 142 N.E. 2d 610 (1957), with approval, the court at page 614 noted that the test of legality of use is the exchange of free games for money or other things of value. They concluded that it was improbable that unrecorded free games might be so exchanged. The court found that the intent of the Legislature in passing the 1957 amendments was "to prohibit the use and 'maintaining' of pinball machines which are equipped with recording devices that may be used to compute 'payoffs'." Con-

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sequently, it must be concluded that pinball machines which confer *recorded free games* upon players are gambling devices as defined by Burns § 10-2330 (4), *supra*, whereas those granting *unrecorded* free games are not.

The term "unrecorded" is clearly the key word in the court's ruling. Emphasis has been placed by the court on the evil sought to be remedied, *i.e.*, the exchange of the free games for something of value. In doing so, the benchmark of "recording" has been established to assist in making a determination as to the legality of the machine regardless of whether or not there has been an actual "payoff".

This brings us to the question of what constitutes a *recorded* right to replay. In construing this phrase, some have attempted to draw distinctions between the visible meter which automatically records the number of free replays and the meter located inside some machines which records the canceled free replays, more commonly referred to as those replays which were "knocked off". Such distinctions find no support in *Peachey, supra*, and would further create serious practical problems of law enforcement (law enforcement officers would have to remove the backs of all suspected machines to determine whether there was a canceled replay meter). The distinction, while possibly applicable when reviewing federal laws designed to reach syndicate gambling, has no application in construing the Indiana statute. Such a distinction goes to degree only, but does not alleviate the substantive evil of exchanging the free games for something of value.

The opinion in *Peachey, supra*, notes at page 610, at page 51 of 167 N.E. 2d, that the trial court initially issued a temporary injunction against seizure, etc., of *all* pinball games, "*with or without recording devices thereon*" (court's emphasis). Subsequently, however, when trial was had on the question of a permanent injunction, the trial court found, *inter alia*, as follows:

"16. That the injunction heretofore entered should be retained inasmuch as it applies to pinball machines which are exempted under the 1957 act, to-wit: those which do not contain an automatic recorder to record

free games, but which mechanically award an immediate right of replay unrecorded.

“‘17. That the injunction should be modified and dissolved as to all other types of pinball machines which do contain such recorders of free games and that the defendants may seize the latter as contraband gambling devices without a warrant in public places and with proper warrant in private places.’”

Judgment was entered by the trial court which, omitting formal parts, is as follows:

“‘WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants are enjoined permanently from seizing pinball machines of the plaintiffs which do not have recording devices for registering free games, and the temporary injunction is modified and dissolved to the extent of allowing defendants to seize as contraband gambling devices those pinball machines so equipped with such recording devices for free games.’”

The above judgment of the trial court was affirmed in *Peachey, supra* at 627 and 59 of 167 N.E. 2d. The class of pinball machines excepted under the 1957 Act was therefore stated to be “those which do not contain an automatic recorder to record free games, but which mechanically award an immediate right of replay unrecorded.” The exemption above does not limit itself to machines containing a recorder to record *canceled* free games, but declares illegal machines which simply *record free games*. Whether the recording is done by a meter visible to the player or by a meter inside the machine and whether the recording simply records the free games won or further records the canceled free games are irrelevant in construing Burns § 10-2330(4), *supra*, and more specifically, the element of *recording* as enunciated in *Peachey, supra*.

It is my opinion that a visible *meter* which automatically records the number of free replays, whether mechanically or electronically conferred causes a machine to be a “gam-

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bling device". Such a machine is a "gambling device" regardless of the existence or nonexistence of an internal meter which further *records* the canceled free replays. If the recording meter is truly made inoperable so that free games cannot be actually recorded, the pinball machine is granting an "unrecorded" right to replay and would therefore not be a "gambling device."

Attempts to camouflage the meter so that it is no longer visible to the player, while still recording the free games won, will not render the machine legal. As long as free games are recorded as defined above, the machine is a "gambling device."

In conclusion and to specifically answer your questions raised:

1. A free-game meter, visible to the player of a pinball machine, is a "recorder" and does render a machine equipped with such a meter illegal as a "gambling device" within the Indiana statute.
2. The answer to (1) controls regardless of whether the right to replay is mechanically or electronically conferred.

OFFICIAL OPINION NO. 33

August 27, 1968

ELECTIONS—Certification of Parties and Candidates by State Election Board for General Election.

Opinion Requested by Hon. Roger D. Branigin, Governor.

You have called to my attention the fact that in this year of 1968, September 1 falls on Sunday, and that Monday, September 2, is Labor Day. This circumstance raises ques-