

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2009-2010

1080826

Terry Surlles, sheriff of St. Clair County; Richard J. Minor,
district attorney of St. Clair County; and
Bob Riley, Governor of the State of Alabama

v.

City of Ashville; American Legion, Post 170; and Shooting
Star Entertainment Group, LLC

1081015

State of Alabama

v.

City of Ashville; American Legion, Post 170; and Shooting
Star Entertainment Group, LLC

Appeals from St. Clair Circuit Court
(CV-08-382)

1080826, 1081015

SHAW, Justice.

These appeals are from a ruling of the St. Clair Circuit Court upholding an ordinance adopted by the City of Ashville ("the City") regulating bingo games within the City. We reverse and remand.

Facts and Procedural History

On July 22, 1992, Amendment No. 542, Ala. Const. 1901 (Off. Recomp., Local Amendments, St. Clair County, § 2), was ratified. That amendment, which applies only to St. Clair County, states: "The operation of bingo games for prizes or money by certain nonprofit organizations for charitable, educational, or other lawful purposes shall be legal in St. Clair County" This authorization, however, is "subject to the provisions of any resolution or ordinance by the county governing body or the governing bodies of the respective cities and towns within their respective jurisdictions as provided by law regulating such operation." The amendment goes on to specify the authority of these governing bodies to regulate bingo games:

"The said governing bodies shall have the authority to promulgate rules and regulations for the issuance of permits or licenses and for operation of bingo games within their respective jurisdictions;

1080826, 1081015

provided, however, that said governing bodies must insure compliance pursuant to said law and the following provisions:

"(1) No person under the age of 19 shall be permitted to play any game or games of bingo unless accompanied by a parent or guardian; nor shall any person under the age of 19 be permitted to conduct or assist in the conduct of any game of bingo;

"(2) No bingo permit or license shall be issued to any nonprofit organization unless such organization shall have been in existence for at least 24 months immediately prior to the issuance of the permit or license;

"(3) Bingo games shall be operated only on the premises owned or leased by the nonprofit organization operating the bingo game. If the premises is leased, the rate or rental shall not be based on a percentage of receipts or profits resulting from the operation of bingo games;

"(4) No nonprofit organization shall enter into any contract with any individual, firm, association or corporation to have said individual or entity operate bingo games or concessions on behalf of the nonprofit organization, nor shall said nonprofit organization pay consulting fees to any individual or entity for any services performed in relation to the operation or conduct of a bingo game;

"(5) A nonprofit organization shall not lend its name or allow its identity to be used by any other person or entity in the operating or advertising of a bingo

1080826, 1081015

game in which said nonprofit organization is not directly and solely operating said bingo game;

"(6) Prizes given by any qualified nonprofit organization for the playing of bingo games shall not exceed the cash amount or gifts of equivalent value, set by the legislature, during any bingo session. The legislature shall set a maximum amount for any calendar week;

"(7) By whatever name or composition thereof, no person or organization shall take any expenses for the operation of a bingo game except as permitted by law.

"(8) A fee of \$.10 (ten cents) shall be levied upon each bingo card sold pursuant to the provisions of this amendment or pursuant to any local law. Said fee shall be collected by the nonprofit organization who sold the bingo card and paid to the tax collector or revenue commissioner of St. Clair County on a weekly basis. The tax collector or revenue commissioner shall place the proceeds collected into the treasury of St. Clair County in a special fund. All funds collected shall be expended by the county commission in the following manner:

"40% (forty percent) of said funds shall be allocated to volunteer fire departments located in St. Clair County;

"30% (thirty percent) of said funds shall be allocated to senior citizens' programs and facilities;

1080826, 1081015

"20% (twenty percent) of said funds shall be allocated to youth recreation programs and facilities;

"10% (ten percent) of said funds shall be allocated to the St. Clair County sheriff's department.

"The tax collector or revenue commissioner of St. Clair County shall have authority to promulgate necessary rules and regulations to implement the procedure for the collection of the fee prescribed herein. The legislature, from time to time, may by local law alter the fee levied herein and alter the method of allocating the proceeds of said fee."

Act No. 91-710, Ala. Acts 1991, the "St. Clair County Bingo Act," and an act amending it, Act No. 93-687, Ala. Acts 1993, regulate the operation of bingo games in St. Clair County. Both acts define "bingo" as "that game commonly known as bingo where numbers or symbols on a card are matched with numbers or symbols selected at random."

On December 22, 2008, the city council of the City adopted City Ordinance No. 2008-0011 ("the ordinance"). The ordinance sets forth rules and regulations for licensing, permitting, and operating "machine bingo games" within the City. The ordinance defines "bingo" and "bingo games" as follows:

"(a) 'Bingo' and 'Bingo Games' shall mean any game of chance known as bingo, including any game defined as such by state or federal law (whether or not electronic computer or other technologic aids are used in connection therewith), which incorporates the following elements:

"(i) the game must be played in a grid of five (5) horizontal rows intersected by five (5) contiguous squares contained within the grid;

"(ii) each square in a grid must be designated by a number or other symbol contained in a collection of numbers or symbols used for playing the game;

"(iii) numbers or symbols are selected by a procedure or mechanism entirely or predominately governed by chance, and as such number(s) or symbol(s) are selected during the playing of a particular game, the same number(s) or symbol(s), if they are present on one or more of the squares on any grid in play, are covered or otherwise marked on such grid;

"(iv) the winner or winners of a particular game are the players of those grids for which a previously designated pattern or arrangement is first covered or marked;

"(v) one or more players must compete against one another for prizes;

"(vi) money may be collected from the players of bingo for the opportunity to participate in the game, and such monetary amounts may vary to reflect the value of the prize for winning a particular game, whether for participation in the whole game or a particular phase thereof, and other factors reflecting the interplay of the amount collected from each player, the size of the prize and the probability of winning; and

1080826, 1081015

"(vii) the prizes for winning the game can be money or anything of value. To the extent that the foregoing elements are present in the game of bingo, it can be played with different kinds of equipment varying from one end of the spectrum, where traditional cards displaying the grids are used with tokens to cover the designated squares on the cards, to the technologically advanced end of the spectrum, where electronic devices perform the operations of the game using computers or micro-processors and interact with the human players by means of an electronic console. If the game of bingo is played on electronic devices which determine and signal the winner, such devices shall be electronically linked to ensure that multiple players are competing against each other. The prizes or evidence thereof for winning bingo games may be disbursed by the electronic devices or consoles used in playing such games at the time each game is won or on different schedules that reflect a record of wins and losses involving multiple games."

The ordinance also defines "machine bingo game," in part, as "any electronic or mechanical equipment, machine or device, or computer or other technical hardware" that is used to play "bingo" as that term is defined in the ordinance. The ordinance provides that no entity may operate machine bingo games without a permit from the City and provides a process for acquiring such a permit.

Subsequently, American Legion, Post 170 ("Post 170"), applied for a "machine-bingo permit" to operate electronic bingo games at a "machine-bingo facility," and Shooting Star

1080826, 1081015

Entertainment Group, LLC ("Shooting Star"), applied for a permit to establish such a machine-bingo facility. On December 30, 2008, the City filed a declaratory-judgment action, naming as defendants Post 170, Shooting Star, and the sheriff of St. Clair County, Terry Surles. The complaint essentially alleged that Sheriff Surles had indicated that he believed that "electronic, video, or machine bingo" was illegal and that he had "advised that when licensees or permittees [sic] start up machine bingo operations" pursuant to the ordinance, the participants would be arrested. The City thus sought a judgment declaring that the ordinance

"is in compliance with the Constitution and the laws of the State of Alabama, that electronic, video or machine bingo is lawful in St. Clair County, Alabama, and is authorized by the Constitution and that licenses or permits issued to [Post 170 and Shooting Star] are consistent and in compliance with [the ordinance], and with the Constitution and laws of the State of Alabama; that any participant playing or in possession of electronic or video bingo machines authorized by [the ordinance] and pursuant to permits and/or licenses issued by the [City], [is] in compliance with the laws of the State of Alabama, including its Constitution."

Both Shooting Star and Post 170 were later realigned as plaintiffs.

Sheriff Surles answered the complaint and filed a

1080826, 1081015

counterclaim for a declaratory judgment. The counterclaim asserted that the City "seeks to allow [Post 170 and Shooting Star] to operate ... an illegal lottery/gambling operation that they classify as machine bingo" and sought a judgment declaring that "machine bingo" uses instruments that are "gambling devices" under Alabama law. Further, Sheriff Surles sought a declaration that the operation of such "machine-bingo" devices is forbidden by Ala. Const. 1901, art. IV, § 65, and Ala. Code 1975, §§ 13A-12-23, -27, -30, and -70, and that the operations proposed by the City, Post 170, and Shooting Star are illegal lotteries or gambling schemes. Further, Sheriff Surles sought a declaration that the ordinance is unconstitutional under Amendment No. 542, which, he argued, required that bingo be played on "cards" that are to be taxed, and that the ordinance violated Act No. 91-710 and Act No. 93-687.

On February 3, 2009, Richard J. Minor, the district attorney of St. Clair County, filed a complaint and a motion to intervene in the case as a defendant. Minor alleged that, as district attorney of St. Clair County, he was charged with enforcing state law. Post 170 and Shooting Star, he alleged,

1080826, 1081015

sought to operate bingo-gaming devices that were illegal under both Ala. Const. 1901, art. IV, § 65, and Amendment No. 542. Neither the ordinance nor the local acts regulating bingo in St. Clair County, Minor contended, could authorize those devices. Minor alleged:

"There exist[s] a real and present controversy between the parties, which includes a dispute as to each of the following:

"a. Is any form of electronic simulated bingo authorized under [art. IV, § 65] to the Alabama Constitution and if so what is necessary in order for an electronic game to qualify as legal bingo under [§] 65?

"b. Is the activity subject to the permits referred to in Plaintiffs' complaint authorized under Amendment 542 and subsequent amendments to the Alabama Constitution and do such amendments create an exception to the prohibition against gambling and/or lotteries in Alabama?

"c. Is Ashville Ordinance 2008-0011 constitutional?

"d. Are the machines and/or proposed systems that are subject to the permits referred to in the complaint illegal slot machines or gambling devices under the laws of Alabama?

"e. Is the gaming activity contemplated by the permits referred to in the complaint in fact a form of bingo, electronic or otherwise, and if so is such electronic bingo legal in St. Clair County despite the fact that paper bingo cards are not used and despite the fact that the elements of human skill utilized in ordinary paper bingo are not a factor

1080826, 1081015

when playing electronic bingo?"

The trial court granted Minor's motion to intervene.

On February 26, 2009, the attorney general filed an acknowledgment of service of Sheriff Surles's answer and counterclaim and, because the State was represented by Minor, waived any further service and right to be heard at the trial court level.¹

Trial was held on March 17, 2009. The trial court entered an order on March 30, 2009, stating that the "predominant issue" before it was "whether bingo games in St. Clair County, in particular in the City of Ashville, may be conducted on electronic devices pursuant to the City's Ordinances." The trial court concluded that the definition of "bingo" found in the ordinance

¹The filing stated:

"Because, at the trial level, the State is represented in this matter by the Honorable Richard J. Minor, District Attorney of the 30th Judicial Circuit, the Attorney General, having accepted service, hereby waives any further service upon him of any pleadings, discovery and other matters filed in this matter at the trial level, and further waives his right to be heard at the trial level. The Attorney General reserves all rights and privileges, including any notice of pleadings, right to be heard and other matters, on appeal, if any, in this matter."

1080826, 1081015

"does not expand or broaden the definition of bingo games authorized by Amendment No. 542, but merely provides greater specifics on the elements regarding bingo, and that bingo games may be conducted on electronic devices. Regardless of the format, all the elements of bingo must be present in order for the game being conducted to be bingo."

The trial court further found that "bingo" consists of five elements:

"A. A game played on a card containing a grid of five rows intersecting five columns containing a series of numbers or symbols in each square, with no two cards containing the same pattern of numbers or symbols in any one game;

"B. Numbers or symbols are generated at random from a finite pool which corresponds to the pool of numbers or symbols contained on the cards;

"C. The numbers or symbols generated are covered on the cards;

"D. The game must be played by two or more individuals competing against one another; and

"E. The winner(s), either by game-ending patterns or interim patterns, are those card holders being the first to match specific predetermined patterns."

"Bingo," the trial court held, "may be conducted on electronic devices or machines so long as all elements listed ... are present." It concluded that "machine bingo, or electronic bingo can be conducted as these terms describe items or equipment used to conduct the game of bingo, not a separate

1080826, 1081015

and distinct kind of lottery different from bingo." Machine or electronic bingo can be conducted, the trial court held, only if it is carried out in strict compliance with Amendment No. 542 and the ordinance and if an "independent gaming laboratory" certifies that the machines play bingo as described in the ordinance and in the trial court's final order.²

Sheriff Surles and District Attorney Minor filed a notice of appeal (case no. 1080826). The attorney general filed a notice of appearance in the trial court and also filed a separate notice of appeal (case no. 1081015). We consolidated the appeals for the purpose of writing one opinion.

Governor Bob Riley filed several motions in this Court, seeking to intervene as an appellant in these appeals or to file an amicus curiae brief on behalf of Sheriff Surles or District Attorney Minor in case no. 1080826. This Court ultimately granted the Governor's motion to intervene. Minor and the Governor have filed a joint brief; Sheriff Surles has

²The trial court also crafted an "objection procedure" for Sheriff Surles to use in challenging the legality of individual "bingo" playing machines. This procedure is challenged on appeal; however, because of our resolution of these appeals, we pretermitt discussion of the issue relating to the "objection procedure."

1080826, 1081015

filed his own brief; and the attorney general has filed a brief on behalf of the State of Alabama.³

Discussion

Article IV, § 65, of the Alabama Constitution of 1901, prohibits what it describes as "lotteries or gift enterprises":

"The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided."

³During the briefing of these appeals, a dispute arose as to which party may represent the State. The attorney general filed a "Notice of Assumption," indicating that the attorney general "will represent the State's interest, which was represented by Sheriff Terry Surles and District Attorney Richard Minor at the trial court," and later filed a motion asking this Court to "recognize assumption" of representation. Sheriff Surles moved to quash this "Notice of Assumption." Subsequently, the attorney general filed what he titled "Potential Solution to the Representation Dispute Between the Three State Appellants and the Governor" and suggested that this Court grant the "Notice of Assumption" and, "[s]hould the Court desire that each of the arguments for vacating the lower court's decree identified by the various parties be presented, grant the Governor's Motion to Intervene as an Appellant/Defendant." Given that there now seems to be no dispute that this Court may consider all the briefs filed by all the parties in this case, we see no need to rule upon these motions or to decide this dispute.

1080826, 1081015

"Bingo" is a lottery under art. I, § 65. Barber v. Cornerstone Cmty. Outreach, Inc., [Ms. 1080805, November 13, 2009] ___ So. 3d ___, ___ (Ala. 2009) ("[T]his Court has explicitly stated that "'bingo' is a lottery"). Various local constitutional amendments create an exception to this rule by authorizing bingo gaming; these amendments are to be construed narrowly:

"'Since 1980, Alabama has adopted various constitutional amendments creating exceptions to § 65, specifically allowing the game of bingo under certain circumstances. See Ala. Const., Amendments 386, 387, 413, 440, 506, 508, 542, 549, 550, 565, 569, 599, and 612.' (Emphasis added.) Thus, the bingo amendments are exceptions to the lottery prohibition, and the exception should be narrowly construed."

Barber, ___ So. 3d at ___ (quoting Opinion of the Justices No. 373, 795 So. 2d 630, 634 (Ala. 2001)).

It is this Court's "general disposition in the gambling context to regard always the substance and not the semblance of things, so as to prevent evasions of the law." Barber v. Jefferson County Racing Ass'n, Inc., 960 So. 2d 599, 611 (Ala. 2006) (internal citations, brackets, and emphasis omitted). Games purporting to constitute legal bingo merely by using the word "bingo," by attempting to incorporate parts of the game

1080826, 1081015

of bingo, or by otherwise attempting to resemble that game have previously been invalidated. See City of Piedmont v. Evans, 642 So. 2d 435 (Ala. 1994) (holding that a game described as "instant bingo" did not constitute "bingo" but rather constituted an illegal lottery; thus, an ordinance authorizing the "instant bingo" game was held unconstitutional); see also Barrett v. State, 705 So. 2d 529 (Ala. Crim. App. 1996) (holding that a constitutional amendment allowing "bingo games" created only a narrow exception to art. IV, § 65, and did not allow a game involving players attempting to choose numbers to match numbers later called by an announcer, which was "clearly not the game 'commonly known as bingo'"); and Foster v. State, 705 So. 2d 534 (Ala. Crim. App. 1997) (same). Cf. Barber v. Jefferson County Racing Ass'n, supra (holding that a scheme purporting to involve the redemption of sweepstakes entries was, in substance, the operation of illegal slot machines). Thus, the clear policy of art. IV, § 65, cannot be circumvented by applying the label of "bingo" to a similar but incomplete version of the game.

On appeal, Sheriff Surlles, District Attorney Minor, and

1080826, 1081015

Governor Riley argue that the definition of "bingo" provided in the ordinance and in the trial court's final order is unconstitutionally broad and conflicts with precedent of this Court holding that local amendments excepting bingo from the general prohibition on lotteries in § 65 must be narrowly construed to encompass only the game commonly known as bingo. We agree.

At trial and on appeal, the parties offered dueling opinions as to the proper definition of "bingo." The expert for the City, Post 170, and Shooting Star at trial, Nick Farley, when asked to give his definition of bingo, explained as follows:

"Q. What is bingo in the general -- Nick Farley's definition of that?

"A. My definition of bingo would be a game of chance involving a card that possesses numbers, symbols, or other representations that are derived from a common pool or a finite pool of numbers, symbols, or other designations. Those numbers or symbols are drawn randomly from the finite pool. What's drawn is compared to what's on the card. If predefined or predetermined patterns are formed on a bingo card, that would entitle players or participants in the bingo game to a prize.

"Q. Is part of bingo also that people play each other?

"A. Yes. I think that would be an element of

1080826, 1081015

bingo, in that you have to have two or more people competing.

"Q. It's not house banked, in other words?

"A. Well that's debatable. I think you can have predefined prizes, which would mean that those predefined house amounts would be house banked. You can also have [parimutuel] bingo, where those that are participating pay so much to play, and what's derived as profit could be issued as a prize. I've seen bingo played both ways, where you have finite prizes offered for obtaining certain bingo patterns, in which case that would be house banked in my opinion."

Under cross-examination, Farley acknowledged that it was "entirely possible" that games such as roulette, craps, and "wheel of fortune" would meet his definition of "bingo."⁴ Nevertheless, it appears that the trial court accepted the definition of "bingo" offered by Farley, held that the definition of "bingo" in the ordinance did not expand or broaden that definition, and further held that bingo as thus

⁴Roulette, craps, and wheel of fortune were described at trial as games in which players would select a number on a grid or card, and corresponding numbers would be selected at random from a finite pool by spinning a wheel or rolling dice; players would win if the number they selected on the grid or card matched the number selected at random. Farley's acknowledgment was premised on the assumption that the "winning pattern" could be a "one spot" pattern consisting of one number; he stated that there was no "regulation" in effect specifying that the winning pattern for bingo must consist of more than one matching selection or spot.

1080826, 1081015

defined can be played on an electronic machine.

At trial, the expert for Sheriff Surles and District Attorney Minor, D. Robert Sertell, provided a different definition:

"The game commonly known as bingo is a contest where the game is structured around a matrix, a five-by-five grid, if you will, of five vertical and five horizontal openings. Those openings can be rectangular or circular. It doesn't matter.

"Some finite number of numbers or outcome is placed in some fashion into the game. The game is operated in such a way that numbers are called or displayed in some fashion.

"The bingo customer or player then uses concentration, attention, if you will, to listen for the numbers as they are called, to notice whether those numbers are present on the card that they have, and to then cover or mark or daub or denote those numbers one at a time as they are called by the mechanism or the person who is calling the number. It can be a mechanism.

"[Counsel:] How is the game won?

"[Sertell:] Generally, bingo arranges pre-announced winning combinations. The simplest is simply a straight line horizontally, vertically, or diagonally. There can be dozens of other combinations: four corners, the shape of a cross, the shape of a T, the shape of an L, anything that's announced in advance.

"The winning customer then examines their progress, if you will, in daubing or marking the numbers. If they achieve a winning combination, they then either raise their hand or press a button,

1080826, 1081015

in some big bingo halls, that rings a buzzer, or they just yell 'bingo' to announce that they have achieved bingo.

"Their announcement must come before some other customer. If two customers have bingo, the person who announced it first is generally the winner.

"[Counsel:] That would seem to indicate competition amongst more than one player, two or more players; is that correct?

"[Sertell:] Two or more, yes, sir.

"[Counsel:] It's played on printed cards? You used the words 'cards'?

"[Sertell:] Yes, sir. The game commonly known as bingo is printed on paper or cardboard cards."

Sertell testified that "anything ... that might be labeled bingo," or any game of chance, would fall under the definition of bingo provided in the ordinance.

This Court, in Barber v. Cornerstone Community Outreach, supra, recently provided the legal definition of the game commonly or traditionally known as bingo:

"The characteristics of that game include the following:

"1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.

"2. Alphanumeric or similar designations are randomly drawn and

1080826, 1081015

announced one by one.

"3. In order to play, each player must pay attention to the values announced; if one of the values matches a value on one or more of the player's cards, the player must physically act by marking his or her card accordingly.

"4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.

"5. A player must recognize that his or her card has a 'bingo,' i.e., a predetermined pattern of matching values, and in turn announce to the other players and the announcer that this is the case before any other player does so.

"6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the first to properly mark a card with the predetermined winning pattern and announce that fact."

___ So. 3d at ___.

Although the ordinance in this case does require that "bingo" games authorized by the ordinance must be played on a grid consisting of spaces containing numbers or symbols to be arranged in five horizontal and five vertical rows, it nevertheless provides for a game that differs from the game of bingo described in Barber. To demonstrate, the ordinance does

1080826, 1081015

not require that the game be played on a card or that the numbers or designations selected be announced to the players. Additionally, the ordinance contains no requirements for human interaction in playing the game. Specifically, players are not required (1) to pay attention to the numbers or designations announced, (2) to physically act to determine and then to mark whether they have a matching number or symbol, or (3) to recognize that they have a winning card and be the first to announce this fact. The ordinance also makes no provision for players who make mistakes in marking their cards or announcing that they are winners. In fact, the ordinance does not appear to require any action by the players. Instead, its definition of "machine bingo game" indicates that player participation and interaction will actually be performed by a machine. Thus, there is no opportunity for players to participate and to fulfill the various elements of bingo described above that require human interaction, and there is no possibility of a player's making a mistake or incorrectly performing these functions. This is not the game

1080826, 1081015

of bingo as described in Barber.⁵

Conclusion

Because the ordinance provides for the operation of games that extend beyond the permissible definition of bingo and thus beyond the permissible bounds of the exception to art. IV, § 65, in Amendment No. 542, we reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, and Murdock, JJ., concur.

⁵Post 170 and Shooting Star correctly argue that no evidence was received at trial regarding the specific machines they actually intended to use in the facility. Thus, our discussion is limited to the legality of the game authorized by the ordinance and does not purport to pass on the legality of any particular game or machine that they intended to use in the facility.