Argued by
Martin W. Littleton

Court of Appeals

OF THE STATE OF NEW YORK

The People of the State of New York,
Respondent,

against

James J. Hines,
Defendant-Appellant.

APPELLANT'S REPLY BRIEF

As to the Facts

Contrary to the impression sought to be created in the respondent's brief, appellant does not concede the *truth* of the testimony adduced against him on the trial. His concession in the court below was made for the *purposes of argument only,* in order to eliminate any factual conflict in the determination of the legal issues presented by the appeal.

Some forty pages of the respondent's brief are devoted to an alleged "resumé" of the facts, for the ostensible purpose of furnishing to the court "an accurate picture of the criminal enterprise which the defendant Hines and his accomplices conspired to, and did, carry on" (Respondent's Brief, p. 3). The picture portrayed is by no means accurate, however, and does not reflect the true situation as it appears in the record.

The charges against the defendant rest mainly upon the testimony of two confessed habitual perjurors—J. Richard (Dixie) Davis, a disbarred underworld lawyer, and George Weinberg, an ex-convict and gangster (2165, 2914, 2917, 5145). The record shows that Davis and Weinberg were unconscionably coddled by the District Attorney and that every conceivable effort was made to induce them to involve the defendant in the alleged conspiracy. As soon as they signified their willingness to plead guilty and testify against the defendant, Davis and Weinberg were deliberately placed in the same cell for the obvious purpose of permitting them to rehearse the details of the story which they subsequently told on the witness stand (2953). They were accorded most unusual privileges. Among other things, arrangements were made whereby Davis was allowed to make frequent visits to the apartment of his mistress, Hope Dare, in the company of police officers attached to the District Attorney's office, under court orders obtained upon the pretext that he required medical treatment (5249). As a reward for their testimony, Davis and Weinberg were promised "consideration" in their sentences (2954, 2970, 2988).

Apart from the manifestly improper and unfair tactics employed by the District Attorney, the record is replete with evidence showing that the testimony of Davis and Weinberg was perjurious in many material respects. The record is voluminous, however, and it will serve no useful purpose to burden this court with a lengthy analysis of the testimony. In this court, as in the court below, appellant will rely upon the contention that the evidence, even if viewed in its most unfavorable aspect to him, is insufficient in law to support his conviction.

(1)

The operation of a policy game is not a violation of Section 1372 of the Penal Law.

(In reply to Point I of Respondent's Brief)

In relying upon decisions in other jurisdictions (Respondent's Brief, pp. 44-45) the District Attorney ignores the fundamental difference between the penal provisions of this state and those in which the cited cases arose. In the State of New York, the Legislature has expressly differentiated between lottery and policy, and the courts have uniformly recognized the distinction between them.

> *People* v. *Bloom*, 248 N. Y. 582;
> *People* v. *Lyttle*, 225 A. D. 299, aff. 251 N. Y. 347;
> *People* v. *Edelstein*, 231 A. D. 459;
> *People* v. *Weber*, 245 A. D. 827;
> *Matter of Praither*, 246 A. D. 846, aff. 271 N. Y. 598.

In all states except New York, on the other hand, the statutes are either completely silent upon the subject of policy, and prohibit only lottery; or else, as in the District of Columbia, (see *Forte* v. *United States*, 83 Fed. (2nd) 612) they combine both policy and lottery in one statute and prescribe the same punishment for either offense. In no other state is the statutory situation comparable to that existing in the State of New York, where lottery and policy are accorded separate and different legislative treatment, one being classified as a felony (Section 1372) and the other a misdemeanor (Section 974). Consequently, the decisions in other

jurisdictions are not applicable in this state, since the courts in those jurisdictions have no *statutory basis* for any distinction between lottery and policy.

The argument that Section 974 was not intended to apply to *operators* of policy games, but only to those who commit "minor offenses peculiar to policy", (Respondent's Brief, p. 50) is absurd. A reading of that section readily discloses that it is broad enough in its terms to cover all persons directly or indirectly concerned in the operation of a policy game. It is beyond comprehension how it can be suggested that a statute specifically directed against "the game commonly called policy" was intended to affect only minor offenders in the game, but not the chief offender—the operator or proprietor of the game.

The further contention—that the operator of a policy game can be prosecuted either under the policy statute or under the lottery statute, as the District Attorney chooses—is equally unsound and illogical. That contention is predicated upon the fallacious theory that both statutes define the same crime, as in *People* v. *Bord,* 243 N. Y. 595, and other similar cases. It is not to be denied, as contended by the District Attorney, that "the state may proceed under a general statute even though a more specific one is available", (Respondent's Brief, p. 51) *provided, however, that both the general and the specific statute define the same crime.* In this state, as repeatedly pointed out by the courts, the crime of operating a policy game is, by express legislative enactment, differentiated from the crime of contriving, proposing and drawing a lottery. Although both were intended to suppress gambling, Sections 974 and 1372 are

directed against *two different types of gambling.* The situation in the case at bar, therefore, differs radically from that present in the *Bord* case, where both statutes involved were identical except for the penalty prescribed.

The District Attorney seems to rely heavily upon the decisions in *Wilkinson* v. *Gill,* 74 N. Y. 63, and *Forte* v. *United States,* 83 Fed. (2nd) 612. Although both of those cases were analyzed and distinguished from the case at bar in appellant's main brief (pp. 13-16) it is significant that the grounds upon which they were distinguished are neither challenged nor commented upon in the respondent's brief.

As to *Commonwealth* v. *Wright,* 137 Mass. 250, and *Commonwealth* v. *Sullivan,* 146 Mass. 142, it is sufficient to point out that the statutes of the State of Massachusetts contain no prohibition against policy or policy games. Unlike New York, there is no statute in the State of Massachusetts under which the operator of a policy game can be prosecuted, *except a lottery statute.* Under those circumstances, of course, the court was compelled to construe policy as lottery for the purpose of criminal prosecution, notwithstanding the difference in identity and manner of operation between the two schemes.

In the case at bar, appellant does not seek to distinguish policy from lottery upon the basis of the difference in identity or manner of operation. *He relies entirely upon the statutory distinction created by the Legislature itself.* It is beside the point to argue that policy is a species or form of lottery. Assuming that to be so, the Legislature having declared that that particular species or form of lottery "commonly

called policy'' constitutes a misdemeanor (Section 974), there is no basis for prosecuting it as a felony.

(2)

The acts allegedly committed by the defendant Hines did not constitute "assisting in contriving, proposing or drawing" lotteries.

(In Reply to Point II of Respondent's Brief)

The District Attorney takes the position that the words ''contriving, proposing or drawing'', as used in Section 1372 of the Penal Law, ''comprehend the entire conduct and operation of a lottery scheme'' (Respondent's Brief, p. 63). He argues that the statute applies to all persons who participate in or contribute to the success of the enterprise, regardless of the particular nature of their acts of assistance. A complete answer to that contention is contained in Point II of appellant's main brief.

As proof that Section 1372 was not intended to apply to *all* acts of assistance in the conduct of a lottery, appellant, in his main brief, pointed out that acts other than ''contriving, proposing and drawing'' are separately prohibited as misdemeanors (Section 1373 *et seq.*). The District Attorney rejects that theory upon the authority of three decisions: *State* v. *Wong Took*, 147 Wash. 190, 265 Pac. 459; *Commonwealth* v. *Harris*, 95 Mass. 534; *State* v. *Louie*, 139 Wash. 430, 247 Pac. 728.

The *Wong Took* case, which was referred to in the opinion of the court below, is analyzed in appellant's main brief. The court there holds

that the term "contriving, proposing or drawing" applies to all persons who participate in the "*instituting or administering*" of the lottery. As the defendant Hines concededly took no part in instituting or administering the policy games in suit, his conviction, under the principle of the *Wong Took* case, was manifestly invalid.

The *Harris* case merely holds that one who commits the misdemeanor crime of selling lottery tickets may also be charged with the felony crime of setting up and promoting the lottery, provided that, in addition to selling tickets, he also participates in the instituting or administering of the lottery. That ruling, obviously, does not support the contention urged here. On the contrary, it specifically limits the felony classification of lottery to acts which form a constituent part of setting up or promoting the lottery, and excludes merely incidental or collateral acts of assistance, such as those allegedly committed by the defendant Hines.

The decision in the *Louie* case likewise fails to bear out the contention of the District Attorney. There the court held that one who leases a building for lottery purposes cannot be charged with contriving, proposing or drawing the lottery. In the course of its opinion, the court said as follows:

> "The instruction complained of, and which we find erroneous, stated that the words contriving, proposing and drawing a lottery, or assisting in so doing 'apply to one who * * * permits a lottery to be operated therein', which is the very offense lesser than that with which the appellant is charged."

These decisions plainly justify appellant's contention that one who merely aids or assists in the general scheme, but does not participate in the prohibited acts of contriving, proposing or drawing, does not violate Section 1372.

The District Attorney attempts to draw a distinction between the defendant's alleged acts and acts such as selling lottery tickets or leasing a building for lottery purposes, upon the theory that the defendant's acts evidenced a "conscious participation" in a "criminal enterprise" (Respondent's Brief, p. 78). It is difficult to follow that argument, since the person who sells lottery tickets is presumed to know the purpose for which the tickets are sold and the person who leases a building for lottery purposes surely knows that the building is to be used for that purpose.

Obviously, one who sells lottery tickets or leases a building for lottery purposes, participates consciously in a criminal enterprise, just as much as one who provides police protection for the operators of the lottery. In both instances the act furthers and aids in the general operation of the scheme. None of such acts, however, fall within the terms of Section 1372, since they do not relate to the "contriving, proposing or drawing" of the lottery.

The rule that law enforcement officers who promise protection to others in the commission of a crime are themselves guilty of the crime (see cases cited on p. 73 of respondent's brief) has no application to the situation present in the case at bar. The statutes involved in those cases are not limited in their scope to particular acts of assistance, as is Section 1372. Under the statutes there involved, one who committed *any act of assistance* became a principal. Here, in order

to bring the defendant within the terms of the statute, it was incumbent upon the prosecution to show not merely that he aided generally in the running of the lottery, but that the nature of his acts were such as to constitute participation in "contriving, proposing or drawing" the alleged lotteries. In other words, unless the defendant's acts were a constituent part of the actual institution or administering of the lottery, he was not chargeable as a principal in the crime defined by Section 1372 of the Penal Law.

(3)

(a) The conspiracy count of the indictment is invalid in that it fails to allege the commission of an overt act within the statutory period of limitations.

(b) The evidence shows that the conspiracy terminated more than two years prior to the filing of the indictment.

(In Reply to Point III of Respondent's Brief)

Appellant's contentions with respect to the insufficiency of the conspiracy count are fully set forth in his main brief (Point IV) and require no further elaboration.

As to the proof, the record shows conclusively that the conspiracy terminated with the death of "Dutch Schultz", the conceded head and master of the so-called "Policy Combination". It is true that some of the members of the original combination continued in the policy business after Schultz died, but the combination itself was disbanded.

In his recital of the facts, the District Attorney makes the following assertion (Respondent's Brief, p. 9):

> "The Combination thus organized by Schultz in the year 1931 continued to operate until about October of 1936. Schultz himself maintained active control until his murder in 1935, when the leadership passed —without any interruption in the operation of the conspiracy—to two of his partners commonly referred to as the 'Italians' (4698-4700)."

An examination of the record fails to disclose any evidence which justifies that assertion. There is evidence in the record that, after Schultz died, two former members of the Combination—George Weinberg and Harry Schoenhaus—became salaried employees in a policy bank owned by two "Italians" in New Jersey (4695-4701). There is not a scintilla of testimony, however, that the "Italians" were Schultz's partners or that their policy bank in New Jersey was being operated by Schultz's combination. On the contrary, the uncontroverted proof shows that the "Italians" were the exclusive owners and operators of their own policy business (4699) and there is not even the remotest suggestion in the record that the defendant Hines knew them or that he had even heard of them.

It is true that Schoenhaus testified that Weinberg had told him that one of the Italians "was a silent partner of Schultz before" (4699). Apart from that hearsay statement, the record shows no connection whatsoever between the policy bank operated by the Italians and the policy combination operated by Schultz and his associates before his death.

The theory that the conspiracy continued after Schultz's death, is based entirely upon Weinberg's testimony that he made payments to the defendant Hines after Schultz died. As pointed out in appellant's main brief, that testimony is palpably perjurious. In any event, however, Weinberg did not claim that he made the alleged payments on behalf of his employers; nor did he claim that the payments were made in consideration of any services rendered or to be rendered by the defendant.

We do not challenge the soundness of the rule that "a conspiracy is not terminated merely because some of the conspirators withdraw from it or die" (Respondent's Brief, p. 87). Dutch Schultz, however, was not merely just an ordinary member of a conspiracy. The record shows quite plainly that he was the acknowledged master and that the other members were merely his hirelings. He organized, dominated and controlled the policy combination and received the major portion of the proceeds derived therefrom. When he died, the independent policy bankers who had been forced into the combination and who remained in it only because they feared his reputation as a notorious gunman and gangster, immediately withdrew and resumed their independent operations. In short, when Schultz died, the conspiracy died with him, and his associates—Davis, Weinberg and Schoenhaus—either decamped or entered new ventures (4702, 5033).

It is true that the question of whether the conspiracy continued after Schultz's death was submitted to the jury for determination as an issue of fact. It is quite evident, however, that the jury was misled by the court's instruc-

tion that the defendant's membership in the conspiracy was presumed to continue unless there was *affirmative proof* of his withdrawal (11283). As pointed out in appellant's main brief, even if the defendant had been a member of Schultz's conspiracy, as claimed, he could not have withdrawn from it after Schultz died, as there was nothing left to withdraw from. The uncontroverted proof that the combination was disrupted and disbanded when Schultz died, obviated the necessity for any affirmative proof of withdrawal.

(4)

The records of the hearings before Magistrates Capshaw and Erwin were improperly admitted in evidence, and the court erred in directing the jury to determine whether their decisions were legally correct.

(In Reply to Point IV of Respondent's Brief)

Most of the arguments advanced by the District Attorney in attempted justification of the court's action have been anticipated and answered in appellant's main brief (Point III).

The decision of the Court of Oyer and Terminer in *People* v. *Kerr*, 6 N. Y. Cr. 406 (Respondent's Brief, p. 92), is not in point. In that case the defendant was charged with giving bribes to certain members of the Board of Aldermen in consideration for their promise to vote favorably upon an application for a railroad franchise, and the official minutes of the meetings of the Board were admitted in evidence to corroborate the charge. The principle upon which those minutes were admitted, how-

ever, does not apply to records of *judicial* proceedings.

In the *Kerr* case, the *legal* propriety of the granting of the franchise by the Board of Aldermen was not in issue. Here, on the other hand, the minutes were admitted and read to the jury as the basis upon which they were to determine the question submitted to them by the court, to wit: Did the magistrates have *legal cause* for dismissing the charges before them? That question was neither a relevant nor a proper issue in the case.

It will be noted that the District Attorney does not entirely deny that the minutes were introduced to demonstrate the legal incorrectness of the magistrates' decisions. He claims only that their "probative effect" was not "limited to a showing that the magistrates had erred" (Respondent's Brief, p. 93). He suggests that the minutes were partly introduced for the purpose of showing that the "general attitude and demeanor" of the magistrates during the course of the hearings "pointed inevitably to the presence of an outside influence". There are two conclusive answers to that argument:

(1) It is wholly improper to ask a jury of laymen to decide whether the statements and rulings made by a judge during the course of a judicial proceeding indicate corruption or bias.

(2) The minutes were admitted and used *solely* for the purpose of demonstrating that the "magistrates had erred".

The purpose for which the minutes were introduced in evidence was clearly revealed by the District Attorney himself when, after read-

ing one of the transcripts, he asked the court to instruct the jury that:

> "from the minutes it is apparent that the magistrate was under a legal duty to hold the twenty-six defendants and not discharge them". (fol. 1137)

All doubt as to the purpose for which the minutes were admitted is dispelled by the following statements made by the court during his charge to the jury:

> "I shall tell you what the law is as to possession and then you are to determine whether the magistrate was right in discharging those men or whether he was wrong". (fol. 11199)
>
> "It is for you to say whether the magistrate was justified under the law or not in discharging that number of defendants". (fol. 11213)

At no time during the trial was it intimated, either by the District Attorney or by the court, that the minutes were merely admitted as evidence of the conduct and actions of the magistrates during the hearings. At no time was the jury instructed that they were to consider only the "general attitude and demeanor" of the magistrates, as now claimed. The specific question submitted to the jury was whether, under the law of possession as laid down by the court, the magistrates had sufficient legal cause to hold the defendants, and the minutes were used solely for the purpose of enabling the jury to determine that question. The suggestion to the contrary is not supported by the record and is merely an afterthought, made for the purpose of justifying an unprecedented and indefensible procedure.

Two further arguments are advanced in respondent's brief, in attempted justification of the admission of the Magistrates' Court minutes (p. 93):

(1) That "the records were not presented to establish the truth of the facts therein, and there was no such issue before the jury".

(2) That the hearsay rule and Civil Rights Law (which gives a defendant the right to be confronted by the witnesses against him) do not apply in this case because the defendant Hines did not dispute the fact that "each of the prisoners before the magistrates had been engaged in the numbers game".

As to the first argument, it is sufficient to point out that, under the court's charge, whether or not the magistrates decided correctly, *upon the evidence before them,* was an element in the determination of the defendant's guilt. Since the jury was being asked to sit in review of the conclusions reached by the magistrates, they should have been placed in the same position as the magistrates, in order to enable them to properly evaluate the credibility and truthfulness of the testimony upon which the magistrates' conclusions were based. It was wholly unfair to the defendant to permit the jury, upon mere typewritten transcripts of the testimony, to pass judgment upon the conclusions reached by the magistrates after seeing and hearing the witnesses in person.

The second argument is specious on its face. No defendant is called upon to admit or dispute anything in order to become entitled to be confronted by the witnesses against him. Every witness who appeared before the magistrates and

whose testimony was read to the jury, was a witness against the defendant Hines, inasmuch as his testimony was to be considered by the jury in determining an issue of fact in the case. True, the issue as to the correctness of the magistrates' decisions was irrelevant and should not have been submitted. But, since it was made an issue in the case, the defendant was legally entitled to be confronted by the witnesses upon whose testimony it was to be decided.

A number of decisions are cited upon respondent's brief (p. 95) in support of the proposition that "evidence of the acts which the agent commits at the instance of the principal, is admissible against the latter in a criminal prosecution". That rule—the soundness of which appellant does not question—does not permit the admission in evidence of testimony adduced in a judicial proceeding, for the purpose of showing bias or corruption on the part of the presiding judge. Unquestionably, the records of the *dismissals* by Magistrates Capshaw and Erwin were properly admitted to corroborate the charge that the defendant Hines had caused them. The admission of the testimony upon which the dismissals were based and the submission to the jury of the question whether the dismissals were legally correct, however, was clearly erroneous.

Respectfully submitted,

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