Journal of Criminal Law and Criminology

Volume 50
Issue 3 *September-October*

Article 3

Fall 1959

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A NEW WEAPON AGAINST CONFIDENCE GAMES

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The author is First Assistant Attorney General of the State of Montana. His article is based upon a decision which has stood unaltered since it was rendered. Mr. Crowley believes there will be no change in the law in the near future since "confidence games in Montana seem to have vanished."—EDITOR.

For over ten years the law enforcement officers of southwestern Montana were harassed by a swindling operation so carefully planned and executed that it was apparently immune from the law. It was finally stopped in the summer of 1957 by a prosecution that completely changed Montana confidence game law. The method was specialized to deal with a rare kind of operation, but can be useful in a much wider area.

A swindle is usually a success only if the swindler can disappear quickly and successfully afterward. This operation depended on the disappearance of the victims, and it was so successful in choosing the right victims that it operated almost without interruption for over ten summers.

Although it took in as much as a thousand dollars a day, this confidence game looked like anything but a big money swindle. It operated in a shabby animal display beside a state highway leading to the west entrance of Yellowstone National Park. The scheme was merely a version of the old carnival "count-store", a small "gambling" game where bets must constantly be doubled. Only by getting a winning number (which never appears) can the victim, once started, retrieve his money. When all his funds are gone he is eased out to make room for a successor. It seems ridiculous in the middle of the twentieth century, but this simple swindle was over-supplied with customers throughout the tourist season and many travelers never saw Yellowstone Park.

The scheme prospered by the judicious choice of victims. Only tourists from over a thousand miles away were taken, and among them only families with a single male in the group. While the women and children looked at the animals, the head of the house was deftly steered into a small shed, separated from his money, and sent on his way. If any victim turned back toward the county seat and the authorities, operations were suspended.

Most victims continued on to the next town before admitting even to themselves that they had been swindled. By this time they were in another county, at least sixty miles from any court having jurisdiction. Few ever returned to make complaint. Of these, none was ever willing to stay long enough to be a witness in a criminal prosecution, or to return when the case could be brought to trial. Many criminal complaints were filed, but every action failed for lack of witnesses.

There was a great deal of doubt whether a conviction could have been secured even if the witnesses were available. The operation involved a good deal of sleight of hand. The average victim was morally certain that he had been defrauded but could give no adequate description of the way in which it was done.

CHARACTERISTICS OF THE LAW

In any other type of crime the obvious remedy would have been to send investigators to the scene to gather the necessary evidence, but the peculiarities of the laws governing confidence games absolutely ruled this out. A short summary of the peculiarities will show why.

Montana's confidence game statute is similar to those in effect in the other states. It provides that:

> "Every person who obtains or attempts to obtain from another any money or property, by means or use of brace faro, or any false or worthless checks, or by any other means, artifice, device, instrument or pretense, commonly called confidence games or bunco, is punishable by imprisonment in the state prison not exceeding ten years."[1]

The courts in construing this type of statute have held that the distinctive feature of a "confidence game" is the fact that the scheme can operate only by gaining the victim's confidence. This, the

[1] Section 94-1806, Revised Codes of Montana, 1947.

courts have said, is the test: If the criminal actually gains the victim's confidence, and, by an abuse of that confidence, secures his money, the law is violated. Unless the confidence is gained, the offense may be a crime but it is not the crime of confidence game.[2]

This rule was apparently adopted in the beginning as a handy way of distinguishing between confidence games and the allied crime of obtaining money by false pretenses,[3] but it soon became an iron-clad requirement.[4] This is the only field of criminal law where the state of mind of the victim is an essential element of the offense.[5] The rule is not founded upon logic, but it has become embedded in the law and has been carried to extreme lengths by the courts.

To prove the crime of confidence game, the courts hold, it is not sufficient to show merely that the defendant has gained the confidence of the victim. He must have gained it originally with a felonious intent.[6] If the victim's confidence is gained by a series of honest transactions, and then misused, there is no crime of confidence game.[7] Again, the confidence of the victim in the swindler must be full and complete. The fact that the victim parted with money or property is not enough. In the case of State vs. Allen[8] the Montana Supreme Court reversed the conviction of a man who had secured a diamond ring from an elderly woman by promising her a monthly income of $200.00 from his oil properties. At one point during very lengthy testimony the woman testified that "... in a way I didn't believe him," and that she "was afraid he was crooked." Although she later clarified the issue by stating that her suspicions were not aroused until after she had parted with the ring, the court held her confidence had not been sufficient to make the defendant guilty of the crime of confidence game.

As a further stumbling block, if the victim is sufficiently skeptical to make an investigation at any stage of the transaction, even though completely unsuccessful, the prosecution is usually foreclosed.[9]

All of these restrictions apparently attach even if the charge is attempting to obtain money by confidence game, rather than the completed crime. The victim's confidence must be obtained, or there is no attempt.[10]

These were the difficulties that blocked a successful prosecution of the "free zoo" racket. Ten years of effort had not produced a single usable witness among the victims, and the evidence of investigators would be inadmissible because they did not have confidence in the operators of the game.

Affairs stood at this point when a member of the Montana Attorney General's staff, doing research for some gambling prosecutions, noticed this statute among the code provisions on gambling:

> "Every person who uses or deals with or wins any money or property by the use of brace-faro, or of any two-card faro-box, or any brace roulette-wheel or roulette-table, or any brace apparatus, or with loaded dice or with marked cards, or by any game commonly known as a confidence game or bunco, is punishable by imprisonment in the state prison not exceeding five years."[11]

The section is almost identical with the "bunco" statute.[12] The difference lies in its prohibition against use of any confidence game. The statute had not been tested since its enactment in 1907, but the title of the original act recited the intention "... To Prohibit Certain Games ..."[13] The punishment for violation was only half that provided by the bunco statute—five years. This also indicated that a different criminal act was to be prohibited.

The title and wording of the act was hardly sufficient to convince a court that the historic requirements of confidence game law should not apply. However, we believed that we might be able to show that the statute, in prohibiting the

[2] State vs. Moran, 56 Mont. 94, 182 Pac. 110 (1919); State vs. Allen, 128 Mont. 306, 275 Pac. (2d) 200, (1954); State vs. Pickett, 174 Mo. 663, 74 S.W. 844 (1903); People vs. Poindexter, 243 Ill. 68, 90 N.E. 261 (1909).

[3] See State vs. Allen, note 2, supra, at p. 308.

[4] The rule was stated as early as 1868 in the case of Morton vs. People, 47 Ill. 468 and was firmly entrenched at the time of the decision in Maxwell vs. People, 158 Ill. 248, 41 N.E. 995 (1895).

[5] For an excellent discussion see ATWELL, *The Confidence Game in Illinois*, 49 NORTHWESTERN UNIVERSITY LAW REVIEW 737, p. 743, et seq.

[6] People vs. Massie, 311 Ill. 319, 142 N.E. 503 (1924); People vs. Heinsius, 319 Ill. 168, 143 N.E. 783 (1925).

[7] People vs. Gould, 363 Ill. 348, 2 N.E. (2d) 324 (1936); People vs. Snyder 327 Ill. 402, 158 N.E. 677 (1927).

[8] 128 Mont. 306, 275 Pac. (2d) 200 (1954).

[9] People vs. Robinson, 299 Ill. 617, 132 N.E. 803 (1921).

[10] People vs. Peers, 307 Ill. 534, 139 N.E. 13 (1923).

[11] Section 94-2406, Revised Codes of Montana, 1947.

[12] Section 94-1806, Revised Codes of Montana, 1947.

[13] Chapter 115, Laws of 1907.

mere use of the game, made that act alone criminal, and did not require the obtaining of the victim's confidence as well as his money.

A search of the codes, past and present, of all 48 states, turned up two similar statutes, and two cases in point. Section 561–700, Missouri Revised Statutes, 1949 (since repealed) provided:

"Whoever shall, in this state, deal, play or practice, or be in any manner accessory to the dealing, playing or practicing of the confidence game or swindle known as three-card monte, or of any such game, play or practice, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not to exceed five thousand dollars, or by confinement in the penitentiary not less than two nor more than five years."

The only case upholding a conviction under this statute was State vs. Edgen.[14] In that case the operators had never succeeded in gaining the confidence of their intended victim. They tried to get him into a game of three card monte and were flatly refused. One of them even put up money for him to bet, but, after winning that bet he would not play any more. The operators were convicted of using a confidence game.

The defense on appeal was that the victim's confidence had never been secured, and no money or property taken from him, both things being necessary to a prosecution on the usual charge of obtaining money by confidence game. The Missouri Supreme Court held otherwise, saying:

"... The statute (Sec. 561.700 Mo. Rev. St. 1949) is levelled at playing it, and practicing the game and the guilt of the person violating it in no way depended upon whether or not money or property was bet upon it."

Kansas later adopted the Missouri statute and in the case of State vs. Terry[15] held:

"... It is clear this statute was aimed directly at 'the confidence game or swindle known as three-card monte,' or 'any such game, play or practice.' It made anyone who participated in such a game guilty of a felony and subject to severe penalties. Its obvious purpose was to stamp out that game, or any such game. It was not aimed at fraud or deceit in the many forms that might be practiced, or at gambling devices, or at gambling generally, for we already had many statutes dealing with those matters." (Citing State v. Edgen, supra.)

[14] 181 Mo. 582, 80 S.W. 942 (1904).
[15] 141 Kan. 922, 44 Pac. (2d) 258 (1935).

Preparing for Prosecution

The Terry case was reversed on other grounds, but these two were the only authorities in point and were favorable to our contentions. We began preparing a prosecution.

In early June two members of the Attorney General's staff, dressed as tourists and displaying Canadian license plates on their car, stopped at the free zoo and were welcomed in the usual way by the management.

These men were trained investigators and were thoroughly briefed on the manner of operation. They were able to pin down the exact point where the fraud occurred and recite all the relevant details at the trial of the operators.

The subsequent prosecution went exactly according to plan. The trial court, after some deliberation, decided that the element of confidence was not necessary under this statute. The problem arose in acute form, however, when the time came for the giving of instructions to the jury. It was necessary that the jury be given a definition of "confidence game" in the form of an instruction, so they could determine whether the game used was the kind of game "commonly known as a confidence game." Every available definition of "confidence game" actually defined the complete statutory offense of "obtaining money by confidence game," rather than the game itself. We finally drafted our own definition and incorporated it into the following instruction, which was given:

"A confidence game is any swindling operation whereby one seeks to lead his victim to repose confidence in him with a view of taking advantage thereof and thus obtain the victim's money or other property. The statute under which the defendant has been charged, and which has been read to you, prohibits any person from using or winning any money by any game commonly known as a confidence game. Consequently the victim's state of mind, that is to say, whether or not he had actually reposed confidence in a person using or winning any money by any game commonly known as a confidence game, is immaterial. And if you find beyond a reasonable doubt under the evidence submitted to you and these instructions that defendant did use or win any money by any game commonly known as a confidence game in the manner and form charged in the information, then you will find the defendant guilty."

Long Time Effects

The jury found the defendant guilty. The case was appealed to and upheld by the Montana

Supreme Court. This decision, State vs. Hale,[16] is the first case of its kind decided by a court of last resort in the United States since the Edgen case, half a century ago. Its significance to prosecutors lies in the adaptability of this kind of prosecution to the newer kinds of confidence games now multiplying across the American landscape. In place of the old schemes where the victim was taken into a supposedly illegal scheme intending to swindle a third party while actually being swindled himself, the newer operations pose as completely honest and legal business transactions. The operators often purport to be bona fide real estate brokers, rental agents, or even schools.[17] They simply never deliver the goods or services purchased in good faith. Their greatest protection is that they deal exclusively with people who are gullible and not very intelligent. These victims are hopelessly muddled by the "legal" trappings of the deals they are involved in and are useless as witnesses. Unless trained investigators can be put on the trail of these operators, the public cannot be protected.

The Hale case removed some of the legal protections that have shielded confidence artists from the investigator. Any jurisdiction can model a law after the Montana statute with reasonable assurance of a similar interpretation by its courts. The doctrine should be useful, also, in those cases where the swindle is interrupted before any money changes hands, and in the attempt cases where the victim is not gullible enough to fall in with the scheme.

It is doubtful that any confidence game prosecution in Montana in the future will be lost because the victims did not have confidence in the swindler. We hope that it may eventually be the case throughout the country.

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[16] ——Mont.——, 328 Pac. (2d) 930 (1958).

[17] See, for example, the cases of State vs. Weber, ——Mo.—— 298 S.W. (2d) 403 (1957); People vs. Glenn, 415 Ill. 47, 112 N.E. (2d) 133 (1953); and People vs. Brand, 415 Ill. 329, 114 N.E. (2d) 370 (1953). In the Weber case the defendant offered an apartment for rent and collected as much as a year's rent in advance. He then demanded additional payment for proposed alterations, and would not permit occupancy or refund the deposit. At least five people lost a year's rent to this scheme. The defendants in the Glenn case offered attractive apartment rentals in an area of housing shortage. Sixteen people testified that they paid $500 to $1000 each to the defendants who neither owned nor controlled any rental apartments. The victims were merely "stalled off" until they gave up in disgust and forfeited the money. The offense in the Brand case was committed through the medium of a construction firm with a permanent suite of offices and a payroll of 25 persons.