McLaughlin, John v. State of Missouri 1858 St. Louis 396/1

Old Box 595/19

V= John Wise
stole pocketbook
2 yrs. in jail

Filed 1858
affirmed
A= J. W. Sharp
Richardson

O= ins. good
motion for new trial b/c of new
evidence should've had his affidavit

27
111

COA= grand larceny

The State of Missouri, ss.

The State of Missouri, to the Honorable the St Louis — Criminal Court — **in said State Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Criminal Court held in and for the County of St. Louis in said State —

wherein The State of Missouri was plaintiff and John Mc Laughlin was defendant

in a Civil Action — manifest error hath intervened, to the great damage of said defendant — as by his complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the third Monday in October next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office in the City of Saint Louis, the Eighth day of March in the year of our Lord one thousand eight hundred and fifty-eight.

Wm S. Glanville,
CLERK.

The State of Missouri }
County of St. Louis }ss.

I Frederick Kretschmar Clerk of the St Louis Criminal Court, in obedience to the commands of the within writ, herewith transmit to the Supreme Court of said State a full true and Complete transcript of the Record and Proceedings in the case of The State of Missouri against John Mc Loughlin, as fully as the same now remain of record and on file in my office.

In testimony whereof I hereto set my hand and the Seal of said Court at Office in St Louis this ~~Seven~~ eighth day of March A.D. 1858.

Fred. Kretschmar

Clerk

1 State of Missouri to wit

At a term of the St Louis Criminal Court begun and held at the City of St Louis were present the Honorable Henry A Clover Judge Charles G Mauro Esq Circuit attorney James H Vail Esq assistant Circuit attorney William C Smith Esq Marshal of St Louis County and Frederick Kretschmar Clerk of said Court

Term

The Marshal returns here into Court the Venire facias to him directed with a panel of Grand Jurors endorsed thereon who being called come as follows to wit George K Budd who is by the Court appointed foreman Robert Holmes, John Handrews David Harvey Samuel McNeilly Henry Overstolz Henry Pilkington R McIlvaine Henry Weisenfelts Stephen Ridgely John V Olshausen Alexander McIlhininey Louis Kessler Abram Meyer and George Mattack and William Beggs sixteen good and lawful men who being duly empannelled and sworn and having received their charge from the Court retire to consider of their presentments

Jury Grand

Tuesday January 26th 1858

The Grand Jurors return to the bar and deliver the following indictments as a true Bill to wit

State of Missouri }
County of St Louis } ss

St Louis Criminal Court January Term 1858

Indictment returned

The Grand Jurors of the State of Missouri within and for the body of the County of Saint Louis now here in Court duly empannelled sworn and charged upon their oath present That John McLaughlin late of Saint Louis in Saint Louis County on the twenty third day January

2 in the year of our Lord One thousand eight hundred and fifty eight at Saint Louis in St Louis County one pocket book of the value of fifty cents money current by law and usage in this State of the sum of and value of twenty two Dollars all of the property of John Wise then and there being found feloniously did then and there steal take and carry away contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State

Jas H Vail assist Circuit Attorney

Endorsed: A true bill. Geo K. Budd. foreman. — Filed January 26th 1858. Fred. Kretschmar. Clerk

Whereupon the following Capias was issued.

County of St Louis ss

The State of Missouri

Capias To the Marshal of St Louis County Greeting:

We Command, You to take John McLaughlin if he be found in your ~~bailiwick~~ and safely keep so that you have his body before the Honorable Judge of the St Louis Criminal Court now in session at the City of Saint Louis within and for the County of Saint Louis forthwith to answer an indictment found against him by the Grand Jurymen of the State of Missouri for the body of the County of Saint Louis for Grand Larceny contrary to the form of the statute in such case made and provided and against the peace and dignity of the State and have you then there this Writ with your return thereon how you execute the same

Witness Frederick Kretschmar clerk of our said Court with the seal thereof hereto affixed at office in the City of St Louis this 26th day of January in the year of our Lord eighteen hundred and fifty eight

Fred Kretschmar Clerk

3)
Marshals Return } Executed this by arresting the within named Defendant and delivering his body to the Jailor of St Louis County Jaily 27th 1858

Wm C Smith Marshal

Wednesday January 27th 1858

Plead not guilty

The State of Missouri vs John Mc Laughlin } On indictment for Grand Larceny Now at this day said defendant being brought into Court and having had hearing of said indictment says he is not guilty as therein charged and for trial puts himself upon the country and the Circuit Attorney doth the like

Monday February 8th 1858

Trial

The State of Missouri vs John Mc Claughlin } On Indictment for Grand Larceny Now at this day comes the Circuit Attorney who prosecutes for the State and the said Defendant being brought into Court there-

Jury

upon come a Jury to wit Thomas Yates William Woodman Edward Mead George Ottman Isaiah Parker Jr Watson Daniel Eaches Edward Underhill Thomas S Hobbs Thomas Burke William M Sleeth John Bamridge twelve good and lawful men who being duly elected tried and sworn the traverse between the parties aforesaid well and

Conviction

truly to try upon their oath aforesaid say they find the said defendant guilty of Grand Larceny as charged in in the said indictment and assess his punishment at Two years imprisonment in the penetentiary

Friday February 12th 1858

Motion for new trial filed

The State of Missouri vs John Mc Laughlin } Grand Larceny Motion for a new trial supported

by affidavit filed by Defendants counsel

Saturday February 13th 1858

Motion for new trial Overruled

The State of Missouri
vs
John McLaughlin

Grand Larceny

The Defendants motion for a new trial herein being this day submitted to the Court and by the Court here fully understood therefore it is considered that said motion be overruled

Tuesday February 16th 1858

Sentenced

The State of Missouri
vs
John McLaughlin

Grand Larceny

Now at this day said defendant being brought into Court to receive his sentence in pursuance of the verdict rendered against him therefore it is considered by the Court that said defendant for his offence of Grand Larceny and in pursuance of said verdict be imprisoned in the Penetentiary of the State for the space of Two years and that he pay the costs of this prosecution and stand committed until this sentence be complied with thereupon the defendant files his Bill of Exceptions herein

Bill of Ex

State
vs
John McLaughlin

St Louis Criminal Court
Jany Term

Be it remembered that on the trial of the above entitled cause at the January Term of the Criminal Court for the County of St Louis the following testimony was adduced on the part of the State

John Wise

John Wise being produced and sworn testified as follows I reside in the County of St Louis and am a Farmer &

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know the defendant, on or about the (23) day of (January) last I lost a pocket book containing from Twenty two to twenty four dollars in money at the North Market in the City and County of St Louis The money was good money my pocket book was in my pantaloons pocket I was at that Market selling chickens and other articles from my wagon somewhere about Eight Oclock in the morning I saw the defendant come three or four different times and stand about the wagon He did not offer to purchase any thing There was a coop in the wagon with but a few chickens in it I had put my hand and part of my body into the coop for the purpose of getting some chickens for a lady who wished to purchase When I put my hand into the coop the deft was standing right by my side I had caught some chickens in my hand when I felt some persons hand in my pockets I drew myself out of the coop and as soon as I could hand the chickens to the lady I felt for my pocket book and it was gone The Deft was gone also I remarked that my pocket book was gone and a lady standing by told me that the man who had it had gone up the street I immediately started after the defendant and overtook him about one and a half or two squares above my wagon on the street I took hold of him and told him to give me my pocket book that he had taken it He said here is your pocket book and at the same time took from his vest pocket Eight Dollars in notes and said that it came out of the pocket book There was two five Dollar gold pieces in my pocket book I opened it and found them still there The defendant had overlooked them as they were in a little pocket The deft then wanted me to let him go as I had my money back I refused to do so He said he had found my pocket

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book on the pavement I do not know the precise amount that was in my pocket book it was about $24 I recovered back eighteen Dollars from the deft He came up to the wagon four times I think before I missed my pocket book He just stood around and did not want to purchase any thing He was standing right by my side at the wagon wheel when I put my head and hands into the coop Before I could get out he was gone He did not try to escape when I caught him He could not have escaped The Market master came up just after I had my pocket book back and we took him up to the station house

Wm J Wise

Wm J Wise being produced and sworn testified as follows I know the deft I am Market master of the North Market in this City I had watched him about the market about three or four days before this occurence He was doing nothing there only hanging around I saw him on the morning I spoken of in the market going up Broadway and immediately after saw the prosecuting witness also going up rather fast I followed them and came up just as Deft handed Wise the pocket book and gave him the money He said the money came from his (Wise) pocket book We arrested him and took him to the station house Wise did not say that he had lost only 8 or 9 dollars He said that there was about 24 dollars in his pocket book when it was taken and that he had recovered 18 dollars

Wm was produced and sworn for the Deft testified as follows
I am a police officer I was at the Station house the morning that the Market master and prosecuting witness brought

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Deft there under arrest I understood Wise to say that he lost eight or nine dollars which the deft gave him with the pocket book That is my best recollection I understood witness to say that he lost only eight or nine dollars I might have been mistaken The witness Wise spoke broken English

Philander V Baskett

Philander V Baskett produced for deft was sworn and testified

I recollect the time that deft was brought to the station house under arrest by the Market Master I can tell by referring to my memorandum book how much money the prosecution witness said at the station house that he had lost I understood him to say he had lost eight or nine dollars I think he said he had eight or nine dollars in his pocket book when he lost it He did not say anything about any money being missing when he got it back that I heard of The witness spoke broken english he is a German

John Wise recalled

John Wise recalled

I did not say that I had lost only eight or nine Dollars I said at the station house that the dift gave me back eight Dollars but there were two five dollar gold pieces in the pocket book which he had overlooked I said there was about $24 dollars in my pocket book when it was taken and I got back eighteen dollars

and this was all the Evidence in the case

The Court then instructed the Jury as follows

Instructions given by Court

Larceny is the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convert them to his the takers own use and make them his

own property without the consent of the owner
If the Jury believe from the Evidence that the defend=
ant at Saint Louis County also within three years
previous to the finding of the Indictment did felonious=
ly steal the property mentioned in the indictment of
the value of ten Dollars and upwards the property of
John Wise you will find him Guilty Grand Larceny
as charged
If the Jury believe from the Evidence that the property
mentioned in the indictment was stolen and that recen=
tly afterwards the same was found on the person of the defen=
dant it is then incumbent upon him to account for
his possession of it honestly otherwise the law accounts
him to be the thief and so the Jury should find
Although the pocket book containing the money may
have dropped from the pocket of the prosecutor on the
sidewalk still the same was in his possession so
that larceny may have been committed of it and if
the pocket book had dropped from the pocket of the
prosecutors pantaloons on the sidewalk and if the de=
fendant seeing it knew to whom the same belonged
or from whose possession it was lost and that the de=
fendant took the pocket book and contents with such
knowledge of ownership with intent to steal the same
and to appropriate the same to his own use and that
he did so appropriate the same or a portion thereof you
will then find the defendant Guilty of Grand Larceny
If you have a reasonable doubt of defendants guilt
you ought to give him the benefit of such doubt and
acquit but a doubt to authorize an acquittal or that ground
ought to be a reasonable doubt of his guilt arising from a
view of the whole Evidence and not a bare possibility of
his innocence
If you find the defendant guilty of Grand Larceny

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you will assess his punishment by imprisonment in the penetentiary not less than two nor more than five years

Although the defendant may have offered to and did return the property in question to the prosecutor at the time of his arrest yet if the Jury believe from the Evidence that deft was guilty of Larceny such restoration of property cannot qualify any act of larceny previously committed by him for the law does not permit a party to compensate a crime of this character by a return of the property stolen

But if the defendant found the property in question without any knowledge of the ownership of it on his part and took it into his possession with the intent to return the same to the owners when found or as lost property found by him and after taking it into his possession appropriated it or a portion of it to his own use this is not Larceny in the Law

To the giving of which defts at the time excepted
And the Defendant asked the Court to instruct the Jury as follows

Instructions asked by Defts refused

If the Defendant found the pocket book and after getting possession of it concluded to appropriate the contents to his own use it is not larceny

Refused

To convict the Defendant the Jury must believe from the Evidence that the Defendant took the Pocket Book from the possession of Wise with the felonious intent of appropriating the money to his own use

Which instructions last named were refused by the Court and to said refusal the Defendant excepted

at the time and after argument of Counsel the Jury returned a verdict of guilty and find defendants punishment at two years imprisonment in the penitentiary and whereupon within four days after said Verdict and trial the defendant moved for a new trial and filed in said Court the following reasons therefor contained in two affidavits

Motion for new trial & affidavits

State of Missouri
vs
John Mc Laughlin

St Louis Criminal Court

Motion for New Trial

This day the Defendant John Mc Laughlin comes into Court by his attorney John H Sharp and asks the Court to set aside the Verdict in this case and grant the defendant a new trial for the following reasons to wit:

1st That the Defendant was charged with Grand Larceny of a Pocket Book at the Broadway Market and the proof was not positive that the defendant took or stole the Pocket Book from the person of the prosecuting Witness

2d That the proof went to show that there were several ladies standing by at the time one of whom called the attention of the witness to the fact that he had lost or a man had his Pocket Book

3d That although Deft knew that several were standing by when he picked up the Pocket Book that he did not know either of their names or that he could prove a material fact to his defense by either of them or that where either of them lived that he might procure their attendance at his trial

4th That he has this day found one of those ladies Susan Saylor by whom he can prove the fact that he did find the Pocket Book on the ground and asked who it belonged to that it was the same Pocket Book referred

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to in the Evidence and for which he was indicted and tried that this evidence is material to his defense and without it he could not get Justice done him that with it he is certain that the verdict would be different that he never knew before to day the where abouts name or importance of this witness and that if a new trial is granted him he can procure the attendance of this important witness which he never knew of before whose Evidence would produce a different result if a new trial is granted him and that he used due diligence in preparing for his trial

Sworn to and subscribed before me this 12 day of February A D 1858

J W Sharpe attorney for John McLaughlin

Fred Kretschmar

Clerk

St Louis February 12th 1858

Susan Saylor

I Susan Saylor state and say that on or about the twenty fourth day of January 1858 I was at Broadway Market in the City of Saint Louis between nine and ten o clock to the best of my recollection for the purpose of marketing and while passing the wagon of one Dutchman or Frenchman with a kind of chicken Coop on it I saw a man pick up a Pocket Book from between two boxes one of the said Boxes contained I think Eggs and the other I think Butter several Strangers were standing near by the man who picked up the Pocket Book and he asked if any of us lost the Book no one claimed it several of the ladies examined it to see if it was theirs he then said he would Keep it until he found an owner for it leaving at the same time I never knew the person or his name who picked up the Pocket Book untill yesterday evening but would know him if I saw him again

her

Susan X Saylor

mark

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State of Missouri } Be it remembered that on this
County of St Louis } twelfth day of February 1858 be-
fore me the undersigned L B
Montague a Notary Public within and for the County
and State aforesaid came Susan Taylor who is known
to me to be the same person whose name is subscribed
to the foregoing instrument of writing and made oath
that the facts therein as stated are true
Sworn to and subscribed before me this 12th day of
February 1858

In testimony whereof I hereunto set my hand
and affix my notorial seal the day and year above
written L B Montague
Notary Public
for St Louis County Mo

Seal

And the Court refused to grant Such new trial
and rendered judgement on said Verdict and
to the ruling of the Court in refusing such new
trial and said rendition of judgement the defen-
dant at the time excepted Defendant now prays
that his Bill of Exceptions may be certified and made
part of the Record of this case which is done
H A Clever Seal

State of Missouri }
County of St. Louis } ss I. Frederick Kretschmar. Clerk of the St. Louis Criminal Court
certify the above and foregoing to be a true and correct Transcript of the Record and proceedings
had in the above entitled cause of the State of Missouri versus John Mc. Laughlin as the
same now remains in my office

Witness my hand and the seal of said Court hereto affixed at office in
the City of St. Louis this 6th day of March A D 1858.

Fred. Kretschmar
Clerk

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(19)

March. T. 1858

The State of Missouri

vs Copy of Record &c

John McLaughlin

From St. Louis Criminal Court.

Filed 8 March 1858

Wm S. Glanville

Ck.

Mauro for State

John W. Sharp for defendant

Transcript $8.60

Motion to docket / to docket consent / order / apts. stat. & brief

agreement filed / res brief / Affirmed. June 5 58 – Bp. 449

State vs John McLaughlin

Statement of Case

The defendant in this Case was arrested on the 23d day of January 1858 at the north market house in the City of St Louis while walking down the pavement, he was Charged with the larceny of a Pocket Book Containing money, Defendant was then taken to the police Station and Confined without Examination, On the 26th January ~~two~~ days only intervening, he was Indicted for the larceny of the Pocket Book Containing about $27. = on the succeeding day the 27th January Defendant was brought into Court Arraigned and Plead not guilty, On the 8th February 1858, his Case was called for trial, the defendant Stated ~~that~~ he was not ready for trial, and ~~that~~ his Lawyer was not in Court, the State being ready the Court ordered defendant to go to trial and at the Same time Assigned defendant Counsel the Evidence on the part of the State was heard and Exceepted to by defendant as being incompetent, the Cause was argued to the Jury by Counsel on both Sides, the Court then instructed the Jury, the defendant Exceepted

at the time to the instructions given to the Jury as not being pertinent or Containing the law of the Case and having a tendency to Mislead the Jury, the defendant at the Same time offered instructions which were overruled by the Court to which ruling the defendant Excepted at the time,
the Jury returned a Verdict of guilty and fixed defendants punishment at two years imprisonment in the Penetentiary, within four days from Said trial and Verdict the defendant Moved the Court for a new trial, Supported by legal grounds, and two affidavits, Showing that newly discovered testimony Material and important to the defendant and which would probably Change the result had been discovered Since the trial, the Court overruled Said Motion and defendant Excepted to the ruling of the Court at the time, on the 16th day February the Court passed Sentence on defendant in accordance with Said Verdict defendant Excepted at the time,
and prepare a Bill of Exceptions and presented them during Said term Which have been Certified Sealed and Signed

John W Sharp
for Defendant

State of Missouri
vs
John McLaughlin

Statement of
the Case

Filed 26 March 1858
Wm S Glanville
Ch

State of Missouri } March Term
vs } Supreme Court
John McLaughlin } at St Louis

I Charles G Mauro Circuit attorney for Saint Louis district, Consent and agree that the above Entitled Cause in which the State of Missouri is plaintiff and John McLaughlin is defendant may be taken up tried and disposed of during the present term of the Court if Convenient to the honorable Court

March 27th 1858.

C G Mauro
Circuit Atty.

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State

O,

McLaughlin

Consent of Cir.
atty to try Cause

Filed 25 March 1858
Wm S Glanville
Ck

State of Missouri } Supreme Court
vs } March Term
John McLaughlin } St Louis

John W Shaw for plaintiff in Error

The Judgement in this Case is Erroneous because the Evidence is Contradictory and insufficient to warrant it ———

The Instructions given by the Court were improper not being the Law of the Case, and those offered by the defendant improperly refused ———

good and legal grounds was offered by defendant for a new trial and improperly refused by the Court ——

It will be observed that the ~~defendant in error~~ was arrested on the 23d Jany 1858 in the City of St Louis at the north Market house, Charged with the larceny of a pocket book Containing about $18 co Defendant had gone about two blocks from the place before overtaken

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this was in open day, on the most public Street in Said City and from the person of the prosecutor While Several were present Standing by at the time, While prosecutor had his arms and a part of his body into a Chicken Coop Which was made upon his wagon Catching Chickens for a lady, Who must have been at his Side — prosecutor felt the hand in his pantaloons pocket Where his pocket book was, but neither Misd or Said anything about it, untill he finished waiting on the lady, Then he felt for it & found that it was gone and assoon as he Said that it was gone the lady told him that the man Who had it, had gone up the Street — She therefore must have Seen the defendant pick it up or She would not have known Who had it — if She had Seen defendant take it from the person of the prosecutor She would have told him at the time, or would have Said that the man Who Stole it had gone up the Street instead of the man Who had it, besides there were others present When the hand was felt in the pocket — defendant had every opportunity to Escape

before he was overtaken" When overtaken he was going along on the Side walk without having Changed his direction" and on being told that he had prosecut pocket book he gave it up with $10 in Coin which he had not touched and took out of his Vest pocket $8 in paper Money saying that Came out of the pocket book and that he picked up the pocket book on the Side walk" remember that this was all the Money Claimed by the prosecutor at that time" and at the Station house" Why was not this important lady brought into Court to testify who knew all about the manner the defendant got the pocket book" the defendant was thrust into prison and denied an Examination" and knew nothing of this woman untill refered to by prosecutor" on the trial — he was indicted on the 26. ~~[illegible]~~ arraigned on the 27th one day after" and kept in Jail untill the 8th Feby and on that day tried — prosecutor Swore before the grand Jury that there was $22 & on the trial about $24. and the Police officers for the defendant testified that he did not Claim any more than the amount the

defendant gave him" was not the defendant Searched at the Station and did he have an opportunity of using any of the money" then was there no false Swearing at the trial as to the amt= Could the pocket book been taken at the time the prosecutor was in that position" and if taken would a not those present have Seen it and would not the defendan have fled" the prosecutors Statement is against Common Sence reason and nature and not Sufficient to warrant the Verdict - then we are driven to the. Instructions of the Court to Explain how the Verdict was rendered" first there are different degrees of larceny" and the instructions of the Court Should be pertinent To Case in issue" and Contain only the law of that Case" they are argumentative and do not Contain the law of this Case and must have had a tendency to confuse the Jury" ~~in this Case~~" They Start out to define larceny and Say that Larceny is the wrongful Or "fraudulent" taking &c I hold that is not the definition in any Case and Especially in this Case as there is no fraud proved" wrongful and fraudulent taking might be law in a Case where the offender acquired the possession

through fraud with a feloneous intent Chitty Crim law 3 Vol p 917.. Bourier law Dic or where the offender acquired the possession of his own goods by taking them fraudulently after they were pledged to another in order to Charge for their Value,, or from a Servant in the Same Way.. Chitty Crim law Vol 3 p 918. to 23. but there was no fraud Expressed or implied in this Case and the instructions therefore were improper,,

The Court further Instructed the Jury that if the pocket book had been droped by the the prosecutor on the Side walk Still the Same was in ~~the~~ his possession and that larceny may have been Committed by taking it - and appropriating Contents,, this is Error,, for a taking by finding and a Subsequent Conversion will not amount to a felony in no Case Except where the property is found in a place where it is usually Suffered to lie,, Chitty Crim law 3d Vol 3 inst 108 1 hawk c 33. s. 22. Russel 1041 (B) the Instructions offered by the defendant does Contain the law of this Case and they were refused by the Court,, for if the pocket book was found on the Side walk it was where it did not usually lie,, and a finding and

Subsequent Conversion is no degree of
Larceny in law" Chitty Crim Law 3d Vol 926
Bouvier Dic and all Criminal authorities ——
The last Instruction offered by the defendant
Contains a principle of law as old as the
Common law itself" and improperly refused
by the Court" This must have had an undue
weight with the Jury in making a Verdict"
Lastly" The defendant within four days
from said trial and Verdict filed good
and legal grounds Sworn to by defendant
Counsel" and also the affidavit of Susan
Taylor the very Lady who was present
at the time the pocket book was picked
up" and moved the Court for a
new trial this Motion with grounds
Supported was overruled greatly to
to the prejudice of defendant which
is no bar here, if Error, the defendant
therefore asks that the Judgement be
reversed and he remanded for a new
Trial. —

John W Thaxton for
plaintiff in Error

State
vs
John McLaughlin

Plaintiff in Errors
Brief

Filed 3 April 1858.
Wm L Glanville
Clk.

J. W. Sharpe for
plaintiff in Error

State of Missouri
Respondent
vs
John McLaughlin
Appellant

} Supreme Court by appeal from the Criminal Court of St Louis County.

It is agreed that the blanks in the 3d line of the evidence of John Wise on the 5th page of the record, is to be filled with the words "Twenty third day of January", in as much as the counsel for the dft by mistake failed to fill up said blank as it had been understood he would do, when the State's Atty handed him the bill of Exceptions

John W. Sharp

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State
vs.
McLaughlin

Agreement of
attorney to fill
blank in record.

Filed 14th April 1858
W. S. Glannon
Ch.

272 State v. Mc Laughlin

It is supposed to day, without analyzing the instructions that were given, that they presented the law of the case fairly to the jury. and on the hypothesis that the defendant found the pocket book, the law was stated in conformity to the opinion of this Court in the case of the State v. Conway 18 No 321.

The instructions asked by the defendant were properly refused because the principle contained in the first was covered by one already given, and the second was wrong, because it assumed that larceny can could only exist where the property stolen is taken from the possession of the owner, and excluded the idea that larceny can be charged in any case when the defendant acquires possession of property by finding it.

The motion for a new trial on the ground of newly discovered evidence was supported by the affidavits of the defendants attorney and of the discovered witness, but the defendant personally did not make any statement or affidavit on the subject and no reason is given for the omission. There are no doubt cases in which the affidavit that accompanies a motion for a new trial on account of newly discovered evidence may properly be made by the attorney or some other person representing the party, but the general rule is that the party himself must make the affidavit, and the circumstances that would authorize an exception

to the rule ought to appear. ~~[illegible]~~

Applications for new trials on the ground of evidence discovered after the trial are entertained with reluctance because of the temptation to parties smarting under defeat to make them, and on account of the facility with which plausible grounds are manufactured. A party may be very willing to take the chances of a new trial but unwilling or afraid to swear to a statement necessary to procure it, and the loosest practice would be established to permit the oath of another to be substituted for the oath of the party himself. He may make a statement to his attorney, which the latter might conscientiously swear he believed to be true, which in point of fact is false. and hence the affidavit of a third person should never be received without an explanation of the reason why the party omitted to make it. The Courts therefore ~~[illegible]~~ to protect themselves from imposition, require such motions to be supported by the affidavit of the party, and the observance of other requisites, which are well stated in Berry vs State of Georgia 10. Geo. 527 as follows; the party must show 1°. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different result if the new trial were granted. 4th. That it is not cumulative

only. 5th That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th. That the object of the testimony is not merely to impeach the character or credit of a witness.

In this case the defendant was not absent: and he knew better than any other person when the evidence stated to have been discovered first came to his knowledge, and what diligence he had used before the Trial to obtain it. The affidavit of Susan Taylor discloses facts which would probably have produced a different result, ~~in the Trial~~ and if the motion had contained the necessary requisites, the defendant ought to have had a new trial. But to allow it under the circumstances of the case, would be at the expense of overthrowing established rules, and would introduce a practice dangerous to the administration of justice.

Judge Napton ~~[illegible]~~ concurring the judgment will be affirmed.

Jno C Richardson

No 272

State

vs

McLaughlin

Opinion of the Court

affirmed

Filed 3 June 1858.

Wm S. Glanville Clk.

Continuation of Brief with the authorities in full Cited

The newly discovered testimony is not accumulative
The record does not Show that The defendant had any attorney until the Jury was Sworn " it does not Show ~~that~~ that The defendant was in Court or that his attorney Knew anything about The Case being disposed of when it was " for The grounds filed for a new trial were filed one afternoon and The Motion overruled The nesct Morning and The record does not Show that the Case was Set for Trial on the Motion " but was overruled on The nesct day " The Evidence does not Show that defendant Knew or had any Means of Knowing the owner of the Pocket book if found on the parement on The highway no papers or mark to indicate it found in it " Courts instructions are argumentative not applicable or pertinent to this Case and in Substance Conveys the idea of guilt Excluding Every hypothesis of defendants innocence they are two lengthy and from the

Evidence not the law of this Case
also have a Tendency to Confuse
the Jury" those offered by defendant
were refused and none given in their
Stead Changing the phraseology —
the Jury were bound to reflect their
understanding of the Meaning and
force of Instructions given by the
Court "and they were given after argument
of Counsel a View of the whole Case
seem to demand the Justice of
a new trial

John W Sharp
for plaintiff in Error

Authorities pertinent to this Case

14th	Johns R.	294
18	Missouri	321
22	Con	153
19	Wendal	460
1st	Hill	94
5th	Gilman	305
1st	Hawk P C. C 33, S 2	
4th	M & W	623
1st	Vol Newyork Crim R	
1st	Hale	506

Tiffany Crim Law Page 335
Levingston Mag Mch & Appeal Cases

2a Russel C & M 13 to 14

Martin & Ozlagie P.226 Ten ~~[illegible]~~. doctrine carried still farther on the point of knowledge of ownership of lost property — . Sharp

Continuation
of Brief
& Authorities
2

J. W. Sharpe
for Pltf in Error

Authorities on grounds for New Trial

State vs Mc Laughlin

3. J. J. Marsh. R 521.
2. J J Marsh R. 32
3. Serg & Rawle. 41
6. Greenl R 479
4. Ohio R. 5
2. Caines R 155
2. W. C. C. R 411
16. Mart Louis Rep 419
2. Aiken Rep 407
1. Halst R 434
Grah. N. J. Sc. 13.
1 Chitty Crim Law 654. 4 Chit Pr 80
2 Roll 691. 2 Co. 4; Hob 53.
Co Litt. 227. Grah & S. 341. 356. 3
6 Mod 22. 11. Mod. 1. 2 Chit. Rep 195.
14 John R 112. 2 John Cas. 318. 2 Murph R. 384.

The above authorities are to the point on Grounds for New trial and remained in My hat and therefore unintentionly omitted being put in the Case

John W. Shaw

State vs McLaughlin
in Error

Authorities on
Grounds for
New trial

John W. Sharp for
P. in Error