

Gambling and the Law® Pennsylvania Court Rules Poker Is A Game Of Skill

In the first important legal decision of 2009, a trial judge in Pennsylvania dismissed criminal gambling charges against the operator of a garage poker room and his girlfriend dealer, holding that Texas Hold 'em is a game of skill.

Columbia County Judge Thomas A. James, Jr., filed his written Opinion on January 14, 2009. Walter "Buzz" Watkins and Diane A. Dent had been charged with 20 counts of violating Pennsylvania's anti-gambling statutes. Prosecutors alleged they unlawfully solicited and allowed "persons to collect and assemble for the purpose of unlawful gambling."

Judge James dismissed all charges.

Buzz had set up poker tables in a rented garage. The only game spread was no limit Hold 'em. Antes were \$1 or \$2. There apparently was no rake or drop. Instead, winners were expected, but not required, to tip the dealer; the larger the win the bigger the tip.

In August and September 2008, an undercover vice cop sat in on several of the games. Charges were filed in September. Defendants quickly filed for a writ of habeas corpus.

Habeas Corpus is Latin for "you have the body." But a better translation in practice would be, "You, jailor, bring this person to court, together with proof on why you should continue to be allowed to hold him in prison." It is also called the Great Writ, because it is the fundamental right of anyone accused of a crime to have a judge decide whether they should be set free.

In this case, Judge James had to decide whether Buzz and Diane could be guilty of the crimes charged.

The case was made somewhat easier because both the state and defendants agreed, "that the controlling issue is whether Texas Hold 'em is 'unlawful gambling' under the Crimes Code." The Pennsylvania statutes, like many in the U.S., have no definition of "gambling."

So, the first thing Judge James did was to turn to dictionaries. These were not much help.

Next, he looked at prior case law. Pennsylvania courts, like almost all others, have held that gambling has three elements: "consideration, chance, and reward." "Thus," the Judge wrote, "the controlling sub-issue is whether Texas Hold 'em is a game of skill or a game of chance or, if both, does skill trump chance or vice-versa."

There are disputes about how much skill is necessary to make a game not gambling. Judge James adopted the majority test: "If skill predominates, it is not gambling."

Courts have developed many different tests for skill. Judge James decided to apply these four, whether: 1) each player has sufficient data available to make informed choices; 2) each player possesses and has the opportunity to exercise skill; 3) skill sufficiently governs the outcome; and 4) the standard of skill is known to all players.

Judge James' conclusion could be extremely important, because it is the first case to look at recent literature and current scientific studies. Judge James cited articles from 2007 and 2005, including from the *Gaming Law Review*, of which I am co-editor-in-chief. He looked at the many "how-to" books, including the 2008 edition of Mike Caro's CARO'S SECRETS OF WINNING POKER. And he examined a statistical study of online poker published by academics in Sweden.

Virtually every author and expert agreed, of course, that "in the long run, good players will win money and bad players will lose money."

According to the Bloomsburg, Pennsylvania *Press Enterprise*, Buzz thinks the whole thing was a waste of money, especially the undercover cop.

"The funny part is, there was no need to send him in there. I get three or four police officers who play regularly in our games now."

END

© Copyright 2009. Professor I Nelson Rose is recognized as one of the world's leading experts on gambling law and is a consultant and expert witness for players, governments and industry. His latest books, INTERNET GAMING LAW and GAMING LAW: CASES AND MATERIALS, are available through his website, www.GAMBLINGANDTHELAW.com.

COMMONWEALTH OF PENNSYLVANIA

vs

DIANE A. DENT

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE 26TH JUDICIAL DISTRICT,
COLUMBIA COUNTY BRANCH,
PENNSYLVANIA
CRIMINAL DIVISION

CASE NO: 733 OF 2008

COMMONWEALTH OF PENNSYLVANIA

vs

WALTER WATKINS

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE 26TH JUDICIAL
DISTRICT, COLUMBIA COUNTY
BRANCH, PENNSYLVANIA
CRIMINAL DIVISION

CASE NO: 746 OF 2008

THOMAS LEIPOLD, ESQUIRE, Attorney for the Commonwealth of
Pennsylvania
PETER CAMPANA, ESQUIRE, Attorney for Defendants

JANUARY 14, 2009. JAMES, J.

CLERK OF COURTS OFFICE
COLUMBIA COUNTY OF COLUMBIA, PA

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OPINION

In September 2008, defendants Walter Watkins and Diane A. Dent were each charged with twenty (20) counts of violating 18 Pa.C.S.A. sec. 5513 (a)(2), (a)(3), and (a)(4) - Gambling, Devices, Gambling,

Etc.¹ Defendants filed Omnibus Pretrial Motions to suppress evidence and for a writ of habeas corpus. Defendant Watkins also filed a motion for return of property. A hearing and argument was held on December 15, 2008.

The facts are simple and uncontested. An undercover Pennsylvania State Police Trooper attended defendants' poker games and provided the factual background. Defendants hosted Texas Hold'em² poker games in a garage they controlled. Defendant Dent was the dealer. Texas Hold'em was the only game played. The parties placed an ante (\$1 or \$2) in the pot before cards were dealt. Then the players could bet after their two cards were dealt and after each of the flop, turn, and river. The players could bet a specific dollar amount or go "all-in," i.e., whatever they have left on the table. Whoever had the best poker hand, won the pot.

¹ Specifically, the Commonwealth alleges that the defendants did "unlawfully allow persons to collect and assemble for the purpose of unlawful gambling"; "unlawfully solicit or invite any person to visit any unlawful gambling place for the purpose of gambling"; and being an accomplice to such unlawful gambling in violation of 18 Pa.C.S.A. sec. 306(1)(i)(ii) and (2).

² A simple explanation of the game is in an abstract Explaining Winning Poker - A Data Mining Approach by Ulf Johansson, Cecilia Sonstrod, and Lars Niklasson, Proceeding of the 5th International Conference on Machine Learning and Applications (ICMLA'06): "When playing Hold'em, each player is dealt two private cards face down. The cards are referred to as the *hole cards*. Now the initial betting round takes place. After that, three public cards (the *flop*) is placed face up in the middle of the table. The second betting round follows. When the betting round has finished, another public card (the *turn*), is placed alongside the flop. Next is the third betting round. After that, the final, fifth, public card (the *river*) is turned up, followed by the final betting round. Each player still remaining in the pot now combines the public cards with her hole cards to obtain a five card poker hand. When doing so, it is possible to use one, both or none of the hole cards to obtain a five card poker hand. Naturally, the player now (at the *showdown*) having the best poker hand wins the pot." This was essentially the format of the game hosted by defendants.

Once a player won the pot, the practice was to "provide a tip to the dealer... It was always up to the player to decide what tip. It was suggested by other players that the people in charge treat the players well so that you should tip appropriately depending on if you won a larger amount in the poker pot then you should tip the dealer more." (Tr. p. 8).

Commonwealth and defendant both agree that the controlling issue is whether Texas Hold'em poker is "unlawful gambling" under the Crimes Code. 18 Pa.C.S.A. sec. 5513 (a)(2), (a)(3), and (a)(4) - Gambling, Devices, Gambling, Etc. states:

(a) Offense defined.-A person is guilty of a misdemeanor of the first degree if he:

(2) allows persons to collect and assemble for the purpose of *unlawful gambling* at any place under his control;

(3) solicits or invites any person to visit any *unlawful gambling* place for the purpose of gambling;

or

(4) being the owner, tenant, lessee or occupant of any premises, knowingly, permits or suffers the same, or any part thereof, to be used for the purpose of *unlawful gambling*. (emphasis supplied)

"Gambling" is "[t]he act of risking something of value, esp. money, for a chance to win a prize." Black's Law Dictionary (7th ed. 1999). The word "gamble" derives from "obsolete *gamel*, to play games, from Middle English *gamen*, *gamenen*, to play, from Old English *gamenian*, from *gamen*, *fun*." See The American Heritage® Dictionary of the English Language, Fourth Edition

Copyright © 2006 by Houghton Mifflin Company. See also, Webster's Ninth New Collegiate Dictionary (1990).

Gambling in and of itself is not unlawful in Pennsylvania. See Commonwealth v. Betres, 237 Pa.Super. 361,366, 352 A.2d 495, 498 (1975).³ Under Pennsylvania case law, there are three elements of gambling: consideration, chance, and reward. Pennsylvania Liquor Control Board v. PPC Circus Bar, Inc., 96 Pa.Cmwltth. 115, 506 A.2d 521 (1986). In our case, it is apparent that the ante and the betting is consideration and that the pot is the reward. Thus, the controlling sub-issue is whether Texas Hold'em is a game of skill or a game of chance or, if both, does skill trump chance or vice-versa. Simply, if chance predominates, Texas Hold'em is gambling. If skill predominates, it is not gambling.

³ This court is not commenting on the social, ethical, or religious ramifications of gambling in society. That is not the issue before this court. The Pennsylvania Legislature has the power to regulate gambling, which it has done by banning certain gambling and authorizing other forms of gambling, e.g., the lottery, horse racing, and slot machines. "[G]ambling is still a controversial activity that sparks emotional debates in elections and legislative battles. While ostensibly most debate centers around amoral pragmatic issues, such as problem and underage gambling, the rhetoric is often reduced to hyperboles, such as referring to any type of gambling as the "crack cocaine" of gambling. In theory, a pragmatic approach to gambling, policy, and legislation would involve comparing the costs and benefits of a certain activity as the basis for allowing, prohibiting, or regulating the activity. Increasingly, both the opponents and proponents attempt to justify their respective positions on gambling on the bases of pragmatic arguments. Opponents do so as opposed to voicing religious and moral arguments. Proponents do so as opposed to voicing natural rights arguments." In Poker: Public Policy, Law, Mathematics, and the Future of and American Tradition, 22 T.M.Cooley L.Rev. 443-445 (Michaelmas Term 2005) (citations omitted).

The states are divided as to whether Texas Hold'em is gambling. See *Poker and the Law: Is it a Game of Skill or Chance and Legally Does it Matter?*, 11 Gaming L. Rev. 190 (June 2007). Pennsylvania courts have not specifically addressed the issue. Our courts have found that poker is gambling within the context of the Liquor Code. See Pennsylvania Liquor Control Board v. Kehler, 114 Pa.Cmwlth. 310, 538 A.2d 979 (1988). The Pennsylvania Supreme Court has found that certain electronic poker machines constituted gambling devices since "the element of chance predominates and the outcome is largely determined by chance." Commonwealth v. One Electro-Sport Draw Poker Machine, 502 Pa. 186, 195, 465 A.2d 973, 978 (1983).

However, the One Electro-Sport Draw Poker Machine court wrestled with the concepts of skill versus chance within the gambling definition context. The court concluded that "[t]he skill involved in Electro-Sport is not the same skill which can indeed determine the outcome in a game of poker between human players can be appreciated when it is realized that holding, folding, bluffing and raising have no role to play in Electro-Sport poker. Skill can improve the outcome in Electro-Sport; it cannot determine it." *Id.* 502 Pa. at 196, 465 A.2d at 978.

Since the 1980's a vibrant poker industry has exploded across the country - on-line, on television, and in many other venues. Many books and articles have been published explaining and dissecting the game. One website lists over 600 books dealing with all aspects of poker.

www.holdemsecrets.com/books-title.htm . The compelling case that Texas Hold'em is much more a game of skill is found in many diverse sources. Without statistical analysis, many of these "how-to" books state uncategorically that poker is a game of skill. See, e.g., Caro's Secrets of Winning Poker, by Mike Caro (Cardoza Publishing 4th ed. 2008, p. 17), which says that "[i]n poker, a game of skill, the money flows from the bad players to the strong players. It's as simple as that."

However, academics and researchers have found scientific and statistical bases for the proposition that poker is a game of skill. For example, one excellent academic abstract reported the results of a statistical study of online poker in order to explain what signifies successful play. See *Explaining Winning Poker - A Data Mining Approach* by Ulf Johansson, Cecilia Sonstrod, and Lars Niklasson, Proceeding of the 5th International Conference on Machine Learning and Applications (ICMLA'06). These Swedish researchers conducted a statistical analysis as to what skills make a successful

Texas Hold'em poker player. The authors note that "[a]s most beginners soon find out, Hold'em is a very sophisticated game, requiring mastery of many different skills." The authors aim was to explain what makes a player successful. In addressing this court's issue, they state "[t]here is definitely an element of chance in the game of poker, but there is general agreement that, in the long run, good players will win money and bad players will lose money." These researchers created four categories of players, from weakest to strongest - a "calling station"; a "rock"; the "maniac"; and the "solid player." After a statistical analysis, the authors found that all four categories of players had certain basic playing characteristics which accounted for their success or failure as a player.

With the advent of internet poker and tournament poker has come a spate of very instructive law review analyses of gambling law and poker. In *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 Hofstra L. Rev. 1617, 1662-1663 (Spring 2007) (citing Morrow v. State, 511 P.2d 127 (Alaska 1973), the author discusses the tests in other jurisdictions for whether or not poker is a game of skill or chance:

The question of poker's placement along the skill-chance spectrum is not new to the realm of the courthouse. In determining whether chance governs, and the subsequent

application of each state's individual gambling laws, courts generally employ one of two guides: (1) the pure chance doctrine or (2) the dominant factor test. The former being defined as a scheme in which the person's judgment plays no part in the selection and award of the prize and the latter being a scheme where chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.

Most jurisdictions favor the dominant factor test (emphasis supplied). The dominant factor doctrine is essentially what the name implies. The court determines whether chance or skill is the dominant factor of the game, recognizing, similar to Hurt's article, that the distinction runs along that of a spectrum. In deciding where on the spectrum any particular game falls, the courts have devised a four part test. The elements in deciding whether ability governs are that: (1) participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment; (2) participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill; (3) skill or the competitors' efforts must sufficiently govern the result; and (4) the standard of skill must be known to the participants, and this standard must govern the result. (cites to footnotes omitted).

The Hofstra author opines that poker is a game of skill:

[P]oker should not constitute a "game subject to chance." The courts should look no further than the dissenting opinion in People v. Mitchell, 444 N.E.2d 1153, 1155 (Ill.App.Ct.1983)]:

The State argues that poker is not a game of skill but is a game of pure chance or luck. This allegation is a canard. Anyone familiar with even the barest rudiments of the game knows better. Pure luck? Send a neophyte player to a Saturday night poker game with seasoned players and he will leave his clothes behind and walk home in a barrel. Pure luck? This is true of bingo or lottery. But it cannot be said of poker. The court should take judicial notice that poker is a game of

skill. It cannot be gainsaid, of course, that there is an element of luck in poker. Of course there is. There is an element of luck in everything in life. Even the prosecution of a lawsuit contains an element of luck. But everything that contains an element of luck is not gambling. If the federal courts proceed to classify poker as a skill game, then the Act would not apply. Based on the verbiage of the definition of wager poker would once again be freely playable on the Internet.

If the federal courts are to base their analyses on the dominant factor test, then poker would not be classified as a game of chance. Applying those elements, it is fairly evident that skill is the dominant factor. As shown, there is ample data upon which one can calculate an informed judgment. The data is basic arithmetic applied on a consistent basis. For the second and fourth element, the argument may be made that the skill level is not equal throughout, and that the disparity of skill is not known. This in fact is entirely true. However, the opportunity to learn this skill is widely available. But, even more importantly, the general consensus (even though there is no scientific proof for it) is that most poker players are quite savvy to the extent of the fundamental skills of the game. Very few novices play for stakes, and in turn, the second element is satisfied. As for the fourth element, the standard of skill would be known to all participants if poker were to be regulated on the Internet. Many creative ways can be established to keep the unsuspecting from being fleeced. One, for example, would be to create a ranking system similar to that of chess in which cumulative wins and losses are recorded, resulting in a ranking. Finally, the third element, like the first, has already been addressed to show that the competitor's skill sufficiently governs the result. (cites to footnotes omitted).

35 Hofstra L. Rev. at 1664-1665.

In Poker: Public Policy, Law, Mathematics, and the Future of and American Tradition, 22 T.M.Cooley L.Rev. 443 (Michaelmas Term 2005), the authors comprehensively review the history of poker, gambling law in various states, the skill versus chance conundrum, and public policy. They specifically

discuss the "Mathematics of Poker" which is worth quoting at length:

Gambling games can be categorized as those of pure chance and those involving an element of skill. Games of pure chance include roulette, craps, keno, bingo, (traditional) slots, and lotteries. In these games, the outcome is determined by chance alone, and no strategy or skill can affect the long-run percentage of money won or lost. Casino games involving skill include blackjack, video poker, and many of the newer poker-based casino games such as Caribbean stud poker, let it ride poker, and three-card poker. In these types of games, the percentage of money won or lost is a direct reflection of a player's level of skill.

Poker is predominately a game of skill, although chance plays a role. Most authors emphasize that in the long run a skilled player will beat an unskilled player. The general argument is that the cards will "even out" over the long term (which they will, assuming random deals), and the winners will be the better players. Numerous authors have drawn analogies between poker and other endeavors involving strategic-decision making. It is not surprising that John von Neumann and Oskar Morgenstern devoted an entire chapter to poker in their seminal book on game theory. Von Neumann drew a strong connection between poker and economics:

A seemingly trivial and playful pursuit like poker might hold the key to more serious affairs for two reasons. Both poker and economic competition require a certain type of reasoning, namely the rational calculation of advantage and disadvantage based on some internally consistent system of values ('more is better than less'). And in both, the outcome for any individual actor depends not only on his own actions, but on the independent actions of others.

In comparing poker to other games involving an element of skill, one gambling author and expert writes:

There are a few professionals who earn a living playing blackjack, and even fewer who sustain themselves playing video poker, but it's tough. Perfect play will produce a one to two percent player edge. Skill has a part in those

contests, but luck and the percentages still hold the greatest sway.

It's the other way around in poker. Bad luck can hurt, but skill always beats luck over time.

Serious and skilled poker players tend to win consistently, while those relying on luck do not. If skill were not a significant factor, the collection of winners would be more representative of a random selection from the field of all players. If you ask who are the top five poker players in the world, you will receive a meaningful response because skill is a determining factor. But if you ask who are the top five roulette players in the world, the response is utterly meaningless: roulette is purely a game of chance. As seen below, much anecdotal evidence exists among authors and experts regarding the role of skill in poker. The collective expert opinion is unequivocal: poker is a game of skill, and in the long run, a skilled player will beat an unskilled player. The following passages are typical:

Over the long run everybody gets the same proportion of good and bad cards, of winning and losing hands. Beginning poker players rely on big hands and lucky draws. Expert poker players use their skills to minimize their losses on their bad hands and maximize their profits on their big hands. They also are able to judge better than others when a big hand is not the best hand and when a small hand is the best hand. . . . For above all . . . poker is not primarily a game of luck. It is a game of skill.

One of the finest illustrations of the laws of chance is furnished by the game of poker. It is not a game of pure chance, like dice and roulette, but one involving a large element of skill or judgment.

In any Poker game, be it Stud or Draw Poker or any of their countless variations that combine skill and chance, the more skillful player will win the money in the long run. . . . Poker contains a greater skill element than any other card game, including Contract Bridge, Pinochle and Gin Rummy. Poker is the one and only game where a skilled player may hold bad cards for hours and still win the money.

Poker is a game of skill; luck and psychology also play a part, but unlike other casino games that rely entirely on

luck, winning poker requires skill. A skillful poker player can change the odds in the game to his favor by using position, psychology, bluffing, and other methods to increase his chances to win the pot and increase the size of the pots he wins.

The excerpts above are not anomalous; it is difficult to find an expert who does not claim that success in poker depends in large part on skill.

As one author put it, "There's no doubt that luck plays a major role in short-term poker success, but over the long run poker is certainly a game of skill." Another writes "The result from an individual poker session has a lot to do with luck. The structure of the game, however, is such that a player with an understanding of the game can be a long-term winner, whereas those who don't really understand the game will be losers."

Experts agree there are several components to the skill necessary to play poker well. These include mathematics, psychology, assessing competition, reading hands, recognizing tells, exploiting position, and money management. These factors are, of course, interrelated, and good poker strategy and tactics require the use of a combination of these skill components. Deceptiveness and bluffing are essential to the game. In his classic book on the theory of gambling, Richard Epstein notes that poker games have a large number of strategic alternatives and certain types, such as five-card stud and seven-card stud, are almost purely strategic.

Id. At 465-468 (citations to footnotes omitted).

In determining the skill/chance aspect of gambling, some states have relied on a "predominance test." Under this test "an activity is considered illegal gambling if a person risks something of value on an activity predominately determined by chance for the opportunity to win something of greater value than he or she risked." Id at 445. The Pennsylvania courts appear to be in line with those using the predominance test.

See Commonwealth v. One Electro-Sport Draw Poker Machine,
supra.

Using the predominance test, in conjunction with analyzing skill versus chance using the four prong dominant factor test⁴, it is apparent that skill predominates over chance in Texas Hold'em poker. First, each player has a distinct possibility of exercising skill and has sufficient data available to make an informed judgment. Second, each player has the opportunity to exercise the skill, and they do possess the skill (albeit in varying degrees). Third, each player's skill and efforts sufficiently govern the results. Fourth, the standard skill is known by the players and governs the results. Skill comes with varying degrees of competence, but that is the case with any competition involving skill.

The academic studies and the experts generally agree that a player must be skillful to be successful at poker. At the outset, chance is equally distributed among the players. But the outcome is eventually determined by skill. Successful players must possess intellectual and psychological skills. They must know the rules and the mathematical odds. They must know how to read their opponents "tells" and styles. They

⁴ "See *In Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 Hofstra L. Rev. at 1663, *supra*.

must know when to hold and fold and raise. They must know how to manage their money.

This court finds that Texas Hold'em poker is a game where skill predominates over chance. Thus, it is not "unlawful gambling" under the Pennsylvania Crimes Code.

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Defendant

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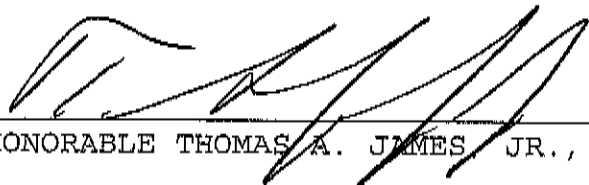
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ORDER

AND NOW, this 14th day of January 2009, defendants'
Motions for Writ of Habeas Corpus is GRANTED. The cases against
the defendants are DISMISSED. The property seized from defendant
Watkins shall be returned to him forthwith.

BY THE COURT:


HONORABLE THOMAS A. JAMES JR., J.