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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 81

RANDALL K. MCGOVERN,

Appellant.

20 Eagle Street
Albany, New York
September 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. McGovern.

3 MR. SCHWARTZ: Good morning, Your - - - I'm
4 sorry. Good afternoon, Your Honors. May it please the
5 court - - - if it pleases the court, I would request two
6 minutes of time for rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. SCHWARTZ: I'm Jeremy Schwartz. I represent
9 the appellant, Randall McGovern. As an initial matter. In
10 this case, the People do acknowledge, it seems, that they
11 do have the burden to establish in a case such as this - -
12 - where counts I and II of the indictment were of the same
13 occurrence - - - that that prima facia evidence has been
14 put forth, and it is now the People's burden to show that
15 these are separate offenses under 70.25.

16 They are not separate offenses. They are not
17 separate acts. They are not separate under really any of
18 the framework that has been put forth. It would be
19 actually pretty difficult to - - -

20 JUDGE TROUTMAN: So here the forgery and the
21 larceny are the same act?

22 MR. SCHWARTZ: Yes. Because the act of forging
23 the document was the false pretense for the larceny.

24 JUDGE TROUTMAN: Couldn't you have forged
25 something without the larceny aspect of it?

1 MR. SCHWARTZ: Well, in a lot of cases, you
2 could. But in this case, grand larceny has a lot of
3 different theories. And under the grand larceny theory of,
4 say, a simple taking. Yes, you could have a - - - two
5 separate offenses where you take property. That's why the
6 People cited Day, and - - - and they spend quite a bit of
7 time on the framework of - - - of Day, this court's 1989
8 case. Sort of suggesting it's an element by element
9 analysis.

10 JUDGE SINGAS: But in this case, the tires were
11 in the defendant's truck, right? Before the - - - before
12 he even signed the invoice?

13 MR. SCHWARTZ: Well, it - - -

14 JUDGE SINGAS: So wasn't that larceny over at
15 that point?

16 MR. SCHWARTZ: It's not clear whether they were
17 before or after, but it doesn't matter in this case because
18 the theory - - -

19 JUDGE SINGAS: I think it does matter. If they
20 were in his truck, the larceny is completed.

21 MR. SCHWARTZ: If it was charged as a taking, but
22 it was charged as a larceny by false pretense. So the fact
23 that it was charged as a larceny by false pretense - - -

24 JUDGE RIVERA: Well, the false pretense is
25 complete. I'm not understanding you.

1 MR. SCHWARTZ: The false pretense - - -

2 JUDGE RIVERA: He gave wrong information to get
3 them to - - - excuse me - - - to go to this place, to put
4 the tires in the truck. The tires are now in the truck.

5 MR. SCHWARTZ: And the false pretense is the
6 signing of the invoice. That's the - - -

7 JUDGE SINGAS: No. That's the forgery.

8 MR. SCHWARTZ: Well, that's the forgery, but it
9 is also the false pretense.

10 JUDGE SINGAS: But it's a separate crime of
11 forgery. I agree with you that sometimes it could coincide
12 that way, but not in this case.

13 MR. SCHWARTZ: Well, it seems that it did. The -
14 - - the facts are not clear if the - - - the tires were all
15 on the truck before or after. But, again, as charged to
16 the jury, as the - - - the theory of the People of the
17 case, the theory of the indictment, the act of the false
18 pretense was required for the larceny. It was not the
19 taking. If there was - - - if they had charged two
20 separate counts for the larceny. If they charged under
21 separate theories. If there was a count I, the - - - the
22 taking of the property; and if there was a count II, the
23 false pretenses larceny; and then if there was a count III,
24 the forgery, then perhaps counts I and III would be
25 incompatible or would be separable for purposes of 70.25.

1 But they're not.

2 The - - - the - - - the theory of the case, as
3 the jury was charged, the jury was told that they have to
4 find that there was a misrepresentation of a prior fact.
5 There's no evidence that the individual said that the - - -
6 that the - - - well, there's evidence that the person
7 believed perhaps, that the individual that took the tires
8 was Joe Basil Jr. But if he didn't sign that invoice, then
9 he wouldn't have left with the tires.

10 JUDGE HALLIGAN: How do we know that?

11 MR. SCHWARTZ: Well, because - - - but I guess
12 that would cause a whole slew of other offenses, maybe of
13 him speeding away or something along those lines. But it
14 doesn't make sense to think that he would sign - - - there
15 would be no purpose in the person - - - if he had refused
16 to sign the invoice, for example, and said, oh, okay, I've
17 committed this grand larceny, but I'm going to refuse to
18 commit another offense of forgery by signing this, it would
19 have been a simple matter.

20 JUDGE HALLIGAN: So how come the false pretense
21 can't be the exchange before that? You know, when - - -
22 when the instruction is given to call the cell belonging to
23 Joe Jr., and he calls, and there's instructions given to
24 deliver it to a particular place.

25 MR. SCHWARTZ: Well, because it's not - - - then

1 perhaps it would - - - it might be an attempted larceny at
2 that point. Because it is not clear that the tires - - -
3 the - - - the signing of the invoice and the tires were - -
4 - it - - - it's not exactly clear how, what order those
5 were in. He came with the invoice. He came with the
6 tires. He assisted in moving the tires from his truck to
7 the defendant's truck. The defendant maybe moved some of
8 the tires. It's not exactly clear which - - - who moved
9 the tires, which tires, or whether the invoice was taken
10 out and signed prior to those tires actually being in the
11 custody of - - -

12 JUDGE HALLIGAN: But do we have to - - - do we
13 have to think it's necessary for the act to be completed
14 with the signing of the invoice to agree with you? In
15 other words, if - - - if the transaction could have taken
16 place separate from the signing of the invoice, then
17 presumably you have a much harder argument to make, right?

18 MR. SCHWARTZ: Yes.

19 JUDGE HALLIGAN: Okay. And so - - - so it seems
20 to me we have to view the record as - - - as indicating
21 that the act could only have been completed and was
22 completed with the signing of the invoice. Is that fair?

23 MR. SCHWARTZ: It was because that was the
24 manifestation of the false pretense.

25 JUDGE HALLIGAN: But if the record didn't suggest

1 that then, then it would be otherwise?

2 MR. SCHWARTZ: Right. If - - - if the record
3 suggested something different, that - - - that is possible.
4 But in this case, the - - -

5 JUDGE RIVERA: What - - - what's - - - what's all
6 the rest of the scheme then, if it's not false pretense?

7 MR. SCHWARTZ: You mean the scheme - - -

8 JUDGE RIVERA: What - - - what got - - - what got
9 the gentleman to bring the tires to this place to begin
10 with?

11 MR. SCHWARTZ: Well, he was told to bring the
12 tires by an - - - an - - - an owner of the tires. And yes,
13 there were - - - some things were put into motion, that is
14 true. But that was not the entirety of the larceny.
15 Again, this was not charged as a larceny by taking, it was
16 charged as a - - - as a - - - under the alternative theory
17 of a false pretense. That's the - - - that's the way it
18 was charged. That's the way it was told to the jury. The
19 jury had to find that there was a - - - a misrepresentation
20 of a prior fact. The language was very similar - - -

21 JUDGE GARCIA: Doesn't he claim - - - doesn't he
22 claim to be somebody else representing a different company
23 to get the person to drive the tires down to him?

24 MR. SCHWARTZ: Well, that wasn't all established.
25 In fact, all that was established is that the - - - they

1 did not establish, though, who exactly made all the other
2 phone calls. What they established is that the person that
3 was there was identified as the defendant. Whether he was
4 involved in any of the prior machinations is not known.
5 That was not part of the proof. The only thing that was
6 shown was that, for example, it could have been really
7 something Joe Basil Jr. did want and somebody else
8 intercepted that and jumped in and decided he was going to
9 sign Joe Basil's name. That would require - - - there
10 would be - - - that act is necessary again, under the false
11 pretenses theory, as it's indicted. It was not indicted as
12 just simply taking.

13 But again, we don't know whether they were taken
14 before or after the signing. If - - - if it wasn't - - -
15 and I obvi - - - I understand that that could be a - - -
16 distinction that the court would weigh, but the proof
17 doesn't say that. I don't know that the person remembered
18 for sure whether he had.

19 And again, this is getting into some of the jury
20 - - - this - - - I think this is getting a little too into
21 the - - - the - - - the facts of what the jury may or may
22 not have determined. We don't know that the jury
23 determined that the tires were put on first and the invoice
24 was signed later. All we know is that the jury - - - based
25 on the charges as charged to the jury, all we can infer

1 from the jury's verdict is that he signed a false name to
2 an invoice, and that caused the - - - the taking of the
3 tires. So we don't know whether the tires - - - we don't
4 know if the jury made that finding that the tires were put
5 on before or after. Certainly, if he came out of the truck
6 - - - if the delivery person came out of the truck with the
7 invoice and said, sign this invoice and the defendant
8 refused to sign the invoice, he would say, too bad, no - -
9 - no tires. What are you talking about? Or make some
10 phone calls to nix the deal. It - - - that was - - - that
11 was required.

12 If there was no invoice and the defendant simply
13 took the tires off the - - - off the truck without even
14 mentioning anything and left, that would be a taking. But
15 it was not charged that way. And we don't necessarily know
16 what the jury, if the jury made any sort of finding whether
17 it was before or after. This is - - -

18 JUDGE SINGAS: You keep saying we don't know, but
19 in order to accept your argument, we'd have to believe that
20 it happened the way you say it happened.

21 MR. SCHWARTZ: No. Because the People have the
22 burden. The People have the burden of showing that they
23 are separate. So to say that the - - - it happened in some
24 different way, that would require separate sentences - - -

25 JUDGE SINGAS: So I - - - I mean, I guess I'm

1 confused about how they would know to deliver these tires
2 if the call didn't come first pretending - - - somebody's
3 pretending to be Joe Basil, ordering tires, delivering them
4 to a place, and then getting an invoice signed. It doesn't
5 - - - it makes no sense to me otherwise.

6 MR. SCHWARTZ: Well, we don't know who did all
7 that. And they don't know - - - we don't know whether the
8 jury found that the false pretense was that or the false
9 pretense was him - - - him signing the invoice. And,
10 again, that's the burden of the People. Because it is the
11 same occurrence, whether it was one tire before, all tires
12 before, some tires after, we do - - - and, again, I think
13 this is getting too much into the facts and I don't think
14 the People can establish their burden because of that, but
15 we certainly know that the - - - the individual who gave
16 the invoice to the person he identified as taking the
17 tires, said that he was literally leaning on the truck. He
18 used the truck that the tires were going to be put on or
19 were put on or had been put on but hadn't left yet to - - -

20 JUDGE TROUTMAN: But there are circumstances
21 wherein, during one occurrence one can commit more than one
22 offense. You - - - you'd agree with that?

23 MR. SCHWARTZ: Oh, sure. Absolutely. And that's
24 a distinction that is put forth in Day. In Day it was
25 checks that were stolen. And checks ultimately also became

1 the forged instrument. But the checks that were stolen
2 were the grand larceny, and that was the taking. A person
3 took hundreds of thousand dollars' worth of checks. Later,
4 they modified the checks so that they could cash them. So
5 that was the forged instrument by the modification of the
6 checks. So that's a clear example of where that can
7 happen.

8 In a lot of cases there are the - - - there's a
9 lot of jurisprudence around firearms' cases and assaults or
10 - - - or homicides where somebody possesses a firearm,
11 brings a firearm to an incident, and then uses the firearm
12 to shoot someone. That person might be guilty of the
13 assault by the shooting, and also criminal possession of a
14 weapon by having a loaded firearm that they brought to a
15 situation.

16 But like this court said in Hamilton, it's not
17 always the case either. A person could concomitantly have
18 a gun - - - the - - - the facts of that case are not clear
19 because the facts aren't necessarily fleshed out in all of
20 these cases. But in Hamilton, notably the 2005 case, this
21 court indicated that the intent actually matters.

22 Now, the respondent does a lot of work in their
23 brief implying or somewhat urging the court to find that
24 intent does not matter. That the intent of the two
25 offenses shouldn't matter at all. But this court said it

1 did. In Hamilton it said that the possession of the weapon
2 - - - now, I can presume from the finding in this case, but
3 I don't know, that the firearm that was used to shoot the
4 various people in that case was - - - was at least not
5 proven by the People. Again, this is showing that it's
6 their burden. But at least not proven that he had the
7 firearm at any point prior to the shooting. That he got
8 the shooting, his intent manifested to shoot at the exact
9 same time he possessed the gun.

10 Here, the intent is obviously inseparable. There
11 is no reason to have this invoice unless you're going to
12 steal those tires. And there's - - - so the - - - under
13 Hamilton, the intent is inseparable. Under the facts of
14 the case, depending on how important they are, the People
15 cannot establish their burden that there is a separation
16 here enough to overcome 70.25(2).

17 So unless there are any questions, I would ask
18 the court to reverse.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. HILLERY: May it please the court, Michael
21 Hillery appearing for respondent, the People.

22 JUDGE TROUTMAN: Mr. Hillery, can you establish
23 whether - - - what is the evidence that establishes there
24 were two separate offenses here?

25 MR. HILLERY: Well, first, Judge, I appreciate

1 the question. I believe the evidence, in fact, does
2 factually establish that these were two separate offenses.
3 As to the question of when the tires were unloaded from the
4 Exxpress Tire truck and loaded onto the defendant's
5 trailer. I think the record is clear with respect to my
6 adversary here. Pages 750 to 753 of the record, Mr.
7 Michalak testified that after the unloading and loading had
8 taken place, he went to his truck, he received the invoice,
9 he presented the invoice to the defendant, and the
10 defendant signed it: Joe Basil.

11 I would also submit, Judge, that the forgery in
12 this case was extraneous to the grand larceny.

13 JUDGE HALLIGAN: So when was the grand larceny
14 completed? When the tires were done being loaded on?

15 MR. HILLERY: The moment they were moved even
16 slightly, that constituted a taking, Your Honor. So yes.

17 JUDGE HALLIGAN: And - - - and if - - - if - - -
18 if we were to agree with you, do we have to read the record
19 to - - - to indicate that - - - that - - - well, let me - -
20 - let me put this differently. If we concluded that the
21 signature on the invoice was required in order to complete
22 the taking, then it seems to me your adversary would have a
23 better argument, right?

24 MR. HILLERY: I - - - I agree - - -

25 JUDGE HALLIGAN: Okay.

1 MR. HILLERY: - - - he would have a better
2 argument.

3 JUDGE HALLIGAN: So what - - - what in the record
4 shows us that the signature on the invoice was - - - was
5 not completed and what exactly is the false pretense?

6 MR. HILLERY: There are, to be sure, in the
7 record, many false pretenses here, or false representations
8 of an existing fact which occurred well before the forgery
9 occurred. So the moment that the defendant calls Exxpress
10 Tire and speaks to Ms. Rule (ph.) and represents that he is
11 Joe Basil and that he is requesting a certain type of tire
12 and a certain quantity of that tire, he has made a
13 representation - - - a misrepresentation or a false
14 representation of an existing fact.

15 JUDGE HALLIGAN: And do we have to - - - do we
16 have to conclude that, in fact, the tires would have been
17 delivered based on that representation or is the fact that
18 it was made enough? In other words, if - - - if - - - if
19 the tires wouldn't have been left behind without the
20 invoice, what then?

21 MR. HILLERY: Well, if they wouldn't have been
22 left behind without the invoice, I think that that
23 underscores that the - - -

24 JUDGE HALLIGAN: Wouldn't that mean that that - -
25 - wouldn't that mean that the larceny wasn't completed



1 until the invoice was signed?

2 MR. HILLERY: No, Your Honor. Because the
3 invoice is extraneous in this. If - - - if we look at the
4 testimony, we look at the record, and we hear from Mr.
5 Michalak about the nature of the invoice. This was not a
6 document meant to establish the identity of the person
7 receiving the tire. There was no identification requested
8 of the defendant to confirm that he was, in fact, Joe
9 Basil.

10 JUDGE HALLIGAN: So what was it meant to do in
11 your view?

12 MR. HILLERY: Well, according to the testimony
13 and Mr. Michalak's testimony, the purpose of that was
14 inventory. Keeping track of inventory, creating a record
15 of the transaction, allowing the customer to have proof
16 that the transaction occurred, that he received the tires.
17 So that is independent of whether or not the person who was
18 signing the - - - the invoice is, in fact, the person that
19 he purports to be.

20 JUDGE GARCIA: I'm sorry. I thought your
21 statement earlier was that the larceny was complete when
22 the tires were moved.

23 MR. HILLERY: Yes, Your Honor.

24 JUDGE GARCIA: So then why would it make a
25 difference if that's signed later if the larceny is already



1 complete? Right. So that's signed after - - - assuming
2 that you're accurate in your description of the record - -
3 - that's signed after. So it seems to me if the larceny is
4 complete when the tires are moved into the defendant's
5 trailer, wouldn't that mean that there were other
6 representations that led to that transfer? Right? I mean,
7 it's based on something else than the invoice, which seems
8 like it hasn't been signed yet.

9 MR. HILLERY: Absolutely, Judge. Our position
10 is, in fact, that the representations that were made - - -
11 the oral representations, both on the phone some four times
12 before the - - - the meeting occurred, up to the point
13 where the two are now face-to-face in this lot and the
14 individual, the defendant, is telling him that I'm with the
15 - - - I'm an employee of the Joe Basil family - - - those
16 representations in and of themselves are sufficient here to
17 constitute the false misrepresentation of a fact. And that
18 was sufficient to trigger the actual taking of the tire or
19 the delivery, and then the taking by defendant of the
20 tires.

21 So under the Laureano framework the - - - and
22 there is material overlap here is what I take it counsel is
23 arguing here. But under the Laureano framework, even with
24 that material element overlap, this court can go to the
25 record and determine whether or not there were facts

1 presented by the People that supported the - - - the
2 forgery as an independent, separate act. And I believe the
3 People have - - - have accomplished that. There is no need
4 that the jury - - - it be established that the jury would
5 have interpreted that way. It's simply whether or not
6 those facts are available in the record to support a
7 separate act independent of the grand larceny.

8 I would also - - - Judge, or Your Honors, I would
9 bring up one other case and I - - - this - - - I apologize.
10 I thought of this well after my brief was submitted. But
11 it - - - it's an interesting analogy, I - - - I believe, in
12 this situation, if I may. And that is People v. Rodriguez
13 from 2015, this court's decision. The cite is 25 N.Y.3d
14 238.

15 Our position essentially here in this case, is
16 that the forgery was extraneous. In People v. Rodriguez it
17 involved consecutive sentences for an assault and a
18 robbery. Factually, what happened was the defendant and
19 codefendants confront the victim on the street. Defendant
20 puts his gun or shows his gun to the victim, demanding the
21 victim's gold chain from around his neck. The victim
22 starts to comply, he's removing the gold chain. And
23 defendant, while the victim is already complying with his
24 order, in the show of force, shoots him multiple times
25 interrupting the robbery with an assault. This court found

1 that consecutive sentencing in that situation was
2 appropriate. The defendant had argued, of course, that the
3 show of force - - - I'm sorry. The - - - the shooting was
4 consonant with the show of force to advance the robbery.
5 They were essentially one and the same. But this court
6 said no, that was extraneous force. The assault was
7 unnecessary. The force that he had shown the defendant in
8 the display of the gun was sufficient to - - - to establish
9 that coercion and to lead to the effect of the robbery.

10 This is very similar, I think, because what we
11 have in the forgery is extraneous in the sense that now the
12 defendant is continuing the deceit, but the deceit has
13 already happened multiple times through multiple false
14 representations of fact and all of the phone calls
15 preceding that transaction, and even at the site when the
16 defendant says, I'm Joe - - - I'm Joe Basil, Jr. and then
17 ultimately signs. It had already been accomplished. So
18 the forgery was simply not necessary. They're separate and
19 distinct.

20 And unless the court has any other questions,
21 I'll ask the court to - - - to affirm and thank the court
22 for its consideration.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. SCHWARTZ: And just briefly. Respondent
25 again says that the larceny occurred when the tires were

1 taken. That it's the taking. It is not because that's not
2 how it was indicted. In fact, in this indictment, the
3 second count not only says - - -

4 JUDGE RIVERA: No. But isn't that the charge? I
5 mean, isn't that the way the jury is charged? Said you
6 have to wrongfully take, obtain, or withhold such property
7 from the owner of that property and then goes on to say
8 definition of larceny by false pretenses involves obtaining
9 possession to the property as a result of the owner's
10 reliance upon the misrepresentation.

11 MR. SCHWARTZ: It - - - it does.

12 JUDGE RIVERA: Obtaining possession. That's it.
13 And if the tires are moved and put on the truck, defendant
14 obtained possession.

15 MR. SCHWARTZ: So even if the grand larceny could
16 have been completed, say, the second count was never even
17 charged and the - - - the grand larceny, the tires were
18 possessed in whatever way they were, and it was by a false
19 pretense, the second count must go concurrent to that.
20 Because that count, it's the - - - the invoice number is in
21 the second count of the indictment. The invoice states
22 "those tires", it doesn't state anything else. So whatever
23 other misrepresentations there were, they were - - - at - -
24 - at least, the second count, the act in the second count
25 of signing was part, at least, part of the act of the grand

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larceny. So even if the grand larceny can stand on its own, count II cannot. So count II has to go concurrently. Under 70.25, has to go concurrently to count I.

And with that, I would ask the court to reverse. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Randall K. McGovern, No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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