

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 02-11,662
:
:
vs. : CRIMINAL DIVISION
: Petition for Writ of Habeas Corpus
KENNETH LARUE HUNTER, :
Defendant :

OPINION AND ORDER

Defendant has been charged with one count of gambling or gambling devices in violation of Section 5513(a)(1) of the Crimes Code. In the instant Petition for Writ of Habeas Corpus, filed November 21, 2002, Defendant contends the evidence does not establish a prima facie case of the crime charged.

At the hearing held December 27, 2002, counsel stipulated to the evidence to be considered by the Court, specifically that on March 27, 2002 a PLCB agent entered Frederick's Tavern where Defendant was tending bar. The agent observed a patron playing an electronic poker machine and when the patron accumulated a certain number of credits he called Defendant over to the machine. Defendant physically manipulated the machine and took the credits off the screen. Defendant then went behind the bar, wrote something down in a notebook which was located on the shelf by the cash register, opened the cash register and gave the patron \$50.00.

The Section with which Defendant is charged indicates that a person is guilty of a misdemeanor of the first degree if he "intentionally or knowingly makes, assembles, sets-up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease, or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards." 18 Pa.C.S. Section 5513(a)(1). Defendant argues the evidence shows none of these actions on Defendant's part, contending that "maintain" refers to performing maintenance on a machine. Reference to the prior section, Section 5512(b)(1), makes it clear, however, that the

word maintain is being used in the sense of keeping or operating, rather than performing maintenance. Section 5512(b)(1) makes it a misdemeanor of the first degree if one “sets-up, or maintains, any lottery or numbers game.” 18 Pa.C.S. Section 5512(b)(1). Obviously, performing maintenance on a lottery or numbers game is not intended by the use of the word “maintain” and Defendant can point to nothing, which indicates the legislature used the same word in the very next section with a different meaning in mind. Indeed, reference to case law, while sparse, shows an interpretation of the word “maintain” in the sense of operating or keeping for use. See, e.g., Commonwealth v Cancillieri, 70 A.2d 669 (Pa. Super. 1950). With this interpretation of the word “maintain” in mind, the Court finds the evidence is sufficient to establish a prima facie case of the crime charged.

Defendant contends that even if a prima facie case is established, the evidence shows a de minimus violation of the Statute, which should not be prosecuted, under 18 Pa.C.S. Section 312(a)(2). That Section requires the Court to dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds the conduct of a defendant did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction. Defendant argues that his conduct violated the law to an extent too trivial to warrant his conviction. The Commonwealth argues that the evidence shows a course of conduct on Defendant’s part. The Court agrees with the Commonwealth that there is prima facie evidence of a course of conduct even though the specific evidence is that of only one instance of violation. Defendant’s conduct therefore cannot be considered de minimus within the meaning of the Statute. See Commonwealth v Hoffman, 714 A.2d 443 (Pa. Super. 1998) (The actual harm or threat of harm in that case was indicated by the Court to perhaps be deemed less trivial if the facts indicated continuous or repetitive violation of the Section in question). The Court therefore believes the prosecution is appropriate in the instant matter.

ORDER

AND NOW, this 17th day of January, 2003, Defendant's Petition for Writ of Habeas Corpus is hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA
Peter Campana, Esq.
Gary Weber, Esq.
Hon. Dudley N. Anderson