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ORIGINAL

Decision No. ~~76503~~

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AL KEITH PLOTKIN, aka G. PLOTKIN, Plaintiff, vs PACIFIC TELEPHONE, Defendant.	Case No. 8762 (Filed January 31, 1968)
WALTER PLOTKIN, J. E. GIBBONS, and RANDALL V. HENDRICKS, Complainants, vs THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Defendant.	Case No. 8763 (Filed January 31, 1968)
GLENN HUBBS, and GUY CALE ENTERPRISES, served herein as CALIFORNIA GUY, Complainants, vs THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Defendant.	Case No. 8764 (Filed January 31, 1968)

C. 8762, C. 8763, C. 8764,
C. 8765, & C. 3766 - NW

FRANK A. MILANO dba COAST TO COAST TURF PUBLICATIONS, Complainant, vs. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Defendant.	Case No. 8765 (Filed February 2, 1968)
GUY CALE, Complainant, vs. THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Defendant.	Case No. 8766 (Filed February 2, 1968)

James E. Green, for Glenn Hubbs and Guy Cale Enterprises, Frank A. Milano, dba Coast to Coast Publications, Guy Cale, Walter Plotkin, J. E. Gibbons, Randall V. Hendricks, and Al Keith Plotkin aka G. Plotkin, Complainants.
Lawler, Felix & Hall by Richard L. Fruin, Jr., for Pacific Telephone and Telegraph Company, defendant.
Roger Arnebergh, City Attorney, by Charles E. Mattson, for City of Los Angeles, intervenor.

OPINION ON REHEARING

Complainants, all of whom use the telephone to supply information concerning horseraces, in the five above numbered cases allege that they are subscribers and users of telephone service and that they are threatened with disconnection of telephone service by defendant telephone company. They allege that they have never used the telephone service to violate the law or aid or abet such violations and that they will suffer great and irreparable damage if they are deprived of said telephone service. They seek a restraining order directing defendant to maintain existing telephone service pending a hearing of their complaint and a permanent injunction enjoining and restraining defendant from discontinuing or interfering with their telephone services in the future. The City of Los Angeles filed a Petition for Intervention in each of the above cases objecting to the continuation of telephone service to the complainants herein on the ground that said complainants use such telephone service as an instrumentality, directly or indirectly, to violate or assist in the violation of the law. Interim relief was ordered for complainants as prayed for and the cases were heard on a consolidated record. In Decision No. 75647 dated May 13, 1969, the Commission granted the relief requested by the City of Los Angeles in Cases Nos. 8763, 8764, 8765, and 8766. The Commission ordered The Pacific Telephone and Telegraph Company to forthwith remove all of its telephone facilities from the premises of the complainants in the aforementioned cases. The Commission granted the relief requested by the complainant in Case No. 8762.

Complainants in Cases Nos. 8763, 8764, 8765, and 8766 petitioned the Commission for a rehearing of Decision No. 75647. On June 24, 1969, the Commission in Decision No. 75850 granted said Petition for Rehearing and stayed the effective date of Decision No. 75647. Rehearing was held before Examiner Robert Barnett on September 3, 1969 at Los Angeles, California. At the rehearing no evidence was produced by any party. The cases were submitted based upon the evidence received at the prior hearings in this matter and subject to the receipt of briefs, which have been received.

A detailed statement of the evidence in this case is set forth in Decision No. 75647 and in the findings of fact herein. Briefly, that evidence shows that each of the complainants uses the telephone service of defendant to rapidly collect and disseminate information to customers regarding horseraces, for which complainants receive the sum of $10 to $25 a week per customer. Complainants make numerous arguments to support their assertion that on the facts of this case the conduct of complainants does not warrant disconnection of telephone service. Only three of these arguments require discussion. Complainants' free speech arguments were adequately met in Decision No. 75647 and need not be repeated.

Complainants argue that under the laws of the State of California their use of the telephone in dispensing race results was not illegal prior to October 26, 1967, and that if such use ever became illegal it was not until the effective date

of California Penal Code, Section 337i, which became effective after October 26, 1967. Section 337i states:

> "Every person who knowingly transmits information as to the progress or results of a horserace, or information as to wagers, betting odds, changes in betting odds, post or off times, jockey or player changes in any contest or trial, or purported contest or trial, involving humans, beasts, or mechanical apparatus by any means whatsoever including, but not limited to telephone, telegraph, radio, and semaphore when such information is transmitted to or by a person or persons engaged in illegal gambling operations, is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison for a period not exceeding two years.
>
> "This section shall not be construed as prohibiting a newspaper from printing such results or information as news, or any television or radio station from telecasting or broadcasting such results or information as news. This section shall not be so construed as to place in jeopardy any common carrier or its agents performing operations within the scope of a public franchise, or any gambling operation authorized by law. (Added by Stats 1967 ch 1618 sec. 1; Amended by Stats 1968 ch 578 sec. 2.)"

We do not base our decision in this matter on a finding of a violation of Penal Code Section 337i as that section was not effective at the time the conduct complained of in these cases took place. However, we do not agree that under the laws of the State of California in effect prior to October 26, 1967 complainants' conduct was legal. We have previously found it to be in violation of public policy. (Kilgore v. General Telephone Co. (1967) 70 PUR 3d 294 (Decision No. 72782.) In People v. McLaughlin (1952) 111 CA 2d 781, the court upheld a conviction of the suppliers of horseracing information by wire for conspiracy to promote bookmaking when it had been established that wire service information had no other use than to supply information needed by bookmakers to conduct illegal gambling operations. Later in this opinion we will have more to say in this connection.

Complainants assert that Decision No. 71797, insofar as it requires removal of telephone service where the service is being used, "as an instrumentality, directly or indirectly, ... to assist in the violation of the law" is so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application. Complainants make no analysis of the language to show in which ways it is vague and indefinite nor do complainants cite any cases construing non-penal statutes or rules wherein such language or analogous language has been held to be vague and indefinite. In Lorenson v. Superior Court (1950) 35 C 2d 49, the Supreme Court held that the broad language defining a criminal conspiracy as acts committed with the purpose "... to pervert or obstruct justice, or the due administration of the laws," was not vague and ambiguous and did not violate due process principles. The court said that, "the meaning of the words 'to pervert or obstruct justice, or the due administration of the laws' is easily ascertained by reference either to the common law or to the more specific crimes enumerated in Part 1, Title VII (of the Penal Code).... To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. 'To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct

prohibited' (People v. Smith (1940) 36 CA 2d Supp 748, 752)." The court then went on to give examples of broad general language that was held to be not constitutionally infirm: e.g., "unreasonable speed," "unjustifiable physical pain or mental suffering," "practice law," and "to the annoyance of any other person."

Applying this reasoning to the case at bar, and considering that the words of the rule are clear and simple; that the specific crimes are found in the Penal Code; that the rule has been in effect since 1948 in California; that the rule has recently been under review in the Supreme Court (Sokol v. Public Utilities Commission (1966) 65 C 2d 247); and that every other jurisdiction that has considered this matter has uniformly enforced the removal of telephone service for violation of statutes and rules of like tenor (see Paterson Publishing Company v. New Jersey Bell Telephone Company (1956) 14 PUR 3d 77 ("further or promote the interest of any unlawful pursuit"); and cases collected 8 PUR Digest 2d Service, Sec 451.1), we have no doubt that the words of the rule are well enough known to enable those persons within its reach to understand and correctly apply them. Finally, we must not forget that in this case we are not enforcing a penal statute nor are we imposing criminal penalties. The higher standards of certainty which are required of penal rather than of civil statutes are not applicable here. (Lorenson v. Superior Court, 35 C 2d at 60.)

Finally, complainants assert that the City of Los Angeles did not support its burden of proving that the use made of the service by complainants was prohibited by law, or aided and abetted a violation of the law. We disagree. Not only is there ample evidence on this record to show that complainants' activities violated the public policy of California, as found in our first opinion in this case, but there is ample evidence on this record to show that complainants violated the Penal Code: conspiracy to commit bookmaking.

Complainants state that there was no evidence as to the identity or profession of complainants' customers nor any evidence that complainants were providing their information to known bookmakers. This is not so. First, there is evidence on the record that the police arrested bookmakers who had in their possession the telephone number of complainants' service and telephone bills which showed that they called complainants' service. Second, complainants' service is of no use to anyone other than bookmakers so it is a reasonable inference that complainants knew that their service was being used by bookmakers. Lastly, a person may be charged with a conspiracy with a person or persons unknown. (People v. Roy (1967) 251 CA 2d 459,463.)

An analysis of the evidence in this case along the lines suggested in the excellent opinion of Fleming, J. in People v. Lauria (1967) 251 CA 2d 471 shows beyond a reasonable doubt that complainants were engaged in the crime of conspiracy

to commit bookmaking. Justice Fleming undertook to answer the question: Under what circumstances does a supplier become a part of a conspiracy to further an illegal enterprise by furnishing goods or services which he knows are to be used by the buyer for criminal purposes? This is also the question in the case at bar. His approach to the answer starts with the assertion that, "both the element of knowledge of the illegal use of the goods or services and the element of intent to further that use must be present in order to make the supplier a participant in a criminal conspiracy." (251 CA 2d at 476-77.)

Proof of knowledge is ordinarily a question of fact and requires no extended discussion in the present case. The knowledge of the supplier was sufficiently established when the evidence showed that the information so furnished is of no monetary value to the general public, but is indispensable to the operations of gamblers and bookmakers. On this record we think the City of Los Angeles is entitled to claim positive knowledge by complainants of the use of their service to facilitate the business of bookmaking.

The remaining issue in this case is the sufficiency of proof of intent to further the criminal enterprise. Justice Fleming analyzed this issue as follows: "The element of intent may be proved either by direct evidence, or by evidence of circumstances from which an intent to further a criminal enterprise by supplying lawful goods or services may be inferred... Where direct proof of complicity is lacking, intent to further the

conspiracy must be derived from the sale itself and its surrounding circumstances in order to establish the supplier's express or tacit agreement to join the conspiracy. (at p.477.)

....

"In examining precedents in this field we find that sometimes, but not always, the criminal intent of the supplier may be inferred from his knowledge of the unlawful use made of the product he supplies. Some consideration of characteristic patterns may be helpful.

"1. Intent may be inferred from knowledge, when the purveyor of legal goods for illegal use has acquired a stake in the venture. (United States v. Falcone, 109 F.2d 579, 581.) For example, in Regina v. Thomas, (1957) 2 All Eng. 181, 342, a prosecution for living off the earnings of prostitution, the evidence showed that the accused, knowing the woman to be a convicted prostitute, agreed to let her have the use of his room between the hours of 9 p.m. and 2 a.m. for a charge of (3 pounds) a night. The Court of Criminal Appeal refused an appeal from the conviction, holding that when the accused rented a room at a grossly inflated rent to a prostitute for the purpose of carrying on her trade, a jury could find he was living on the earnings of prostitution. (at p. 478.)

....

"2. Intent may be inferred from knowledge, when no legitimate use for the goods or services exists. The leading California case is People v. McLaughlin (1952) 111 Cal. App.2d 781,

in which the court upheld a conviction of the suppliers of horse-racing information by wire for conspiracy to promote bookmaking, when it had been established that wire-service information had no other use than to supply information needed by bookmakers to conduct illegal gambling operations. (at p. 478.)

"3. Intent may be inferred from knowledge, when the volume of business with the buyer is grossly disproportionate to any legitimate demand, or when sales for illegal use amount to a high proportion of the seller's total business. In such cases an intent to participate in the illegal enterprise may be inferred from the quantity of the business done. (at p. 479.)

....

"Inflated charges, the sale of goods with no legitimate use, sales in inflated amounts, each may provide a fact of sufficient moment from which the intent of the seller to participate in the criminal enterprise may be inferred. In such instances participation by the supplier of legal goods to the illegal enterprise may be inferred because in one way or another the supplier has acquired a special interest in the operation of the illegal enterprise. His intent to participate in the crime of which he has knowledge may be inferred from the existence of his special interest. (at p. 480.)

....

"From this analysis of precedent we deduce the following rule: the intent of a supplier who knows of the criminal use to which his supplies are put to participate in the criminal

activity connected with the use of his supplies may be established by (1) direct evidence that he intends to participate, or (2) through an inference that he intends to participate based on, (a) his special interest in the activity, or (b) the aggravated nature of the crime itself." (at p. 482.)

When we review complainants' activities in the light of this analysis we find ample evidence from which their special interest in bookmaking activities can be inferred. Complainants made excessive charges ($25 per week) for information obtainable in daily newspapers, they furnished services (rapid transmission of the information) without a legitimate use, and they did all their business with gamblers and bookmakers. We find that complainants are involved in a conspiracy to commit bookmaking.

For convenience we will restate the findings of fact set forth in Decision No. 75647 in addition to making further findings. Findings numbered 10 and 11 in Decision No. 75647 will be modified as set forth in findings numbered 10 and 11 of this decision.

Findings of Fact

1. Complainant in Case No. 8762, Al Keith Plotkin, also known as G. Plotkin, uses seven lines of telephone service at 5700 Whitsett Avenue, North Hollywood, in conducting a horseracing service spot ever since 1962.

2. Complainant was required to answer questions under oath by the Commission after he had claimed immunity and relief from any penalty or forfeiture under Section 1795 of the Public Utilities Code.

3. A motion of the City of Los Angeles to strike the testimony of complainant Al Keith Plotkin subsequent to his claim of immunity was granted.

4. Complainants in Case No. 8763, Walter Plotkin, J. E. Gibbons, and Randall V. Hendricks, use nine lines of telephone service at 4255 Cloverdale Avenue, Baldwin Hills, in conducting a horseracing service spot ever since 1962.

5. Complainants in Case No. 8764, Glenn Hubbs and Guy Cale Enterprises, (served herein as California Guy), use seven lines of telephone service at 621 West Century Boulevard, #2, Los Angeles, in conducting a horseracing service spot ever since 1962.

6. Complainant in Case No. 8765, Frank A. Milano, dba Coast to Coast Turf Purblication, uses forty-one lines of telephone service at 5504 Hollywood Boulevard, #204, Hollywood, in conducting a horseracing service spot ever since 1962.

7. Complainants in Case No. 8766, Guy Cale, W. G. Riley, and Elaine Thomas, use nine lines of telephone service at 268 South Larchmont Boulevard, Hollywood, in conducting a horseracing service spot ever since 1962.

8. Each of the complainants uses his telephone service to collect and disseminate information to customers regarding horseraces, for which complainants receive the sum of $10 to $25 per week per customer.

9. The information so furnished is of no monetary value to the general public, but is indispensable to the operations of gamblers and bookmakers. Complainants know that such information is used to further bookmaking and gambling.

10. Each of the complainants is engaged in the business of the rapid transmission of information as to the progress or results of horseraces, or information as to prices paid, post or off times, or jockey changes by use of telephone facilities, to persons known to complainants to be putting such information to an illegal use. Such business encourages the perpetration of an unlawful act, to-wit, bookmaking.

11. It is against the public policy of the State of California to use telephone equipment to knowingly furnish information, by rapid transmission, as to the progress or results of a horserace, or information as to prices paid, post or off times, or jockey changes, to persons known to the disseminator of the information to utilize such information for illegal purposes. Such use encourages the perpetration of an unlawful act, to-wit, bookmaking.

12. Each of the complainants by engaging in the activity set forth in Finding No. 10, provided such information and services with the intent to further the crime of bookmaking.

13. Each of the complainants are involved in a conspiracy to commit bookmaking, and have used telephone service as an instrumentality to violate and to assist in the violation of the law.

Based on the foregoing findings of fact the Commission concludes that:

1. Complainants' services are not protected by the First or Fourteenth Amendment to the Constitution of the United States

or similar provisions in the Constitution of the State of California.

2. The use to which complainants put the facilities of defendant, The Pacific Telephone and Telegraph Company, encourages the perpetration of an unlawful act, namely bookmaking, and which use is contrary to the public policy of the State of California.

3. Each of the complainants have conspired to commit bookmaking, and have used telephone service as an instrumentality to violate and to assist in the violation of the law.

4. Complainant, Al Keith Plotkin, aka G. Plotkin, in Case No. 8762, was required to testify under oath by the Commission, claimed, was granted immunity from any penalty or forfeiture under Section 1795 of the Public Utilities Code and testified in reliance thereon. The striking of Plotkin's testimony, thereafter, could not and does not work a retroactive cancellation or vacation of such immunity. Complainant is entitled to continuation of his telephone service.

5. The complaints in Cases Nos. 8763, 8764, 8765, and 8766 should be dismissed, the temporary interim relief heretofore granted should be vacated, and defendant should be directed to discontinue service to complainants and remove its telephone facilities from complainants' premises.

ORDER ON REHEARING

IT IS ORDERED that:

1. The temporary interim relief granted by Decision No. 73706, dated February 6, 1968, in Case No. 8763; Decision No. 73707, dated February 6, 1968, in Case No. 8764; Decision No. 73708, dated February 6, 1968, in Case No. 8765; and Decision No. 73709, dated February 6, 1968, in Case No. 8766, is vacated and set aside.

2. The relief requested by complainants in Cases Nos. 8763, 8764, 8765 and 8766 is denied

3. The relief requested by the City of Los Angeles, in its petition in intervention in Cases Nos. 8763, 8764, 8765, and 8766 is granted to the extent set forth in Ordering Paragraph No. 4 of this order and in all other respects is denied.

4. The Pacific Telephone and Telegraph Company shall forthwith remove all of its telephone facilities from complainants' premises located at:

4255 Cloverdale Avenue, Baldwin Hills, Case No. 8763

621 West Century Boulevard, #2, Los Angeles, Case No. 8764

5504 Hollywood Boulevard, #204, Hollywood, Case No. 8765

268 South Larchmont Boulevard, Hollywood, Case No. 8766.

5. Decision No. 73682, dated February 2, 1968, granting interim relief to complainant Al Keith Plotkin, aka G. Plotkin, at 5700 Whitsett Avenue, North Hollywood, California, requiring continuation of telephone service to complainant, is made permanent, subject to defendant's tariff provisions and existing applicable law.

The Secretary of the Commission is directed to cause personal service of this order to be made upon The Pacific Telephone and Telegraph Company and to serve all other parties by mail.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 2nd day of DECEMBER, 1969.

William Symons, Jr.
President

Commissioners