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No. 156

The People &c.,
Respondent,

v.

Western Express International
Inc., et al.,

Defendants,

Douglas Latta and Anna Ciano
a/k/a Angela Perez,
Appellants.

Jan Hoth, for appellant Latta.
Submitted by Marianne Karas, for appellant Vassilenko.
Allen Fallek, for appellant Roach.
Matthew J. Galluzzo, for appellant Perez.
David M. Cohn, for respondent.

LIPPMAN, Chief Judge:

Appellants have been indicted for enterprise corruption
(Penal Law § 460.20 [1] [a]), a class B felony, based in
essential part on their commission of numerous predicate

offenses.¹ There was proof before the grand jury that three of them - Douglas Latta, Lyndon Roach and Angela Perez -- repeatedly purchased stolen credit card data which they then used for fraudulent purposes, and that the remaining appellant, Vadim Vassilenko, through the company he controlled, defendant Western Express International, Inc. (Western Express), facilitated transactions by which the purloined credit card data was transferred.

Appellants' conduct, the People claim, was part of a larger enterprise to traffic in stolen credit card information. To make out the corrupt enterprise, the People adduced before the grand jury proof that Eastern European vendors of stolen credit card data engaged in internet transactions with buyers in New York. There was also proof that, in consummating these transactions, buyers and sellers sometimes availed themselves of services offered by Western Express through its publicly accessible internet web sites. While Western Express's menu of services -- i.e., check cashing, mail receiving, issuing money orders, digital currency exchange, and Russian/English translation -- was superficially unremarkable, the services themselves being legal and admitting of legitimate utility in the

¹These included scheme to defraud, conspiracy, grand larceny, money laundering, possession of stolen property, and falsifying business records. No issue is before us respecting the sufficiency of the counts charging these offenses; this appeal concerns no more than the sufficiency of the evidence offered in support of the enterprise corruption count.

conduct of international transactions, there was evidence that some Western Express customers, among them defendants Latta, Roach and Perez, used the company's services for "carding" purposes, i.e., to traffic in stolen credit card information.

The People, in presenting the matter to the grand jury, dwelt principally on the carders' use of Western Express's digital currency exchange service. Western Express, having purchased large sums of the unregulated internet currencies EGold and Webmoney, was an authorized vendor of those forms of tender. For a commission of between two and five percent, the company would transfer into a customer internet account held in an assumed name digital currency purchased from it by the customer with US dollars. The digital currency could then be, and on occasion was, transferred to pay for stolen credit card information, after which the vendor would sell the digital currency received in payment back to Western Express for its value in another digital currency or US Dollars, with Western Express taking an additional commission. This transactional pattern recommended itself for money laundering purposes by reason of the circumstance that E-currency was not government regulated and that international transactions using it went largely unscrutinized.

There was evidence that Western Express was not a neutral observer of this use of its services; its employees offered advice on how to structure transactions to avoid

detection and defendant Vassilenko, the company's president, recognizing that a significant portion of Western Express's business was from "carding" transactions,² actively sought the patronage of carders. Carder business was encouraged by postings on the Western Express web sites and there was proof that Vassilenko attempted (evidently unsuccessfully) to advertise Western Express's services on Carder Planet, a members-only web site devoted exclusively to facilitating illegal carding activities.

Supreme Court granted appellants' respective motions to dismiss the subject indictment's enterprise corruption count upon the ground that the proof before the grand jury, even when viewed most favorably to the People, did not make out the existence of a "criminal enterprise." As is here relevant, guilt of enterprise corruption under New York's Organized Crime Control Act (OCCA) (Penal Law § 460.00 et seq.) requires proof that the accused "when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise . . . intentionally conducts or participates in the affairs of [the] enterprise by participating in a pattern of criminal activity" (Penal Law § 460.20 [1] [a]). For OCCA purposes a "criminal enterprise" is "a group of persons sharing a common purpose of engaging in criminal conduct,

²Vassilenko estimated that 5% of his business was from carding transactions. The People contend that the actual percentage was much higher.

associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents" (Penal Law § 460.10 [3]). In dismissing the enterprise corruption count, Supreme Court focused upon the absence of proof of an "ascertainable structure distinct from a pattern of criminal activity":

"Here, the People have failed to even articulate - much less adduce evidence proving - any system of authority or hierarchy in which the defendants participated . . . [W]hat the People allege are a series of arms-length business transactions - admittedly extensive and, if the People's allegations are true, illegal - conducted by a variety of organizations and individuals, each operating independently and with no overarching structure or system of authority. In essence, the People have described an illegal industry rather than a corrupt enterprise, the criminal parallel of a typical legitimate industry consisting of producers, wholesalers, distributors, retail outlets, and credit suppliers, each of [whom] has a unique but independent role in the industry."

In reversing and reinstating the enterprise corruption count (85 AD3d 1 [1st Dept 2011]), the Appellate Division, while acknowledging that there was no evidence of a traditionally structured, i.e., hierarchical, entity, theorized that Vassilenko had used Western Express to create a structured enterprise the purpose of which was to "actively encourage more and larger transactions by its participants on an ongoing basis" (*id.* at 14). The evidence, said the Court, permitted the inference that

defendants knowingly played roles in the enterprise even though, for the most part, they had no personal interaction (id.). Two Justices dissented, expressing the view that the requisite "ascertainable structure" to the alleged enterprise had not been demonstrated, even to the bare bones extent necessary to sustain the enterprise corruption count to trial. The dissenters found compelling the absence of "evidence of any collective decision-making or coordination with respect to the purported enterprise's activities or of any overarching structure of authority or hierarchy in which defendants participated" (id. at 19). One of the dissenting Justices granted appellants' separate applications for permission to appeal to this Court. We now reverse and reinstate the orders of Supreme Court dismissing the enterprise corruption count as against appellants.

New York's OCCA was enacted in 1986 to afford state prosecutors a means of exacting heightened penalties for criminal activity referable to or generative of structured criminal enterprises (see Penal Law § 460.00). Those enterprises were understood to present a distinct evil by reason of their unique capacity to plan and carry out sophisticated crimes on an ongoing basis while insulating their leadership from detection and prosecution (see id.; People v Besser, 96 NY2d 136, 142 [2001]). The Federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961 et seq.) had, of course, for some time enabled federal prosecutors to prosecute enterprise corruption as

such, but until the enactment of the OCCA there was no New York State analogue.

The common challenge posed both federal and state legislators in penalizing enterprise corruption as a separate crime was to delineate the circumstances under which conduct already fitting under a criminal definition would additionally be subject to prosecution and more serious penalization for its connection to a criminal organization. To justify the superadded penalties for participation in a corrupt enterprise, and concomitantly to avoid sweeping relatively minor offenders into complex multi-defendant, multi-count prosecutions entailing a risk of draconian punishment, it was necessary to distinguish between what on the one hand were merely patterns of criminal conduct and what on the other were patterns of such conduct demonstrably designed to achieve the purposes and promote the interests of organized, structurally distinct criminal entities. Accordingly, both RICO and the OCCA require the prosecution to prove, in addition to a pattern of criminal activity, the existence of a separate criminal enterprise to which that pattern of activity is beneficially connected (see United States v Turkette, 452 US 576, 583 [1981]; Penal Law §§ 460.20 [1]; 460.10 [3]). While RICO does not explicitly require proof of the enterprise's structural integrity, it is settled that a qualifying enterprise must have structure (Boyle v United States, 556 US 938, 940-941 [2009]). And, as noted, the OCCA, which is

assertedly of more narrow application than RICO (Penal Law § 460.00),³ makes the requirement of "an ascertainable structure distinct from a pattern of criminal activity" express in its definition of "criminal enterprise" (Penal Law § 460.10 [3]). Both statutes demand or have been understood to demand proof of an association possessing a continuity of existence, criminal purpose, and structure -- which is to say, of constancy and capacity exceeding the individual crimes committed under the association's auspices or for its purposes (*id.*; Boyle, 556 US at 946).

There is no question that the People presented as to each appellant considerable evidence of a pattern of illegal activity. The issue to be decided is whether they also presented evidence from which a petit jury could reasonably infer (see People v Bello, 92 NY2d 523, 525 [1998]) that that activity bore the requisite relation to a distinct criminal enterprise - a "group of persons" seeking a "common purpose" and associated in an ascertainably structured entity. The People and the Appellate Division majority proposed a structure composed of buyers and sellers of stolen credit card information arrayed around Western

³As is here relevant the Legislature in enacting the OCCA was careful to explain that "[t]he organized crime control act is a statute of comparable purpose [to that of RICO] but tempered by reasonable limitations on its applicability, and by due regard for the rights of innocent persons. Because of its more rigorous definitions, this act will not apply to some situations encompassed within comparable statutes in other jurisdictions" (Penal Law § 460.00 [emphasis supplied]).

Express's hub-like web sites, drawn there by reason of the sites' menu of facilitative services. As Supreme Court perceptively observed, however, this does no more than describe a prevalent pattern evidently organic to the "carding" market; it is how that business often happens to be configured given the needs and interests of the individual market participants. It is, however, not indicative of a distinct, structured criminal enterprise. There is no hint that any of the market participants acted except for and according to their own particular interests,⁴ much less that their actions within the illicit market were somehow connected to the workings of a structured, purposeful criminal organization.

The People urge that a criminal enterprise need not be hierarchical to be structured and that structure may be inferred from patterns of criminal conduct. While both of these propositions may be true in theory, it remains that under the OCCA a "common purpose" is required and the structure of a criminal enterprise must be "ascertainable." Here these conditions are not met. The presented evidence was indicative of no more than the manner in which international transactions in stolen credit card data were commonly conducted, with or without

⁴We note that, while the Appellate Division offered that the common purpose of the purported enterprise was to encourage more and larger criminal transactions, there was no proof that Western Express's customers availed themselves of the company's services with any objective other than the expedient conduct of their own individual transactions.

the use of Western Express's services⁵; it did not support the further inference of a distinct, beneficially related criminal enterprise.

It is true that in Boyle the RICO requirement of enterprise structure was deemed satisfied simply by proof of the underlying pattern of criminal activity and the inference of structure that that proof would bear (see 556 US at 947-948). The OCCA, unlike RICO, however, specifically demands that the structure be distinct from the predicate illicit pattern, and not surprisingly there are no New York cases in which the requisite structure has been inferred simply from an underlying pattern. Moreover, Boyle involved a ring of thieves whose relatively constant membership met from time to time to plan and execute bank heists, the proceeds of which they shared (see id. at 941). There was, then, some evidence from which a continuing cooperative criminal enterprise possessed of a common purpose and some, albeit loose, structure could be inferred. Here, although there was evidence of many arms' length transactions, there was no proof of concerted activity from which a petit jury might reasonably have gathered that the appellants were knowing participants in the affairs of a "criminal enterprise" within the meaning of Penal Law § 460.10 (3).

Doubtless, the internet may be used to facilitate

⁵There are numerous providers of such services and, in fact, after Western Express's demise, its carder clientele simply switched to different providers of comparable services.

crime, and we do not exclude the possibility that a web site singularly preoccupied with processing a screened clientele's illicit transactions could be understood as elemental to and reflective of a criminal enterprise. But crimes committed by resort to cyber means are not invariably referable to distinct nefarious enterprises, and the web sites here involved do not permit the inference of an overarching criminal purpose or organization; while Western Express may have sought to make its web sites attractive to carders, the sites themselves presented simply as publicly accessible loci for the conduct of business, the legality of which turned in the end upon the independent agendas of individual users. To the extent that the usage was for illegal purposes, it reflected the existence of a prevalent black market but did not reasonably justify the additional inference necessary to the viability of the proposed enterprise corruption prosecution, that there was within that market an enduring structurally distinct symbiotically related criminal entity with which appellants were purposefully associated.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed and the orders of Supreme Court, New York County, dismissing the enterprise corruption count of the indictment as against appellants, reinstated.

People v Western Express et al.

No. 156

PIGOTT, J.(dissenting):

The days of traditional organized crime families seem to be fading. Instead, in today's modern world, criminal organizations now vary in size and even operate on a global span by way of the computer. Criminal organizations operating on the internet do so without any notion of a hierarchy or any formalized decision-making process. The New York State Legislature, recognizing that organized crime is evolving, has expressly permitted courts and prosecutors to apply the Enterprise Corruption statute (Penal Law § 460.20 [1] [a]), in their discretion, to organizations that engage in a pattern of criminal activity and that possess any sort of "ascertainable structure" (see Penal Law § 460.00).

The majority correctly summarizes the Grand Jury presentation by the People, noting the following: (1) defendant Western Express purchases "large sums of the unregulated internet currenc[y]"; (2) it then transfers this money to customers with "assumed name" accounts; (3) those "customers" then buy stolen credit card information with this unregulated money; and (4) the "customer" then sells the currency back to Western Express obtaining U.S. dollars in return with Western Express taking an

additional commission. As the majority notes, this is simply a digital form of money laundering.

My colleagues conclude that no "ascertainable structure" was presented to the Grand Jury in this case because, although there was a "prevalent black market" for stolen credit card information, within that market there was no "enduring structurally distinct symbiotically related criminal entity with which appellants were purposefully associated" (majority op at 11). I find no such requirement in the statute.

The People allege that a cybercrime group (which the People termed the Western Express Cybercrime Group), was formed. The group included a pre-existing corporation, Western Express International, Inc., that acted as the "money mover" for the other members of the group. Those other members included "vendors" and "buyers" who trafficked in stolen credit card numbers and other stolen personal identifying information.

The group acted with a common purpose to engage in conduct constituting the crime, among others, of trafficking stolen information, while avoiding detection by law enforcement. Specifically, the vendors and buyers, through Western Express, were permitted to conduct anonymous transactions, via the internet and by other means, using sophisticated payment schemes. Western Express further assisted the buyers and vendors by helping structure the transactions to avoid federal reporting requirements. For instance, via computer, Western Express

employees advised certain members to structure wire transfers in small amounts under various names. Thus, although the members had their own self-interest to profit from the criminal activity, they also acted for the benefit of both the vendors and buyers. Indeed, all of the participants of the group were acting together for the intended result and common goal of ensuring that all parties to and proceeds of the transactions remain virtually untraceable.

The purpose in enacting the Enterprise Corruption statute "was to address the particular and cumulative harm posed by persons who band together in complex criminal organizations" (People v Besser, 96 NY2d 136, 142 [2001]). Here, Western Express and the other group members banded together in a way that was distinct from a simply buy-sell transaction on the black market. Rather, the parties acted in an organized way, or, in other words by an "ascertainable structure", which allowed the members to be more successful in effecting their criminal purpose and to avoid detection from law enforcement for several years.

I would, therefore, affirm the order of the Appellate Division.

* * * * *

Order, insofar as appealed from, reversed and orders of Supreme Court, New York County, dismissing the enterprise corruption count of the indictment as against appellants, reinstated. Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo, Read, Smith and Jones concur. Judge Pigott dissents and votes to affirm in an opinion.

Decided October 18, 2012