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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant-Respondent,

-against-

No. 32

GERARD IPPOLITO
a/k/a GERALD IPPOLITO,

Respondent-Appellant.

20 Eagle Street
Albany, New York 12207
February 06, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

GEOFFREY KAEUPER, ESQ.
MONROE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Appellant-Respondent
47 South Fitzhugh Street
Rochester, NY 14614

JAMES ECKERT, ESQ.
OFFICE OF THE PUBLIC DEFENDER
Attorneys for Respondent-Appellant
10 North Fitzhugh Street
Rochester, NY 14614

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Good afternoon.
2 We're going to start with number 32, People v.
3 Ippolito.

4 Counselor, would you like some rebuttal
5 time?

6 MR. KAEUPER: Could I reserve two minutes,
7 please?

8 CHIEF JUDGE LIPPMAN: Two minutes? Sure,
9 go ahead.

10 MR. KAEUPER: Thank you. Geoffrey Kaeuper
11 on behalf of the People.

12 The reversal of the criminal possession of
13 forged instrument counts in this case turns this
14 court's decision in People v. Cunningham on its head.

15 CHIEF JUDGE LIPPMAN: Counselor, what about
16 the statutory law at the time that this took place?
17 Does it anywhere say that they've got to put in that
18 these - - - the capacity in which he signs these
19 checks?

20 MR. KAEUPER: The forgery statute. Yes, I
21 mean - - -

22 CHIEF JUDGE LIPPMAN: Yes.

23 MR. KAEUPER: - - - I mean, the forgery
24 statute requires that you not misrepresent the maker
25 of - - -

1 JUDGE READ: Would you have to put PoA on
2 it?

3 MR. KAEUPER: You have - - - I think, if
4 you're talking about the change in the General
5 Obligations Law in 2008 - - -

6 CHIEF JUDGE LIPPMAN: That's what we're
7 talking about.

8 MR. KAEUPER: Right, right. And that
9 specifies the means by which you - - - which you
10 record the agency relationship. That is, prior to
11 that 2008 change in the law, that change doesn't
12 change the substantive law. What it - - - prior to
13 that point, it was unclear how - - - if there was a
14 prescribed way in which you had - - -

15 CHIEF JUDGE LIPPMAN: What are you basing
16 your view on? Cunningham? What?

17 MR. KAEUPER: Well, certainly Cunningham.

18 CHIEF JUDGE LIPPMAN: Isn't Cunningham a
19 very different situation than this?

20 MR. KAEUPER: Cunningham is almost the
21 mirror image of this case. It's somebody who signs
22 his name, but without authority. Here the claim is I
23 signed the victim's name, but I had authority.
24 Cunningham makes very clear that - - -

25 JUDGE SMITH: He did have the authority,

1 didn't he?

2 MR. KAEUPER: To sign - - - to sign her
3 name? No, I don't think he did.

4 JUDGE SMITH: Well, he would have, if he'd
5 put "by the" - - -

6 MR. KAEUPER: That's - - -

7 JUDGE SMITH: - - - "PoA" after he would
8 have been - - -

9 MR. KAEUPER: Absolutely. Because then
10 he's - - - then he's got a - - -

11 JUDGE SMITH: The power of attorney on its
12 face doesn't say - - - in fact it says on its face he
13 can do anything that I could do if I were physically
14 present.

15 MR. KAEUPER: Okay. But, I mean, that
16 doesn't give him a right to commit forgery. And
17 forgery is - - - involves - - -

18 CHIEF JUDGE LIPPMAN: Where's the
19 definition of forgery?

20 MR. KAEUPER: It's in Penal Law 170 - - -
21 well, the various components, Penal Law 170.00
22 defines - - -

23 CHIEF JUDGE LIPPMAN: Where does it say
24 that he has to put the capacity that he signed on it?

25 MR. KAEUPER: It says - - - it says that

1 MR. KAEUPER: - - - else that makes - - -

2 JUDGE GRAFFEO: - - - is there anything in
3 the legislative history that tells us if that was a
4 codification of the common law or was that a new
5 statutory requirement?

6 MR. KAEUPER: As I looked at the bill
7 jacket on - - - was it 5-150 - - -

8 JUDGE GRAFFEO: It's 1507.

9 MR. KAEUPER: - - - 7, yeah. And it's an
10 amendment that addressed a whole bunch of different
11 provisions in the General Obligations Law. And the
12 legislative history there indicates that the point is
13 not to change the law, but to clarify and remove
14 ambiguity. And I think that's what's being done
15 here.

16 CHIEF JUDGE LIPPMAN: So you're saying even
17 though there was ambiguity, he still had to put
18 "PoA", or whatever he had to do?

19 MR. KAEUPER: No. I think there was
20 ambiguity about the mecha - - - what is the
21 prescribed means of identifying the agency
22 relationship, not that you can not identify that
23 agency - - -

24 JUDGE SMITH: Even if you're right, isn't
25 there another step you'd have to take? Suppose he

1 did have to iden - - - suppose he was required to
2 identify his agency relationship and that not doing
3 so was fraud. Fraud's still not forgery. He still -
4 - - he couldn't - - - he still had authority, even if
5 he didn't disclose the fact that he was acting
6 pursuant to the authority.

7 MR. KAEUPER: Well, I mean, I think the
8 authority question - - - I mean, Cunningham says we
9 don't import questions of authority into the forgery
10 analysis. The forgery analysis is based on - - -

11 JUDGE SMITH: Well, but the statute - - -

12 MR. KAEUPER: - - - authenticity.

13 JUDGE SMITH: - - - the statute itself
14 makes authority relevant. It has to be either - - -
15 a forgery is signing either for somebody who doesn't
16 exist or for someone who does exist but didn't
17 authorize you to sign.

18 MR. KAEUPER: Right. That's the language
19 of the statute. And this court - - -

20 JUDGE SMITH: She did - - - she did
21 authorize him to - - - you're saying she didn't
22 authorize him to sign in that way?

23 MR. KAEUPER: Not to sign as if it's her.

24 JUDGE PIGOTT: Let me give you an ex - - -
25 let's assume the defendant here goes into Macy's or

1 some store, and he says I've got my lady here, and
2 she's in need of some clothing, so I'm going to buy
3 her 250 dollars' worth of clothing. We'll make it a
4 threshold thing. And he goes, while I'm here, I
5 think I'll pick up a suit. So then he goes to the
6 cashier and she rings it up and he says 250 dollars
7 for her clothes. He signs her name on a check and
8 gives it to her for that. Then on his, he says,
9 well, I'm here. He signs her name on another check,
10 only it's for his suit, not for her stuff. Has he
11 committed a forgery?

12 MR. KAEUPER: If he's signing her name on
13 her check, yes. I think that's a for - - -

14 JUDGE PIGOTT: All right, so - - -

15 MR. KAEUPER: Now, whether - - -

16 JUDGE SMITH: How many forgeries?

17 JUDGE PIGOTT: Even though - - - even
18 though he had the - - - he has authority from her to
19 sign, when he's signing within the context of what
20 she meant for him to do, she can do - - - he can sign
21 her name and that's okay. But if he's signing the
22 next check in the same way for the same amount but
23 it's for his clothing, that's a forgery?

24 MR. KAEUPER: Well, no. I guess I would -
25 - - the terminology is throwing me. I think both of

1 those are falsely made under 170.00.

2 JUDGE SMITH: But by your logic, that's two
3 forgeries in Judge Pigott's hypothetical.

4 MR. KAEUPER: Well, it's two documents that
5 are falsely made. But one is - - - one of them is
6 not made with intent to - - - with fraudulent intent.
7 So it's not going to be a forgery.

8 CHIEF JUDGE LIPPMAN: Why isn't this just
9 larceny?

10 MR. KAEUPER: Because he - - -

11 CHIEF JUDGE LIPPMAN: Why is it forgery
12 rather than larceny? There it makes a difference
13 what he's doing.

14 MR. KAEUPER: It's also larceny, but it's
15 forgery because the instruments misrepresent the
16 ostensible maker. Again, the language in Briggins:
17 "The forged character of a document does not depend
18 so much on whether it contains a falsehood, but on
19 whether, on its face, it misrepresents its
20 authority." These are checks that misrepresent their
21 authority. They purport to - - -

22 JUDGE PIGOTT: So in my example, because
23 the one check was for her, it's not a forgery,
24 because he had power of attorney to do that, and
25 that's what the power of attorney was supposed to do,

1 but on the one where he's buying things for his own
2 personal use, it's a forgery because it's not within
3 the confines or context of the PoA.

4 MR. KAEUPER: I think that's right. But
5 not - - - but I think - - - but again, to be clear, I
6 think they're both falsely made. They both meet the
7 definition of falsely made. Just - - - but that's
8 not the - - -

9 JUDGE PIGOTT: We're trying to get to the
10 word "forgery", or at least I am. Are they both
11 forgeries, or one's a forgery and one isn't?

12 MR. KAEUPER: Well, but forgery is the
13 crime, one element of which is that it be falsely
14 made. So those would be falsely made. If you signed
15 - - -

16 JUDGE PIGOTT: Both of them?

17 MR. KAEUPER: Right. If you're signing the
18 - - -

19 JUDGE PIGOTT: So every single time he did
20 anything on behalf of this lady, whether he - - - as
21 long as he did not put "PoA", he was committing
22 forgeries left and right?

23 MR. KAEUPER: Well, he's falsely making
24 instruments.

25 JUDGE PIGOTT: I get that.

1 MR. KAEUPER: Yes, I don't - - - but I
2 don't - - - but forgery requires you be intending to
3 - - - it has a fraudulent component also. And it has
4 - - -

5 JUDGE PIGOTT: I thought I was giving you a
6 softball. But you want to say that either they're
7 both forgeries or neither one is, in my Macy's
8 example.

9 MR. KAEUPER: Well, no. I mean, I want to
10 say that they're both falsely made, if they
11 misrepresent who the maker is.

12 JUDGE PIGOTT: Right. So is he guilty of
13 two whatever crimes you want to call them, for making
14 - - - falsely making checks?

15 MR. KAEUPER: No, he's not guilty of two
16 forgeries.

17 JUDGE PIGOTT: What's the guilty of?
18 Anything?

19 MR. KAEUPER: Well, and I mean - - - I mean
20 - - -

21 JUDGE SMITH: Your answer is one forgery?

22 MR. KAEUPER: Right, on the one where he's
23 signing his name on her check for his benefit, I
24 think that's a forgery. But that - - - but they both
25 satisfy - - -

1 CHIEF JUDGE LIPPMAN: So we examine what he
2 is - - - what the item is that he is signing his name
3 for, and each time you have to look at it and say,
4 oh, that's a forgery, because that's really for him
5 not for her?

6 MR. KAEUPER: No, no, no. Not on - - - not
7 on the false making element of the statute. You
8 would - - - you do have to do that on the - - - you
9 know, it has to be for a fraudulent purpose.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. KAEUPER: Right. So that's - - -

12 CHIEF JUDGE LIPPMAN: Okay. You'll have -
13 - - you'll have your rebuttal time.

14 MR. KAEUPER: Okay.

15 CHIEF JUDGE LIPPMAN: Thanks.

16 MR. KAEUPER: Thank you.

17 MR. ECKERT: May it please the court, James
18 Eckert for Gerard Ippolito.

19 An authorized signature is not a forgery.

20 JUDGE PIGOTT: All right. So in my Macy's
21 example, she's wherever she is, because she's old.
22 And she's not going to Macy's. So she's sitting
23 there thinking well, I sent the defendant off, and
24 he's going to get me some clothing, and it's going to
25 be great, and he's going to come back and I'll be

1 able to try them on, and I'm very excited.

2 In the meantime, he's doing exactly the
3 same thing, signing her name on both the checks, and
4 one of them is going for a suit for his.

5 MR. ECKERT: Right.

6 JUDGE PIGOTT: Has he committed a forgery?

7 MR. ECKERT: No, because in both - - -

8 JUDGE PIGOTT: On neither - - -

9 MR. ECKERT: - - - cases - - -

10 JUDGE PIGOTT: - - - one?

11 MR. ECKERT: Correct. He's author - - -
12 she has explicitly - - - here the uncontested facts
13 are he had explicit written authority to sign her
14 name.

15 CHIEF JUDGE LIPPMAN: So what is he - - -
16 so what is he guilty of?

17 MR. ECKERT: As far as sufficiency of the
18 evidence is concerned, it's theft. I mean, in that -
19 - -

20 CHIEF JUDGE LIPPMAN: So it's larceny - - -

21 MR. ECKERT: - - - example, he's stealing.

22 CHIEF JUDGE LIPPMAN: - - - it's larceny
23 but not forgery, till there's a statutory requirement
24 to put the capacity in? You agree, after the
25 statute, there's a different situation?

1 MR. ECKERT: It is a different situation.
2 It may be - - - I think there may still be a question
3 - - -

4 JUDGE GRAFFEO: Why is it a different
5 situation after the enactment of the General
6 Obligations Law provision?

7 MR. ECKERT: Now there's an explicit legal
8 requirement that he identify the nature of the
9 signature.

10 JUDGE GRAFFEO: And why did the legislature
11 do that?

12 MR. ECKERT: Because prior to that time,
13 there was no requirement that a person who had
14 authority to sign another person's name - - -

15 JUDGE GRAFFEO: Isn't it to give notice to
16 the entity accepting the check?

17 MR. ECKERT: That might have been the
18 fundamental purpose of - - -

19 JUDGE GRAFFEO: I mean, that's what bothers
20 me here with such a broad argument in terms of what's
21 authorized is, if he had put the "PoA" on these
22 checks, as he did with other documents - - - so he
23 knew about it; he definitely did it on other
24 documents that he signed as her representative - - -
25 it's possible that the bank would have said, can I

1 see that - - - can I see that power of authority?
2 Instead, somehow, 700,000 dollars disappears.

3 MR. ECKERT: And those are very important
4 policy considerations that the legislature took into
5 effect and enacted - - -

6 JUDGE GRAFFEO: But was he - - -

7 MR. ECKERT: - - - a new requirement.

8 JUDGE GRAFFEO: - - - was he authorized to
9 not indicate that he was acting in a representative
10 capacity?

11 MR. ECKERT: He's authorized to sign her
12 name. And under the previous existing - - -

13 JUDGE GRAFFEO: In - - -

14 MR. ECKERT: - - - law - - -

15 JUDGE GRAFFEO: - - - as her
16 representative?

17 MR. ECKERT: Well, under the previously
18 existing law, a signature means this is either the
19 original creation of the ostensible maker or an
20 authorized signature. And that's what the forgery
21 statute - - -

22 CHIEF JUDGE LIPPMAN: Was there a common-
23 law duty before the statute to put your capacity?

24 MR. ECKERT: I don't believe criminal - - -
25 and I would urge this court to find that criminal

1 liability cannot be established by common law; that
2 custom can't be a basis for criminal prosecution.

3 JUDGE PIGOTT: Well - - -

4 JUDGE GRAFFEO: There was no objection to
5 that - - - to the attorney who testified at the trial
6 about that.

7 MR. ECKERT: Absolutely not. I mean, it's
8 a question of whether or not that's a legal basis to
9 impose criminal liability. The fact that - - -

10 JUDGE SMITH: Well, the - - -

11 MR. ECKERT: - - - might well be proved - -
12 -

13 JUDGE SMITH: - - - it could also - - - it
14 could be liable - - - it could be relevant to the
15 larceny count anyway, couldn't it?

16 MR. ECKERT: Yes, yes. In other words, the
17 fact that he didn't do something and that he did in
18 other circumstances, might well be evidence that he -
19 - -

20 JUDGE SMITH: But even if - - -

21 MR. ECKERT: - - - acknowledged that he was
22 doing - - -

23 JUDGE SMITH: - - - even if - - -

24 MR. ECKERT: - - - something wrong.

25 JUDGE SMITH: Excuse me. Even if he was

1 intending to deceive by leaving off the PoA, and even
2 if he did deceive, isn't there a difference between
3 fraud and forgery?

4 MR. ECKERT: Correct. I mean, that's sort
5 of mixing the two and saying that doing something
6 that constitutes an intent to defraud reduces forgery
7 from falsely making an instrument with the intent to
8 defraud to simply intending to defraud.

9 JUDGE PIGOTT: Well, then why did he do - -
10 - I mean, weren't there checks here where he signs -
11 - - let's see. He makes a check payable to her. He
12 signs it, and then he signs her name on the back, as
13 if it's her. Where, if he was actually exercising
14 his PoA authority, he didn't have to go through all
15 those gyrations, he could have just written the check
16 to wherever he was trying to get the money to in his
17 larcenous world. But at some point, isn't there a
18 forgery in there, when all three of them on - - - are
19 signed by the same person and the money's going out
20 the door?

21 MR. ECKERT: I think there's a fraud,
22 perhaps. But there's not a forgery. If you have
23 authorized to sign the name, it doesn't matter how
24 many times you're doing it, you're authorized to sign
25 the name - - -

1 JUDGE PIGOTT: Yes, but - - -

2 MR. ECKERT: - - - it can't be a forgery.

3 JUDGE PIGOTT: Let's assume he's buying
4 drugs. All right? He's out on the street buying - -
5 - I don't know if you buy them with a check anymore.

6 MR. ECKERT: If the check is big enough,
7 you probably can.

8 JUDGE PIGOTT: I'll be you're right. So
9 you know, all of a sudden she gets arrested for - - -
10 because they get the check and it says you're - - -
11 you've got a felony against you for buying a hundred
12 pounds of hashish, and your defendant's going to say
13 yeah, she wanted me to buy it for her, so I bought it
14 for her, so throw her into jail.

15 At some point there's a forgery there, is
16 there not?

17 MR. ECKERT: No. Because again, the
18 People's argument on appeal, and I think their
19 argument below, hinged on the belief that everyone
20 knows or everyone believes this signature must be the
21 creation of the person whose name appears and ignores
22 the fact that people are authorized to sign other
23 people's names.

24 JUDGE PIGOTT: But there's a mens rea
25 element, it seems to me. If he's signing her name to

1 do what he's supposed to be doing with a power of
2 attorney, that's one thing. If he's saying I'm now
3 going to abuse that - - - Judge Smith would say
4 that's a fraud; I'm saying, at some point, doesn't it
5 become a forgery, when you have absolutely no
6 authority to sign that name?

7 MR. ECKERT: Only if the court imports into
8 the forgery element something which I believe the
9 court has repeatedly refused to import before, which
10 is some kind of mens rea negating the authority to
11 sign. It's kind of like the burglary statute where
12 the prosecution might well want to say you were - - -
13 you had license to enter the store for legitimate
14 purposes only. And if we can prove that you intended
15 to steal when you entered, you committed a burglary.

16 JUDGE PIGOTT: Right.

17 MR. ECKERT: Because the store's never
18 going to let you in if you intend to steal from it.

19 JUDGE PIGOTT: Well, that's true, isn't it?
20 I mean, you can be - - - you can walk into a Macy's
21 and be charged with burglary for the intent to enter
22 or remain unlawfully for the purposes of committing a
23 crime.

24 MR. ECKERT: Well, I don't think it's an
25 unlawful entry.

1 JUDGE GRAFFEO: So how - - -

2 MR. ECKERT: I don't mean to distract us
3 with a different thing.

4 JUDGE GRAFFEO: - - - how are the banks
5 here, that he presented these checks to, supposed to
6 know that he had a power of attorney or whether he
7 was abusing his power of attorney?

8 MR. ECKERT: I think that's why the
9 legislature made the change to require there to be an
10 explicit statement of the nature of the authority.
11 But I don't think that an authorized signature
12 becomes unauthorized if the bank doesn't understand -
13 - -

14 CHIEF JUDGE LIPPMAN: So at - - -

15 JUDGE GRAFFEO: Is it authorized for any
16 purpose?

17 MR. ECKERT: He's authorized to sign her
18 name.

19 JUDGE GRAFFEO: You give me a power of
20 attorney, I can sign your name for any - - - for any
21 purpose at all. It never becomes a forgery?

22 MR. ECKERT: I believe that's correct. And
23 it doesn't become a forgery. It might become a
24 hundred other crimes, but it's still an authorized
25 signature. And the requirement for "falsely made" is

1 either the entity didn't exist or the entity didn't
2 authorize the signature.

3 CHIEF JUDGE LIPPMAN: Counselor, your
4 adversary relies on Cunningham. What does Cunningham
5 stand for?

6 MR. ECKERT: Cunningham, I believe, stands
7 for the opposite of what they're saying. And now
8 granted, Cunningham signed his own name. But I
9 believe Cunningham represents a rejection by this
10 court of incorporating other elements into whether or
11 not there was, in fact - - - he signed his own name
12 to a company check. The company says that's a
13 forgery because he's not authorized to do it for that
14 purpose. He had authorized - - -

15 CHIEF JUDGE LIPPMAN: Is a corporation a
16 different situation than we have here?

17 MR. ECKERT: It is. Because as - - -
18 effectively, Cunningham represented a decision that
19 he's authorized to sign his own name, which I - - -
20 which really wasn't contested. He wasn't authorized
21 to sign that particular thing.

22 I think the dissent on the prosecution
23 erroneously rely on Shanley a great deal. Shanley
24 was an indication where a person had power of
25 attorney, signed the other person's name, and was

1 prosecuted for - - - I forget if it was forgery or
2 possession of a forged instrument. But the reason is
3 because the signature was authenticated. The
4 defendant didn't simply sign the person's name and
5 leave out - - -

6 JUDGE SMITH: Well, I mean, isn't there - -
7 - wasn't the statute different back in 1909? I mean,
8 they didn't have the definition of false making back
9 then.

10 MR. ECKERT: No, it - - - correct. There
11 were a number of - - - there were a number of other -
12 - - but I think the gist of the Shanley decision was
13 not that - - - saying power of attorney was required.
14 And I think some of the language from Shanley was
15 incorporated by the dissent that it was a factual
16 finding on the part of the jury. But that's because
17 of facts that - - -

18 CHIEF JUDGE LIPPMAN: Does Cunningham
19 supersede that, being a much more recent case?

20 MR. ECKERT: It is. It is. But it - - -
21 Shanley, the problem was, the defendant either signed
22 under power of attorney, which is what he claimed in
23 his defense, or what the prosecution had evidence of,
24 which is he brought an imposter to the notary, to the
25 Commissioner of Deeds. And she said I am Julia Smith

1 and I signed this document. And so both of those
2 statements were false. And I think the dissent
3 wrongly picks up that language without Shanley. So I
4 - - -

5 JUDGE SMITH: Let me just - - - it may not
6 be relevant. Does this - - - does how this comes out
7 matter to your client? Didn't he get the same time
8 on the cases - - - on the claims that are - - - the
9 counts that are not an issue here?

10 MR. ECKERT: There was - - - these counts
11 do represent concurrent time on behalf of the
12 defendant. That's correct. So his - - -

13 JUDGE SMITH: So is this, in some sense, an
14 academic exercise we're doing here?

15 MR. ECKERT: Well, I don't know what's
16 going to happen to the other convictions at - - -

17 CHIEF JUDGE LIPPMAN: Well, it would be - -
18 -

19 MR. ECKERT: - - - some point.

20 CHIEF JUDGE LIPPMAN: - - - is your
21 argument it would be reduced, the time?

22 MR. ECKERT: I don't believe so.

23 CHIEF JUDGE LIPPMAN: You don't believe so?

24 MR. ECKERT: I don't believe so. I believe
25 these were concurrent and the consecutive - - - there

1 were a few forged instrument counts that were
2 consecutive.

3 CHIEF JUDGE LIPPMAN: So what's the purpose
4 of - - -

5 MR. ECKERT: I can't not raise an issue.
6 What's - - -

7 JUDGE SMITH: The purpose is you're doing
8 your job.

9 MR. ECKERT: I'm not sure. He's got two
10 minutes to talk about it.

11 CHIEF JUDGE LIPPMAN: Okay, good.

12 MR. ECKERT: But in his defense, he didn't
13 apply for leave personally.

14 JUDGE PIGOTT: So you're saying these are
15 forty counts of a larceny, either a petty or a grand,
16 depending on the size of the check that he had
17 authority to sign, buying a car and buying whatever
18 else - - -

19 MR. ECKERT: Yes. They're just part of the
20 larger larceny prosecution. His failure to write
21 "PoA" in many instances, when he did in some
22 instances, might be indication of a larcenous intent.
23 But it's not an indication - - -

24 JUDGE GRAFFEO: Does this number of counts
25 have anything to do with the restitution hearing?

1 MR. ECKERT: There was no dispute by the
2 prosecution that a hearing is required - - -

3 JUDGE GRAFFEO: I mean, if there is a
4 restitution hearing.

5 MR. ECKERT: It may be relevant. But I
6 think under the decisions of this court, even an
7 acquittal on some counts doesn't deprive the court of
8 the opportunity - - -

9 CHIEF JUDGE LIPPMAN: Okay, counselor.

10 MR. ECKERT: - - - to take those into
11 consideration.

12 CHIEF JUDGE LIPPMAN: Thanks, counselor.

13 Counselor, rebuttal?

14 MR. KAEUPER: Yes. And if I could pick up
15 on something Judge Graffeo was talking about, about
16 notice to the entity, because I think I - - - another
17 circumstance, I think, makes this pretty clear.
18 Because there are cases that talk about when somebody
19 uses a fictitious name that's their nom de plume.
20 And that is not a forgery if you sign your own
21 fictitious nom de plume. It is a forgery, however,
22 if you sign that as the drawer and your own real name
23 as the payee.

24 Now, as far as authority, again, you got
25 authority to use that name. It's my nom de plume. I

1 have authority to use it. If that's all I use, it's
2 not a forgery. I have the authority. But if I'm
3 deceiving the entity who's receiving it - - - if I'm
4 presenting you with an instrument, which on its face
5 is deceptive about who is the osten - - - or who is
6 the maker of the instrument, that's a forgery.
7 That's the nature - - -

8 JUDGE SMITH: Well, wasn't that true in
9 Cunningham? It was deceptive on its face about who
10 was the maker of the instrument.

11 MR. KAEUPER: No. Because he signed his
12 own name. That's exactly the issue in Cunningham.

13 JUDGE SMITH: The purported maker of the
14 instrument was a company that had not authorized him
15 to sign.

16 MR. KAEUPER: Well, I think that - - - as I
17 read Cunningham, that's an issue that's debated but
18 not resolved by this court. This court resolves it
19 based upon the fact that it's his signature, that
20 he's representing his - - - and again, if authority
21 were the issue, Cunningham had no authority. That's
22 not really - - -

23 JUDGE SMITH: Yes, that's what's bothering
24 me. I mean, in Cunningham, it's an obviously
25 misrepresentation of authority.

1 MR. KAEUPER: Of authority, but not
2 authenticity.

3 JUDGE SMITH: How is that - - - how is that
4 what you're complaining about here? He's - - -

5 MR. KAEUPER: Again, it's authenticity
6 rather than authority. Whether he has authority or
7 not may be relevant to whether he knows that these
8 are forged instruments. But whether he has authority
9 or not is not relevant to whether the document, on
10 its face, misrepresents who is the maker of the
11 document. That's the essence of forgery. That's
12 always been the essence of forgery.

13 And the reason he did sign her name and not
14 include "by her agent", as he had on other documents,
15 is to further the larceny. It is - - -

16 JUDGE SMITH: But if - - -

17 MR. KAEUPER: - - - to deceive the - - -

18 JUDGE SMITH: - - - if he put the PoA
19 there, who would the maker be?

20 MR. KAEUPER: If he had put - - - if he had
21 signed her name and then put "by" - - -

22 JUDGE SMITH: Followed by PoA.

23 MR. KAEUPER: Well, I mean, then - - -
24 then, I guess - - -

25 JUDGE SMITH: Who would the maker be?

1 MR. KAEUPER: I guess she is - - - I guess
2 she's the maker.

3 JUDGE SMITH: And then if he leaves off the
4 PoA, she's still the maker. So how is he
5 representing it?

6 MR. KAEUPER: Because she isn't the maker.

7 JUDGE SMITH: She's the purported maker
8 both times.

9 MR. KAEUPER: But again, I think the key is
10 that the document, on its face, is misrepresenting
11 who the maker is, versus not misrepresenting who the
12 maker is.

13 That is, it's he - - - or maybe the correct
14 answer is, he is the maker as her agent. And I guess
15 that would fit with the Cunningham case too. He
16 signs his name, he's the maker, even though it's
17 ostensibly the - - -

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MR. KAEUPER: Thank you.

20 CHIEF JUDGE LIPPMAN: Thanks. Thank you
21 both. Appreciate it.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Gerard Ippolito a/k/a Gerald Ippolito, No. 32 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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