

As the owner of a logging operation, Peter Morat planned to open a sawmill business in Madison County, under the name Herkimer Precut, Inc. He engaged defendant as a consultant to arrange for financing and related activities. In exchange for his services, defendant was to receive a 20% interest in the new venture. As the project progressed, Morat turned over various financial aspects of the business to defendant, entrusting him with control over the corporate checkbook. Because defendant was responsible for paying bills, Morat would sometimes provide defendant with blank, signed checks. At no time, however, did Morat authorize defendant to sign any checks.¹

After Morat discovered that corporate bills were not being paid, he examined the company's bank records and found unauthorized payments, some on checks he had signed in blank and others bearing a signature he did not recognize. Morat alleged that by improperly signing or issuing checks, defendant stole thousands of dollars from Herkimer Precut.

In two indictments consolidated for trial, a Montgomery County grand jury charged defendant with one count of grand larceny, 15 counts of forgery in the second degree and 15 counts of criminal possession of a forged instrument in the second

¹Although defendant contends Morat gave him authority to sign certain checks, the jury necessarily concluded that authority was lacking. On appeal from a conviction, we must consider the evidence in the light most favorable to the People (see e.g. People v Barney, 99 NY2d 367, 371 [2003]; People v Hitchcock, 98 NY2d 586, 591 [2002]).

degree. A single count survived the trial: the forgery conviction before us, stemming from a \$195.50 Herkimer Precut check defendant wrote to Nancy Herrick for work performed by Northeast Woodcraft.² In Montgomery County, defendant signed his own name to that check, telling Herrick that he owned Herkimer Precut. Herrick was acquainted with defendant personally and professionally and knew that he was affiliated with Herkimer Precut. She did not know, however, that Morat owned the company and that defendant lacked authority to sign checks. The check was for defendant's personal expenses.

A divided Appellate Division affirmed defendant's conviction. We agree with the dissenters that forgery was not proved.

II.

² The defense claimed that Montgomery County had no jurisdiction over the alleged crimes. Herkimer Precut was based in Madison County. The company's only checking account was with an office of Manufacturers and Traders Trust Company in Onondaga County. The bank mailed statements to a Madison County address. Defendant was a resident of Oneida County. In rendering its verdict, the jury announced that defendant was "not guilty, no jurisdiction" with respect to the first count, grand larceny. As the foreman continued to read the verdicts on other counts, he said "not guilty." At that point, the judge interrupted and asked whether the jury found defendant not guilty or whether there was a lack of jurisdiction. The foreman then explained that the jury had found no jurisdiction as to 19 of the counts (presumably because defendant's acts did not take place in Montgomery County). However, no question regarding jurisdiction or the form of the verdict is before us. The appeal deals only with whether defendant committed forgery by signing the check in question.

In People v Levitan (49 NY2d 87, 90 [1980]), we held that "[w]hile it is true that in certain rare instances one may commit a forgery by signing one's own name, this is so only where the signing is done in such a way as to deceive others into believing that the signer is in fact some third party." Levitan signed her name to deeds purporting to convey real property she did not own. In reversing her forgery conviction, we noted that "no pretense was ever made that the signatory was anyone other than defendant" (id. at 89). We also observed that "[u]nder our present Penal Law, as under prior statutes and the common law, a distinction must be drawn between an instrument which is falsely made, altered or completed, and an instrument which contains misrepresentations not relevant to the identity of the maker or drawer of the instrument" (id. at 90).

Although the Legislature has updated the statute³ to cover credit cards (see L 1984, ch 949, § 1) and certain other technological advances (see L 1996, ch 357, § 4), it has not abrogated Levitan's classic approach to forgery. In defining forgery, Penal Law § 170.00(4) provides, in pertinent part, that "[a] person 'falsely makes' a written instrument when he makes or draws a complete written instrument * * * which purports to be an authentic creation of its ostensible maker or drawer, but which is not such * * * because the ostensible maker or drawer * * *

³Our current forgery statutes have their roots in Penal Code 1881, §§ 509 - 527.

did not authorize the making or drawing thereof" (emphasis supplied).

The terms "authentic creation" and "ostensible maker" are pivotal. In most prosecutions, the forger, acting without authority, signs someone else's name. Thus, in a typical case, the forger, John Doe, wrongfully signs Richard Roe's name, (mis)leading the payee into believing that the check is the authentic creation of Richard Roe, its ostensible maker. Roe, of course, has not granted Doe any such authority and in most such instances has never even met Doe. In this simple formulation, the ostensible maker (Roe) and the actual maker (Doe) are two different people. If, however, the ostensible maker and the actual maker are one and the same, there can be no forgery under the statute.

Not surprisingly, the parties here disagree as to who is the ostensible maker. The prosecution argues that it is Herkimer Precut; defendant argues that he, the actual maker, is also the ostensible maker. They also disagree as to whether the check was the authentic creation of its ostensible maker.

The People contend that Herkimer Precut is the ostensible maker because its name appears on the check as owner of the account. Further, they argue that because defendant lacked authority to sign company checks, the check in question was not the authentic creation of the company, and a forgery is made out. Defendant counters that the check was an authentic

creation of its ostensible maker and that because he signed his own name, he cannot be guilty of forgery: as the ostensible maker, he did not pretend to be anyone other than himself -- the actual maker. Moreover, defendant argues that even if Herkimer Precut was the "ostensible maker" of the check, defendant's relationship with Herkimer Precut was sufficient to make the check the "authentic creation" of the company. In People v Briggins (50 NY2d 302, 307 [1980]), we observed that "when an individual signs a name to an instrument and acknowledges it as his own, that person is the 'ostensible maker'" (emphasis in original). Although Briggins involved a slightly different setting (and not a corporate check, as here), its language along with the statute's history and purpose, informs our analysis and supports defendant's position.

Forgery is a crime because of the need to protect signatures and make negotiable instruments commercially feasible (see generally Kessler, *Forged Instruments*, 47 YALE LJ 863 [1938]). In its common law roots, forgery had little to do with abstract questions of authority.⁴ At Queen's Bench, Chief

⁴Lord Coke illustrated this point, describing the crime's derivation: "[t]o forge is metaphorically taken from the smith who beateth upon his anvil, and forgeth what fashion or shape he will: the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word to forge is *falsare* or *fabricare*, and this is properly taken when the act is done in the name of another person" (3 Edward Coke, Institutes of the Laws of England, ch 75, at 169 [1644]). See also 3 William Blackstone, Commentaries 247 (1768) (defining forgery as "the fraudulent making or alteration of a writing to the prejudice of another

Justice Cockburn wrote that forgery "by universal acceptance *** is understood to mean the making or altering of a writing so as to make the writing or alteration purport to be the act of some other person, which it is not" (In re Windsor, 6 Best & Smith 522, 122 ER 1288 [1865]). As one treatise explains, "it is not forgery for a person to sign his own name to an instrument, and falsely and fraudulently represent that he has authority to bind another by doing so" and "the signer is guilty of false pretenses only" (Clark and Marshall, A Treatise on the Law of Crimes § 12.34, 957 [7th ed 1967]). Although statutes vary, most jurisdictions in this country have tended to follow the Windsor approach to forgery (see e.g. 2 Wharton, Criminal Law § 859, 1162 [12th ed 1932]).

In Gilbert v United States (370 US 650 [1962]), the Court considered whether a federal forgery statute included misrepresented agency. An accountant endorsed a government check written to a client by signing the name of the payee and then his own, as agent. He had no authority to do so. Under the federal statute, forgery "does not embrace a purported, but misrepresented, agency endorsement" (id. at 652). Recognizing the common law origins of that statute, the Court cited Regina v White (2 Car & K 404, 412, 175 ER 167, 170 [1847]), which held that "indorsing a bill of exchange under a false assumption of authority to indorse it per procuration, is not forgery, there

man's right").

being no false making."⁵

As the court noted in United States v Young (282 F3d 349, 351 [5th Cir 2002]), "[t]he majority of state law cases hold that signing one's own name on one's own check without sufficient funds to cover the amount of the check does not constitute forgery. In these cases, the person writing the check is not trying to pass himself off as someone else. The same principle applies when an agent signs a company check without actual authority to do so."⁶ We conclude that authority and authenticity are not the same thing. Defendant did not commit

⁵See also Greathouse v United States (170 F2d 512, 514 [4th Cir 1948] [holding that "[i]t is well established that forgery contemplates a writing which falsely purports to be the writing of another person than the actual maker" and therefore "it is not forgery for one, with intent to defraud, to issue a check in his own name on a bank which he has no funds"]); Edwards, Annotation, Use of One's Own Name as Constituting Forgery, 4 ALR Fed 793.

⁶Citing Levitan (49 NY2d 87). See also People v Mann (75 NY 484 [1878]); In re Heilbonn (1 Park Cr 429, 434 [Sup. Ct., New York 1853]); Commonwealth v Baldwin (11 Gray 197, 198 [Mass 1858]); People v Bendit (111 Cal 274 [1896]); State v Willson (28 Minn 52, 56 [1881]); People v James (178 Colo 401, 405 [1972]); State v Taylor (16 So 190 [La 1894]); Mallory v State (179 Tenn. 617 [1943]); Sales v. State (628 SW2d 796, 798-799 [Tex Crim App 1982]); Leslie v State (10 Wyo 10, 24 [1902]); Charter Bank Northwest v Evanston Ins. Co. (791 F2d 379 [5th Cir 1986]); In re Tully (20 F 812, 814-815 [SDNY 1884]); Greenberg, New York Criminal Law § 16:3, at 684 (2002); 2 Groble, Callaghan's Criminal Law in New York § 26:06 (3d ed 1991); 10 Zett, New York Criminal Practice § 111.1 (2), at 111-4; 37 CJS, Forgery, § 13, at 76. While some states have adopted a contrary, broad conception of forgery, they have tended to do so based on statutes that have expanded the crime beyond its common law boundaries (see e.g. People v Susalla, 392 Mich 387 [1974]; In re Clemons, 168 Ohio St 83, 84 [1958]).

forgery merely by exceeding the scope of authority delegated by the corporation.⁷ Our interpretation leaves no gap in the Penal Law. Although embezzlers who use their own names to sign checks beyond their authority are not guilty of forgery in New York, their conduct would ordinarily fall within our larceny statutes (see Penal Law § 155 et seq.; see also supra note 2).

Moreover, importing issues of authority into the statute -- without express legislative language -- would create vexing problems in adjudging forgery cases. If, for example, a corporate officer authorized to sign corporate checks does so for a personal purchase, is that forgery? Would an officer authorized to sign checks up to \$20,000 who signs a check for \$25,000 be guilty of forgery? While the prosecution argues that we should read our statute to justify convictions in those instances, it has not identified any New York decision interpreting the statute so expansively.⁸

⁷We recognize that theft of a check might be different from embezzlement, but have no occasion to decide whether it would be forgery to sign one's own name on a corporate check when having no connection with the corporation.

⁸In People v Cannarozzo (62 AD2d 503 [4th Dept 1978]), the court properly reversed a conviction for criminal possession of a forged instrument. An agent of the Commissioner of Motor Vehicles issued a drivers license to defendant without requiring him to pass the requisite tests. Even though the agent did not have authority to issue licenses without giving the tests, the court held that the license was not a forgery. The ostensible and actual maker of the license were the same: an agent of the Commissioner of Motor Vehicles. This Court affirmed without opinion (see 48 NY2d 687 [1979]; accord Commonwealth v Apalakis, 396 Mass 292 [1985]). We note that in the case before us neither

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed.

* * * * *

Order reversed and indictment dismissed. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges Smith, Ciparick, Graffeo, Read and Smith concur.

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the majority at the Appellate Division nor the prosecution relies on Cannarozzo. Nevertheless, to the extent the Appellate Division's dicta in Cannarozzo suggests it would be forgery for an agent to sign one's own name in excess of authority, we decline to follow that reasoning.