

LOTTERIES: : The scheme herein described is a lottery;
GAMBLING: : while a Prosecuting Attorney has broad
PROSECUTING ATTORNEY:: discretion in determining whether a
: particular criminal case should be prose-
: cuted, a refusal to prosecute lottery
: cases generally, would constitute an abuse
: of his discretion.

FILED
10

March 1, 1955

Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri

Dear Mr. Boone:

Your letter of February 21, 1955, requesting
an opinion of this office, reads:

"The enclosed newspaper advertisement
has been running in the West Plains
Daily Quill, West Plains, Missouri,
over a period of several weeks, the
only change each week being in the
name of the winner for the previous
week.

"I have today been contacted by a
Service Station operator in my county
concerning the advertisement and ask-
ing my opinion as to whether or not
the project is a violation of the laws
of Missouri.

"It is my opinion that such a drawing
is a violation of the Lottery laws of
Missouri, however my inquirer takes
the opposite view of the law and cites
me to the enclosed clipping, and also
states that such an advertisement is
appearing in other counties in the
State.

"I would appreciate your opinion as to
whether or not the scheme described in
the advertisement is in violation of
the laws of Missouri.

"I would also appreciate your opinion
as to whether or not a prosecuting At-
torney has any discretion in the en-
forcement of law violations concerning

Honorable Paul Boone:

drawings or lotteries. This question is being asked for the reason that numerous drawings, selling of chances and lotteries in different forms are being conducted in counties over the State, and the people in my county feel that the law should either be enforced or repealed."

The advertisement to which you refer, is as follows:

"FREE!

FREE!

BE A WINNER

WINNER SATURDAY - MRS. JOHN LAND, 914 W. 1st St. - 4.2 GAL.

NEW DRAWING EACH WEEK

Each time you purchase gasoline at the Renfro Phillips 66 Service Station at 218 E. Main, you will be given a ticket for the amount purchased. Each Saturday night a ticket will be drawn. The winner, whose name will appear in the Quill each Monday, will receive free, an equal of the amount shown on the ticket.

Every purchase means another chance to win. The more you buy the more you can win.

BUY THE BEST WIN THE BEST

RENFRO PHILLIPS 66 SERVICE STATION".

The fundamental policy of the State toward lotteries is established by Article III, Section 39, Constitution of Missouri, 1945. That section provides, in part, as follows:

"* * * The general assembly shall not have power:

* * * * *

"(9) Authorization of Lotteries or Gift Enterprises.--To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; ".

It is made criminal by Section 563.430, RSMo 1949, to conduct a lottery in Missouri. That section provides:

Honorable Paul Boone:

"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."

The Supreme Court of Missouri has declared in *State ex inf. McKittrick vs. Globe-Democrat Pub. Co.*, 341 Mo. 862, 110 S.W. (2d) 705, 713, that:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. * * *."

The "consideration" is the participation requirement that one must purchase gasoline from the person(s) conducting the scheme. It matters not that the price of the gasoline is no greater than it was prior to the institution of the scheme. The consideration in this scheme is similar to the consideration involved in the case of *State vs. Mumford*, 73 Mo. 647, 39 Am. Rep. 532. There, the subscriber to a newspaper received both the newspaper and a ticket which might draw a prize, for the regular subscription price of the newspaper. The Supreme Court of Missouri made the following statement, l.c. 651:

"* * * The fact that the subscription price of the Times was not increased, does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a

Honorable Paul Boone:

ticket in the lottery as well as to a copy of the paper, * * *."

The gasoline which the winner receives is a "prize" as defined by 54 C.J.S., Lotteries, pages 849, 850:

"While a scheme or transaction cannot constitute a lottery unless it involves the offering of a prize, it is not essential that the prize, if a money one, be a specific amount, or that the prize be money or have a fixed market value, or that the value be previously fixed. In the absence of statute, anything of value offered as an inducement to participate in a scheme of chance is a prize. * * *."

The scheme at hand appears to be a conventional drawing, i.e., the winner is determined by the drawing of a ticket; and thus satisfies the "chance" requirement. State vs. McEwan, 120 S.W. (2d) 1098.

Since the scheme consists of the allocation of a thing of value, by chance, for a consideration, it constitutes a lottery.

We turn to your second question of whether a Prosecuting Attorney has any discretion in the enforcement of criminal laws concerning drawings or lotteries.

The Prosecuting Attorney does have a large degree of discretion in determining whether a particular criminal case should be instituted or pursued. See the comprehensive discussion of the breadth of the discretion of the Prosecuting Attorney, in the case of State ex rel. Griffin vs. Smith, 258 S.W. (2d) 590. Briefly, the Prosecuting Attorney may use his sound discretion, in good faith, in deciding whether to prosecute a particular case.

We gather, however, that your question does not pertain to any particular case, but instead inquires whether a Prosecuting Attorney may decline to prosecute lottery cases, generally, because lotteries may be operating in other counties without apparent interference by law enforcement officers. We cannot usurp the exercise

Honorable Paul Boone:

of discretion by Prosecuting Attorneys, but it is clear to us that a refusal to prosecute lottery cases, merely because of the prevalence of lotteries or the acceptance of them by a substantial portion of the people of a locality, would constitute not merely an abuse of discretion by the Prosecuting Attorney, but would be a refusal to exercise discretion at all. In the case of State vs. Wymore, 345 Mo. 169, 132 S.W. (2d) 979, it was plainly shown that the failure of a Prosecuting Attorney to suppress gambling could not be sanctioned under the guise of "discretion". Your attention is further invited to State ex inf. McKittrick vs. Graves, 346 Mo. 990, 144 S.W. (2d) 91, and State ex inf. McKittrick vs. Wallach, Mo., 182 S.W. (2d) 313.

CONCLUSION.

It is, therefore, the opinion of this office that the scheme hereinabove described is a lottery; and, that while a Prosecuting Attorney has broad discretion in determining whether a particular criminal case should be prosecuted, a refusal to prosecute lottery cases generally, would constitute an abuse of his discretion.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk