2. Application of Criminal Law to Out-of-State Conduct

HAGESETH v. THE SUPERIOR COURT OF SAN MATEO COUNTY
150 Cal. App. 4th 1399 (2007)

OPINION

KLINE, P. J.--This writ petition presents the question whether a defendant who was never himself physically present in this state at any time during the commission of the criminal offense with which he is charged, and did not act through an agent ever present in this state, is subject to the criminal jurisdiction of respondent court even though no jurisdictional statute specifically extends the extraterritorial jurisdiction of California courts for the particular crime with which he is charged. We shall conclude that territorial jurisdiction to prosecute lies under the traditionally applicable legal principles, and it makes no difference that the charged conduct took place in cyberspace rather than real space.

FACTS AND PROCEEDINGS BELOW

On May 24, 2006, the San Mateo County District Attorney filed a criminal complaint charging petitioner with the felony offense of practicing medicine in California without a license in violation of section 2052 of the Business and Professions Code. Section 2052 provides that any person who "practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ... physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars ($ 10,000), by imprisonment in the state prison, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment." Petitioner, whose allegedly unlawful conduct consisted entirely of Internet-mediated communications, claims the trial court lacks jurisdiction because no part of that conduct took place within the State of California.

The complaint is predicated on an investigative report of the Medical Board of California (Board) dated April 20, 2006, which the Board forwarded to the San Mateo County District Attorney as part of its referral of the case for criminal prosecution. The report states that, on or about June 11, 2005, John McKay, a resident of San Mateo County, initiated an online purchase of fluoxetine (generic Prozac) on "www.usanetrx.com," an interactive Web site located outside of the United States. The questionnaire McKay received and returned online, which identified him as a resident of this state, was forwarded by operators of the Web site to JRB Health Solutions (JRB) for processing. JRB, which has its headquarters in Florida and operates a server in Texas, forwarded McKay's purchase request and questionnaire to petitioner, its "physician subcontractor," who resided in Fort Collins, Colorado, and was then licensed to practice medicine in that state. After reviewing McKay's answers to the questionnaire, petitioner issued an

online prescription of the requested medication and returned it to JRB's server in Texas. JRB then forwarded the prescription to the Gruich Pharmacy Shoppe in Biloxi, Mississippi, which filled the prescription and mailed the requested amount of fluoxetine to McKay at his California address. Several weeks later, intoxicated on alcohol and with a detectable amount of fluoxetine in his blood, McKay committed suicide by means of carbon monoxide poisoning. The Board's report indicates, and it is undisputed, that petitioner was at all material times located in Colorado and never directly communicated with anyone in California regarding the prescription. His communications were only with JRB, from whom he received McKay's online request for fluoxetine and questionnaire, and to whom he sent the prescription he issued.

On May 24, 2006, the district attorney filed a criminal complaint charging that, "in the County of San Mateo," petitioner willfully and unlawfully practiced medicine in this state without a valid license authorizing him to do so, in violation of Business and Professions Code section 2052, a felony. Petitioner quickly demurred to the complaint and moved to quash the warrant and to dismiss the complaint. All such relief was sought on the ground that, because all the alleged criminal acts occurred outside the state, the court lacked jurisdiction. At a hearing conducted on August 2, 2006, the trial court concluded that the complaint was "sufficient" to survive demurrer. The motions to dismiss and to quash the arrest warrant were both denied.

The instant writ petition was filed on October 3, 2006.

DISCUSSION

Under Traditionally Applicable Principles, Jurisdiction Lies

(1) Unlike civil actions, criminal proceedings cannot take place in the absence of the defendant, because the confrontation clause of the Sixth Amendment bars criminal default judgments. Because criminal cases are therefore "not subject to the same flexibility enjoyed by the more elastic rules governing extraterritorial jurisdiction in civil cases," "[t]he rule is well-settled that civil 'minimum contacts' analysis has no place in determining whether a state may assert criminal personal jurisdiction over a foreign defendant."

(2) "Like most other states, California has addressed the problem of criminal activity that spans more than one state by adopting statutes that provide our state with broader jurisdiction over interstate crimes than existed at common law. Such laws generally 'are premised on the belief that a state should have jurisdiction over those whose conduct affects persons in the state or an interest of the state, provided that it is not unjust under the circumstances to subject the defendant to the laws of the state.' Penal Code section 27 generally permits the punishment of a defendant under California law for any crime committed 'in whole or in part' in the state. (§ 27, subd. (a)(1).) In addition, sections 27 and 777b through 778b establish territorial jurisdiction for specific types of interstate situations or particular crimes. For example, a person who, acting outside the state, aids, advises, or encourages a person in the state to commit a crime in California can be punished in California in the same manner as if he or she had acted within the state. (§§ 27, subd. (a)(3), 778b.)

With the parties, we agree that the jurisdictional statutes applicable to this case are Penal Code section 27, subdivision (a)(1), and Penal Code section 778. As noted, section 27 simply states that "persons are liable to punishment under the laws of this state ... [¶] ... who commit, in whole or in part, any crime within this state." Section 778 states in its entirety as follows: "When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable to punishment therefor in this State in any competent court within the jurisdictional territory of which the offense is consummated."

(3) The question whether sections 27 and 778 confer jurisdiction over petitioner's interstate activity, rendering the law of this state applicable, involves issues of fact; nevertheless, it is to be decided by the court prior to trial, not by a jury. Territorial jurisdiction establishes no more than the court's authority to try the defendant, a procedural matter that does not itself determine the defendant's innocence or guilt. Because they are not elements of a crime, "jurisdictional facts need be proved only by a preponderance of the evidence and not beyond a reasonable doubt." For the purpose of determining jurisdiction, the parties agree petitioner was not physically in this state at any time between the commencement and consummation of the alleged offense, and no agent located within the state ever intervened in his behalf during that period of time. Because the dispute before us is therefore essentially one of law only, our review is de novo.

Petitioner maintains he committed no "part" of the offense in California, as section 27 requires, and does not come within the purview of section 778 because he did not use an "agent or some other means" to consummate a crime in California. Petitioner maintains that his "act of practicing medicine began and ended with the writing of the prescription in Colorado," and "[t]he filling of the prescription, which occurred in Mississippi, was an entirely separate act, requiring a separate license," for which he cannot be held criminally accountable. As petitioner sees the matter, it is irrelevant whether he knew the medication he prescribed would be sent to California because his act ended with the writing of the prescription, and section 778 does not make his knowledge of the fact that the medication he prescribed would be sent to California a determining or even a relevant factor. Acknowledging cases finding personal jurisdiction in cases in which some *portion* of the alleged crime was committed within the state by the defendant or his agent, petitioner maintains that the trial court lacked territorial jurisdiction to adjudicate the crime with which he is charged because "no part of the offense was committed [either by him or by any agent of his] within the boundaries of California." The validity of petitioner's argument turns on the meaning of section 778.

The enactment of section 778, in 1872, was apparently inspired by the opinion six years earlier in *Ex Parte Hedley,* a habeas corpus proceeding in which the jurisdictional issue was resolved on the basis of common law principles. In that case, Hedley, an agent of Wells, Fargo & Co., residing in Nevada, was alleged to have drawn telegraphic checks upon his principals at San Francisco, in favor of his San Francisco broker for his own purposes and without the knowledge of his principals. Hedley sought relief on the ground the allegations did not make out a case of embezzlement, but he additionally maintained that, even if it did, "the offense was not committed in this State, and that therefore our Courts have no jurisdiction." The court rejected both claims.

With respect to the second claim, the court reasoned as follows: "The offense, though commenced without this State, was consummated within it, and the offender having been found in the State and arrested therein, is clearly amenable to its criminal justice. 'Where the commission of a public offense commenced without the State is consummated within the boundaries thereof, the defendant shall be liable to punishment in this State though he were without the State at the time of the commission of the offense charged, provided he consummated the offense through the intervention of an innocent or guilty agent within this State, or any other means proceeding directly from himself; and in such case the jurisdiction shall be in the county in which the offense is consummated.' Under *Hedley*, territorial jurisdiction exists only where the defendant or his agent was within the state at some time between the commencement and consummation of the offense.

Though the enactment of section 778 was undoubtedly motivated by the opinion in *Hedley*, its language differs. The statutory language therefore appears to apply to an offense consummated within the boundaries of the state by a defendant himself outside the state "through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant" (§ 778), *regardless whether the agent or other means employed was within the state at any relevant time*.

During 135 years that have passed since its enactment, section 778 has been invoked by our courts on remarkably few occasions, none of them stimulating more than superficial analysis. The first judicial construction of the provision was by this court 40 years ago in *People v. Jones*, 257 Cal.App.2d 235 (1967). We viewed section 778 as showing "legislative recognition of the concept that a defendant may violate a California penal statute even though outside of the state at the time of its commission," and as consistent with the rule of *Strassheim v. Daily,* 221 U.S. 280, 285 (1911), that a state may exercise jurisdiction over criminal acts that are committed outside the state but are intended to, and do, produce harm within the state.

People v. Lazarevich, 124 Cal.App.4th 140 (2004), employed a similar analysis. The court felt that the purpose "was to establish a broad jurisdictional basis for the prosecution in California of offenses involving the interests of persons in California" so that "the reach of California's criminal jurisdiction is not limited by strict territorial considerations." The court reasoned that the objective territorial theory of subject matter jurisdiction[1] permits a court to retain jurisdiction because "to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity."

(4) The "the objective territorial principle" or "detrimental effects" theory of extraterritorial criminal jurisdiction, which evolved out of the common law view of territorial jurisdiction, was most authoritatively articulated by Justice Holmes in *Strassheim v. Daily*. The defendant in that case, Daily, who resided in Illinois, offered to bribe Armstrong, the warden of a state prison in Michigan, if he agreed to accept machinery required by contract to be new but which Armstrong knew was used. Daily offered the bribe while he was in Illinois, though he made several visits to

[1] Unlike the "subjective territorial principle," which relates to situations in which all of the elements of the crime occurred in the territory of the forum state, the "objective territorial principle" comes into play when the elements of the crime all took place elsewhere.

Michigan in pursuit of the contract. Assuming that, other than those visits, Daily did no act in Michigan connected with his plan, Justice Holmes concluded that "[i]f a jury should believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceived the Board of Control, and induced by fraud the payment by the State, the usage of the civilized world would warrant Michigan in punishing him, *although he never had set foot in the State until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.*" (221 U.S. at 284-85 (italics added)).

Though Justice Holmes's opinion acknowledged the several visits Daily made to Michigan, the italicized language, which requires no act in the forum state, has been treated by modern courts as a reasonable and sufficient basis upon which to confer territorial jurisdiction, even without the benefit of a jurisdictional statute. Some courts have heavily emphasized the requirement that the defendant be shown to have intended that the detrimental effect would occur in the forum state, or that he "could ... reasonably foresee that his act would cause, aid or abet in the commission of a crime within that state," but others appear to deem it sufficient to confer jurisdiction that the extraterritorial act had an "adverse result" in the forum state.

The detrimental effect theory of extraterritorial jurisdiction has been described as a "doctrine of constructive presence," a legal fiction considered "necessary to the practical administration of criminal justice." Under this common law rule, "if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes."

(5) The detrimental effect theory of extraterritorial jurisdiction has been incorporated into the Model Penal Code (§ 1.03, subd. (1)(a)) and has been accepted by our Supreme Court as a valid basis upon which territorial jurisdiction may be posited. Section 778 essentially codifies this theory of extraterritorial criminal jurisdiction. The statute renders a person liable to punishment for the commission of a public offense "commenced without the State" if the offense is "consummated within its boundaries" through the intervention of an agent or "other means proceeding directly from said defendant." As discussed above, the text of the statute does not require that the agent or "other means" by which the crime is committed be within the forum state. Where the intervention of the agent or other means "proceed[] directly from [the] defendant," the defendant is deemed constructively present within the "jurisdictional territory" of this state; the doctrine of constructive presence implicit in section 778 satisfies the requirement of section 27, enacted at the same time as section 778, that the crime be committed "in whole or in part ... within this state."

In short, it is not necessary to the "detrimental effect" theory of extraterritorial jurisdiction that the defendant be physically present in this state during some portion of the time during which his alleged criminal act took place, or that he act through an agent physically present in this state, or that there exist a statute or judicially declared exception extending the state's territorial jurisdiction for the particular crime with which the defendant is charged. Accordingly, in the circumstances of this case, jurisdiction is not precluded by petitioner's physical absence from the state and the fact he did not act through an agent located in California.

(6) The charged offense, violation of section 2052 of the Business and Professions Code, prohibits the act of holding oneself out "as practicing ... any system or mode of treating the sick or afflicted in this state," or practicing such a system or mode of treatment by "diagnos[ing], treat[ing], operat[ing] for, or prescrib[ing] for any ... . physical or mental condition of any person," without having at the time of doing so a valid license. The criminalization of these acts represents a reasonable exercise of the state police power, as the statute was designed to prevent the provision of medical treatment to residents of the state by persons who are inadequately trained or otherwise incompetent to provide such treatment, and who have not subjected themselves to the regulatory regime established by the Medical Practice Act (Bus. & Prof. Code, § 2000 et seq.). Causing or intending an injury is not an element of the offense; and the injury sought to be prevented could not occur in another jurisdiction.

(7) A preponderance of the evidence shows that, without having at the time a valid California medical license, petitioner prescribed fluoxetine for a person he knew to be a California resident, knowing that act would cause the prescribed medication to be sent to that person at the California address he provided. If the necessary facts can be proved at trial beyond a reasonable doubt, the People will have satisfactorily shown a violation of Business and Professions Code section 2052. It is enough for our purposes that a preponderance of the evidence now shows that petitioner intended to produce or could reasonably foresee that his act would produce, and he did produce, the detrimental effect section 2052 was designed to prevent.

Petitioner endeavors to diminish the significance of the nature and intentionality of his act by focusing almost entirely on the requirement of section 778 that the act be "consummated" within the boundaries of this state. According to petitioner, no criminal act can be "consummated" in California unless the actor or his agent is present here at some point between the commencement of the criminal act and its completion, and that is not here the case. Petitioner may be right with respect to some criminal acts, but his theory does not apply to all, because not all crimes are necessarily "consummated" upon completion by the actor of the last element of the offense. "[T]he word 'consummate' requires a broader reading. In its common meaning, consummation denotes completion. In many instances, of course, a crime is completed upon commission of the last element of the required *actus reus*. Where, however, a statute, in addition to prohibiting conduct, includes within its definition of the offense a specific result, then the crime is not completed until that result occurs. And if the prohibited result occurs in a place other than the conduct which occasioned it, the location of the result may fairly be deemed the place where the crime is 'consummated.' "

As we have said, the acts forbidden by Business and Professions Code section 2052 (the actus reus) are (1) holding oneself out as practicing "any system or mode of treating the sick or afflicted in this state," and (2) actually treating the sick and afflicted in this state, as by, among other things, "prescribing" medication for such persons. A preponderance of the evidence shows petitioner prescribed medication for a resident of this state, aware of the virtual certainty his conduct would cause the prescribed medication to be sent to that person at his residence in California. This state is thus the place where the crime is "consummated." The fact that other parts of the crime were committed elsewhere is immaterial, as there is no constitutional or other reason "that prevents a state from punishing, as an offense against the penal laws of such state, a

crime when only a portion of the acts constituting the crime are committed within the state." Accordingly, respondent court possesses the necessary jurisdiction.

(8) Jurisdiction is not defeated by the fact that petitioner consummated the charged offense through the use of intermediaries located in other states. The trial court indicated its belief that a person in Colorado commits a crime in California if he sends a bomb through the mail, which explodes when the addressee opens the package in California. Petitioner's counsel agreed that might be true, but distinguished the situation here because it was not petitioner, but the Mississippi pharmacy, that sent the prescription to California, and petitioner "had no contact at all with Mr. McKay." The mere fact that petitioner acted through intermediaries--whether they be deemed "agent[s] or any other means"--is irrelevant under section 778: All that is required by the statute is that the intervention of such intermediaries "proceed[] directly from" petitioner, as a preponderance of the evidence shows it did. Petitioner's contention that he cannot be deemed to have committed any part of the offense in California because "the filling of the prescription, which occurred in Mississippi, was an entirely separate act, requiring a separate license," for which he cannot be held criminally accountable, is also unsustainable. That argument, which implies the pharmacy was a "guilty agent," is also undermined by section 778. By making the innocence or guilt of the agent irrelevant, the statute abrogates the common law rule that "[o]ne who, at all times outside the state, commits a crime within the state by a 'guilty agent' is not subject to the jurisdiction of the state."

For the foregoing reasons, and because a preponderance of the evidence now shows that petitioner's acts outside this state were intended to produce and produced detrimental effects within it, we believe the objective territorial principle codified by section 778 provides a basis upon which jurisdiction might be found to lie in this case. Indeed, if petitioner's communications had been by letter or telephone facsimile, there is little doubt jurisdiction would lie.

The remaining question is whether it should make a difference that petitioner's offense took place in cyberspace rather than in the real space for which the jurisdictional statutes were designed.

It Is Jurisdictionally Immaterial That Petitioner Committed the Charged Offense in Cyberspace

"Cybercrime" relates not just to the unauthorized use or disruption of computer files or programs and the theft of an electronic identity, but also to the use of a computer to facilitate or carry out a traditional criminal offense, as alleged in this case. This species of cybercrime is considered by some no different from crimes committed in real space, and this school feels it should therefore be regulated in the same manner. However, a growing number believe cyberspace requires a different system of rules (see, e.g., Johnson & Post, *Law and Borders--The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996)), particularly with respect to jurisdictional issues. Jurisdictional doctrine, which is constitutionally grounded in the due process clause of the Fourteenth Amendment, is not static. Jurisdictional principles have been adjusted to accommodate evolving social, economic, and political needs, and the Supreme Court has long also "recognized that personal jurisdiction must adapt to progress in technology." Mindful of the dynamic relationship between law and technology, some maintain that "[t]he

modern development of the Internet represents just the type of technological change that calls for the doctrinal modification traditionally characterizing both the common law process of constitutional interpretation in general and the law of personal jurisdiction in particular."

An aspect of Internet technology that assertedly most warrants modification of jurisdictional doctrine is the extent to which it undermines the role of territorial boundaries in delineating "law space"--that is, in providing notice that the crossing of a physical boundary may subject one to new rules. It is said that "[c]yberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of a local sovereign's efforts to regulate global phenomena; and (4) the ability of physical location to give notice of which sets of rules apply. The Net thus radically subverts the system of rule-making based on borders between physical spaces, at least with respect to the claim that Cyberspace should naturally be governed by territorially defined rules." (Johnson & Post, *Law and Borders*, 48 Stan. L. Rev. at 1370.) For these reasons, it is claimed that governmental efforts "to map local regulation and physical boundaries into Cyberspace" are sure to prove quixotic and the Internet must be therefore left alone to "develop its own effective legal institutions."

While Internet technology can create new realities courts may be compelled to accommodate, those who claim their Internet-related conduct should be exempt from a traditional legal principle because the conduct is not within the paradigm for which the rule was designed bear the burden of establishing the fact. Petitioner has not done so.

Petitioner does not make the bold claim that cyberspace is or should be beyond the reach of the criminal law, but he does insist that the People's assertion of extraterritorial jurisdiction over his Internet conduct is unreasonable because (1) he and others are not on notice of the unlawfulness of such conduct, and (2) the assertion of jurisdiction would not deter others from his allegedly unlawful conduct, but (3) it would deter physicians licensed in other states from providing residents of this state many useful forms of medical assistance over the Internet.

The claim that petitioner and others like him who prescribe medications over the Internet lack notice of the unlawfulness of that conduct is unacceptable. California's proscription of the unlicensed practice of medicine is neither an obscure nor an unusual state prohibition of which ignorance can reasonably be claimed, and certainly not by persons like petitioner who are licensed health care providers. Nor can such persons reasonably claim ignorance of the fact that authorization of a prescription pharmaceutical constitutes the practice of medicine.

The claim that a finding of jurisdiction in this case would not deter out-of-state physicians from prescribing medications for residents of this state via the Internet cannot be so easily dismissed. Such physicians or the Web sites that employ them can and usually do conceal their names, locations, and state of licensure, and it is difficult and costly for regulatory and law enforcement agencies to discover this information, as they must in order to charge a person with the unlawful practice of medicine.

Nonetheless, as this case demonstrates, the information can sometimes be discovered, so that federal and state agencies are not invariably unable to find and assert jurisdiction to punish persons and entities engaged in the unlawful prescription of pharmaceuticals over the Internet. In an amicus curiae brief the Attorney General represents that the Board is actively engaged in investigating the significant number of complaints it receives about the unlawful prescription of drugs by means of the Internet for residents of this state by physicians not licensed here, and has had "some success" in constraining this practice. The Attorney General is himself not now willing to accept the view that unlawful Internet activity can only be addressed at the national or international level, and we have no basis upon which to say he is wrong.

Given the absence at this time of any significant national or international effort to deter the widespread and growing use of the Internet to sell drugs without a prescription made on the basis of a good faith hands-on medical examination by a physician licensed in the state in which the patient resides (or without any prescription at all), the denial of state jurisdiction to punish the practice would provide the unscrupulous physicians who engage in it even greater freedom to do so than they already possess. Moreover, while state efforts to identify and obtain personal jurisdiction over such physicians are now often frustrated by Internet technology, technological innovations, network engineering, and Internet intermediaries are making it easier to identify and locate those whose unlawful acts take place in cyberspace and to enforce the law. Web sites and Internet service providers already possess the ability to design or filter content based on user location, and at least one state court has issued an enforceable order directing a provider of prescription pharmaceuticals to cease delivering unlawfully prescribed drugs into the forum state, and to place notice on its Web site that it will not do so. The prospect of other technological developments counsels judicial caution in accepting technology-based arguments against the assertion of jurisdiction, as that would eliminate incentives for technology developers to innovate in ways that would facilitate law enforcement and support public values.

Finally, there appears to be little danger that the finding of extraterritorial jurisdiction in this case will stifle provision over the Internet of many useful forms of medical assistance to residents of this state in need thereof. The practice of "telemedicine"--i.e., "health care delivery, diagnosis, consultation, treatment, transfer of medical data, and education using interactive audio, video, or data communications"--is specifically authorized by the Telemedicine Development Act of 1996 (Bus. & Prof. Code, § 2290.5, subd. (a)(1)). Furthermore, the Medical Practice Act exempts from the unlawful practice of medicine "a practitioner located outside this state, when in actual consultation, whether within this state or across state lines, with a licensed practitioner of this state" provided only that the out-of-state practitioner does not "appoint a place to meet patients [in this state], receive calls from patients within the limits of this state, give orders, or have ultimate authority over the care or primary diagnosis of a patient who is located within this state." (Bus. & Prof. Code, § 2060.)

In short, there is no persuasive reason why petitioner's or his employer's use of cyberspace, or the use of it by McKay or the Web site he contacted, should defeat application in this case of the traditional legal principles we rely upon to find extraterritorial jurisdiction.

For the foregoing reasons, the petition is denied.