

In the Superior Court of Pennsylvania

Nos. 167 & 168 MDA 2009

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

DIANE ALICE DENT,

Appellee.

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

WALTER LEROY WATKINS,

Appellee.

BRIEF OF THE POKER PLAYERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

On Appeal from the Judgments of the Court of Common Pleas of
Columbia County, entered January 14, 2009 at Nos. 733 and 746 of 2008

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STATEMENT OF INTEREST

Amicus curiae the Poker Players Alliance is a nonprofit organization whose members are poker players and enthusiasts from around the United States, including thousands in the State of Pennsylvania. The Alliance works to protect the legal rights of poker players. The group's membership has a direct interest in the outcome of this case, because the Commonwealth's theory would preclude many innocent individuals from playing poker in traditional social situations that the state legislature never intended.

ARGUMENT

Defendants-Appellees in this case were charged with allowing persons to assemble for the purpose of unlawful gambling and related charges under 18 PA. CONS. STAT. ANN. §§ 306(1)(i)(ii) and 5513 for hosting a game of the most popular form of poker –Texas Hold 'Em. Appellees preemptively moved for habeas corpus relief on the ground that Texas Hold 'Em does not constitute unlawful gambling. Appellees and the Commonwealth agreed that the Commonwealth must establish three elements in order to sustain a charge of illegal gambling under Pennsylvania law: consideration, reward, and chance. The first two elements were not contested. The sole disputed issue was whether Texas Hold 'Em is a game of chance.

Chance is often a question of degree. The habeas court concluded that the “controlling” question was “whether Texas Hold'em is a game of skill or a game of chance or, if both, does skill trump chance or vice-verse,” such that “if chance predominates, Texas Hold'em is gambling” while “[i]f skill predominates, it is not gambling.” Op. at 4. The parties agreed. The Commonwealth described the proper legal test under Pennsylvania law as follows: “The question is, does skill *predominate* o[ve]r chance or chance predominate over skill? If skill predominates over chance, it is not illegal gambling.” Tr. at 21 (emphasis added). Appellees concurred. *Id.*

The habeas court found that “Texas Hold’em poker is a game where skill predominates over chance” and so is not unlawful gambling under the Crimes Code. Op. at 14. The court reached that conclusion after considering the holding of *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973 (1983),¹ that certain simple machine-based versions of poker are unlawful gambling because, in part, skill played a significantly lesser role in the game at issue than it does in poker games between human players. *See id.*, 502 Pa. at 196, 465 A.2d at 978 (“That the 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.”). The habeas court also took into account an array of scholarly articles analyzing poker from legal, mathematical, and statistical perspectives.

The Commonwealth appealed.

I. WHETHER PLAYING TEXAS HOLD ’EM IS “UNLAWFUL GAMBLING” WAS AN OPEN QUESTION, AND THE COMMONWEALTH’S ARGUMENT THAT THE CASES FORECLOSED THAT INQUIRY WAS WAIVED

On appeal, the Commonwealth contends that prior rulings “unequivocally mandate” the conclusion that Texas Hold ’Em is “unlawful gambling.” Appellant’s Br. at 10. It neglects to mention that it described the same case law to the habeas court as making “interesting reading” (Tr. at 28), but as “nebulous” (*id.* at 27) and “not terribly helpful” (*id.* at 28). As Appellees explain (Appellees’ Br. at 13-14), the Commonwealth’s argument is waived, because its only argument below was that, as a matter of fact, chance predominates over skill in Texas Hold ’Em. *See*

¹ That decision resolved the consolidated cases of *Commonwealth v. Two Electronic Poker Game Machines*, *Commonwealth v. One Electronic Poker Game Machine* and *Commonwealth v. One Electro-Sport Draw Poker Machine*. The habeas court referred to the decision as *One Electro-Sport Draw Poker Machine* because it relied on the portion of the opinion that resolved the issues specific to that case. *Amicus* refers to the decision as *Two Electronic Poker Game Machines* because that is how the Commonwealth refers to it on appeal.

Pa. R. App. P. 302(a) (issues not raised below may not be raised on appeal). The Commonwealth “cannot be heard to complain” that the habeas court made the very inquiry into the role of skill in poker that invited: if it was error, that “error was of his own making.” *Kriner v. Dinger*, 297 Pa. 576, 582, 147 A. 830, 832 (1929).

Appellees are further correct that the Commonwealth misreads the case law which it cites. The decision on which it principally relies, *Pennsylvania Liquor Control Board v. Kehler*, 538 A.2d 979 (Pa. Commw. Ct. 1988), is not relevant because it arises in the context of the Liquor Code, not the Crimes Code’s prohibition on unlawful gambling. A liquor license may be revoked if the establishment permits even *lawful* gambling, and gambling in the liquor licensing context is furthermore defined without regard to whether skill predominates over chance. *Id.* at 980-81 (citing *Pennsylvania Liquor Control Bd. v. PPC Circus Bar, Inc.*, 506 A.2d 521 (Pa. Commw. Ct. 1986)). *Kehler* did not apply that criminal standard—indeed it expressly declined to address whether poker is “unlawful gambling” under § 5513 of the Criminal Code. *Kehler*, 538 A.2d at 981 (“we are not prepared to hold and need not decide that poker playing is ‘unlawful gambling’ under the Crimes Code”).

The legal standard in the criminal context is very different. In determining whether an activity constitutes “unlawful gambling” under the Crimes Code, the question is whether skill or instead chance predominates. As noted, the Commonwealth conceded below that was the correct legal standard. That concession was correct under the governing case law. *Two Elec. Poker Game Machs.*, 502 Pa. at 195, 465 A.2d at 978 (“While appellee has demonstrated that some skill is involved in the playing of Electro-Sport, we believe that the element of chance predominates and the outcome is largely determined by chance.”).

For these reasons, the habeas court was correct to decide the factual question whether skill or chance predominates in Texas Hold 'Em, and the Commonwealth is in any event barred from raising a claim of error on that ground.

II. SKILL PREDOMINATES OVER CHANCE IN TEXAS HOLD 'EM

What remains is the question whether this court should review the habeas court's factual determination that skill predominates over chance in Texas Hold 'Em. The government does not dispute that the court's holding that skill predominates was correct as a general matter, but argues that chance predominated over skill in "Texas Hold 'em as played in this case." As Appellees note, this argument was not raised at the hearing and so is also waived. Appellees' Br. at 17-19.

Should this Court decide to reach the Commonwealth's argument, however, it should reject it on the merits. As *amicus* explains below, skill predominates over chance in Texas Hold 'Em. And since the government offered no evidence that the amount of skill involved in Texas Hold 'Em "as played in this case" differs from the amount involved when that game is played in general, the habeas court's conclusion that Appellees' activity was not "unlawful gambling" was correct.

As is true for similar games like golf, billiards, and bridge, when good poker players play against bad players, they consistently beat them. Players who enter golf and bridge tournaments pay a fee to enter, and earn a cash reward if they win, but these games are contests of skill because their outcome is determined principally by skill. See *Two Elec. Poker Game Machs.*, 502 Pa. at 195, 465 A.2d at 977 ("[i]t cannot be disputed that football, baseball and golf require substantial skill, training and finesse" even though "the result of each game turns in part upon luck or chance"); *In re Allen*, 377 P.2d 280, 281 (Cal. 1962) (bridge requires skill and is not a "game of chance"). So too with poker. To be sure, there is some cumulation of luck over the course of a poker match that will affect how individual players perform. That is also true, for example, of

golf, where “changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers” or a “lucky bounce may save a shot or two.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 687 (2001). But, as in golf, skill is nonetheless dominant in poker play. The fact that every hand of poker involves multiple decision points (at each of the multiple rounds of betting), multiple decisions at each decision point (bet, call, raise, or fold), and innumerable factors that call for skill to evaluate each of those decisions (for example, the player’s own cards, the odds of his hand improving, his sense of the strength of the other player’s hand, his sense of the other players’ perception of him), establishes that poker is a contest of skill.

Where a game is one which contains elements of both skill and chance, such as poker, two general methods of determining the predominant element have developed. The traditional method courts have used to determine whether a game is predominantly one of skill is to evaluate the game’s structure and rules. If the structure and rules allow sufficient room for a player’s exercise of skill to overcome the chance element in the game, the game is one of skill and the gambling laws do not apply. *See, e.g., In re Allen*, 377 P.2d at 281-82 (holding the card game of bridge to be one predominantly of skill). A second approach, more favored by the scientific community, is an empirical approach that examines the actual play of the game. It being well accepted that in a game predominated by skill the more skillful players will consistently perform better (*see, e.g., Patrick Larkey et al., Skill in Games*, 43 *MANAGEMENT SCIENCE* 596 (May 1997)), this approach looks for specific instances over repeated trials to see if in fact the “more skillful players tend to score better than less skillful players.” *Id.* at 596. Using either method confirms that the game of poker is predominantly a game of skill.

This section thus proceeds first with an analysis of the structure of poker, demonstrating the importance of making correct decisions in poker, and the degree of skill required to make those decisions. *See* § II.A. It shows that how a person plays his cards is far more important to the person's winning or losing than what actual cards the person is dealt. The subsequent part of this section lays out the results of recent scientific studies based on computer simulations of poker matches and statistical analysis of the actual results of poker matches, all of which demonstrate that more skillful players consistently outperform less skillful players. *See* § II.B.

A. Making Correct Decisions In Poker Requires A Diverse Array Of Sophisticated Skills That Games Of Chance Do Not

The essence of poker is correct decision-making. Each time it is a player's turn to act, he must choose among several decisions, typically whether to bet, raise, or fold. During the course of a single session, a player will have to make hundreds of those decisions. Each time, in order to make the optimal decision the player must take into account a variety of known and unknown factors. The importance of decision-making in poker cannot be understated: in a recent statistical analysis of millions of actual poker hands, the players' decisions *alone* rather than the cards dealt accounted for the result in 76% of all the hands played. *See* Paco Hope, Brian Mizelle & Sean McCulloch, *Statistical Analysis of Texas Hold'Em* at 5 (Jan. 28, 2009) (attached for the Court's convenience as Ex. A).² In other words, in those 76% of hands, all but one player folded, making the remaining player the hand's winner, and the actual cards were never revealed. With player decisions deciding more than three-quarters of all poker hands, the players who consistently make good decisions will win. Those who do not will lose.

² <http://www.cigital.com/resources/gaming/poker/100M-Hand-AnalysisReport.pdf>.

To make the right decisions consistently, poker players must employ a range of skills. By skill, *amicus* does not mean simply a sophisticated knowledge of odds, which is merely a prerequisite to competent poker play. To be skilled at poker, players must develop an ability to directly influence the way an individual hand turns out—who collects the pot at the end, and how much is in the pot. As the court below held, “[s]uccessful 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 must know when to hold and fold and raise. They must know how to manage their money.” Op. at 13-14.

Of course, it is true that individual moves in poker are called “bets.” But that vocabulary is misleading. The “bet” is not a wager on a chance event. Unlike poker “bets,” true wagers do not alter the outcome of the event. A bet on the Super Bowl does not change the score; bets at a blackjack table are made before the cards are dealt; bets on roulette wheels are placed before the ball is dropped. Bets at a poker table are different. What is called a “bet” in poker is really a “move” like a move in any other game: it is a gambit designed to provoke a desired reaction from an opponent.

The importance of these moves is heightened because, in typical complex poker games like Texas Hold ’Em, a player must contend with a large number of decision-making stages and a variety of possible courses of action at each stage. In each hand of Hold ’Em, for example, a player has four principal decision-making opportunities: the first after he receives his two down cards, and the next three as the common cards are turned over in three stages. At each stage the player has available to him many courses of action. The focus of each decision is how worthwhile it is to risk additional chips relative to the chance of winning all the chips in the pot in that

hand. These decision-making stages reduce the element of chance in the game, since logical decision-making at each of these stages allows the player to control his “fate.”

To make optimal moves at each of these stages, players must be mathematicians, observers of human nature, and capable deceivers. Poker players use their “bets” principally to communicate with, manipulate, and intimidate their opponents. Skeptics sometimes say that no amount of skill can turn a deuce into an ace. It is true that skill cannot change the cards, as a great golfer cannot change the wind. But skill allows a poker player with the deuce to make his opponent believe he has an ace, causing his opponent to fold a hand that would have won the pot. So skill also means that a good player will lose less with a deuce and win more with an ace than a bad one. Indeed, as noted, more than 75% of all hands are won when one player bets and all remaining players fold in response. *See Hope et al.* at 5; *see also* Howard Lederer, *Why Poker Is a Game of Skill* (May 6, 2008) (unpublished manuscript, attached as Ex. B); World Poker Tour Stats, Website (in World Poker Tour play, only 15% of hands go to a showdown).³

Even in that subset of hands, the players typically are not betting on the outcome of a chance event. For example, when a poker player bets as a bluff, he is not hoping that his cards will prove to be better than his opponents’. Instead, the player hopes to win the pot by convincing his opponent to fold the best hand. As it turns out, in roughly 50% of hands that do play to a showdown, a player who would have won had he stayed in will have folded—attesting to the skill of the winning player in scaring his competitor into folding. *See Paco, Statistical Analysis* at 5. Of course, a player trying to chase another player out may get called and may lose. But what he was betting on was not what cards his opponents held—the essence of gambling. He was betting to influence what his opponents would do—the essence of strategy.

³ <http://www.worldpokertour.com/StatsAndTools/Landing.aspx>, last accessed Feb. 9, 2009.

