

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN BERNIER,
Appellant,
vs.
RONALD HEARN AND THE STATE OF
NEVADA GAMING CONTROL BOARD,
Respondents.

No. 40485

FILED

APR 22 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order that granted summary judgment based on governmental immunity to respondents in a tort action. Appellant Steven Bernier argues that although state officials are entitled to sovereign immunity for their discretionary acts, when a state official's actions constitute bad faith, the acts are no longer immune from suit under Nevada's discretionary act exception. We conclude that we need not reach that issue, because in this case the state gaming agent had probable cause to arrest Bernier for criminal wrongdoing, and as a result, the agent and the Nevada Gaming Control Board (GCB) are entitled to immunity for discretionary acts.

FACTS

On July 15, 1999, Bernier attended the grand opening of the Resort at Summerlin (Resort). He obtained a "player's club" card, which allows cardholders to earn points that are redeemable for cash, meals, or merchandise. Player's club members earn points based on the amounts they wager. An acquaintance of Bernier's informed him that a particular set of video gaming machines was awarding player's club points at an abnormally high rate, so that "for every \$5 token dropped, [player's club]

points for a \$100 token were awarded.” Bernier played the machines until approximately 1:00 a.m. on July 16, 1999. He accumulated \$17,323.46 in cash value in the player’s club promotion and an additional \$9,200.42 in “comp” value.

Several hours after Bernier left the Resort, GCB Agent Olin Pierce observed a group of people playing the same bank of video gaming machines. Pierce’s GCB report indicates that he observed this group or “team” acting suspiciously, and detained them to investigate. Several members of the group were suspects in previous GCB investigations. GCB technicians inspected the machines and determined that the player’s club tracking system (CDS system) was operating improperly. Specifically, the CDS system machines were reversed as applied to the gaming machines, so that the \$5 machine played by Bernier was programmed as a \$100 machine from the player tracking standpoint. Individuals playing the misprogrammed \$5 machine were credited player’s club points as if they were playing a \$100 machine.

On July 20, 1999, Bernier returned to the Resort, and although the machines no longer awarded points at a higher than normal rate, Bernier played anyway. Resort security observed Bernier looking around nervously as he played the game and continually reaching into his left sock. Security checked Bernier’s player’s club account, which revealed that he “had run up a large number of player’s club point totals on July 16, at a seemingly impossible rate.” Security detained Bernier at 11:41 p.m., and he was handcuffed and taken to the security office. Security then contacted GCB, and GCB dispatched agents Steve Mull and respondent Ronald Hearn to investigate. The agents reviewed surveillance footage of

Bernier and confirmed that he was acting suspiciously. The agents also observed Bernier "remov[ing] the card from his pocket and plac[ing] it into the machine, then immediately pull[ing] it out and put[ting] it back in as if somehow manipulating it. Whenever casino employees were in the area, Bernier took the card out and quickly put it in his pocket." Resort security searched Bernier at 12:53 a.m., but found nothing of significance.

Hearn and Mull began questioning Bernier. According to Hearn, Bernier acknowledged that he had received more player's club points than he should have, and asked if he had done anything wrong. Mull and Hearn continued to question Bernier and informed him that he was likely guilty of a felony under NRS 465.070, which prohibits, among other things, taking anything of value from a gambling game with the intent to defraud, or collecting an amount greater than the amount won.

Hearn's report indicates that he advised Bernier of his constitutional rights and Bernier executed a waiver form. Eventually, after further questioning, Bernier agreed to return his player's club points to the casino and was released.

Hearn acknowledged that on July 24, 1999, he and Mull returned to the Resort and learned of the misprogrammed machines. Although according to Agent Pierce, GCB knew of the misprogrammed machines on July 17, 1999, it appears that Hearn and Mull did not know of the error at the time of Bernier's detention.

Bernier filed a complaint in district court against the Resort, GCB, and Hearn, alleging state law claims for false imprisonment, assault and battery, conversion, and conspiracy. Bernier moved for partial summary judgment against GCB and Hearn on his claims of false

imprisonment and conversion. GCB and Hearn opposed Bernier's motion and moved for summary judgment on the basis of governmental immunity. In the meantime, Bernier settled with the resort. The district court granted summary judgment to Hearn and GCB, concluding that Hearn's investigation and detention of Bernier was a discretionary act entitled to immunity. The district court also determined that Hearn had probable cause to arrest Bernier for violating Nevada's gaming statutes, even though Hearn released Bernier after Bernier surrendered his player's club points. Bernier appealed.

DISCUSSION

This court reviews an order granting summary judgment de novo.¹ Summary judgment is appropriate when, after a review of the record viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.² The nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true,³ and the burden of establishing the non-existence of any genuine issue of fact is on the movant.⁴

¹Walker v. American Bankers Ins., 108 Nev. 533, 536, 836 P.2d 59, 61 (1992).

²See Medallion Dev. v. Converse Consultants, 113 Nev. 27, 31, 930 P.2d 115, 118 (1997).

³Id.

⁴Pacific Pools Constr. v. McClain's Concrete, 101 Nev. 557, 559, 706 P.2d 849, 851 (1985).

Sovereign immunity

Although Nevada has waived its sovereign immunity under NRS 41.031, in NRS 41.032(2) it has expressly retained sovereign immunity for state officials exercising discretion. State officials can be sued for torts committed while performing non-discretionary or “ministerial” acts, but not for torts committed while performing discretionary acts.⁵ Immunity still attaches if the discretion involved is abused.⁶ This court has defined discretionary acts as those that “require the exercise of personal deliberation, decision and judgment.”⁷ On the other hand, “[a] ministerial act [for which there is no immunity] is an act performed by an individual in a prescribed legal manner in accordance with the law, without regard to, or the exercise of, the judgment of the individual.”⁸

Generally, an officer’s investigation and decision to arrest a suspect is discretionary.⁹ Bernier, however, argues that Hearn lacked any

⁵NRS 41.032; Ortega v. Reyna, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998).

⁶NRS 41.032(2).

⁷Pittman v. Lower Court Counseling, 110 Nev. 359, 364, 871 P.2d 953, 956 (1994) (quoting Travelers Hotel v. City of Reno, 103 Nev. 343, 345-46, 741 P.2d 1353, 1354 (1987)), overruled on other grounds by Nunez v. City of North Las Vegas, 116 Nev. 535, 1 P.3d 959 (2000).

⁸Id.

⁹See Ortega v. Reyna, 114 Nev. 55, 953 P.2d 18 (1998); Foster v. Washoe County, 114 Nev. 936, 964 P.2d 788 (1998).

semblance of probable cause to arrest him. According to Bernier, while discretionary acts are entitled to immunity, acts taken in bad faith should not be considered discretionary in nature.¹⁰ Bernier asserts that Hearn's detention of him without probable cause equates to bad faith, and as a result, discretionary immunity should not attach in this case.

We need not determine whether the length and type of detention at issue in this case could warrant a "bad faith" exception to discretionary immunity because we conclude that Hearn had probable cause to detain, and if he so chose, to arrest Bernier for violating Nevada's gaming statutes. Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to lead a prudent person to believe that a suspect has committed a crime.¹¹ Probable cause does not require virtual certainty; it does, however, require more than mere suspicion.¹²

NRS 465.070(3) makes it illegal for a player to:

claim, collect or take, or attempt to claim, collect or take, money or anything of value in or from a gambling game, with intent to defraud, without having made a wager contingent thereon, or to claim, collect or take an amount greater than the amount won.

¹⁰In support of this assertion, Bernier cites Falline v. GNLV Corp., 107 Nev. 1004, 823 P.2d 888 (1991).

¹¹State v. McKellips, 118 Nev. 465, 472, 49 P.3d 655, 660 (2002); Alward v. State, 112 Nev. 141, 156, 912 P.2d 243, 253 (1996).

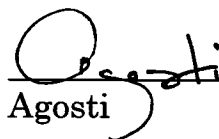
¹²See Marschall v. City of Carson, 86 Nev. 107, 113, 464 P.2d 494, 498-99 (1970); Nelson v. State, 96 Nev. 363, 366, 609 P.2d 717, 719 (1980).


Although we do not reach the question of whether Bernier's actions actually violated NRS 465.070, the facts known to Hearn during Bernier's detention were sufficient to lead him to believe that Bernier violated Nevada's gaming laws. Nothing in the record demonstrates that Hearn knew of the misprogrammed machines at the time of Bernier's detention. Instead, Hearn observed Bernier's highly suspicious actions and his abnormally high player's club point totals. Bernier admitted during the interview that he began playing the misprogrammed machine after being tipped off by an acquaintance, and that he purposely attempted to conceal the malfunctioning machine from the Resort. When the investigation was completed some three months later, GCB decided against prosecuting Bernier; nevertheless, at the time of Bernier's detention, Hearn had probable cause to believe that Bernier had violated Nevada's gaming statutes.¹³ Accordingly, we affirm the judgment of the district court.

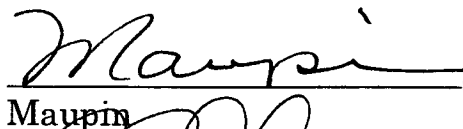
¹³Bernier also argues that Hearn violated Nevada's temporary detention statute, NRS 171.123, by detaining Bernier for over one hour. Bernier contends that NRS 171.123 defines the scope of Hearn's discretion, and that Hearn lacked discretion to hold Bernier for over one hour and then release him. In State v. McKellips, 118 Nev. 465, 49 P.3d 655 (2002), we held that a detention in excess of sixty minutes automatically ripens into a de facto arrest requiring probable cause. Because Hearn had probable cause to arrest Bernier, he did not violate NRS 171.123.

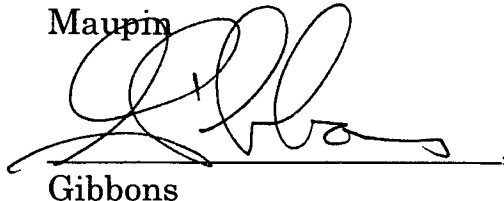
It is so ORDERED.¹⁴

 _____, C.J.
Shearing

 _____, J.
Agosti

 _____, J.
Becker

 _____, J.
Maupin

 _____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Eugene Osko, Settlement Judge
Nersesian & Sankiewicz
Attorney General Brian Sandoval/Gaming Division/Las Vegas
Clark County Clerk

¹⁴The Honorable Robert E. Rose, Justice, voluntarily recused himself from participation in the decision of this matter, and the Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter.