

Gambling, use of gambling equipment by police

Number: INFORMAL

Date: June 18, 1996

Mr. Stephen L. Ziegler
Plantation Assistant City Attorney
400 Northwest 73rd Avenue
Plantation, Florida 33317

RE: GAMBLING EQUIPMENT--MUNICIPALITIES--LAW ENFORCEMENT--SHERIFFS--use of gambling equipment seized as contraband for training of law enforcement officers. Ch. 849, Fla. Stat.

Dear Mr. Ziegler:

You have asked whether the City of Plantation Police Department may retain for its use in training and future investigations, illegal gambling equipment which is seized as contraband pursuant to Chapter 849, Florida Statutes, or whether the property must be turned over to the sheriff for destruction.

According to your letter, the Plantation Police Department has seized gambling equipment as described in section 849.231, Florida Statutes, but, at this time, no arrests have been made for possession or manufacturing of gambling devices. Since no arrest has been made in the case, the clerk of court is reluctant to accept custody of the property unless it will be used by the prosecuting authority as evidence. You ask: "[W]hat agency should maintain possession of this property pending its disposition, whether it must be destroyed, in whole or in part, and if not, may the City of Plantation Police Department use some or all of the property for law enforcement purposes?"

Pursuant to section 849.232, Florida Statutes:

"There shall be no right of property in any of the implements or devices enumerated or included in s. 849.2311 and upon the seizure of any such implement, device, apparatus or paraphernalia by an authorized enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction of such offenses and shall not be released by such clerk until he shall be advised by the prosecuting officer of such court that the said implement is no longer required as evidence and thereupon the said clerk shall deliver the said implement to the sheriff of the county who shall immediately cause the destruction of such implement in the presence of the said clerk or his authorized deputy."

The statute provides that "upon seizure" gambling equipment shall be delivered and held by the clerk of court until he or she is notified by the state attorney that such equipment is no longer needed for evidentiary purposes. Nothing in the statute requires an arrest to trigger the provisions for delivery to and retention of seized gambling equipment by the clerk.

Therefore, it is my opinion that, upon seizure of gambling equipment as described in section 849.231, Florida Statutes, such equipment must be delivered to and held by the clerk of court until the state attorney notifies the clerk that the equipment is no longer needed for evidentiary purposes.[1]

Further, section 849.232, Florida Statutes, requires that, upon receipt of notice from the state attorney, "the clerk shall deliver the said implement to the sheriff of the county who shall immediately cause the destruction of such implement in the presence of the said clerk or his authorized deputy." A system for the safe-keeping and subsequent destruction of seized gambling equipment is established in sections 849.231-849.235, Florida Statutes. However, I would note that the clerk of court is a ministerial officer[2] and, as an officer, may delegate ministerial acts to an assistant whose appointment is authorized without giving him the status of a deputy.[3] The clerk may, therefore, enter into a bailment or agency-type arrangement with the police department for the housing and safe-keeping of this evidence.

While under either of these arrangements the clerk of court would ultimately be responsible for the evidence,[4] an agency or bailment arrangement could be undertaken similar to the procedure described in section 849.17, Florida Statutes, which authorizes the arresting agency to retain evidence such as slot machines for use in the investigation, prosecution or other proceedings against a violator. Ultimately the police department and the clerk of court must work together to reach a satisfactory arrangement regarding the use and storage of this property until such time as it must be used as evidence or destroyed.

I trust that these informal suggestions will help you in resolving this situation to the satisfaction of both the clerk and the police department.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

[1] Section 849.231(1), Fla. Stat. (1995), provides that:

"Except in instances when the following described implements or apparatus are being held or transported by authorized persons for the purpose of destruction . . . and except in instances when the following described instruments or apparatus are being held, sold, transported, or manufactured by persons who have registered with the United States Government pursuant to the provisions of Title 15 of the United States Code, ss. 1171 et seq., as amended, so long as the described implements or apparatus are not displayed to the general public, sold for use in Florida, or held or manufactured in contravention of the requirements of 15 U.S.C. ss. 1171 et seq., it shall be unlawful for any person to manufacture, sell, transport, offer for sale, purchase, own, or have in his possession any roulette wheel or table, faro layout, crap table or layout, chemin de fer table or layout, chuck-a-luck wheel, bird cage such as used for gambling, bolita

balls, chips with house markings, or any other device, implement, apparatus, or paraphernalia ordinarily or commonly used or designed to be used in the operation of gambling houses or establishments, excepting ordinary dice and playing cards."

[2] See, *generally* 13 Fla. Jur.2d *Courts and Judges* s. 192.

[3] 9 Fla. Jur.2d *Civil Servants* s. 160. *But see* Op. Att'y Gen. Fla. 95-33 (1995), in which it was concluded that "deputy clerks appointed by a clerk of court possess all powers that may be exercised by the clerk, except the power to appoint deputies[;] [a]bsent a statutory provision granting the clerk the discretion to appoint special deputies with specific powers, the clerk may not appoint deputies for the sole purpose of issuing marriage certificates." Thus, a deputy may not be appointed by the clerk for a limited purpose but must share in all the powers of the clerk with the exception of the authority to appoint deputies.

[4] Care must be taken to insure that the chain of custody of this property is maintained. That is, for an object to be introduced into evidence, it must be shown that the object has been kept in proper custody since its seizure. See *generally*, 23 Fla. Jur.2d *Evidence and Witnesses* s. 369.