

POKAGON BAND OF POTAWATOMI INDIANS

TRIBAL COURT

58620 Sink Road, P.O. Box 355, Dowagiac, MI 49047

POKAGON BAND OF
POTAWATOMI INDIANS,
Plaintiff

-vs-

Case No. 10-1093-CO
10-1094-CO

MARK ADAMSKI and DANI
SIMON,
Defendants

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OPINION AND ORDER

The Defendants¹, Mark Adamski and Dani Simon, are charged with violation of Section 14E of the Pokagon Band of Potawatomi Indians Code of Offenses (PBCrimO). Both Defendants are non-Indian persons and, therefore, by virtue of the Civil Offense Division of the Pokagon Band of Potawatomi Indians Code of Offenses are being civilly prosecuted.

Defendants have filed a Motion to Dismiss along with a memo in support of dismissal based on the facts of the case or, in the alternative, requesting the Court to declare PBCrimO Section 14E constitutionally void for vagueness. Defendants' Motion for Dismissal based upon the facts claiming the actions of the Defendants were not a violation

¹The Pokagon Band of Potawatomi Indians Civil Infraction Court Rules refer to Defendants as Respondents and, correspondingly, Plaintiffs are referred to as Petitioners. For purposes of this case, the Court will use the terms "Plaintiff" and "Defendant", respectively, as used in the Code of Offenses.

of the Code of Offenses and the Defendants' claim of unconstitutionality because of vagueness are both denied.

Basic Facts

While playing blackjack at the Four Winds Casino, Mark Adamski was able to see the hole card inadvertently exposed by the dealer and then communicated how to play each hand to Dani Simon by using hand signals.

The parties have entered into a written Stipulation regarding the facts which is attached hereto and is being considered by the Court along with the Defendants' motion, memorandum and attachments, and the oral arguments of both parties in Open Court.

The Offense

The language under which the Defendants are charged is:

It is unlawful for any person, whether he is an employee of a gaming operation or a player in a gaming establishment, to cheat at any game (PBCrimO Section 14 E).

Cheating is defined at PBCrimO 14 A as follows:

"Cheat" means to alter the elements of chance, method of selection or criteria which determine the:

- a. Result of the game;
- b. Amount or frequency of payment in a game;
- c. Value of a wagering instrument; or
- d. Value of a wagering credit.

The Defendants are being civilly prosecuted pursuant to the Pokagon Band of Potawatomi Indians Code of Offenses, Civil Offenses (PBCivO), which provides as follows in Section 2A:

"Any non-Indian alleged to have committed any Offense enumerated in this Code may be civilly prosecuted by the Band and such Offense shall be considered for all purposes under Pokagon Band law as a Civil Offense. In no event shall such civil prosecution permit incarceration of a non-Indian or permit the imposition of a criminal fine against a non-Indian. Civil

prosecutions under this Section shall be conducted in accordance with the applicable rules of civil procedure.”

Analysis

This case presents an issue of first impression with respect to the interpretation of PBCrimO Section 14 E and whether it is unconstitutionally vague.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the legislature. *Booker v Shannon*, 285 Mich App 573, 575; 776 NW 2d 411 (2009). If the statute’s language is clear and unambiguous, the statute must be enforced as written. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW 2d 686 (2001). “Unless defined in the statute, every word or phrase of a statute should be accorded its plan and ordinary meaning, taking into account the context in which the words are used.” *In re Smith Estate*, 252 Mich App 120, 124; 651 NW 2d 153 (2002).

The first step is to examine the plain language of the statute itself. The legislature is presumed to have intended the meaning it plainly expressed. If the statutory language is clear and unambiguous, courts presume that the legislature intended the meaning plainly expressed, and further judicial construction is not permitted. *McElhaney ex rel. McElhaney v Harper-Hudsel Hospital*, 269 Mich App 488, 493; 711 NW 2d 795 (2006).

Plaintiff argues that the Defendants were indeed cheating because the viewing of the dealer’s hole card and subsequent signaling altered the elements of chance which determine the result of the game, the amount or frequency of payment in a game, or the value of the wager.

Plaintiff further argues that even though the Defendants did not use a mechanical device or other method of altering the elements of chance in the game, the mere fact that the hole card was viewed and then communicated to another, that, in and of itself, was

cheating because it affected the result of the game, the amount or frequency of payment in a game, or the value of the wager.

Defendants argue that they are being charged for conduct which is not a violation of law and is indeed legal in other jurisdictions.

Defendants rely on the case of *Sheriff, Clark County, Nevada v Einbinder*, No. 15797, Nevada, December 18, 1984, a copy of the order dismissing the appeal is attached. In that case the Nevada Supreme Court determined that the learning of the value of a hole card as a result of "sloppy dealing" and the communication of that value to a second player did not violate Nevada's cheating statute.

Plaintiff argues that despite the finding in the *Einbinder* case the passage of the cheating statute by the Tribal Council never intended to allow a person to alter the elements of chance which determine the result of a game, the amount or frequency of payment in a game, or the value of a wager.

Constitutionality of PBCrimO 14 E

Defendants' next argument is that Section 14 E of the Pokagon Band of Potawatomi Indians Code of Offenses is unconstitutional in that it is vague and ambiguous and does not give fair notice of the proscribed conduct.

The Pokagon Band of Potawatomi Indians Constitution provides at Article II:

Section 1. This Constitution, all legislative enactments, codes, statutes, ordinances, regulations, and judicial decisions of the Band shall govern all persons, entities, resources and matters subject to the Pokagon Band's jurisdiction.

Section 2. Rule of Law. The members of the Pokagon Band collectively mandate the utmost adherence to a rule of law. Rule of law principles shall be respected by all in their actions/inactions.

By adoption of the above language it is clear that the Pokagon Band insisted that Tribal law and its Rule of Law shall be paid strict adherence.

Article XVI of the Constitution provides as follows:

The Pokagon Band, in exercising the powers of self government shall not:

- (h) deny any person within its jurisdiction to equal protection of its laws or deprive any person of liberty or property without due process of law.

To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. A statute cannot use terms that require persons of ordinary intelligence to speculate regarding its meaning and differ about its application. For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretation, the common law, dictionaries, treaties, or the commonly accepted meanings of words. The above language is taken from the case of *People v Gregory LaMar Sands*, 261 Mich App 158, 161; 680 NW 2d 500 (2004), which is quoted at Page 8 of Defendants' memorandum.

A statute may qualify as void for vagueness if:

1. It is overbroad and impinges on First Amendment freedoms
2. It does not provide fair notice of the conduct it regulates, or
3. It gives the trier of fact unstructured and unlimited discretion to determine whether the statute has been violated.

Department of State v Michigan Education Association - NEA, 251 Mich App 110, 113; 650 NW 2d 120 (2002), quoting *Proctor v White Lake Twp Police Dept*, 248 Mich App 457, 467; 639 NW 2d 332 (2001).

The Defendants here are arguing that the statute is vague because it does not provide fair notice of the regulated conduct. The Court should "examine the entire text of

the statute and give the statute's words their ordinary meanings", *People v Piper*, 223 Mich App 642, 646; 567 NW 2d 483 (1997). Because the vagueness challenge is not based on the First Amendment, this Court examines whether the Code is vague as applied to the conduct allegedly proscribed in this case. *People v Knapp*, 244 Mich App 361; 624 NW 2d 227 (2001).

In this case, the language of the Code itself does not encourage arbitrary or discriminatory enforcement. A word used in a statute need not have but a single meaning to pass constitutional muster...when determining whether a statute is void for vagueness, the reviewing court need not set aside common sense, nor is the legislature required to define every concept in minute detail. Rather, the statutory language need only be reasonably precise. *Dept of State, supra*.

In the case of all written laws, it is the intent of the law giver that is to be enforced. But, this intent is to be found in the instrument itself...where a law is plain and unambiguous, whether it is expressed in general or limited terms, the [lawgiver] should be intended to mean what they have plainly expressed and consequently, no room is left for construction. *Nat' Price at Work, Inc. v Governor*, 481 Mich 56, 80; 748 NW 2d 524 (2008).

Discussion

It is clear to this Court that the Tribal Council of the Pokagon Band of Potawatomi Indians when adopting its Code of Offenses clearly intended that cheating was unlawful and any conduct that altered the elements of chance or the method of selection which determined the result of a game, the amount or frequency of payment in a game, or value of a wager was proscribed.

Here, when Mr. Adamski viewed the hole card of the dealer and then signaled that value to Mr. Simon so that he could determine whether he would take an additional card or change his bet, clearly affected the result of the game which conduct was intended to be proscribed by the Tribal Council's adoption of its Code of Offenses.

This Court has carefully considered the ruling in the *Einbinder* case and concludes that if this Court were to adopt that court's reasoning, such would render an absurd result for the reason that this Court believes the legislative intent, by creating the offense of cheating, is to eliminate the alteration of the elements of chance. To find otherwise would require this Court to set aside its common sense (*Dept. of State, supra*).

Conclusion

Based upon the above case law, statutes and constitutional principles cited, this Court finds that the observation of a dealer's hole card and signaling that value to another player allows that player to alter the elements of chance or the method of selection or criteria which determines the result of the game, the amount or frequency of payment in a game, or the value of a wager and is, therefore, a violation of the Pokagon Band of Potawatomi Indians Code of Offenses as applied to the Defendants. Further, the Court finds the Code under which the Defendants are charged (Section 14 E) is not vague or ambiguous and gives fair notice of the proscribed conduct. That conduct being whatever alters the element of chance, method of selection or criteria which determine the result of the game, or an amount or frequency of payment in a game or the value of a wager which occurred when Mr. Adamski signaled the value of the dealer's hole card to Mr. Simon so he would know whether to take an additional card, stand, or possibly change his wager.

Order

IT IS HEREBY ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is denied for the reasons stated above and the Defendants shall appear before this Court on September 1, 2011, or such other date as agreed by the parties, for further proceedings as determined by the Court and counsel.

Dated: July 21, 2011

David M. Peterson
David M. Peterson
Judge, Pokagon Band Tribal Court