1610 PERMITTING REAL ESTATE TO BE USED AS A GAMBLING PLACE — § 945.04(1m)(a)

Statutory Definition of the Crime

A person violates § 945.04(1m)(a) of the Criminal Code of Wisconsin if the person intentionally permits any real estate owned or occupied by that person, or under that person's control, to be used as a gambling place.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant owned, occupied, or controlled real estate.
2. The real estate was used as a gambling place.[1]
3. The defendant intentionally permitted the real estate to be used as a gambling place.

   This requires that the defendant acted with the purpose to permit the use of the real estate as a gambling place and knew that it was being used in such a way.[2]

Meaning of "Gambling Place"

A gambling place is any building or any room within it, one of whose principal uses is any of the following: making and settling bets or receiving, holding, recording or forwarding bets or offers to bet.[3]

Meaning of "Principal Use"

"A principal use" means one of the more important uses of the real estate. It need not be the only use or even 50% of the total usage of the real estate. No mathematical definition can be given. The use of any place or room at any given time may determine its principal use at that time, but for purposes of this offense, that use must be considered in light of the overall or other uses of the place or room. In order to constitute one of the principal uses, the usage must be more than incidental. You must view the character of the alleged gambling place over a sufficient period of time to determine whether gambling constituted one of the principal uses.[4]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1610 was originally published in 1990. This revision was approved by the Committee in October 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. This offense requires the use of real estate as a "gambling place"; proof of use for "commercial gambling" is not required, even though "commercial gambling" appears in the title to § 945.04. "'Gambling place' is defined by § 945.01(4) without reference to 'commercial gambling.' Because § 945.04(1) is unambiguous in this respect, we ignore its title." State v. Dahlk, 111 Wis.2d 287, 294, 330 N.W.2d 611 (Ct. App. 1985).

2. "Intentionally" is divided into two parts: purpose and knowledge. Having the mental purpose to cause the result is one of the two definitions of "intentionally" provided in § 939.23(3) and is believed to be most likely to apply in the context of this offense. The other alternative is being "aware that his or her conduct is practically certain to cause the result." See the discussion in Wis JI-Criminal 923A and 923B.

The knowledge requirement is based on § 939.23(3), which provides that when the word "intentionally" is used, it requires knowledge of all the facts which make the conduct criminal and which appear after the word "intentionally" in the statute.

In State v. Dahlk, cited in note 1, supra, the defendant contended that because he did not know that his pyramid club was an illegal lottery, the jury could not find he permitted the warehouse to be used as a gambling place. The court of appeals rejected this claim, emphasizing that mistake as a defense requires an honest error of fact or law other than criminal law. See § 939.43(1). "Defendant's mistake as to the legality of the pyramid club under the criminal laws of this state does not negate the existence of criminal intent." 111 Wis.2d 287, 305.

3. The definition of "gambling place" is adapted from the one provided in § 945.01(4)(a):

> (4) Gambling place. (a) A gambling place is any building or tent, any vehicle (whether self-propelled or not) or any room within any of them, one of whose principal uses is any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling machines.

4. Three decisions of the Wisconsin appellate courts have discussed the "principal use" requirement. The definition in the instruction is based on those cases.

In State v. Morrissy, 25 Wis.2d 638, 131 N.W.2d 366 (1969), the Wisconsin Supreme Court rejected the defendant's argument that "principal" required that the use be the "single, main, chief, or dominant" use, or that it be given a meaning of "more than 50 percent of the use."

> The term "one of the principal uses" contemplates a comparison of the degree of use between a class of principal uses and incidental uses. No mathematical definition can be given, and admittedly the line of demarcation is difficult to draw. . . .

> The use of a place or room at any given time may determine its principal use at that time but for the purpose of sec. 945.01(4), Stats., such use must be considered in light of the overall or other uses of the place or room. A sufficient period of time must be considered to fairly ascertain the character of the alleged gambling place in terms of principal uses.

25 Wis.2d 638, 642-43.

The Morrissy court found the evidence to be sufficient to establish that a tavern was a gambling place where Monday night poker games were conducted 25 or 26 times a year.

In State v. Dahlk, note 1, supra, the court of appeals found that the definition of "gambling place" was constitutional in the face of the defendant's claim that it was vague and overbroad. The court held that a person of ordinary intelligence can be expected to understand the distinction between principal and incidental uses of premises. 111 Wis.2d 287, 304. The Dahlk court applied the Morrissy definition of "principal use" to find that a warehouse qualified as a gambling place where it was used over a three-week period for meetings of a club engaged in an illegal pyramid investment scheme.

In State v. Nixa, 121 Wis.2d 160, 360 N.W.2d 52 (Ct. App. 1984), the court of appeals reversed a conviction under § 945.02(2) for illegally remaining in a gambling place. The court concluded that a one-time use of an apartment recreational building for gambling did not make gambling a principal use of the premises; prior gambling activity must be shown. The court found that the phrase "one of whose principal uses" was ambiguous and therefore investigated the intent of the legislature and reviewed Morrissy and Dahlk: "This case law, combined with the statute and its legislative history, convinces us that evidence of prior gambling activity is necessary to prove the existence of a gambling place." 121 Wis.2d 160, 166. The court referred to the Judiciary Committee Report on the 1953 Criminal Code which states that a "tavern where customers occasionally play cards for money is not a gambling place because that is not one of its principal uses." 1953 Report at 153. "This language indicates that, even with multiple event gambling evidence, the statute is not violated if a principal use for gambling purposes is not demonstrated." 111 Wis.2d 160, 164-65.

