

Slot machines, adult arcades

Number: INFORMAL

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Mr. Dwight W. Severs
Titusville City Attorney
Post Office Box 2806
Titusville, Florida 32781-2806

Dear Mr. Severs:

On behalf of the City of Titusville, you have asked whether adult arcades, adult amusement centers, or other similar facilities act outside the scope of section 849.161(1)(a)1., Florida Statutes, when awarding points or credits that may be exchanged at the arcade for gift certificates or gift cards redeemable for merchandise, other than alcohol or cash, at other businesses off the premises of the arcade. In order to provide assistance, the following general observations are made.

While it is unlawful to possess gambling devices such as slot machines,[1] section 849.161(1)(a)1., Florida Statutes, provides a limited exception as follows:

"Nothing contained in this chapter shall be taken or construed as applicable to an arcade amusement center having amusement games or machines which operate by means of the insertion of a coin and which by application of skill may entitle the person playing or operating the game or machine to receive points or coupons which may be exchanged for merchandise only, excluding cash and alcoholic beverages, provided the cost value of the merchandise or prize awarded in exchange for such points or coupons does not exceed 75 cents on any game played."

In its recent opinion in *Delorme v. State*,[2] the Fifth District Court of Appeal affirmed the lower court's rejection of an arcade owner's argument that section 849.161(1)(a)1., Florida Statutes, was void for vagueness. The district court related the proceedings below, specifically noting that the lower court had found that the subject games involved minimal skill, that the use of the term "coin" under the exception in section 849.161(1)(a), Florida Statutes, meant "coin" only, and that the term "merchandise" as a prize referred to actual physical goods, rather than gift certificates or gift cards.[3] The district court, however, made no specific findings that gift certificates or gift cards were not "merchandise" for purposes of section 849.161(1)(a)1., Florida Statutes, but merely agreed that the statute was not unconstitutionally vague.

In Attorney General Opinion 2004-12, this office concluded that a violation of section 849.161(1)(a)1., Florida Statutes, occurs when points or credits are awarded to be exchanged at the arcade for gift certificates that may be exchanged off premises at other businesses for merchandise that includes alcoholic beverages, or cash which is provided for the purchase of some item of nominal value. Noting that the statute clearly prohibits points or coupons awarded from being exchanged for cash or alcoholic beverages, the opinion stated that those seeking to

claim the exemption afforded by section 849.161(1)(a)1., must ensure that all, not merely some, of the requirements for the exemption have been satisfied. It was concluded that by failing to ensure that points or coupons awarded could be exchanged for merchandise only, and not alcohol or cash, an arcade amusement center failed to meet all the requirements for application of the exemption.

In light of the discussion in *Delorme*, which would appear to preclude prizes of gift cards or gift certificates that may be redeemed off the premises of the arcade, and this office's prior opinion, which makes a distinction between gift cards or certificates that may be exchanged for alcohol or cash and those that may not, you have questioned how section 849.161(1)(a)1., Florida Statutes, should be interpreted.

The exemption for arcade games in section 849.161(1)(a)1., Florida Statutes, was initially created in 1967 as an exemption within section 849.16(1), Florida Statutes. The original language is almost identical to the present day statute, allowing an individual to "receive points or coupons which may be exchanged for merchandise only, excluding cash and alcoholic beverages" No legislative history is available to find whether the Legislature may have considered gift cards or gift certificates as the equivalent of merchandise for purposes of the statute. Equally, I have not found, nor have you brought to my attention, evidence that the fairly recent phenomenon of gift cards with electronically calculated balances was a viable method of distributing prizes in 1967. It would be safe to say that the Legislature did not contemplate the use of such cards and certificates when it created the exemption now contained in section 849.161(1)(a)1.

The plain language of the statute states that points or coupons awarded for playing arcade games may be exchanged for "merchandise only." There is no intermediary exchange contemplated that would include gift cards or gift certificates redeemable off the premises of the arcade.

Absent a more definitive authorization for the use of gift cards or gift certificates as a means to secure merchandise for playing arcade games, it may be advisable to seek legislative clarification in the matter. Until such time as the Legislature amends the language in section 849.161(1)(a)1., Florida Statutes, to allow gift cards and gift certificates as prizes, it is my opinion that arcades act outside the scope of section 849.161(1)(a)1., when awarding points or credits that may be exchanged at the arcade for gift certificates or gift cards redeemable for merchandise at other businesses off the premises of the arcade.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] See ss. 849.01, 849.15 and 849.16, Fla. Stat.

[2] 895 So. 2d 1252 (Fla. 5th DCA 2005).

[3] The district court noted that the bulk of the defendants' arguments had been recently addressed in *State v. Cyphers*, 873 So. 2d 471 (Fla. 2nd DCA 2004), in which the court rejected a claim that s. 849.161(1)(a)1., Fla. Stat., was unconstitutionally void for vagueness. In *Cyphers*, the court had found that the defendant's games were not protected under the arcade exception in s. 849.161(1)(a)1., because the games were not coin operated, as required by the statute, rather they were operated by cash bills.