

MEMORANDUM

FROM: Jean Dubofsky
DATE: February 21, 2012
RE: Constitutionality of House Bill 1280

Question

Whether the general assembly, without referral to the people for a vote, may add video lottery terminals that look like slot machines to state-supervised lotteries?

Short answer: Yes.

Discussion

House Bill 12-1280 ("H.B. 1280") allows video lottery terminals (that look like electronic slot machines) as a state-supervised lottery to be installed at up to three locations in the state. A portion of the additional revenue obtained from the video lottery terminals would be allocated to in-state scholarships. The casinos in Central City, Black Hawk and Cripple Creek oppose the legislation, contending that the proposal violates the constitutional provision that allows limited gaming, including slot machines, in only the three historic mountain communities. This opinion concludes that the proposed legislation is constitutional.

Background**1. State-supervised lotteries.**

Effective January 1, 1981, Colorado voters approved "the conducting of state-supervised lotteries." Colo. Const. art. 18, §2(1). Article 18, § 2(7) of the Colorado Constitution provides,

Any provision of this constitution to the contrary notwithstanding, the general assembly may establish a state-supervised lottery. ...

The constitution left the design of any lottery and the allocation of the proceeds to the general assembly.

The general assembly defines "lottery" as

all lotteries created and operated pursuant to this part 2, including, without limitation, the game commonly known as 'lotto,' in which prizes are awarded on the basis of designated numbers conforming to numbers selected at random, electronically or otherwise, by or at the direction of the commission, and any multistate lottery or game that is authorized by a multistate agreement to which the division is party."

Colo. Rev. Stat. § 24-305-201(5). Case law defines a "lottery" as "when consideration is paid for the opportunity to win a prize awarded by chance." In re Interrogatories of Governor Regarding Sweepstakes Races Act, 585 P.2d 595, 598 (Colo. 1978).

In accord with the constitutional requirement of a state-supervised lottery, "management of the lottery and control over the operation of its games shall remain with the state." Colo. Rev. Stat. § 24-35-204.5(1)(a). Thus, the Colorado lottery commission determines the types of lotteries to be conducted, Colo. Rev. Stat. § 24-35-208(2)(a), and the executive director of the department of revenue enters into contracts "for materials, equipment, and supplies to be used in the operation of the lottery" and "for the design and installation of games or lotteries." Colo. Rev. Stat. § 24-35-204.5(1)(a).

The director of the state lottery division licenses agents to sell lottery tickets, and the lottery commission by rule determines the "manner and amount of compensation, if any, to be paid licensed sales agents necessary to provide for the adequate availability of tickets or shares to prospective buyers and for the

convenience of the public. Colo. Rev. Stat. §§ 24-35-206 and -208(2)(h). The commission by rule determines the price of lottery tickets and the numbers, sizes, and payment of the prizes on winning tickets. Colo. Rev. Stat. § 24-35-208(b) and (c). Total disbursements for lottery prizes “shall be no less than fifty percent of the total revenue accruing from the sale of lottery tickets or shares.” Colo. Rev. Stat. § 24-35-210. The state collects the revenue from the sales.

The state lottery division and the Colorado lottery commission are “an enterprise for the purposes of section 20 or article X of the state constitution,” thus exempting the lottery from the restrictions in TABOR. Colo. Rev. Stat. § 24-35-202(1)(b).

2. Limited gaming.

Effective October 1, 1991, the voters approved “limited gaming” in Central City, Black Hawk and Cripple Creek. Colo. Const. art. 18, § 9. “Limited gaming” in casinos in those cities was initially “the use of slot machines and the card games of blackjack and poker, each game having a maximum single bet of five dollars.” In 2008, the voters increased the maximum bet to \$100 and allowed craps and roulette.

The Colorado limited gaming control commission licenses the privately owned and operated casinos, Colo. Rev. Stat. § 12-47.1-501(1)(b) and (c), and the casinos pay state taxes on their adjusted gross proceeds (the total amount of all wagers made by players less all payments to them). The commission establishes annually the percentage paid by the casinos into the limited gaming fund. Colo. Const. art. 18, § 5(a).

Analysis

The general assembly, without referral to the people for a vote, may add video lottery terminals that look like slot machines to state-supervised lotteries.

The proposed legislation allows video lottery terminals that look like electronic slot machines as a state-supervised lottery. H.B. 1280 defines "video lottery terminal" as

an electronic computerized game machine that (I) is networked and can be monitored, controlled, and audited by a central technology system; (II) upon insertion of cash value, is available to play a video game of chance authorized by the division; and (III) uses microprocessors to award to a player, on the basis of chance, free games or credits evidenced by a printed pay voucher redeemable for currency.

§ 24-35-201(9)(a). The proposed legislation states that a "video lottery terminal" is not (I) a machine or device that directly disburses coins, cash, tokens, or any item of value other than a printed pay voucher; or (II) a machine or device defined as a slot machine in section 9(4)(c) of article XVIII of the state constitution." § 24-35-201(9)(b).

H.B. 1280 also states that the Colorado lottery commission "may promulgate rules as necessary ... to monitor and regulate the operation of video lottery terminals ...," § 24-35-208.5(6), and the director and the commission "shall manage and regulate the operation of video lottery terminals in accordance with this section and their powers and duties as set forth in sections 24-35-204 and 24-35-208, respectively." § 24-35-208.5(7). Each video lottery terminal "shall offer only games licensed and authorized by the commission." § 24-35-208.5(9)(a).

The opponents of the bill assert that H.B. 1280 may be unconstitutional because the use of slot machines as limited gaming devices is restricted to three locations in the state. Colo. Const. art. 18, § 9(3) (limited gaming “shall take place only” in historic buildings in Black Hawk, Central City and Cripple Creek). They contend that the limited gaming definition of “slot machine,” which includes electronic devices like the video lottery terminals, restricts state lotteries. Under the constitution, “[a]s certain terms are used in regards to limited gaming:

“Slot machine” means any mechanical, electrical, video, electronic, or other device, contrivance, or machine, which, after insertion of a coin ... or upon payment of any required consideration ... is available to be played or operated, and which, whether by reason of the skill of the player or application of the element of chance, or both, may deliver or entitle the player ... to receive cash ... or any other thing of value other than unredeemable free games, whether the payoff is made automatically from the machines or in any other manner.

Colo. Const. art. 18, § 9(4)(c) (Emphasis added). It is important to note that this constitutional definition of “slot machine” applies only with respect to limited gaming.

Thus, the constitution prohibits devices that look like slot machines from use elsewhere in the state only if the use is part of limited gaming, operated by private owners of gambling casinos. State-run lotteries, in contrast, may be conducted anywhere in the state. And there is nothing in the constitution that prevents devices that look like slot machines from being used as a lottery game. Indeed, the constitution authorizes the general assembly and the Colorado lottery commission to define state-sponsored lottery games, including the types of games and where they may be played, “any provision of this constitution to the contrary notwithstanding.” Colo. Const. art. 18, §2(7).

This interpretation is consistent with well-established principles of statutory construction. A statute is presumed to be constitutional unless the party challenging the statute's constitutionality "can prove the statute is unconstitutional beyond a reasonable doubt." Renteria v. Colorado State Department of Personnel, 811 P.2d 797, 799 (Colo. 1991) (statute allowing state personnel administrators to allocate job assignments did not violate constitutional provision that provides for disciplinary hearings before state personnel board). When a statute is susceptible to both constitutional and unconstitutional interpretations, a court "must adopt the constitutional interpretation of the statute." Id.

The test for the existence of a conflict between two constitutional amendments is "Does one authorize what the other forbids or forbid what the other authorizes?" City of Glendale v. Buchanan, 578 P.2d 221, 226 (Colo. 1978) (constitutional amendment providing that Boundary Control Commission must approve proposed annexation and constitutional amendment providing that general assembly may alter requirement of voter approval of annexation may "coexist harmoniously"); see CLPF-Parkridge One, L.P. v. Harwell Investments, Inc., 105 P.3d 658, 660 (Colo. 2005) (If statutory provisions are in conflict, we adopt the interpretation that "best harmonizes the various provisions if possible."); see also, Moffett v. Life Care Centers of America, 219 P.3d 1068, 1072 (Colo. 2009) (When statutory provisions concern the same subject matter or are "part of a common design, we must read them together to give full effect to each.").

I conclude that H.B. 1280, allowing devices that look like slot machines to be located in places other than the three historic mining towns, is constitutional. There is nothing exclusive about the definition in either constitutional provision that prevents the use of video lottery terminals that look like slot machines both as a lottery and as a form of limited gaming. Neither authorizes what the other forbids, or forbids what the other authorizes.

The constitutional provision that authorizes state lotteries and the provision that authorizes limited gaming are parts of a common design that must be read together. A primary reason for allowing lotteries to be conducted anywhere in the state that the general assembly or lottery administrators choose is that the state directly supervises the lottery. H.B. 1280 details the lottery commission's and administrators' regulation and supervision duties for the networked system of video lottery terminals. In contrast, the constitutional limitation on the location of limited gaming reflects that the casinos are owned and operated by private entities that make many of the decisions about the design of games and their payouts, decisions that are made by the state for lotteries. Consistent with the constitutional design for state-run lotteries and privately-run limited gaming, video lottery terminals that look like slot machines may be located wherever the legislature chooses without a vote of the people to amend the constitution.

Jean E. Dubofsky
The Dubofsky Law Firm, P.C.
1000 Rosehill Dr., Boulder, CO 80302
Ph: 303-447-3510; Fax: 303-4472801
jeandubofsky@comcast.net