IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

FILED

December 6, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellant,	)	No. 01C01-9804-CC-00174
	)	
	)	Montgomery County
v.	)	
	)	Honorable John H. Gasaway, Judge
	)	
RHONDA LEIGH BURKHART,	)	(Possession of Gambling Devices)
	)	
Appellee.	)	

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OPINION FILED:_____

REVERSED AND REMANDED

Joseph M. Tipton
Judge

O P I N I O N

The state appeals as of right from the Montgomery County Circuit Court's dismissal of an indictment charging the defendant, Rhonda Leigh Burkhart, with knowingly possessing gambling devices, specifically, six "One-Armed Bandit" video machines, in violation of Tenn. Code Ann. § 39-17-505. The state contends that the trial court erred in finding portions of Tenn. Code Ann. §§ 39-17-501 and -505 unconstitutionally vague and overbroad. We hold that the statutes are constitutionally sound and we reverse the dismissal of the indictment.

The Clarksville Police Department seized six video machines from the defendant's bar. At the preliminary hearing, Raymond Mario Marcias, an alcohol beverage control agent with the Clarksville Police Department, testified that on January 10, 1997, he went to the Pit Row Pool Room to check for violations of alcohol control ordinances. He said that the manager, Ms. Poston, gave him permission to look around. He said that while walking through the building, he noticed a door marked "office." He said the manager permitted him to enter, and he noticed that the wall did not extend completely to the ceiling. He said he also noticed a door with a deadbolt lock. He said he asked the manager what was behind the door, and she told him video machines. He said he asked to see behind the door, and the manager retrieved a set of keys, none of which would open the door. He stated that the manager agreed to allow Agent Crow to look over the wall. He said that Agent Crow reported that the room held six video machines and that the door could be unlocked from the inside. Agent Marcias said the manager allowed Agent Crow to climb over the wall and to unlock the door.

Agent Marcias testified that the room contained video machines and a heater. He said that each machine had a stool. He said the screens were on, and the machines automatically demonstrated a certain number of games. He said he noticed two switches on the top of each machine, one of which appeared to be a "knock-off" switch. He said he noticed that each machine had a bill acceptor, which took one-dollar bills, five-dollar bills, and twenty-dollar bills. He said that he found a total of seventy dollars in the machines. He said he advised the manager that he was confiscating the machines as gambling devices. He admitted that he did not see anyone playing the machines.

Ross Elbert Haynes testified that he worked for the Knox County District Attorney General's Office and was assigned to a federal task force which investigated gambling operations and trained local officers to recognize gambling devices. He said that he examined the six machines from the defendant's bar. He said the machines' lack of serial numbers violated federal law. He said that the machines required no skill to play and that once a player pushed the button starting the game, the player had no further control over the game. He stated that each machine had a knock-off switch, which allowed the credits to be removed ostensibly once the player was paid for them. He said the only way to remove the score on a true amusement device is to insert another coin for a new game. He said he believed the machines were gambling devices because the game took an inordinately short time to play in relation to the amount of money required to play, because they had knock-off switches, and because each machine had a meter which retained the credits run off the machine. He noted that one could adjust the odds of winning on these machines. He admitted that the machines could not pay out money.

At the combined hearing on the defendant's motion to suppress and motion to dismiss the indictment, Agent Marcias again described his discovery of the machines. He testified that he believed the machines to be gambling devices because they had a knock-off switch and lacked an amusement sticker, but he admitted that at the time, he was thinking strictly in terms of the prior statute's definition of a gambling device. He admitted that the machines had no slot to distribute money and that he found no evidence that anyone had been gambling in the room. He said the defendant's arrest was prompted by the fact that the room was hidden, the door locked from the inside, and the machines' speakers had been disconnected to prevent them from emitting sound. Agent Marcias stated that dice, playing cards, and poker chips all could be considered gambling devices in the right setting. He said that the only thing preventing a grocery store employee who stocked these items from being arrested under the current statute was his decision not to arrest that person.

Carl McClanahan testified that he was a registered lobbyist for gambling-related issues and that he had studied Tennessee's gambling laws. He said that in his opinion, dice, poker chips, and playing cards were all gambling devices under the

current law, even without someone using them to gamble, because they were designed for use in gambling. He testified that objectively no difference exists between these items and the video machines at issue in this case. He stated that the current definition of a gambling device provides no standard for law enforcement.

Mr. McClanahan admitted that one can play cards or use dice without gambling. He said he was familiar with the video machines owned by the defendant. He said video poker is a generic term for games with a gambling theme and that the defendant's machines have a slot-machine theme. He said he believed these machines were designed for recreation and entertainment. He said the knock-off switches simply allow the machine's owner to prevent a subsequent user from taking advantage of unused free plays.

The trial court dismissed the indictment with prejudice, concluding:

> having carefully considered . . . § 39-17-505, and . . . having determined that application of the definitions [in] § 39-17-501 regarding "gambling devices" and "gambling" and the resulting application of . . . § 39-17-505 is so overly broad and unduly vague in proscribing "gambling devices" that application of the criminal statute . . . § 39-17-505 constitutes a denial of equal protection under the law and due process guaranteed citizens under the Constitution of the United States and the Constitution of the State of Tennessee such that prosecution . . . under this statute is constitutionally prohibited.

I. DUE PROCESS

The state contends that Tenn. Code Ann. §§ 39-17-501 and -505 comport with due process, arguing that the statutes are not overbroad because they implicate no constitutionally protected rights. It asserts that the statutes are not vague because the Sentencing Commission Comments, the case law under the prior statute and the opinions of the attorney general serve to guide citizens and law enforcement as to the meaning of the statutes. The defendant contends that §§ 39-17-501 and -505 are unconstitutionally vague because they fail to provide fair notice and allow arbitrary and discriminatory enforcement.

Under the due process clause, a party may facially attack the constitutionality of a statute under two doctrines: overbreadth and vagueness. The

overbreadth doctrine provides that a statute is invalid on its face if it reaches a substantial amount of constitutionally protected conduct. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 495, 102 S. Ct. 1186, 1191 (1982). Constitutionally protected conduct is generally viewed as the exercise of First Amendment rights. City of Clarksville v. Moore, 688 S.W.2d 428, 430 (Tenn. 1985); see City of Chicago v. Morales, ___U.S. ___, ___, 119 S. Ct. 1849, 1857 (1999); Hoffman Estates, 455 U.S. at 496, 102 S. Ct. at 1192; Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S. Ct 2908, 2915-16 (1973); see also United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 2100 (1987) (stating that the overbreadth doctrine only applies in the context of the First Amendment); Schall v. Martin, 467 U.S. 253, 269 n.18, 104 S. Ct. 2403, 2412 n.18 (1984) (stating that "outside the limited First Amendment context, a criminal statute may not be attacked as overbroad").

A criminal statute is vague if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858 (1983); Morales, ___ U.S. at ___, 119 S. Ct. at 1857; State v. Wilkins, 655 S.W.2d 914, 915 (Tenn. 1983). The more important of these two factors is the presence of minimal guidelines to direct law enforcement. Kolender, 461 U.S. at 359, 103 S. Ct. at 1858; Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 532 (Tenn. 1993). "The degree of vagueness that the Constitution tolerates–as well as the relative importance of fair notice and fair enforcement–depends in part on the nature of the enactment." Hoffman Estates, 455 U.S. at 499, 102 S. Ct. at 1193. Criminal statutes are held to a higher standard of clarity than civil statutes due to the penalties involved. Kolender, 461 U.S. at 358-59 n.8, 103 S. Ct. at 1859 n.8; Hoffman Estates, 455 U.S. at 499-500, 102 S. Ct. at 1193; Winters v. New York, 333 U.S. 507, 515, 68 S. Ct. 665, 670 (1948). Nevertheless, the Supreme Court has warned:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colton v. Kentucky, 407 U.S. 104, 111, 93 S. Ct. 1953, 1957 (1972); State v. Strickland, 532 S.W.2d 912, 921 (Tenn. 1975).

Citing Hoffman Estates, 455 U.S. at 496, 102 S. Ct. at 1191, the state contends that a facial vagueness challenge is improper unless the statute is vague in all of its applications. The state argues that the proper analysis requires us to look first to the facts of the defendant's case, and if the statute clearly proscribes those facts, then the defendant cannot complain that the statute is vague with respect to other circumstances not existing in this case. See Id. The analysis advocated by the state directs that every inquiry into the facial vagueness of a statute be preceded by a successful "as applied" challenge to the statute's clarity.

The defendant contends that even if a statute clearly applies to certain conduct, the statute may be so fundamentally vague as a whole that it violates due process. She argues that independent of whether §§ 39-17-501 and -505 are clear in their prohibition of her video machines, these statutes are facially vague because they fail to guide law enforcement sufficiently as to what the legislature intended to proscribe. The defendant maintains that a party may successfully bring a facial vagueness challenge even when the statue is not vague in every application, citing Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 251-52, 254 (6th Cir. 1994).

In Springfield Armory, gun manufacturers and dealers contended that an ordinance prohibiting assault weapons was facially vague. The ordinance defined assault weapons by listing a number of specific weapons and also prohibiting other weapons by the same manufacturer but with slight modifications or enhancements to the same action design. The court held the general part of the definition of assault weapons to be facially vague even though some of the parties possessed guns specifically named in the constitutionally sound portion of the definition. Id. at 252-54. The court criticized the district court for assessing the definition only as applied to the specific weapons presented at the evidentiary hearing without considering generally "whether a person of ordinary intelligence could make sense of" the definition. Id. at 254. The sixth circuit noted a discrepancy in United States Supreme Court cases regarding the correct approach to a facial vagueness challenge:

> At times the Court has suggested that a statue that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S. Ct. 1186, 1191, 71 L.Ed.2d 362 (1982), but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application. Kolender v. Lawson, 461 U.S. 352, 358-59 n.8, 103 S. Ct. 1855, 1859 n.8, 75 L.Ed.2d 903 (1983); Colautti v. Franklin, 439 U.S. 379, 394-401, 99 S. Ct. 675, 685-88, 58 L.Ed.2d 596 (1979).

Id. at 251-52. In this respect, we note that the most recent United States Supreme Court decision on the vagueness of a criminal statute reveals a split among the justices over whether a statute is void for vagueness only if it is vague in all of its applications. See Morales, ___ U.S. at ___, 119 S. Ct. at 1857, 1857 n.22, 1866, 1870-7, 1886. Noting that criminal statutes are held to a stricter standard of clarity, the sixth circuit in Springfield Armory elected to approach the facial vagueness question by examining the law as a whole. 29 F.3d at 252-53.

In any event, the approach used by the Tennessee Supreme Court in determining whether a criminal law is unconstitutionally vague encompasses both a general evaluation of the statute in question and an examination of its application to a particular defendant. See e.g., State v. King, 973 S.W.2d 586, 590 (Tenn. 1998) (holding that the statute regarding jury instruction on the possible minimum sentence generally gives "explicit, objective, and unambiguous guidance sufficient to overcome any allegations of vagueness"); Davis-Kidd Booksellers, 866 S.W.2d at 532 (holding that the term "excess violence" is void for vagueness because it provides no guidance to sellers or officials); State v. Lyons, 802 S.W.2d 590, 593-94 (Tenn. 1990) (holding that terms within a statute prohibiting trespassing and disorderly conduct on school property were not vague and, thus, the statute as a whole was constitutional); State v. Martin, 719 S.W.2d 522, 525-26 (Tenn. 1986) (evaluating a statute regulating the display of adult literature and movies generally and then with regard to the defendant's particular facts); Wilkins, 655 S.W.2d at 916 (holding that the statute generally gives adequate notice); State v. Thomas, 635 S.W.2d 114 (Tenn. 1982) (holding that the statute defining aggravated rape was facially valid); State v. Hinsley, 627 S.W.2d 351, 354 (Tenn. 1982) (holding that the language of the habitual drug offender statute is generally clear enough to give notice and to set boundaries for the courts and police). Also, once the court has determined that the law is not vague in a general sense, it will

not allow the defendant then to allege other factual situations beyond the defendant's own conduct in which the statute might be vague. See State v. Tabor, 678 S.W.2d 45, 46 (Tenn. 1984) (answering the defendant's contention that a statute prohibiting people from knowingly watching a cockfight could reach news reporters or investigators by noting that none of the defendants claimed to be such); see also State v. Alcorn, 741 S.W.2d 135, 139 (Tenn. Crim. App. 1987) (explaining that unless the defendant can show that the statute is generally vague, "the challenge is limited to the application of the statute to [the defendant's] own conduct"). The court has recognized that in the absence of a facial infirmity, "[i]t is not a proper function of a Court of last resort to envision in advance of application all possible contingencies of attempted prosecution under a criminal statute, and declare which are constitutional and which are not." State v. King, 635 S.W.2d 113, 114 (Tenn. 1982); see also State v. Davis, 654 S.W.2d 688, 694 (Tenn. Crim. App. 1983) (extending this provision to all appellate courts).

When examining a criminal statute for overbreadth or vagueness, we construe it according to the fair import of its terms. Tenn. Code Ann. § 39-11-104. The words of a statute should be interpreted in their ordinary sense and not be given a forced or subtle meaning. Bowater North American Corp. v. Jackson, 685 S.W.2d 637, 638-39 (Tenn. 1985). We apply the natural and common meaning of the language used. State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985); State v. Logan, 973 S.W.2d 279, 282 (Tenn. Crim. App. 1998). While a statute must give fair notice of the prohibited conduct, absolute precision or certainty is not required. State v. McDonald, 534 S.W.2d 650, 651 (Tenn. 1976). In analyzing the potential vagueness of a statute, we may look beyond the statutory language to judicial interpretations or legislative history to ascertain the clarity in meaning required by due process. See Rose v. Locke, 423 U.S. 48, 52, 96 S. Ct. 243, 245 (1975); United States v. National Dairy Products Corp., 372 U.S. 29, 33-34, 83 S. Ct. 594, 598 (1963); Wilkins, 655 S.W.2d at 916. We are compelled to adopt a reasonable statutory construction that will preserve the constitutionality of the statute. Lyons, 802 S.W.2d at 592.

Tenn. Code Ann. § 39-17-505(a) provides:

> A person commits an offense who knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints, or makes any gambling device or

> record. However, it is not an offense for a person to own or possess in this state a lottery ticket originating from a state in which a lottery is lawful, if such ticket is not owned or possessed for the purpose of resale.

Tenn. Code Ann. § 37-17-501(1) defines "gambling" as "risking anything of value for profit whose return is to any degree contingent on chance, but does not include a lawful business transaction." A "gambling device or record" is "anything designed for use in gambling, intended for use in gambling, or used for gambling." Tenn. Code Ann. § 39-17-501(3).

A. OVERBREADTH

The trial court concluded that the Tennessee statutes prohibiting the possession of a gambling device and defining the term "gambling device" were overly broad. The state argues that these statutes are not overbroad because they do not interfere with any constitutionally protected conduct or with First Amendment rights in particular. For First Amendment freedoms, the Supreme Court recognized an exception to the long standing rule that "constitutional rights are personal" and may not be asserted hypothetically with regard to others. Broadrick, 413 U.S. at 611-13, 93 S. Ct. at 2915-16. It made this exception because of the risk "that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Id. Within this exception, it becomes increasingly difficult to deem the restricting statute overbroad as the protected activity moves from pure speech to expressive conduct. Id. at 616, 93 S. Ct. at 2917. In this respect, we believe that the possession of a gambling device enjoys no First Amendment protection, nor does it implicate any other constitutionally protected right. Thus, the overbreadth doctrine does not apply. See, e.g., United States v. Hill, 167 F.3d 1055, 1063 (6th Cir. 1999) (limiting analysis to whether Tennessee's definitions of "gambling" and "gambling device" are vague as applied to the defendant's specific facts because no First Amendment interests were threatened).

B. VAGUENESS

The defendant contends that the definition of a gambling device is vague both on its face and as applied because it fails to give fair notice of what items are covered by the statute and encourages arbitrary enforcement. The state contends that

the definition is constitutionally sound because of the narrow application of the "designed for use in gambling" language. The state also argues that the defendant had fair notice that her machines were prohibited because gambling-theme video machines were gambling devices per se under the prior law.

1. Facial Challenge

The defendant contends that the plain language of the "designed for use" prong of the definition of a gambling device in § 39-17-501(3) fails to guide law enforcement as to what items fall within the definition. The state argues that the "designed for use in gambling" language is limited to devices that are designed principally for use in gambling as determined by their objective features. The state maintains that this construction of the "designed for use" prong gives fair notice of the meaning and scope of the statute and guards against arbitrary and discriminatory enforcement.

The United States Supreme Court has upheld the constitutionality of the phrase "designed for use." In Hoffman Estates, the Court analyzed a quasi-criminal ordinance requiring a business to obtain a license before it could sell any items "designed or marketed for use with illegal cannabis or drugs." The Court defined "design" as to "'fashion according to a plan,'" holding that "[i]t is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." Hoffman Estates, 455 U.S. at 502, 102 S. Ct. at 1195 (quoting Webster's New International Dictionary of the English Language 707 (2d ed. 1957)).

The same is true for a device designed for use in gambling. Whether a device is a gambling device by design turns upon whether the device is principally designed for use in gambling based upon the objective features that the manufacturer has incorporated into the device. This construction narrows the definition by limiting it to devices principally designed for gambling. It also provides guidance for determining the device's principal use by directing that we look to the device's objective features. The Attorney General has adopted this construction of the "designed for use" language in § 39-17-501(3), recognizing that the determination of whether an item is a gambling

device depends "upon the particular aspects of the device, as it is designed to actually be played." Op. Att'y Gen. 94-129 (Nov. 2, 1994). Although we are not bound by the statutory constructions espoused by the Attorney General, our supreme court has recognized that the Attorney General's opinions are "entitled to considerable deference" because "government officials rely upon them for guidance." State v. Black, 897 S.W.2d 680, 683 (Tenn. 1995).

The defendant seeks to distinguish Hoffman Estates by arguing that the Court upheld the ordinance because the city attorney had issued guidelines which listed specific items covered by the ordinance. Although the Court noted that the administrative guidelines delineated whether specific items were designed for use with illegal drugs, the Court framed its analysis in terms of the meaning of the word "design." Hoffman Estates, 455 U.S. at 502, 102 S. Ct. at 1194-95. The Court pointed out that both the ordinance and the guidelines contained ambiguities, "[n]evertheless, the 'designed for use' standard is sufficiently clear to cover at least some of the items . . . sold." Id., 455 U.S. at 503, 102 S. Ct. at 1195 (emphasis added). Thus, we believe that the Court relied upon its interpretation of the term "design" rather than depending exclusively upon the presence of the guidelines to hold that the ordinance was not unconstitutionally vague.

The defendant also argues that requiring that a device be designed principally for gambling as measured by its objective features gives no guidance as to what those features are. The law is well-settled that we read statutes relating to the same subject matter together. State v. Williamson County Hosp. Trustees, et al, 679 S.W.2d 934, 936 (Tenn. 1984). The definition of a gambling device in section -501(3) must be read together with section -501(1), which defines "gambling" as "risking anything of value for a profit whose return is to any degree contingent on chance." Thus, the devices covered by section -501(3) must have objective features that permit the risking of something of value for gain and that do so based upon chance rather than skill. In State v. Strawberries, Inc., 473 N.W.2d 428 (Neb. 1991), the defendants argued that a Nebraska statute defining a "gambling device" as "any device . . . used or

usable for engaging in gambling"[1] was unconstitutional because virtually anything could be used for gambling. The Supreme Court of Nebraska held that the definition was constitutionally sound because the "bet" requirement in the definition of gambling[2] must be read into the definition of a gambling device. Id. at 437. Similarly, the requirements of value, profit and chance limit the devices that are designed for gambling under Tennessee law.

The defendant claims that the Attorney General's application of the principal design standard to souvenir dice in Opinion U90-169 obscures what conduct constitutes possession of a gambling device because it concludes that souvenir dice violate § 39-17-505. The opinion sets forth the principal design standard and states that:

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[1]Nebraska defines "gambling device" as follows:

> Gambling device shall mean any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value, free games redeemable for something of value, instant-win tickets which also provide the possibility of participating in a subsequent drawing or event, or tickets or stubs redeemable for something of value, except as authorized in the furtherance of parimutuel wagering. Supplies, equipment, cards, tickets, stubs, and other items used in any bingo, lottery by the sale of pickle cards, other lottery, raffle, or gift enterprise conducted in accordance with the [laws regulating bingo and lotteries] are not gambling devices within this definition.

Neb. Rev. Stat. § 28-1101(5).

[2]Nebraska defines "gambling" in pertinent part as follows:

> A person engages in gambling if he or she bets something of value upon the outcome of a future event, which outcome is determined by an element of chance, or upon the outcome of a game, contest, or election, or conducts or participates in any bingo, lottery by the sale of pickle cards, lottery, raffle, gift enterprise, or other scheme not authorized or conducted in accordance with [laws regulating bingo and lotteries] . . . but, a person does not engage in gambling by:
>
> (a) Entering into a lawful business transaction;
>
> (b) Playing an amusement device or a coin-operated mechanical game which confers as a prize an immediate, unrecorded right of replay not exchangeable for something of value;
>
> (c) Conducting or participating in a prize contest; or
>
> (d) Conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise conducted in accordance with [laws regulating bingo and lotteries].

Neb. Rev. Stat. § 28-1101(4).

> nothing in the objective features of ordinary dice [demonstrate] that they are designed principally for use in gambling, and it is well-known that dice are commonly used in various games which do not involve gambling. Of course, "shaved" or "loaded" dice might be said to be "designed for use in gambling," but ordinary dice would not constitute a "gambling device" in that sense.

Op. Att'y Gen. U90-169 (Nov. 28, 1990) (emphasis added). We note that the opinion does not determine whether shaved or loaded dice are designed for use in gambling. Nevertheless, the opinon concludes that the souvenir dice are gambling devices because the hypothetical individual purchasing the dice knew that they were "originally" designed for use in gambling. Here the opinion departs from the principal use standard by focusing solely upon the particular intent of the manufacturer rather than the objective features of the dice. In this respect, the opinion does not state the law in Tennessee.

The defendant contends that the principal design standard results in arbitrary and capricious enforcement as evidenced by the differing positions of the state on whether dice or a deck of cards are gambling devices. The defendant claims that the state's position in this case that dice and cards are not gambling devices unless their possessor intends to use them to gamble or uses them to gamble contradicts the testimony of the state's witnesses at the preliminary and motion hearings. The defendant states that the state's expert, Agent Haynes, testified that dice and cards were inherently gambling devices and that Agent Marcias testified that he could arrest Kroger employees who stocked cards or dice for the possession of a gambling device. However, the defendant fails to mention that Agent Haynes qualified his statement, saying that a gambling device must include the element of risk found in the definition of gambling and that dice alone are not a gambling device.[3]

Agent Marcias stated that cards and dice could be gambling devices in the "right setting" before giving his belief that he could arrest grocery employees for stocking these items under § 39-17-505. However, we believe that Agent Marcias's statement that individuals who transported, stocked or touched a deck of cards at a

[3]Interestingly, although Mr. McClanahan, the defense expert, deemed that dice and cards were designed for use in gambling, he believed that the defendant's six gambling-theme video machines, equipped with knock-off switches and retention meters, were purely amusement devices.

grocery store have violated section -505 was erroneous because it did not take the principal design standard into account. A deck of cards or a pair of dice may be used to play numerous games with no connection to gambling. The objective features of the cards or the dice in no way make them particularly suited for risking something of value for gain based upon chance. Agent Marcias' recognition that cards and dice could be gambling devices in the right context properly reflects that an individual could use them to gamble or could intend to use them to gamble even though that is not their principal use. Such a finding under the intent or use prongs of the definition would depend upon the surrounding facts rather than the features of the dice or cards themselves. Agent Marcias' mistaken beliefs about the limits of his authority do not require us to conclude that the definition of a gambling device fails to give sufficient guidance to law enforcement. In any event, this opinion will serve to guide law enforcement officers in the future application of the "designed for use" language within the statute. See Wilkins, 655 S.W.2d at 916 (recognizing that judicial interpretations may refine the meaning of a statute so that it comports with due process).

2. As Applied

We also hold that § 39-17-501(3) gives the defendant fair notice of whether her video machines constitute gambling devices because, in addition to falling within the plain language of the "designed for use" prong, similar gambling-theme video machines were gambling devices per se under the prior law. The pre-1989 gambling statutes defined a gambling device as follows:

> [A]ny article, device or mechanism by the operation of in any place in which a right to money, credits, deposits or other things of value may be credited, in return for a consideration, as the result of the operation of an element of chance; any article, device or mechanism which, when operated for a consideration does not return the same value or thing of value for the same consideration upon each operation thereof; any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; and any subassembly or essential part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation.
>
> This definition shall not include any coin-operated game or device designed and manufactured for bona fide amusement purposes only, which may, by application of skill, entitle the player to replay the game or device at no additional cost if:

> (A) The game or device accumulates and reacts to no more than fifteen (15) free replays;
>
> (B) Discharges accumulated free replays only by reactivating the game or device for one (1) additional play for each accumulated free replay; and
>
> (C) Makes no permanent record, directly or indirectly, of free replays.

Tenn. Code Ann. § 39-6-601(4) (repealed 1989). Under this definition, the court of appeals held video card games to be gambling devices per se. Bracker v. Estes, 698 S.W.2d 637, 643 (Tenn. Ct. App. 1985) (holding a video machine that simulated a five-card-draw poker game and allowed a player to accumulate up to 999 replays was a gambling device). The court applied this holding to coin-operated video games that "accumulated and reacted to more than fifteen free replays, that . . . discharged the accumulated free replays more than one at a time, and that . . . made a permanent record of the free replays." T & W Enterprises v. Casey, 715 S.W.2d 356, 358-59 (Tenn. Ct. App. 1986). Agent Haynes testified that the defendant's video machines allowed a player to accumulate up to twenty thousand credits and to risk eight to sixty-four credits per play. He also stated that the machines had a meter that retained the total number of credits run off the machine.

The legislature amended the gambling statutes in 1989. The defendant contends that case law under the prior act is of no use in giving fair notice of what devices are designed for use or intended for use in gambling under the current act. However, the Sentencing Commission Comments to § 39-17-501 state:

> This section contains the definitions for gambling offenses. The definitions are intentionally broader than those found in prior law. The commission intends to include any scheme by which value is risked upon a chance for greater value as a "gambling" offense. The definition of "gambling" includes lotteries, chain or pyramid clubs, numbers, pinball, poker or any as yet unnamed scheme where value is risked for profit.

We note that the legislature approved the publication of the Sentencing Commission Comments to the 1989 revisions to the criminal code. See 1989 Tenn. Pub. Acts, ch. 591, § 114. Thus, we will view the comments as evidence that the legislature intended the definition of a gambling device to be broader under the current gambling law. See Sutherland Statutory Construction § 48.09 (5th ed. 1992); see also State v. Horton, 880 S.W.2d 732, 735 (Tenn. Crim. App. 1994). This broader definition necessarily includes what was formerly covered. We also note that a device that is "designed for use in

gambling" under the principal design standard is the equivalent of a gambling device per se, as such a device was recognized under prior law.

Citing to State v. Horton, the defendant contends that the very fact that the legislature repealed the prior act means it did not want the courts or law enforcement to continue to rely on the prior law. In Horton, this court held that circumstances found to implicate a prior law cannot be extended to a new law when such circumstances contravene the language of the new statute:

> [T]he state's construction ignores the language of the present statute as it is written. Regardless of whether the legislature intended to include all of the circumstances provided in the 1982 Sentencing Act in the present statute, we cannot enlarge the statute beyond the fair meaning of the language it contains nor can we ignore the fact that the language differs materially from that in the former statute.

880 S.W.2d at 736 (holding that the Sentencing Commission Comments failed to indicate adequately the legislative intent and that the construction advocated by the state contravened the plain meaning of the language used). We do not believe the inclusion of video machines, which were gambling devices per se under the prior definition, strains the meaning of the language in the now broader definition, "anything designed for use in gambling."

The defendant argues that the comments may mean that only the definition of "gambling" is broader under the new act. However, the comments expressly state that the "definitions" are broader. The defendant also suggests that even if the definition of gambling device is now broader, we do not know how much broader the legislature intended it to be. We do not need to know the exact perimeter of the new definition in order to conclude that a device that was a gambling device per se under the prior definition unquestionably falls within the new broader definition. Because a reasonable person would understand that a video machine deemed a gambling device per se under the prior law would also fall within the broader definition of a gambling device under the current law, the definition of gambling is constitutionally sound as applied to the defendant in this case.

The defendant contends that gambling-theme video games are subject to arbitrary and discriminatory prosecution as evidenced by the differing determinations of

law enforcement officials on whether these machines are designed for use in gambling. She claims that the state's position that gambling-theme video games continue to be per se gambling devices under the 1989 act conflicts with the 1992 testimony of John Carney, the former director of the Tennessee Bureau of Investigation. Then Director Carney and one of his agents testified before a joint committee of the legislature regarding the possible regulation and licensing of gambling-theme video machines. Both Director Carney and Agent Slagel stated that gambling-theme video machines must be played and that the player must receive payment for credits won before these machines would be gambling devices under the 1989 act. Coincidentally, Mr. Carney is now a District Attorney General and prosecuted this case against the defendant at the trial level. The defendant claims that Mr. Carney's apparent change in interpretation of § 39-17-501(3) provides a perfect example of the potential for arbitrary and discriminatory enforcement under the statute. We believe that an incorrect interpretation of a statute by a law enforcement officer does not mandate that the statute fails to provide adequate guidance for fair enforcement.

Although the defendant claims that the definition of a gambling device fails to provide adequate guidance for law enforcement with respect to gambling-theme video games, the facts of this case belie that conclusion. Both Agent Haynes and Agent Marcias determined that the defendant's machines were gambling devices based upon their objective features. Agent Marcias testified that he thought the defendant's machines were gambling devices because they had knock-off switches and lacked amusement stickers. Agent Haynes said he believed the machines were gambling devices because the games took an inordinately short time to play in relation to the amount of money required to play, the machines had knock-off switches, each machine had a meter which retained the credits run off the machine, and, importantly, the games required no skill. We believe the testimony of these witnesses illustrates that the current gambling statutes adequately inform law enforcement as to whether gambling-theme video machines continue to fall within the definition of a gambling device.

3. Lawful Business Transaction Exception

Finally, the defendant contends that the exception for lawful businesses in the definition of gambling is unconstitutionally vague. Tenn. Code Ann. § 39-17-501(1)

excepts lawful business transactions from the definition of gambling. Section -501(4) provides that a lawful business transaction "includes any futures or commodities trading." The defendant contends that the exception fails to indicate what lawful conduct, other than futures and commodities trading, is accepted. Therefore, the defendant argues that arbitrary and discriminatory enforcement is inevitable and that the average citizen has no basis for determining whether his or her business transactions are prohibited.

"Lawful" means "conformable to law: allowed or permitted by law: enforceable in a court of law: legitimate" or "constituted, authorized, or established by law: rightful." Webster's Third New International Dictionary 1279 (3d ed. 1993). The plain meaning of section -501(1) reveals that a transaction that might otherwise come within the definition of gambling because value is ventured for a profit contingent upon chance is excluded if that transaction conforms to the law in all other respects. See Op. Att'y Gen. 99-030 (Feb. 18, 1999) (noting that the lawful business transaction exception provides "clear evidence that the legislature did not intend to reach conduct otherwise permitted by law, even if that conduct might fit the statutory definition" of gambling). Possession of a gambling device does not otherwise conform with the law because it violates § 39-17-505.

Our supreme court has addressed the question of whether the term "lawful order" in a trespass statute was unconstitutionally vague. Lyons, 802 S.W.2d at 590. In Lyons, the defendant argued that "lawful order" was undefined and lacked any specific guideline. The court held:

> The term "lawful order" while general in nature is not vague. The concept of "lawfulness" is not inherently unconstitutionally vague, and "people of common intelligence need not always guess at what a statute means by 'lawful'" inasmuch as that term must be considered in the context of the statements of law contained in relevant statutes and court rulings.

Id. at 592 (quoting State v. Smith, 759 P.2d 372, 375 (Wash. 1988)). The legislature did not need to list all of the transactions that could fall within the legal business transactions exception. A person is presumed to know which transactions are lawful. See, e.g., State ex. rel Davis v. Thomas, 88 Tenn. 491, 494, 12 S.W. 1034, 1035 (1890) (presuming that an individual knows the law); Hunter v. State, 158 Tenn. 63, 73,

12 S.W.2d 361, 363 (1928) (holding that ignorance of the law will not excuse a crime). Thus, the defendant's argument that the average individual will not be able to distinguish lawful business transactions from gambling is erroneous. The definition of gambling is not unconstitutionally vague.

II. EQUAL PROTECTION

The defendant contends that the exception for lawful business transactions violates her right to equal protection under the law. She argues that this exception creates a class of people, those engaging in lawful business transactions including futures and commodities traders, who are permitted to venture something of value for a profit contingent upon chance without risking incarceration. She maintains that such a distinction impinges upon her fundamental right to personal liberty. She argues that, therefore, the statute is subject to strict scrutiny. She claims that the statute cannot meet this standard because the unlawful business transaction exception is not narrowly tailored to effectuate a compelling state interest. The state contends that the exception for lawful business transactions does not bear upon any fundamental rights and reasonably relates to a legitimate state interest.

The Fourteenth Amendment to the United States Constitution prohibits a state from denying the equal protection of the law to anyone within its jurisdiction. Equal protection, as guaranteed under Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution, is essentially the same as that afforded by the federal constitution. State v. Tester, 879 S.W.2d 823, 827 (Tenn. 1994); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993). "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Baxstrom v. Herold, 383 U.S. 107, 113, 86 S. Ct. 760, 763 (1966). In the absence of a suspect classification, such as race, or of an intrusion upon a fundamental constitutional right, the challenged classification must "bear some rational relationship to legitimate state purposes." San Antonio Indep. Sch. Dist. v. Rodreguez, 411 U.S. 1, 40, 93 S. Ct. 1278, 1300 (1973). However, if the classification "disadvantages a 'suspect class' or impinges upon the exercise of a 'fundamental right,' the legislative

classification is subject to strict scrutiny by the courts" and must satisfy a compelling state interest. Doe v. Norris, 751 S.W.2d 834, 841 (Tenn. 1988).

No suspect classification is involved in this case. The defendant argues that her fundamental right to personal liberty is implicated because, unlike those who fall within the lawful business transaction exception, she risks incarceration for risking something of value for a profit contingent upon chance. The right to personal liberty is a fundamental right, Id. at 841-42, but it is not the right restricted by § 39-17-501 et. seq. These statutes prohibit gambling, which enjoys no constitutional protection. See State v. Alcorn, 741 S.W.2d 135, 139 (Tenn. Crim. App. 1987) (holding that although a convicted individual would be deprived of his or her liberty, the statute in question prohibits the sale of illegal drugs, which is not a fundamental right).

The legislature has the right to determine what conduct to criminalize. Hinsley, 627 S.W.2d at 355. Every criminal law creates classifications. "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." Phyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394 (1982); Doe, 751 S.W.2d at 841. If the defendant's reasoning were valid, every criminal statute would be subject to strict scrutiny when the resulting sentence restricted a defendant's liberty. Instead, we reserve strict scrutiny for those statutes with subject matter that impinges upon a fundamental right. See, e.g., Doe, 751 S.W.2d at 842 (holding that the practice of the Tennessee Department of Correction of detaining unruly juveniles in secure facilities with delinquent juveniles impinged upon the liberty rights of the unruly juveniles); Campbell v. Sundquist, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (holding that a criminal statute prohibiting consensual sex between adults of the same gender implicated the fundamental right to privacy). Such is not the case with respect to the definition of gambling.

The defendant relies upon State v. Crain, 972 S.W.2d 13 (Tenn. Crim. App. 1998), to support her contention that criminal statutes that create classes of individuals are subject to strict scrutiny. However, we respectfully believe that Crain

applied the wrong standard. In Crain, the nineteen-year-old defendant claimed that a statute punishing eighteen- to twenty-one year olds for driving with a blood alcohol content of .02 percent while not punishing adults over age twenty-one for the same conduct deprived him of equal protection under the law. The court cited Doe for the proposition that personal liberty is a fundamental right. Id. at 16. The court then held that because public service work was a possible sanction under the statute, the statute impinged upon personal liberty, thereby requiring strict scrutiny. Id. at 16. The Crain court failed to account for the distinction in Doe that the practice of housing the two classes of juveniles together which was authorized by statute was the focus of the challenge, not whether the legislature could prescribe certain restrictions for unruly juveniles while not so restricting the average juvenile. Because the right of an eighteen- to twenty-one year old to drive with a blood alcohol content of .02 is not a fundamental right, the legislature's decision to criminalize this conduct with respect to this age group while not criminalizing the same conduct for those over twenty-one should have been examined under the rational basis test.

Thus, we will look to whether a rational basis supports the distinction between gambling and a lawful business transaction. "[I]f some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." Tennessee Small School Systems, 851 S.W.2d at 153. The state has a legitimate interest in regulating business transactions. The legislature "cannot prohibit an ordinary business but it may, however, regulate the business to promote the health, safety, morals or general welfare of the public." Ford Motor Co. v. Pace, 206 Tenn. 559, 564, 335 S.W.2d 360, 362 (1960). The prohibition of gambling is within the state's police power. Ah Sin v. Wittman, 198 U.S. 500, 505-06, 25 S. Ct. 756, 758 (1905). Our supreme court has recognized that the legislature may proscribe the possession of gambling devices in order to preserve public morals. Motlow v. State, 125 Tenn. 547, 568, 145 S.W. 177, 182 (1912). The legislature's clarification that lawful transactions containing an element of chance are to be distinguished from those activities which constitute gambling is rationally related to the

state's legitimate interests in prohibiting gambling and regulating business to preserve public morals. The exception for lawful business transactions is constitutionally sound.

Based upon the foregoing and the record as a whole, we reverse the trial court's dismissal of the indictment and remand the case for reinstatement of the indictment and for further proceedings.

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Joseph M. Tipton, Judge

CONCUR:

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James Curwood Witt, Jr., Judge

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John Everett Williams, Judge