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Criminal Law-Aiding and Abeiting-Criminal Liablity for Knowingly Furnishing Racing Results to Bookmakers

John H. Blish
University of Michigan Law School

CRIMINAL LAW—AIDING AND ABETTING—CRIMINAL LIABILITY FOR KNOWINGLY FURNISHING RACING RESULTS TO BOOKMAKERS—Appellant, who received a weekly salary for distributing horse-racing results by telephone to some twenty bookmakers, was convicted of aiding and abetting bookmaking activities in violation of section 986 of the New York Penal Law.[1] He admitted knowing that the information would be used by his employer's customers in violation of section 986, but no actual evidence of bookmaking was presented to the court. On appeal, *held*, reversed, one judge dissenting. Knowingly transmitting racing results to bookmaking establishments by telephone does not, without proof of acceptance of bets on a professional basis, constitute aiding and abetting bookmaking in violation of section 986. *People v. Smoke*, 38 Misc. 2d 939, 239 N.Y.S.2d 230 (App. T. 1963).

The attempted extension of criminal liability to those who knowingly provide horse-racing information to bookmakers has not been notably successful. While it is obvious that large-scale bookmaking operations could not exist without a constant and timely supply of betting information and racing results,[2] it has generally been held that knowingly furnishing such

1 N.Y. PEN. LAW § 986 provides for five specific categories of illegal conduct, generally subdivided as follows: (1) engaging in bookmaking; (2) keeping a place for the purpose of recording bets or wagers; (3) recording bets or receiving or forwarding any money, thing, or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered; (4) permitting premises to be used for any of the purposes previously enumerated; (5) aiding, assisting or abetting in any manner in any of the forbidden acts.

2 S. REP. No. 307, 82d Cong., 1st Sess. 53 (1951); see Comment, *The Suppression of Bookie Gambling by a Denial of Telephone and Telegraph Facilities*, 40 J. CRIM. L., C. & P.S. 176 (1949); 5 STAN. L. REV. 493 (1953).

information does not constitute aiding and abetting in violation of statutes which merely prohibit bookmaking.[3] Such statutes are generally read to attribute criminality only to the intended use and not to cover the mere supplying of information.[4] It has been suggested that these results are supported by numerous contract cases which hold that a vendee may not successfully maintain a defense to a vendor's action for the price by showing that the vendor knew of an intended illegal use by the vendee at the time of the sale.[5] It should be pointed out, however, that principles which are applicable in holding that a tarnished vendee may not escape his contractual obligations are not necessarily relevant, or even useful, in a determination of a vendor's liability to penal sanctions.

It is axiomatic that accessorial liability for any substantive offense may not be found without a showing that the particular offense was, indeed, committed.[6] Therefore, the absence of any evidence of bookmaking was a crucial factor in the principal case.[7] The form of the complaint, however, necessarily precluded the court's consideration of another theory of criminal liability which might have been applicable: formation of a conspiracy with the purchaser of the information.[8] It is clear that a seller cannot be made an accessory to an existing conspiracy without knowledge that others are conspiring with the buyer, even though he is aware of the buyer's intended illegal use.[9] Regardless of whether the theory advanced

3 See Kreling v. Superior Court, 18 Cal. 2d 884, 118 P.2d 470 (1941); People v. Brophy, 49 Cal. App. 2d 15, 120 P.2d 946 (1942); Hagerty v. Coleman, 133 Fla. 363, 182 So. 776 (1938); Dooley v. Coleman, 126 Fla. 203, 170 So. 722 (1936); People v. Pollack, 204 Misc. 64, 120 N.Y.S.2d 363 (Ct. Spec. Sess. 1953); People *ex rel.* Hammond v. Breen, 44 Misc. 375, 89 N.Y.S. 998 (Sup. Ct. 1904). In each of these cases, unlike the principal case, the record showed evidence of bookmaking.

4 See, *e.g.*, People v. Brophy, *supra* note 3; Dooley v. Coleman, *supra* note 3; People v. Pollack, *supra* note 3.

5 See, *e.g.*, Parsons Oil Co. v. Boyett, 44 Ark. 230 (1884); Bickel v. Sheets, 24 Ind. 1 (1865); Graves v. Johnson, 179 Mass. 53, 60 N.E. 383 (1901); Hill v. Spear, 50 N.H. 253 (1870). Exceptions may be found, but only where the illegal use contemplated is particularly heinous, such as treason. See, *e.g.*, Hanauer v. Doane, 79 U.S. 342 (1870); Tatum v. Kelly, 25 Ark. 209 (1868).

6 Statutes today invariably make the accessory a principal to the substantive offense. See Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 COLUM. L. REV. 228, 229 (1953).

7 Principal case at 940. On appeal, the court assumed that the defendant could not be convicted as an aider and abettor under § 986 in regard to the activities broadly categorized as engaging in bookmaking. Moreover, it disposed of the contention that the conduct fell within the specific prohibition against forwarding any money, thing or consideration of value, bet or wagered, which proscription is obviously aimed at those who actually record bets and hold the stakes. See text accompanying note 1 *supra*.

8 See Note, *supra* note 6, at 232. The writer arranges the prosecutions of sellers of goods for a criminal purpose into four distinct categories: (1) accessory to the substantive crime; (2) accessory to a previously existing conspiracy; (3) joining a larger conspiracy of the buyer and others by agreement; (4) forming a conspiracy with the buyer. The first three categories would appear to be inapplicable here, since there was no evidence of bookmaking and no showing of knowledge by the seller that others were conspiring with the buyer.

9 United States v. Falcone, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

is the joining of a larger and existing conspiracy by agreement or the forming of a new conspiracy with the buyer, the courts have generally required a showing of association beyond the mere sale.[10] In *Direct Sales Co. v. United States*,[11] where a wholesale drug vendor was convicted of conspiring with a physician to violate the drug dispensing regulations of the Harrison Narcotic Act,[12] however, the requisite association was inferred from factors which were inherent in the sale itself. The defendant sold narcotics to a small-town doctor at frequent intervals, in enormous quantities over a seven-year period.[13] Coupled with this was the defendant-company's aggressive sales policy, consisting of large discounts for volume sales and extensive advertising.[14] Although the sales were open and were faithfully reported by the company, it was successfully contended that the peculiar circumstances of the sale were sufficient to show not only knowledge that the illegal use existed, but also an intent on the part of the company to further and cooperate in the illegal enterprise.[15]

It is possible to isolate certain factors which the courts have apparently considered significant in providing the nexus between mere knowledge and the requisite intent to further the illegal enterprise. Typical of these are the nature of the goods sold and their particular susceptibility to an illegal use,[16] encouragement of purchases by the conspirator,[17] failure of the seller to keep the usual records,[18] and a continuity of relationship[19] between seller and buyer. In the context of the principal case, there are factors peculiar to the typical racing wire service which arguably tend to show a conspiracy similar to that found in *Direct Sales*. First, legitimate news media do not need *instantaneous* information of the sort which was supplied by this racing wire service.[20] To the bookmaker, however, the speed with which such information is received constitutes a material element in determining the scope of his operations.[21] Second, the great disparity in

10 References to the distinction between joining a larger conspiracy and forming one with the buyer are to be found in Bacon v. United States, 127 F.2d 985 (10th Cir. 1942); United States v. Koch, 113 F.2d 982, 983 (2d Cir. 1940); United States v. Boyer, 84 F. Supp. 905, 906 (E.D. Pa. 1949).

11 319 U.S. 703 (1943).

12 INT. REV. CODE OF 1954, §§ 2553, 2554.

13 Expert testimony showed that the quantities sold, in several instances, were over 200 times the annual needs of the average doctor. Direct Sales Co. v. United States, 319 U.S. 703, 706 (1943).

14 *Id.* at 706-07.

15 *Id.* at 711. The court did recognize that a sale with knowledge of the contemplated illegal use might only show indifference or a passive acquiescence in the illegal enterprise, rather than an active intent to promote it. *Id.* at 712 n.8.

16 United States v. Tramaglino, 197 F.2d 928 (2d Cir. 1952) (sales of marihuana).

17 Bartoli v. United States, 192 F.2d 130 (4th Cir. 1951).

18 Bacon v. United States, 127 F.2d 985 (10th Cir. 1942).

19 Van Huss v. United States, 197 F.2d 120 (10th Cir. 1952).

20 It is estimated that racing results reach bookmakers in any part of the country within two minutes of the finish of a given race.

21 See S. REP. No. 307, 82d Cong., 1st Sess. 150 (1951), where the racing wire service is likened to a stockbroker's ticker. "A bookmaker who does not have the wire service cannot compete with one who has."

fees charged for such information between legitimate users (newspapers, radio, and television) and the bookmaker-subscriber, suggests that determination of fees in regard to the latter is predicated upon the nature of the bookmaking operation, rather than upon any inherent value in the service itself or in the quantity of information supplied.[22] The existence of such a premium for illegally used information supports the inference that the seller's interest does not end with the sale, but is intimately intertwined with the success of the illegal enterprise and with an expectation of sharing in its continued profits.[23] Finally, the systematic organization of distribution outlets[24] and the necessary continuity of relationship[25] negates any inference that the sales were casual or random in nature.[26] It may be contended that the *Direct Sales* theory of conspiracy with the buyer is applicable only where the nature of the commodity makes it inherently susceptible to illegal use and access to it is rigidly restricted.[27] However, the fact that the sale of racing information furnishes substantial assistance to bookmakers and that the seller is necessarily aware of this fact, indicates that extending conspiratorial criminal liability to this area may, at least in the light of *Direct Sales*,[28] indeed be possible.

The question whether criminal liability could be attached to this fringe area of the illegal bookmaking enterprise is, of course, separate and distinct from any consideration of whether it should be. Relevant to the latter inquiry is the availability of alternative solutions and their relative effectiveness. In this regard, the most direct measure would appear to be the enactment of state statutes expressly prohibiting the dissemination of racing information during specified time periods before and after a given race. Such statutes have been utilized in a few instances and have been held

22 *Ibid.* For example, while United Press International and the Associated Press pay approximately $70-80 per month for the service, the fee charged the Illinois News Service is $250,000 annually for the same information. *Id.* at 53.

23 It might be contended that this argument is not applicable to the principal case, since defendant was employed on a fixed weekly salary.

24 See S. REP. No. 307, 82d Cong., 1st Sess. 53 (1951): "The backbone of illegal bookmaking operations throughout the country is the up-to-the-minute information furnished by the Continental Press Service through its Nation-wide network of telephone and telegraph wires, and the intricate organization of distributors and subdistributors that gather and disseminate the news for Continental."

25 This factor has been stressed as determinative in a finding of criminal liability in several cases. *Compare* Van Huss v. United States, 197 F.2d 827 (6th Cir. 1942), *with* United States v. Koch, 113 F.2d 982, 983 (2d Cir. 1940).

26 In most of the cases where no conspiracy or accessoryship was found, the seller appears to have associated with the criminal enterprise only to the extent of an unsolicited sale. See, *e.g.*, Johns v. United States, 195 F.2d 77 (5th Cir. 1952); Morei v. United States, 127 F.2d 827 (6th Cir. 1942); United States v. Koch, *supra* note 25. *But cf.* Malatkofski v. United States, 179 F.2d 905, 916-17 (1st Cir. 1950).

27 This factor was stressed in Direct Sales Co. v. United States, 319 U.S. 703, 711-12 (1943).

28 MODEL PENAL CODE § 2.06(3)(b) (Tent. Draft No. 4, 1955) takes the position that knowledge of the illegal use plus knowledge that the sale will substantially facilitate the criminal purpose of the buyer, satisfies the intent requirement for purposes of criminal liability.

valid as a constitutional exercise of the state's police power.[29] In addition, there is ample precedent authorizing a denial of services by communications utilities to those engaged in furnishing such information to known bookmakers.[30] Unlike the criminal cases,[31] these decisions accept the theory that the subsequent illegal use of the information taints the entire transaction, relieving the utility of any duty to provide service.[32] Finally, Congress has exercised its power under the commerce clause to prohibit the interstate transmission of racing results and betting information by means of wire communications.[33] The availability of these measures and their potential utilization, alone or in conjunction with one another, would appear to offer the most thorough and systematic solution to the evils of the racing wire service. It is suggested that the employment of these alternative measures is preferable to judicial extension of criminal liability to the vendor of racing information, either as an accessory to the substantive crime of bookmaking, or as a conspirator.

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[29] State v. Ucciferri, 61 So. 2d 374 (Fla. 1952) (dissemination prohibited one hour before first race and until thirty minutes after official posting of the results); Parks v. Bartlett, 236 Mich. 460, 210 N.W. 492 (1926) (dissemination prohibited before race).

[30] See, *e.g.*, McBride v. Western Union, 171 F.2d 1 (9th Cir. 1948); Howard Sports Daily v. Weller, 179 Md. 355, 18 A.2d 210 (1941); Tela-News Flash v. District Attorney, 197 Misc. 1015, 96 N.Y.S.2d 338 (Sup. Ct.), *aff'd*, 277 App. Div. 1119, 101 N.Y.S.2d 245 (1950). *Contra*, Pennsylvania Publications v. Pennsylvania Util. Comm'n, 349 Pa. 184, 36 A.2d 777 (1944), in which it was held that since furnishing racing information was not illegal, the utility was not justified in denying service merely because the subsequent use was illegal.

[31] See cases cited note 3 *supra*.

[32] These cases find a right in the utility to refuse service which may be connected with illegal operations, when that service "would have the effect of promoting illegality, even though the company might not be liable to punishment for rendering the service." Howard Sports Daily v. Weller, 179 Md. 355, 360, 18 A.2d 210, 214 (1941).

[33] 18 U.S.C. § 1084(a) (1961) prohibits the knowing use of wire communications for interstate transmission of "information assisting in the placing of bets or wagers on any sporting event or contest. . . ." Information for use in news reporting and those transmissions between states where off-track betting is legal are exempted from the ban.