

1968

## William Gibson McLaughlin and Dennis Becker : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM GIBSON McLAUGHLIN  
and HEINIS LECKER,

:

Appellants,

:

-vs-

:

Case No. 11305

STATE OF UTAH,

:

Respondents.

:

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BRIEF OF APPELLANT

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An Appeal From the Judgment of the  
District Court of the Fifth Judicial  
District, the Honorable C. Nelson  
Day, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM GIBSON McLAUGHLIN  
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BRIEF OF APPELLANT  
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STATEMENT OF NATURE OF CASE

The appellants, William Gibson McLaughlin and Dennis Becker, were convicted of the crime of willfully and maliciously breaking into a coin box associated with a public telephone instrument in violation of Section 76-48-28 U.C.A., 1953, as amended and appeal to this court from their conviction.

DISPOSITION IN LOWER COURT

The appellants were charged by information of a felony of willful and malicious damage to a public utility. They entered pleas of not guilty. The defendants waived their right to jury trial and the matter came on regularly for hearing before the Honorable C. Nelson Day, Judge of

the District Court of the Fifth Judicial District, Washington County, State of Utah. At the close of the state's evidence a motion to dismiss was made and denied. Both defendants were found guilty of the offense charged and committed to the Utah State Prison.

#### RELIEF SOUGHT ON APPEAL

Appellants seek reversal and remand for new trial.

#### STATEMENT OF THE FACTS

About 5:30 A.M. of the 8th of May, 1967, two young men were observed tampering with a telephone near the store of Mr. Quentin A. Nisson in Washington, Utah. Mr. Nisson observed the incident from his bedroom window approximately 68 feet from the booth. He observed two young men, he testified, "one was dressed in blue and he was completely in blue pants, that is, dark pants and dark shirt, was inside the booth and he was up to the telephone working, not trying to phone, but in the act of trying to get the telephone off, because I could see objects in his hands", the other man was outside the phone booth and had objects in his hands. (TR. 58-59). A car was parked near by and Mr. Nisson testified that the car was a dark car with round tail lights, but he was unable to determine the color of the car or type of license plate; he did

indicate that the car was a dark color. (TR. 60,68). The telephone booth was artificially illuminated from within and the area in the vicinity of the booth was lighted by a street light. Mr. Nisson made these observations in approximately one-half minute. (TR. 73).

Mr. Nisson notified the Highway Patrol of the incident by calling the Utah Highway Patrol Station about two miles from his home; while still in contact with the station on the telephone, Mr. Nisson was informed that a car had been stopped and was asked to go out to the place where the car was stopped. The car, occupied by Bonnie Jean Winget, Barbara Galloway, William Gibson McLaughlin and Dennis Becker, was stopped approximately one and a quarter miles from the Nisson store. When Mr. Nisson arrived at the scene where the car was stopped, Officer Pfoutz had the two men at gun point at the back of their car. Mr. Nisson identified the defendants as being the same two men he saw in and around the telephone booth. (TR. 63). At trial, Mr. Nisson identified the defendants as being the same persons he had seen at the scene of the crime and later, one and a quarter miles down the road at the point of Officer Pfoutz gun. (TR. 65).

Officer Joseph A. Pfoutz, city policeman for the City of St. George, put the defendants and their two women

companions under arrest. The defendants were taken to the St. George City Jail where they were given the Miranda warning. At the time of trial, the prosecution presented evidence to the effect that after the defendants were given a Miranda warning they requested an attorney: (TR. 96-97)

"Q. Were all of the defendants present at the time you overheard officer Whitehead advise them of their rights?

A. Yes, sir, I believe so, yes, sir.

Q. What happened next?

A. The two gentlemen indicated that they didn't--

MR. PICKETT: Just a minute. We object to any indication or interpretation, any indications.

Q. (By Mr. Burns) State what you did.

THE COURT: Mr. Witness, when you say they indicated, why, that's your conclusion as to what they did. You may state the substance of what they said. No one will expect you to remember their exact language at this time, unless it was taken down electronically or like the Court Reporter is doing it now; but you may state in substance what was said, if you remember.

THE WITNESS: They said that--didn't say a heck of a lot. They did want an attorney.

MR. PICKETT: Now, just a minute, your Honor, when they say there are four of them, we would like to know--

MR. BURNS: May I withdraw the question, your Honor? I withdraw the last question and will move forward in a different area.

THE COURT: His answer may stand that they



wanted an attorney, that was all. That's the substance of what he was going to say, anyway." (Emphasis added)

On or about the 18th of May, 1967, an incident occurred in the Washington County Jail, St. George, Utah, where the defendants, McLaughlin and Becker, were incarcerated waiting trial. According to the testimony of Officer Joseph A. Pfoutz, defendant McLaughlin made an admission against his own interest; to the effect that they hadn't broken into the box maliciously, they had done it for money. Officer Joseph A. Pfoutz identified the declarant to be William Gibson McLaughlin, though Mr. McLaughlin was located in a different room of the jail and could not be seen by Mr. Pfoutz at the time the statement was heard. (TR. 99-102). Testimony of Officer Pfoutz is set forth below:

"Q. Now, state what happened.

A. Mr. Becker was awake when I went into the jail. He asked me if I had a cigarette. I opened the main door, walked back into the section, handed him a cigarette.

Q. What happened, then?

A. I walked back outside and locked the door, picked up a piece of paper that was on a table in the room there.

Q. What happened next?

A. Mr. Becker spoke up. Apparently he had placed the book out there, thrown the book out there, a pocket book. He asked or told me that

if I had picked up that book, that it wasn't any good, that he had already read the book and it wasn't worth reading.

Q. What did you say?

A. I told him that I hadn't picked up the book, that I had picked up the complaint and the warrant that had been sworn out against them.

Q. And what did he say?

A. He said--I don't remember exactly.

Q. As near as you can recall, what did Dennis Becker say?

A. He asked me what it said. I am not positive on this. He asked me what it said and I began to read it out loud.

MR. PICKETT: The book or the complaint?

THE WITNESS: Pardon me.

MR. PICKETT: The book or the complaint?

THE WITNESS: The complaint.

Q. (By Mr. Burns) What did he say?

A. I was reading and I just got started, and as I got to the part, "Did willfully and maliciously break into a coin box," Mr. McLaughlin spoke up and stated that they hadn't broken into this box maliciously. They had done it for money.

Q. Could you distinguish their voices?

A. Yes, sir.

Q. Had you talked to them before?

A. Yes, sir.

Q. And you recognized the voice saying they had done it for money as that of William Gibson McLaughlin, is that correct?

A. Yes, sir.

MR. BURNS: I have nothing further of this witness."

Defendant Dennis Becker was in the portion of the jail referred to as the tank with defendant McLaughlin when the statement to the effect that they had done it for money was made by defendant McLaughlin; Becker did not deny the assertion or make any other comment about McLaughlin's statement. (TR. 99).

#### POINT I

THE ADMISSION INTO EVIDENCE OF THE FACT THAT THE DEFENDANTS ASKED FOR AN ATTORNEY AFTER BEING GIVEN A PRE-INTERROGATION WARNING WAS AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS.

Officer Joseph A. Pfoutz testified that the defendant Dennis Becker and defendant William Gibson McLaughlin were given a pre-interrogation warning and in response to that warning they requested an attorney. The law is clear that tacit admissions either by remaining silent in the face of accusation or requesting an attorney in the face of accusation cannot be used against the defendant as a means of penalizing a defendant for exercising his Fifth Amendment privilege. Dennis Becker and William McLaughlin were exercising their Fifth Amendment privilege when they

requested an attorney. When the prosecution introduced the testimony of Officer Pfoutz, that defendants requested an attorney, the defendants' constitutional rights were violated.

In United States v. Brierly, 267 F. Supp. 274 (E.D. Pa., 1967), held that a tacit admission is involuntary per se and its use is thus barred by the Due Process Clause of the Fourteenth Amendment. The court stated, "we think that neither this Circuit nor the Supreme Court would sustain the validity of a tacit admission as evidence in any criminal proceeding, . . ."

In Gamble v. State, 210 So. 2d 238 (Fla. 1968), the court reached the same conclusion:

"In view of the Miranda case it would not be permissible to penalize a defendant for exercising his Fifth Amendment privilege when he was under police custodial interrogation by permitting the prosecution to use at trial the fact that he remained silent in the face of an accusation."

Clearly an expression of a desire to have an attorney is a Fifth Amendment privilege of equal weight and should not be used by the prosecutor for the purpose of creating a negative inference of guilt.

The fact that testimony was given to the effect that defendants, Becker and McLaughlin, requested an attorney was a denial of their constitutional right to a fair trial

and a denial of due process of the law. Further, the trial court expressly indicated the testimony could remain in evidence in spite of defense objection. Thus the court apparently weighed its judgment on the erroneous evidence. Introduction of such testimony is prejudicial and results in an unfair trial because it reflects upon the question of guilt of the defendants. Clearly there can be an inference of guilt when an individual requests an attorney after receiving a pre-interrogation warning since some would conclude, no matter how erroneously, that only a guilty person would feel that he might make incriminating statements without the aid of an attorney. Miranda v. State of Arizona, 384 U.S. 436, 1602, (1966), closes the door to the admissibility of such testimony. Footnote thirty-seven of the Court's opinion in Miranda states:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

See also Griffin v. California, 380 U.S. 609 (1965);

Chapman v. California, 386 U.S. 609 (1967).

People v. Hansard, 53 Cal. Rptr. 918 (1966) supports this view. In that case an officer was allowed to testify

to the fact that at one point in the interrogation the defendant stated that he thought he had better talk to his attorney before stating anything further, the court found that the statement was an implied admission of guilt by silence when the defendant was exercising his constitutional right under People v. Dorado, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965). In the Hansard case, supra, the court said, "The accused's constitutional right to remain silent and to consult with an attorney cannot be exploited to his disadvantage by conversion into an inference of guilty consciousness \* \* \*."

Since the prosecution had no intention of introducing statements obtained as a result of interrogation of the defendants, the circumstances under which the testimony that the defendants requested an attorney was introduced must have been to demonstrate the resulting inference of consciousness of guilt. In the Hansard case, supra, the court found that admission of testimony to the effect that defendant thought he had better talk to an attorney strictly for the purpose of suggesting to the jury an indication of defendant's consciousness of guilt was erroneous. Since the error was of constitutional proportions reversal is required unless it can be said that the error was harmless "beyond a reasonable doubt."

When the facts in this case are examined against the proper standard it is clear upon the record that admission of the statement that defendants requested an attorney after being given a pre-interrogation warning was a prejudicial error requiring a new trial. The evidence absent introduction of this testimony is insufficient to obtain a conviction of either one or both of the defendants. The evidence against defendants Becker and McLaughlin is meager. Mr. Nisson's identification is questionable. He was sixty-eight feet away from the phone booth when he observed one man tampering with the phone, and one outside holding an object, he only observed their activity for about thirty seconds, he was unable to recognize the color of the car or even the origin or color of its license plate, it was dark outside except for the artificial illumination of the phone booth and a street light, and yet he testified that he recognized the defendants in court as being the defendants he saw tampering with the phone. It is much more likely that Mr. Nisson recognized the defendants Becker and McLaughlin because they were the same persons he observed at the point of Officer Pfoutz gun. It is very likely that Mr. Nisson converted the incriminating factors of observing the defendants, Becker and McLaughlin, at the point of Officer Pfoutz gun, a mile

and a quarter from the scene of the crime, into absolute positive identification of the two young men. It was too dark for Mr. Nicson to determine the color of an automobile or whether it had a light or dark top, and therefore, it seems likely that it was equally too dark to positively identify a person or persons at a distance of sixty-eight feet under identical lighting conditions.

Another factor this court must consider in determining whether the error of admitting this testimony in, was prejudicial, is whether the trial judge considered this evidence in deciding the guilt of the defendants. The record shows that the trial judge did consider this evidence significant since he allowed into evidence the testimony of Officer Pfoutz even after the question had been withdrawn. (TR. 97).

Since it is evident from the record that the trial judge considered the testimony of Officer Pfoutz that defendants requested an attorney and since the other evidence against the defendants was somewhat weak it cannot be said beyond a reasonable doubt that the error did not affect the trial court's judgment.

## POINT II

INTRODUCTION INTO EVIDENCE OF AN ADMISSION  
OF DEFENDANT, WILLIAM GIBSON McLAUGHLIN,  
WAS PREJUDICIAL ERROR AS TO DENNIS BECKER



AND A VIOLATION OF HIS CONSTITUTIONAL RIGHT  
TO CONFRONTATION AND WAS PREJUDICIAL ERROR.

Officer Joseph A. Pfoutz testified that on the eighteenth of May he heard defendant McLaughlin say that they hadn't committed the offense maliciously, they had committed it for money. It was prejudicial error to allow this testimony into evidence against both defendants for two reasons. First, the United States Supreme Court established the rule applicable to this case in Bruton v. United States, 88 S. Ct. 1620 (1968). In that case the court held that oral statements made by one defendant which incriminated both defendants were admissible as an exception to the hearsay rule as against the defendant making the statement but could not be used against his co-defendant. The court held that "admission of Evans' confession in [a] joint trial violated [Bruton's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." Even though the Bruton case was a jury tried case, the policy used in that case is applicable in this case. To demonstrate the strength of the desire to protect an individual's right to the protection of the confrontation clause, it should be pointed out that the Supreme Court of the United States found prejudicial error even though the trial court gave

clear, concise and understandable instruction that the confession could only be used against the declarant and must be disregarded with respect to the declarant's co-defendant.

It may be argued that the Bruton decision should not apply since Dennis Becker was in the same room as the declarant, William G. McLaughlin, when the admission was made, and Dennis Becker did not object or deny the admission. This is the second basis of error. The Utah law is clear on this point. In State v. Farnsworth, 14 Utah 2d 303, 383 P.2d 489 (1963), this court found prejudicial error where the trial court admitted testimony of an alleged accomplice's brother who occupied cell with defendant, that in presence of defendant, the accomplice told his brother that they could only be charged with receiving and the defendant remained silent. The facts of the Farnsworth case and those currently before the Court are virtually identical and the instant case is indistinguishable from Farnsworth. Therefore, though Dennis Becker was in the same room as William Gibson McLaughlin, Becker's failure to deny the incriminatory statement of his co-defendant could not be used against him as a tacit admission.

This is not a harsh or unusual burden to place on the State. Under traditional rules of evidence the hearsay statement inculpatng Dennis Becker is clearly inadmissible. There is no recognized exception to the hearsay rule insofar as Dennis Becker is concerned and therefore any violation of the hearsay rule raises questions under the Confrontation Clause. A defendant's constitutional right to be confronted with the witnesses against him includes the right to cross-examine those witnesses; this right is a fundamental right and is made obligatory on the states by the Fourteenth Amendment. See Pointer v. State of Texas, 380 U.S. 400, (1965). In the present case, it is obvious that William McLaughlin's statement of May 18, 1967, that they "hadn't done it maliciously they had done it for money," was a substantial admission. To the extent it was used by the trial court against Becker, his constitutional rights were violated as well as prejudicial error committed under prior case law of this State. Reversal as to Becker is required.

#### CONCLUSION

The trial court's apparent consideration of the evidence, that the appellants upon being given the Miranda warning requested counsel, requires reversal and a new trial. Chapman v. California, supra.

The admission into evidence of the admission made by McLaughlin against Becker either directly or tacitly claiming Becker's silence to be an admission against himself requires reversal of the case and a new trial for Becker.

This court should reverse.

Respectfully submitted,

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