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MAN'S LIES NOT CRIME, COURT SAYS

MARGARET N. O'SHEA, State Staff Writer

The state Supreme Court has overturned the conviction of a Richland County man, saying he broke no law when he lied to his parents about calling "976" numbers on their telephone.

Sean David Lee ran up more than \$500 in charges for calls to pre-recorded messages at "976" numbers, the high court said, but when his parents questioned the bills, Lee denied making the calls. He was prosecuted under a statute that prohibits knowingly avoiding lawful charges for telephone service or causing someone else to avoid payment of a legitimate telephone bill.

Lee, a college student when the offenses occurred, was sentenced to a year in prison and a \$1,000 fine, suspended on service of two years' probation and performance of 200 hours of public service. But in its first interpretation of the phone-bill law, the Supreme Court said prosecution wasn't intended in cases where the telephone company had a way to collect what was due.

"We were delighted about the decision," Columbia attorney **Jack B. Swerling** said. "We took the position all along that he shouldn't have lied about making the calls, but that was something between him and his father as long as the telephone company had recourse to collect the bill.

"Under any other interpretation of the law, any kid in any household, using the telephone could be arrested," said **Swerling**, who didn't handle the original court case, but was hired to handle the appeal.

In Lee's case, a telephone company investigator found a telephone in the young man's bedroom that his parents knew nothing about, and the parents settled the bill.

"This statute contemplates criminal prosecution where the perpetrator is using telephone service and there is no legally chargeable account," Chief Justice George T. Gregory Jr. wrote in the unanimous opinion, which was completed while he was still an associate justice.

But Lee was an authorized user of a known telephone number, he wrote, and did nothing wrong under the law, even if he did lie about the calls. He didn't try to charge the calls to a non-existent telephone or credit card, nor did he use any strange code or device to thwart the billing. There was no rearrangement of equipment or tampering either.

That left only one legal ground for prosecution -- "any other fraudulent means," but the high

court rejected it, too.



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DIAL-A-NIGHTMARE: BILL TAKES TOLL ON FAMILY

MARGARET N. O'SHEA, State Staff Writer

She knew before she opened the envelope that it held something strange, and she was right. Inside the bulky parcel was a nightmare.

After all, telephone bills for the average family don't include 19 pages of toll calls to Dial-A-Joke, Porno Hotline, Sex Connections and Sports Trivia.

When Marjorie Lee opened the bill in January 1985, she and her husband, Gary, did not know that the unfamiliar numbers were tied to such establishments. Nor did they know that the long and eclectic list of "976" calls billed then and in succeeding months to their home telephone would include daily race results, prize-fighting statistics, political notes, soap opera plots, children's stories, stop-smoking tips, stock quotes, gay fantasies and horoscopes. They did know that they didn't make the calls, and they became convinced that no one else in their family did either.

In all, the Lees said they were billed \$656.56 for 736 calls that they believe no one in their home made.

According to one of the bills, 52 of the calls, lasting up to four minutes each, were made between 7:06 and 9:14 p.m. on Sept. 4, 1986 -- a feat that telephone technicians admitted could have been accomplished only by using three-way calling capability and putting some recordings on hold while others were dialed.

The Lees said they didn't know until they went to court that they had the three-way call feature. They'd never used it.

For 14 months, the calls and the charges continued while the Lees alternately withheld payment, negotiated with Southern Bell, and paid under protest.

"Each month we tried to pay what we owed," Lee wrote the Public Service Commission a year into the debacle, "but we were constantly being told that our phone would be disconnected due to a past due balance."

That finally happened in November and December 1985, and because of the two disconnections, Southern Bell requested a security deposit. It was a side twist of the drama that the Lees had become, to Ma Bell, risky customers.

According to court records on their case, the family tried for six months to disconnect their telephones from AT&T long-distance services of all kinds. They were supposed to be disconnected in October 1985. They paid \$10 plus a fee of \$2.50 a month, Gary Lee told the PSC. But the mysterious calls and the charges continued.

The fees were a source of irritation to Lee, who fumed in his PSC letter, "We do not pay Texaco to not buy gas from them and we do not pay Food Lion to not buy food from them. So why is the telephone company so special that we have to pay them to not use their services?"

But money was only part of the bad dream.

The family's protests spawned an investigation that led to a criminal indictment against one of their college-age sons, although the Lees were convinced "not out of love, and not out of blind faith, but out of what we saw and observed" that he hadn't made the calls.

The parents were shocked when the grand jury returned an indictment against their son after secret testimony by persons unknown, as South Carolina law permits, that the Lees had no chance to rebut.

Tried without a jury in 1987 before Circuit Judge E.C. Burnett III, Sean David Lee, then 21, was convicted of avoiding, attempting to avoid, or causing others to avoid payment of a lawful telecommunications charge.

He was sentenced to a year in prison and \$1,000 fine, suspended on completion of two years' probation and performance of 200 hours' community service.

Last week the state Supreme Court overturned that conviction, saying that David Lee did not break the law that's designed to prevent fraudulent evasion of telephone bills. There are five elements of that law, and none of them applied to the youth, who'd done nothing to prevent payment of the bills.

The family's attorney, **Jack B. Swerling**, hired for the appeal, successfully argued that the law was designed to prevent overt fraud -- tapping onto another person's line, making personal calls on work phones, devising codes to evade charges, or evading charges by using a "blue box" device.

Although the younger Lee adamantly denied making the series of 976 calls that plagued his family, **Swerling** said in his legal brief it really wouldn't matter if he had. Southern Bell had settled the Lees' account three months before the younger Lee was indicted and nine months before he was tried.

"We took the position all along," **Swerling** said, "that he didn't lie about making the calls, but even if he had, that would have been something between himself and his father as long as the telephone company had recourse to collect the bill."

Not only was the younger Lee not financially responsible for the phone bill -- the phone was in his father's name -- but there also was no evidence to suggest he'd tried to influence his parents not to pay it. "All he did was profess his innocence," Mrs. Lee said a year later.

"After the trial, David said to me, 'Daddy, if I'd lied and told them I did it, we wouldn't have gone

through all this,' " Lee said ilast week.

Although phone companies around the country are looking for ways to pull the plug on dial-up messages that are sexually explicit, it's not a crime to dial a 976 number. And, while the state's case against the younger Lee was based on the premise that he did make the calls, that's not what he was charged with, and that's not the basis of the conviction that the Supreme Court overturned.

It is, for his tenacious parents, a disturbing loose end.

Gary Lee testified that he didn't protest the excessive phone bills until he was satisfied that no one in his home had made the calls. That was after he'd checked both sons' work and school schedules against the times the calls were made. He found that some of the calls occurred while one son was in Connecticut and the other was in Myrtle Beach. Others occurred when no one was home. For part of the time involved, neither lived at home.

Even so, Lee gave both a chance to confess before mailing his three-page letter to the PSC.

One aspect of the mystery was how anyone could have monopolized the telephone without other family members knowing, at least partly because of the tone-generating answering machine in the family room. Lee said it would beep when a telephone was dialed anywhere in the house.

He questioned how it could beep repeatedly for hours at a time without somebody noticing, especially since his elderly mother spent much of her time in earshot of the machine, watching her favorite television programs.

And Mrs. Lee said their own telephone needs as teachers -- calling parents in the afternoons -- would have precluded the kinds of extensive use for which the family was charged. She said she was sure she'd have known if anyone in the house was making all those phone calls.

"We believed then and we believe now that all of this was done by computer -- that somehow some hacker got in on our line, or our number was used in some way," Lee said. "It could have started as a prank. It could even have been someone we knew, or the boys knew. We don't know. We do know that those calls were not made by anyone in our family, and they specifically were not made by David."

If the troublesome spate of phone calls was a mystery to the Lee family, it was an equal enigma to Southern Bell, whose personnel testified that they could find no explanation unless someone in the household had made the calls but wouldn't admit it.

Marion F. Sturkey, Southern Bell's security manager, and various telephone technicians told the court they'd checked the lines, inside and out, for tampering or interference. They looked for a tap or a splice and found none. They checked their computerized billing mechanisms and found no glitches. They replaced some wiring on the off-chance that it was defective.

Sturkey testified that his visits to the Lee home unearthed an extra telephone in a bedroom used by David Lee when he lived at home -- a phone that the Supreme Court concluded the rest of the family knew nothing about. There was an "unprofessional" telephone hookup in the room, Sturkey said.

That's when the investigation began to focus on David, then a student at the University of South Carolina. It was found that one of three calls billed to the Lees' calling card was made from his girlfriend's house. The others were made from a residence where he'd rented a room.

The Lees said the "unprofessional" connection was there when they bought the house, and it was no secret. They also said there were no telephones in the house that they weren't aware of.

They said their son had once brought an old telephone home from his fraternity house, and kept it about five weeks, and there was a disconnected French-style decorator phone that no longer worked well. Neither could have been used without their knowledge to make the volume of 976 calls reflected on their bills, they said.

As for the calls billed to the calling card, the owners of the phones from which they were made testified that David Lee did not do it.

The Lees' case is one of many prompting local telephone companies to be concerned about the proliferation of 976 numbers and the advertising that lures people to dial them.

Because of court cases brought by Southern Bell and Mountain Bell, dial-a- porn services are not available in South Carolina and several other states, but interstate calls are not forbidden.

Meanwhile, the 976 fiasco has continued to have an effect on the Lees, largely because the favorable Supreme Court victory didn't flatly exonerate their son.

As for David Lee, he's married and living in another state. It's a long- distance call.



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