

Opinion No. 69-54

June 11, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,
Assistant Attorney General

TO: Mr. H. Leslie Williams, Assistant District Attorney, Second Judicial District, Second
Floor Court House, Albuquerque, New Mexico

QUESTIONS

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May gambling devices, Roulette Wheels, Crap Tables and Blackjack Tables, be imported into the State of New Mexico and held for the purposes of providing entertainment for patrons of a night club by using the devices with stage money and without any consideration or prize involved in the entertainment?

CONCLUSION

Yes.

OPINION

{*80} ANALYSIS

Roulette Wheels, Crap Tables and Blackjack Tables could come within the definition of gambling device as that term is used in the New Mexico gambling laws.

"Gambling device' means a contrivance which, for a consideration, affords the player an opportunity to obtain anything of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the device;" Section 40A-19-1 (C), N.M.S.A., 1953 Compilation (1967 P.S.)

It would appear that if there was no opportunity to obtain anything of value when the gambling device was used for entertainment, then the item would not be a gambling device within the definition of the statute. New Mexico statutes further provide for a misdemeanor for the dealing in gambling devices, which "Consists of manufacturing, transferring commercially, or possessing, with intent to transfer commercially" any gambling devices. Section 40A-19-5, N.M.S.A., 1953 Comp. (1967 P.S.). In the question posed it is assumed that there would be no transfer of the devices as stated in the statute.

It would appear that the intent of the user is implied in our criminal statute. In looking to other jurisdictions with different statutes, it is difficult to come to any clear conclusion as

to how the courts view the mere possession of devices which are in effect used for gambling but may not be used for gambling at all times. For example, a Colorado court described the problem as determining whether the reasonably intended use was for gambling. **Approximately Fifty-Nine Gambling Devices v. People**, 110 Colo. 82, 130 P.2d 920 (1942). Other courts have indicated that merely having the qualities of a gambling device is not enough, but it must be shown that the device is maintained for a gambling purpose. **Irvin v. State**, 52 Fla. 51, 41 So. 785 (1906); **Lyle v. State**, 30 Tex. App. 118, 16 S.W. 765 (1891); **Hickerson v. Commonwealth**, 283 Ky. 81, 140 S.W.2d 841 (1940).

On the other hand, there are cases indicating that possession of a gambling device is illegal if it has the qualities which would enable one to use it for gambling. See e.g., **In Re Sutton**, 148 Pa. Super. 101, 24 A.2d 756 (1942); **Mills v. Browning**, 59 S.W.2d 219 (Tex. Civ. App. 1933). In **Approximately Fifty-Nine Gambling Devices v. People, supra**, the court expressed the opinion that a gambling device has an inherent tendency to stimulate the gambling instinct. But, the Colorado court goes on to indicate that whether or not the devices were used or kept for {81} gambling purposes is merely another question of fact and not one which can be determined as a matter of law.

We conclude, therefore, that the narrow definitions of gambling device and dealing in gambling devices in the New Mexico law require a specific intent to use or transfer for use with a gambling purpose, and that use for entertainment alone would not subject the parties to prosecution under our gambling statutes. It also follows from this conclusion that the statute providing for forfeiture of gambling devices seized by law enforcement officials has no application since the equipment is not "used in gambling." See Section 40A-19-10, N.M.S.A., 1953 Compilation.

Further, nothing herein should be construed to limit the authority of the Director of the Department of Alcoholic Beverage Control to promulgate regulations controlling the use of gambling devices in establishments dispensing alcoholic beverages.