THE **STATE v. FAULKNER**, Appellant.

SUPREME COURT OF MISSOURI, DIVISION TWO
175 Mo. 546; 75 S.W. 116; 1903 Mo. LEXIS 78
June 9, 1903, Decided

[Excerpt only. Emphasis (bold text) added by Schafer. 9/3/2001.]

Appeal from St. Louis City Circuit Court. -- Hon. Walter B. Douglas, Judge.

[*553] [**118] GANTT, P. J. -- At the December term, 1901, of the circuit court of the city of St. Louis for the disposition of criminal causes, to-wit, Division number 8 of said court, the grand jury, summoned from the body of said city, in open court preferred the following indictment against Harry A. Faulkner:

"State of Missouri, City of St. Louis, ss.

"Circuit Court, City of St. Louis, December Term, 1901.

"The grand jurors of the State of Missouri, within and for the body of the city of St. Louis, now here in court, duly impaneled, sworn and charged, upon their oath present, that at the said city of St. Louis, on the 31st day of January in the year one thousand nine hundred and two, and during the December term, one thousand nine hundred and one, of said court, the grand jury of the State of Missouri, within and for the body of the city of St. Louis were then and there duly and legally convened, having been then and there duly and legally impaneled, sworn upon their oath and charged according to law in Division No. 8 of said court, and that a certain complaint was then and there made and presented before said grand jury against one Charles Kratz, and one John K. Murrell, and other persons, for the offense of bribery committed by the said John K. Murrell, Charles Kratz and others in said city of St. Louis, and that in the investigation and hearing of said complaint before said grand jury, so impaneled and sworn as aforesaid, it developed that in October and November, in the year one thousand and nine hundred, [*554] there was pending in the Municipal Assembly of the city of St. Louis, consisting of a City Council and a House of Delegates, an ordinance known as Council Bill No. 44, and commonly known as the Suburban Railway Bill, same being a measure giving and granting to the St. Louis & Suburban Railway Company, a railroad corporation, certain rights, privileges and franchises, that one, John K. Murrell, was at said time a member of said House of Delegates, and that one, Charles Kratz, was at said time a member of said City Council, and that one, Philip Stock, was employed by said St. Louis & Suburban Railway Company, a corporation as aforesaid, to secure the passage of said ordinance by said Municipal Assembly, and that on or about November 30, 1900, the said John K. Murrell, member of the House of Delegates as aforesaid, went to said Philip Stock and stated that unless a large sum of money, to-wit, seventy-five thousand dollars, should be put up for the use and benefit of said House of Delegates, the said ordinance would not be passed by the said House of Delegates, but that if said Philip Stock, agent of the said St. Louis & Suburban Railway Company, would place with said John K. Murrell, the said sum of seventy-five thousand dollars, said ordiance

would pass said House of Delegates, and after some conferences the said Philip Stock and the said John K. Murrell went to the Lincoln Trust Company, a corporation, with offices at number 700 Chestnut street, in what is known as the Lincoln Trust Building, and there said Philip Stock, in the presence of said John K. Murrell, deposited in lock box numbered one hundred and thirty-two, of the safe deposit vaults of the said Lincoln Trust Company, the sum of seventy-five thousand dollars, there being two keys to said box, said Philip Stock holding one key and the said John K. Murrell holding the other key, and that the said sum of money was deposited with the express understanding between said Philip Stock and said John K. Murrell [*555] that upon said ordinance being passed by the House of Delegates, the City Council, and signed by the Mayor, the said sum of money would be turned over to the said John K. Murrell for his own use and benefit, and for the use and benefit of the other members of the House of Delegates he claimed to represent. That in said investigation one, Harry A. Faulkner, was duly summoned as a witness, and did then and there personally appear as a witness before said grand jury in regard to said complaint; that the said Harry A. Faulkner was then and there duly sworn by the foreman of the said grand jury and took upon himself his corporal oath, the said foreman, to-wit, one William H. Lee, being then and there duly and legally authorized and empowered, and having competent authority to administer the said oath to the said Harry A. Faulkner, and that then and there it became important and was material to the issue and to the investigation of said complaint by the said grand jury, whether the said Harry A. Faulkner had any knowledge or information of the existence of said sum of seventy-five thousand dollars, and of the purpose for which it was to be applied:

"And then and there he, the said Harry A. Faulkner, on his corporal oath and before the said grand jury, did feloniously, falsely, corruptly, knowingly, willfully, and maliciously depose and swear in substance and to the effect following: that he did not know nor had he ever heard of the existence of the said seventy-five thousand [**119] dollars deposited in the Lincoln Trust Company as aforesaid for the purpose of influencing, or bribing or corrupting any member of the House of Delegates for his vote or influence in the passage of said ordinance; whereas, in truth, and in fact, he, the said Harry A. Faulkner, then and there well knew of the existence of the said sum of seventy-five thousand dollars, and that said sum of seventy-five thousand dollars was deposited in a box in this safe deposit vault of said Lincoln Trust Company as a bribe [*556] to be paid to the said John K. Murrell and other members of the House of Delegates whom he claimed to repent, to influence their votes for and in favor of the passage and enactment of the said ordinance in the said House of Delegates; and so the grand jurors aforesaid, upon their oath aforesaid do say, that the said Harry A. Faulkner, at the city of St. Louis aforesaid, on the thirty-first day of January aforesaid, in the year aforesaid, in the manner and form aforesaid, feloniously, falsely, knowingly, willfully and corruptly committed willful and corrupt perjury contrary to the form of the statute and against the peace and dignity of the State."

The defendant was arrested and was duly arraigned and pleaded not guilty and was tried at the June term, 1902, and convicted and his punishment assessed at two years in the state penitentiary. After unsuccessful motions for a new trial and in arrest of judgment, he was duly sentenced, and from that judgment and sentence he has appealed to this court.

[Text omitted here from page [*556] to [*593].]

VII.

But again, **it is insisted that Lehman's statement to Reiss was a privileged communication by a client to his attorney. To which contention the State answers, it was not privileged, because Lehman was attempting to have Reiss further the crime of bribery, and become accessory after the fact to that crime.** The defendant replies that it is only those communications made by the client to his attorney before the commission of the crime for the purpose of being guided and helped in the commission of it, that are not privileged and that in this case the crime was complete, to-wit, the criminal agreement to vote for the passage of the Suburban bill before Lehman consulted Reiss and the conspiracy ended. The evidence of Reiss was that **Lehman attempted to get Reiss to undertake to bring about a settlement for the seventy-five thousand dollars or part of it, which Stock had deposited in the Lincoln Trust Company for "the boys," himself among the number. In a word, it was an effort to employ Reiss to secure the fruits of a promised bribe which had not yet been realized.** The general rule, both in England and in the United States, is well summed up in Chrisler v. Garland, 11 S. & M. 136, as follows: "Communications from clients to attorneys are privileged on the ground of public policy, with a view to the safe and pure administration of justice. The protection is not qualified by any reference to proceedings pending or in contemplation. It is adopted out of regard to the interests of justice, and from the necessity of free and unrestrained intercourse between counsel and client. It is better, in our judgment, to adhere to the rule, in a broad and liberal sense, than to weaken its force by exceptions." This is a fair [*594] statement of the law in civil cases, and also in regard to communications made by a client to his attorney in the defense of a criminal prosecution, but there is an exception as broad as the rule itself, to-wit, **communications made by a client to an attorney before the commission of a crime and for the purpose of being guided or helped in its commission are not privileged. In Queen v. Cox, 14 L. R. Q. B. D. 153, all the English decisions on this question received the most careful consideration of the ten judges of the High Court of Justice, and the opinion was delivered by Mr. Justice Stephen, with the full concurrence of all the justices.** The three rules deduced and affirmed from these authorities are tersely stated by Judge Hurt, in Orman v. The State, 22 Texas Court of Appeals 604, loc. cit. 616:

"First. **To be privileged the communications must pass between the client and his attorney in professional confidence and in the legitimate course of professional employment of the attorney.**

"Second. If the communications are by the client made to the attorney before the commission of the crime, and for the purpose of being guided or helped in its commission, they are not privileged.

"Third. Nor does the fact that the attorney was wholly without blame in any particular whatever affect the second rule."

Measuring the communication made by Lehman to Reiss by this first rule, it is entirely plain that Lehman was not consulting Reiss for the purpose of defending him against a pending or anticipated prosecution for the bribery disclosed. Was it a communication by a client to his attorney in professional confidence "in the legitimate course of professional employment of the attorney?"

Section [**132] 4659, Revised Statutes 1899, which renders an attorney incompetent to testify "concerning any communication made to him by his client in that relation, [*595] or his advice thereon, without the consent of such client," is merely declaratory of the common law, and in no manner affects the exceptions to the general rule excluding such communications. This court has ruled that the rule does not extend to nor shelter advice concerning or assistance in proposed infractions of the law. [Hickman v. Green, 123 Mo. loc. cit. 165, 27 S.W. 440.]

Lord Brougham's statement of the rule at common law, in Greenough v. Gaskell, 1 M. & K. 101, is generally accepted: "If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the paper in any court of law or equity, either as a party or a witness." This is accepted by Greenleaf as the correct statement of the rule. [1 Greenleaf, sec. 237.]

But, as said by Judge Stephen, it has no reference to communications by a client to his attorney in furtherance of a crime or fraud.

The reason on which the rule rests, is that "it is out of regard to the interests of justice, which can not be upholden, and the administration of justice which can not go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." But, as said by the same learned judge in Queen v. Cox, 14 L. R. Q. B. D. loc. cit. 167, "the reason on which the rule is said to rest can not include the case of communications, criminal in themselves, or intended to further any criminal purpose, [*596] for the protection of such communications can not possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not 'come into the ordinary scope of professional employment.'"

The eminent judge then remarks that Lord Brougham did not have the exception as to communications criminal in themselves, or intended to further any criminal purpose before him, or he would have noted them as exceptions, but remarks that the caution with which he worded the principle has the same effect.

Proceeding in the examination of the point under consideration, he comments upon Gartside v. Outram, 26 L. J. (Ch.) 113, decided by Lord Hatherly, then Sir W. Page Wood. In that case certain wool-brokers sought to restrain a man who had been their sale clerk from disclosing their transactions. He replied they were fraudulent. The vice-chancellor said: "Confidential communications involving fraud are not privileged from disclosure. ... The true doctrine is, that there is no confidence as to the disclosure of iniquity. You can not make me the confident

of a crime or a fraud, and be entitled to close up my lips upon a secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence can not exist," and quotes as his own, this language of Sergeant Tisdal: "If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligation can dispense with the universal one which lies on every member of society to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare." To the same effect is Regina v. Orton, Cockburn, C. J., Shorthand Notes, vol. 3, p. 9381.

[*597] Applying the foregoing principles to the case in hand, we may confidently assert by way of exclusion: First. Lehman had not and was not endeavoring to employ Reiss to defend him against a pending or anticipated prosecution for bribery. Second. This communication was not made by Lehman to Reiss before the commission of the bribery and for the purpose of being guided or helped in its commission, because at that time the bribery was complete, since according to Reiss, Lehman and his associates had, under an agreement with Stock, already agreed to give their votes for the passage of the Suburban bill, in consideration of the promise of the $75,000 deposited in the trust company, and were just as guilty as if each of them had received his pro rata share thereof. Third. If the communication was not privileged it must be because it did not come within the protection of the rule itself which renders a communication between attorney and client privileged only when made between them in professional confidence and in the legitimate course of professional employment of the attorney.

In a most admirable discussion of this question by Judge Ellison in Hamil & Co. v. England, 50 Mo. App. 338 (Kansas City Court of Appeals), it is said that there is now no substantial disagreement of what the rule is, but the difficulty is in the application of the terms "ordinary scope of professional employment" and "professional capacity." The rule does not exclude all that passes between client and attorney, but that only which passes between them in professional confidence.

So that so far as this particular case is concerned, the admissibility of the testimony of Reiss depends upon whether Lehman's statement to him of the deposit of $75,000 for "the boys," alias certain [**133] members of the House of Delegates, including himself, and seeking Reiss's assistance in adjusting a compromise, so that he and his associates could get their bribe, can be [*598] said to fall within the ordinary scope of the professional employment of attorneys at law.

Everywhere the English and American courts have, in true professional pride, pronounced that it is no part of an attorney's employment to advise or hold professional communications as to the manner of committing a felony or fraud, nor to devise means to avoid the punishment which such conduct justly merits. As said by Mr. Justice Stephen, with the concurrence of all the English Judges, in Queen v. Cox, 14 L. R. Q. B. D. 153, "if his criminal object is avowed, the client does not consult his adviser professionally, because it can not be the solicitor's business to further any criminal object."

Conceding that the crime of bribery was complete, so far as the criminal agreement to pass the

ordinance in consideration of the $75,000 was concerned, it is plain that the proposition of Lehman to Reiss was to aid in obtaining the promised bribe which was being withheld by Stock, and was no less iniquitous and degrading so far as the attorney was concerned, than if his aid had been sought in the first instance. Lehman knew and was bound to know, and Reiss the attorney knew, that Lehman's claim against Stock or the Suburban company was one which no attorney could enforce in any court. No judicial tribunal would have listened to such a proposition for an instant, and the attorney advancing it would have deserved disbarment.

It was a bald offer to divide the fruits of crime with the attorney, if the latter could secure them. Lehman seems to have fully appreciated this, because he only asked Reiss to bring about a compromise with Stock, well knowing, as he must be presumed to know, that **such a retainer was not, and could not fall within the scope of the legitimate professional employment.** Indeed, he prefaces his communication with the suggestion that "now that you have been elected a member of the House of Delegates you can be of considerable [*599] service to me and my friends in the House of Delegates." It was not as attorney that he desired his services, but as a member of the House of Delegates, a position which he supposed would readily secure him consideration at the hands of Stock or those whose representative he was.

But conceding that Lehman intended to employ Reiss because he was attorney at law to secure the corrupt fund deposited to pay him and his associates for their votes in passing the bill, **can it be held to be a professional communication to Reiss in a professional capacity? Wherein does it differ in its iniquity from a communication made with reference to a proposed infraction of the law? We have seen that it is now the settled law that the latter is not privileged, and the former differs merely in degree. In each case the attorney is consulted as to a matter which in no lawful sense is a matter of professional duty. He can no more be employed to assist one criminal in requiring or inducing his confederate in crime to disgorge the price of his crime, than to advise and devise means for executing it in the first instance. Neither being a matter in which there can be professional confidence, and neither within the scope of professional employment, neither is privileged.**

It follows that this objection, so far as Lehman was concerned, was not tenable, but the statement should have been excluded on Faulkner's objection, because in the absence of proof of a conspiracy between this defendant and Lehman and Murrell and others to pass the bill in consideration of the bribe and made in the absence of this defendant, it was hearsay and inadmissible.

[The remainder of this written opinion, that continued through page [*618] , is omitted. The other justices on the panel all joined in the opinion.]