People v Fountain
2017 NY Slip Op 30674(U)
April 10, 2017
County Court, Rensselaer County
Docket Number: 16-1139
Judge: Richard M. Koweek

STATE OF NEW YORK
COUNTY COURT : COUNTY OF RENSSELAER

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

RONALD FOUNTAIN, GARY GORDON and SHANE HUG,

Defendants.

Indictment No. 16-1139

DECISION AND ORDER

All three Defendants were arraigned in Rensselaer County Court for the charges of Penal Law §155.25, Petit Larceny; Public Corruption, in violation of Penal Law §496.06; Official Misconduct, in violation of Penal Law §195; Conspiracy in the Sixth Degree, in violation of Penal Law §105.00 and Criminal Solicitation in the Fifth Degree, a violation, Penal Law §100.00.[1] By Stipulation, Defendants and the People asked the Court to consider whether the Indictment should be dismissed first on two specific grounds. Thereafter, it was clarified that the Court would review the Grand Jury Minutes for legal sufficiency (CPL §210.30) and the adequacy of the legal instructions to the Grand Jury (CPL§§ 210.35 and 190.65) The two grounds initially proposed for consideration are:

1. Was there legally sufficient evidence to establish the offenses charged, where each count of the Indictment includes Petit Larceny as an element and the essential

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[1]For a more comprehensive history leading to this Indictment, the reader is referred to this Court's Decision and Order dated December 1, 2016.

theory of the larceny is that the Defendants reproduced a sound recording;

2. Should the Indictment be dismissed for failure to instruct the Grand Jury on the "claim of right defense" made in good faith.

For purposes of point one, it is assumed that the Defendants did not have a right to duplicate this recording.

DISCUSSION

In order to consider the Defendants' first argument, it is necessary to examine Article 155 of the Penal Law and, in particular, the sections containing definitions (Penal Law §155.00).

> A person "steals property" and commits "larceny" when, "with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof" (Penal Law §155.05(1). (Each of the underlined words is separately defined in PL §155.00.)

For example, "property" is defined to mean "any money, personal property, real property, computer data, computer program, thing in action, evidence of debt or contract, or any article, substance or thing of value, including any gas steam or water or electricity,

which is provided for a charge or compensation." (PL §155.00 (1))

"Computer data" is further defined as "property and means a representation of information, knowledge, facts, concepts or instructions which are being processed, or have been processed in a computer and may be in any form, including magnetic storage media, punched cards or stored internally in the memory of the computer." (PL §156.00 (3))

To "deprive" another of property means "(a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property."(PL §155.00 (3)).

To "appropriate" property of another to oneself or to a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person. (PL §155.00 (4)).

"Obtain" includes "the bringing about of a transfer or purported transfer of

property or of a legal interest therein, whether to the obtainer or another." (PL §155.00 (2)).

Finally, when property is taken, obtained or withheld by one person from another person, an "owner" thereof "means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder". (PL §155.00 (5)). Neither side has argued and the proof does not support other theories of larceny such as larceny by embezzlement, by trick, by false pretense, by acquiring lost property, by bad check or by false promise. (PL §155.05 (b), (c), (d), (e))

Each Defendant is accused of stealing property, "to wit, at the aforesaid date and place the above-named Defendant did steal a copy of a 911 call from the Troy Police Department."[2]

PROPERTY

The first question to consider, therefore, is whether or not a copy of a 911 call is property. The Defendants argue that it is merely "sound" and, therefore, cannot be taken, nor can an owner be deprived of it. They argue that sound is defined as vibrations that

[2]Counts One, Six and Eleven of the Indictment. Counts Six and Eleven accuse Gordon and Hug of acting in concert with another person.

travel through the air or another medium and can be heard when they reach a person's or animal's ear, citing the Oxford English Dictionary. Because it is intangible, like the images on a movie screen, it cannot be subject to being taken, because there was no substance that was removed. People v. Borriello, 154 Misc.2d 529 (Sup Ct Kings County 1992)

The People, in response, contend that the sound has been digitized and converted into computer data, which falls under the definition of property. (PL §155.00 (1), PL §156.00 (3). They argue that even though the physical audio disc was not removed, the content of the disc, constituting computer data, was. This digitized sound, they argue, is the intended thing of value, protected by the law. They do not cite any cases.

In this Court's view, in what appears to be a case of first impression in New York, the impermanence of sound has been made permanent by its digitization. It, therefore, falls under the definition of "property", PL §155.00 (1) as amplified by PL §156.00 (3).cf People v. Aleynikov, 148 A.D.3d 77 (1st Dept. 2017)

APPROPRIATE

The next question to be considered is whether or not the Defendants can be accused of appropriating this audio file. As indicated above, to make out a prima facie

case of Petit Larceny, a Defendant must have acted with the "intent to appropriate to himself or another of property." A person "appropriates" property by exercising control over the property either (i) "permanently" or (ii) "for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit" People v. Jennings, 69 N.Y.2d 103, 118 (1983). Proof of either part of that Section is enough to sustain a charge. People v. Aleynikov, 148 A.D. 3d 77, 83 (1st Dept. 2017).

Defendants argue that the owner of the property[3], the Troy Police Department, was not "deprived" of the property because the audio recording remained in its possession. Having an intent to temporarily use the property without the owner's permission or even an intent to appropriate outright the benefits of the property for short-term use, does not fall under the definitions of either "deprive" or "appropriate", they contend, citing People v. Williams, 41 A.D.3d 1252 (4th Dept. 2007).

The People argue that an appropriation was accomplished by the duplication of the audio file. By obtaining an unauthorized copy and permanently exercising control over it, and subsequently disposing of it for their own benefit or that of a third person, they have deprived the owner of control over the property. They cite no cases.

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[3]Defendants do not maintain that they were the owners of the recording or had a superior interest in it, prior to duplication, within the meaning of Penal Law §155.00 (5).

The taking element may be satisfied by a showing that the thief exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owners continued rights. People v. Jennings, 69 N.Y.2d 103, 118 (1986) Asportation is not an essential element in all cases of larceny. People v. Alamo, 34 N.Y.2d 453, 460 (1974); People v. Brenia, 277 A.D.2d 17 (1st Dept. 2000).

The essential question in this case appears to be whether or not an appropriation or trespassory taking occurred when the "owner" lost exclusive possession or control over the property. Neither side has supplied any cases directly on point. A review of existing case law does not appear to shed any light on the subject.

Possess means to have physical possession or otherwise to exercise dominion or control over tangible property (Penal Law §10.00(8)). This Section is to be construed according to the fair import of its terms to promote justice and the objects of the law. (Penal Law §5).

To be sure, there is a line of cases that discuss the importance of proving intent to deprive an owner of property permanently rather than temporarily[4]. All of them relate to

[4]See e.g., People v. Drouin, 143 A.D.3d 1056 (3d Dept. 2016); People v. Contant, 140 A.D.3d 782 (2d Dept. 2016); People v. Terianova, 147 A.D.3d 1086 (2d Dept. 2017); People v. Medina, 18 N.Y.3d 98 (2011); People v. Williams, 41 A.D.3d 1252 (4th Dept. 2007).

tangible objects and the degree with which the defendant exercised temporary or permanent control over them, from which, together with other proof, intent to permanently deprive the owner of the object, could be inferred.

Here, however, a duplicate of a piece of intangible property, but property nevertheless, was made and at least one Defendant was alleged to have arranged to have it reduplicated, where it was subsequently publicly broadcast. If true, this clearly interfered with the owner's exclusive possession of it. In this Court's view, using the standard applicable to reviewing Grand Jury Minutes for their sufficiency (have the People made a primae facie case, People v. Jensen, 86 N.Y.2d 248, 252 (1995)), this constitutes a possession of property wholly inconsistent with the owner's continued rights and is therefore a larceny. People v. Jennings, 69 N.Y.2d 103.

Whether it passes muster as to legal sufficiency will be discussed in point two.

2. Instructions to Grand Jury

A Grand Jury need not be instructed with the same precision required in charging a trial jury. People v. Valles, 62 N.Y.2d 36 (1984); People v. Cannon, 210 A.D.2d 764 (3d Dept. 1994). But the prosecutor must provide adequate guidance to permit the Grand Jury to carry out its function of intelligently determining whether a crime has been committed

and if the elements of that crime have been established by legally sufficient evidence. People v. Valles, 62 N.Y.2d at 38; People v. Wade, 260 A.D.2d 946, 947; People v. Mujahid, 45 A.D.3d 1184 (3d Dept. 2007).

With regard to the question of defenses, not every plea defense suggested by the evidence must be charged to the Grand Jury. Rather, whether a particular defense needs to be charged depends upon its potential for eliminating a needless or unfounded prosecution. People v. Lancaster, 69 N.Y.2d 20, 27; People v. Valles, 62 N.Y.2d 36, 38.

In People v. Zona, 14 N.Y.3d 488 (2010), the Court of Appeals considered the question as to the propriety of giving an instruction to a petit jury regarding a good faith claim of right to property accused of being removed. It found that this defense, contained within Penal Law §155.15 (1), is a defense, not an affirmative defense, and thus the People have the burden of disproving such defense beyond a reasonable doubt. (Penal Law §25.00 [1]). It further held that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor" and a failure to do so constitutes reversible error. People v. Zona, supra, at 492-493.

In an unreported miscellaneous case, People v. Fulkrod, 29 Misc.3d 1203 (A) (County Court Yates County 2010) that Court ruled:

> A court reviewing grand jury minutes must ensure that a district attorney instructed the panel as to an appropriate defense that was "complete and exculpatory" such that if a grand jury could have found the defense to be applicable, "no indictment would have been returned and an unwarranted prosecution would have been avoided." People v. Crump, 150 M.2d 566, 567 (NY County Court, 1992) quoting People v. Valles, 62 N.Y.2d 36, at 38-39 (1984).

The pattern jury instruction for claim of right defense contained in Penal Law §155.15 reads as follows:

> It is a defense to the charge of larceny that the property was taken, withheld, or obtained under a claim of right made in good faith.
>
> In other words, a defendant who takes, withholds or obtains property of another, believing in good faith, though perhaps mistaken, that he or she has a right to possess the property superior to that of the other person, does not have the intent necessary to be guilty of larceny.

The Court of Appeals has held that this is not an affirmative defense but rather an ordinary defense. People v. Chesler, 50 N.Y.2d 203 (1980). In People v. Zona, supra, the Court held that subjective good faith, not reasonableness, is the test. Id. at 493.

Here, the grand jurors heard contradictory evidence. Sgt. Timothy Colaneri, of the Troy Police Department, testified, with the benefit of immunity, that he consented to allow Defendant Fountain to listen to the 911 call. He denied, however, in a second appearance before the Grand Jury, to agreeing to allow a copy of the call to be made,

especially if a duplicate of the call would be given to Gary Gordon. Further, Troy Police Officer Adam Mason testified, also with immunity, that he interviewed Ron Fountain who denied that he ever had conversations with Gary Gordon about trying to obtain a copy of the recorded call. Also Mason claims that Fountain denied any knowledge as to how it was ever to be released to the media. Finally, Mason claims that Fountain denied that he recorded the conversation off of the disc on to his phone. All of these conversations are alleged to have taken place on November 23, 2015, at approximately 12:40 p.m. in Mason's office at the Troy Police Department.

By contrast, Defendant Fountain waived immunity and testified that he was approached by Gary Gordon to obtain a copy of the 911 call. He, in turn, sought permission, over a period of several days from his supervisor, Sgt. Colaneri, to make a copy of the recording, asserting that Gordon was interested in listening to it. He claims that Colaneri placed a disc in his computer containing the 911 phone call recording, pressed play and left the room. Fountain, then made a copy of the recording, and subsequently texted Gordon that he was in possession of something of interest to Gordon. He stated that Gordon came to his house and took Fountain's phone, with his permission, in the garage of Fountain's house. Fountain left the room to change and when he returned Gordon gave him back his phone. When confronted by the District Attorney with police department rules that prohibit the release of information without permission, he contended that he had obtained such permission from Colinari, his immediate supervisor.

In deciding whether the evidence introduced before the Grand Jury is sufficient to support charges, a Court must determine whether the People have made out a prima facie case that the Defendant committed the crimes charged. People v. Jennings, 69 N.Y.2d 103, 114-1.15. In the context of the Grand Jury proceeding, legally sufficient means prima facie, not proof beyond a reasonable doubt. People v. Mayo, 36 N.Y.2d 1002, 1004 (1975). In assessing whether the People presented a prima facie case, the Court inquires whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury. People v. Jennings, supra at 114; People v. Woodruff, 4 A.D.3d 770, 772 (4th Dept. 2004); People v. Smaragdas, 27 A.D.3d 769 (2d Dept. 2006). A Court reviewing the Grand Jury presentation must limit its inquiry to the legal sufficiency of the evidence and may not weigh the proof or examine its quality or adequacy. People v. Galarto, 84 N.Y.2d 160, 164 (1994).

Larcenous intent is one of the elements of Petit Larceny. While the grand jurors were properly instructed as to the pattern jury instruction definition of larceny, they had no opportunity to consider the element of intent, given the potential good faith claim of right claim asserted by the Defendant Fountain. Without such instruction, they could not know that they had the ability to either credit Fountain's version of events, thus negating the element of intent, or disregard his testimony. The District Attorney is the primary source of information as to the law. People v. Valles, supra; CPL 190.25 [6] This is not a

mitigating defense for which there is an element of discretion, (see, for example, People v. Lancaster, supra at 994) but is, if believed, a complete defense. People v. Graham, 2017 Slip Op 02175 March 24, 2017 (4th Dept). The failure to give such instruction impaired the integrity of the Grand Jury proceeding. CPL§ 210.35. The proceeding is, therefore, defective, requiring dismissal. CPL§ 210.35 (5), People v. Valles, supra at 38-39.

Nor is dismissal of only the Petit Larceny counts the appropriate remedy here. Because the prosecution's theory surrounding the other counts, Public Corruption (PL§496.06(1), Official Misconduct (PL§195.00[1]), Conspiracy in the Sixth Degree (PL§105.00) and Criminal Solicitation in the Fifth Degree (PL§100.00) centers around the alleged plot to use their public offices in illegal ways to commit the crime of Petit Larceny, absent legally adequate proof of larceny, the other charges cannot stand.

Therefore, this Court dismisses all charges against all three Defendants with leave to represent any appropriate charges to another Grand Jury. CPL§210.45 (9). Because this decision addresses the sought after dismissal of the charges, the Court does not reach the question of the sufficiency of the charges on other possible grounds under CPL§210.30. To the extent that any of the Defendants were released on bail, the bail for each Defendant is exonerated, effective immediately.

This constitutes the decision, opinion and Order of this Court.

DATED: April 10, 2017
Hudson, New York

RICHARD M. KOWEEK
Acting Rensselaer County Court Judge

Papers Considered:

1. Grand Jury Minutes with Exhibits, August 30, 2016; September 1, 2016; September 28, 2016; October 3, 2016 and October 5, 2016

2. Memorandum of Law dated February 3 2017, of Joseph M. Ahearn, Esq., Attorney for Defendant Ronald Fountain; William D. Roberts, Esq., Attorney for Defendant Gary Gordon; and Trey Smith, Esq., Attorney for Defendant Shane Hug

3. Memorandum of Law dated February 6, 2017, of Paul Czajka, District Attorney, by Joyce Crawford, Esq., Assistant District Attorney