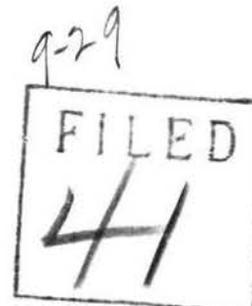


LOTTERY: "Policy writer" of a drawing in this state can be prosecuted for a felony, or for a misdemeanor.

September 28, 1939

Hon. Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated September 25th, 1939, which reads as follows:

"The Police Department here is endeavoring to rid St. Joseph of the "Policy" racket and have asked for my co-operation, and I want to do all I can to assist them.

"'Policy' is unquestionably covered by the lottery laws, and is played in this way: An agent or salesman, familiarly called a 'policy writer', calls on the player--the customer-- and the player selects three numbers out of a range of numbers from one to sixty. The writer calls on other players, or customers, and they too make selections of three numbers each, paying five, ten or twenty-five cents to the 'writer'.

"Each day a 'drawing' is held, that is to say, from a box containing numbers from one to sixty, nine numbers are drawn out. If the player's three numbers are among the nine that have come out of the box he wins a cash prize for that day, the amount of the prize depending upon whether he has made a five-cent, a ten-cent or a twenty-five-cent play.

"Under Section 4314 of the Revised Statutes of 1929 it is made a felony to 'make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state.'

"Under this section, the person who conducts the enterprise is undoubtedly guilty of a felony, but I would like your office to render an opinion to me as to whether the 'policy writer,' who contacts the players, records the numbers upon which the player wagers, receives the consideration, and then turns over the list of wagers to some unknown party connected with the operation of the enterprise is also guilty of a felony under section 4314, or is simply guilty of a misdemeanor.

"Before I start filing cases under this felony section I would like to know that I am on the right track and I would appreciate an opinion from your office on the subject."

Section 4314 R. S. Mo. 1929, reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state) (or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state,) he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment

in the county jail or workhouse for not less than six nor more than twelve months." (Underscoring and parentheses ours)

The part of the above section which is applicable to your request, is the first disjunctive which specifically states "business or avocation in this state." In construing that part of section 4314 the drawing in the nature of a lottery as a business or avocation must be consummated in this state. The latter part of section 4314 applies to the place of advertisements or the publication in any newspaper circulated in this state.

Section 4315 R. S. Missouri, 1929, reads as follows:

"Any person who shall sell or expose to sale, or cause to be sold or exposed to sale, or shall keep on hand for the purpose of sale, (or shall advertise or cause to be advertised for sale,) (or who shall print or publish such advertisement,) (or shall aid or assist, or be in anywise concerned in the sale or exposure to sale of any lottery ticket or tickets, or any share or part of any lottery ticket in any lottery, or device in the nature of a lottery, within this state or elsewhere,) (and any person who shall advertise or cause to be advertised the drawing of any scheme in any lottery,) (or shall print or publish such advertisement, and shall be convicted thereof in any court of competent jurisdiction, shall, for each and every such offense, forfeit and pay a sum not exceeding one thousand dollars." (Underscoring and parentheses ours).

It will be readily seen that this section, although it mentions the words "who shall sell," it more specifically applies to the advertising of lottery tickets in any manner, whether the device of lottery is situated in this state or elsewhere.

Both of the above sections were practically the same at the time of their first enactment. They were distinguished in the early case of State v. Cobb, 15 Mo. App. 433, l.c. 439, where the court said:

"Under the law, as we understand it, any one who establishes, or aids in establishing, a lottery as a business, or advertises such a lottery, is guilty of a felony; whilst one who merely sells tickets, or advertises the sale of lottery tickets, or advertises the numbers drawn, is guilty of a misdemeanor. A vendor of lottery tickets may merely advertise that fact, and publish the numbers drawn; or he may establish a lottery as a business in Missouri, or aid in doing so, or advertise the lottery itself, setting forth, in circulars or otherwise, the supposed advantages of the scheme, the number and amount of prizes, the guarantees that prizes will be paid, and all those circumstances which are calculated to induce persons to purchase tickets. These latter acts, by which the public are incited to buy, the legislature has seen fit to make felonious; and, by no fair construction of the law, can it be said that this species of advertising is not a felony under the law, unless the advertiser is a proprietor of the lottery advertised."

It will be noticed under the above ruling that the court held that a vender of lottery tickets could be prosecuted under the felony section, which, in your case would be section 4314, or could be prosecuted under the misdemeanor section which, in your case, would be section 4315. It all depended upon the facts in the case. They held that one who is guilty of aiding or assisting in making or establishing a lottery in this state would be guilty of a felony. While the mere selling of the lottery tickets was only a misdemeanor, they further said that the vender who, in selling the tickets, committed acts which would also be punishable under the felony section, could be convicted of a felony. State v. Cobb, 15 Mo. 433, was affirmed in 90 Mo. (Sup.) 196.

In distinguishing the two sections 4314 and 4315, supra, it is very noticeable that where the business or avocation is in this state, the felony section should be applied; while, under section 4315, the misdemeanor section only, applies, for the reason that the felony section in cer-

tain cases would not have a venue in this state.

In the case of State v. Hilton, 248 Mo. 522, can be found a form of information or indictment which was held sufficient. In that case the circuit attorney of the city of St. Louis filed an information charging two defendants under two counts under the "policy" act. In the information the first count charged that the two defendants did establish a policy as a "business and avocation", and in the second count the circuit attorney alleged that the same two defendants did aid and assist in making and establishing a policy. At the close of the testimony the circuit attorney elected to proceed upon the second count which was the aiding section. The verdict in the case was affirmed by the court.

In the case of State v. Cronan, 189 Mo. 663, the second count of an indictment on "policy", as set out by the court was held sufficient. In holding the indictment good, the court at l. c. 669, said:

"The indictment is assailed as insufficient in that it fails to define in what manner a 'policy' was made or established, and fails to define what is meant by a 'policy'. This objection was made and answered in State v. Wilkerson, 170 Mo. l.c. 191, 192, in which BURGESS, J., speaking for this court, said: 'Now what is it at which the statute is leveled? Clearly the unlawful and felonious making and establishing a policy as a business and avocation, and these facts are set forth in the indictment. The statute specifically defines the offense in such a way that it cannot be misunderstood, nor can there be any question as to the kind of policy intended, for when the statute says "make and establish a policy" it is well understood to be "a form of gambling in which bets are made on numbers to be drawn by lottery." (Century Dictionary.)' The indictment in that case was in all essentials like the one before us, and adhering to the views there expressed, we hold the indictment is sufficient. The statute itself sufficiently individuates the offense, and in such case it is well-established law of this State that an indictment following the form of the statute is sufficient."

This case was reversed and remanded, solely on the ground that the jury brought in a special verdict and did not include in the wording "as a business and avocation." The court also said that if a general verdict had been brought in, such as "find the defendant guilty as charged in the indictment", the verdict would have been good.

Again referring to section 4314, supra, the wording "or aid or assist in making" is not ambiguous, and should apply to any one assisting in a lottery where the drawing is made in this state.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the "policy writer" who contacts the players on a lottery which is in the nature of policy and where the drawing takes place in this state, can be prosecuted under the felony section 4314, supra.

Respectfully submitted,

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APPROVED:

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