Robert L. McCORMICK v. UNITED STATES.

500 U.S. 257 (May 23, 1991)

Synopsis

State legislator was convicted in the United States District Court for the Southern District of West Virginia, John T. Copenhaver, Jr., J., of extortion under color of official right and filing of false income tax returns and legislator appealed. The Court of Appeals for the Fourth Circuit, 896 F.2d 61,affirmed. Following grant of certiorari, the Supreme Court, Justice White, held that quid pro quo is necessary for conviction under the Hobbs Act when official receives campaign contribution, regardless of whether it is legitimate contribution. Reversed and remanded.

Justice WHITE delivered the opinion of the Court.

This case requires us to consider whether the Court of Appeals properly affirmed the conviction of petitioner, an elected public official, for extorting property under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951. We also must address the affirmance of petitioner's conviction for filing a false income tax return.

I

Petitioner Robert L. McCormick was a member of the West Virginia House of Delegates in 1984. He represented a district that had long suffered from a shortage of medical doctors. For several years, West Virginia had allowed foreign medical school graduates to practice under temporary permits while studying for the state licensing exams. Under this program, some doctors were allowed to practice under temporary permits for years even though they repeatedly failed the state exams. McCormick was a leading advocate and supporter of this program.

In the early 1980's, following a move in the House of Delegates to end the temporary permit program, several of the temporarily licensed doctors formed an organization to press their interests in Charleston. The organization hired a lobbyist, John Vandergrift, who in 1984 worked for legislation that would extend the expiration date of the temporary permit program. McCormick sponsored the House version of the proposed legislation, and a bill was passed extending the program for another year. Shortly thereafter, Vandergrift and McCormick discussed the possibility of introducing legislation during the 1985 session that would grant the doctors a permanent medical license by virtue of their years of experience. McCormick agreed to sponsor such legislation.

During his 1984 reelection campaign, McCormick informed Vandergrift that his campaign was expensive, that he had paid considerable sums out of his own pocket, and that he had not heard anything from the foreign doctors. Vandergrift told McCormick that he would contact the doctors and see what he could do. Vandergrift contacted one of the foreign doctors and later received from the doctors $1,200 in cash. Vandergrift delivered an envelope containing nine $100 bills to McCormick. Later the same day, a second delivery of $2,000 in cash was made to McCormick. During the fall of 1984, McCormick received two more cash payments from the doctors. McCormick did not list any of these payments as campaign

contributions,[1] nor did he report the money as income on his 1984 federal income tax return. And although the doctors' organization kept detailed books of its expenditures, the cash payments were not listed as campaign contributions. Rather, the entries for the payments were accompanied only by initials or other codes signifying that the money was for McCormick.

In the spring of 1985, McCormick sponsored legislation permitting experienced doctors to be permanently licensed without passing the state licensing exams. McCormick spoke at length in favor of the bill during floor debate, and the bill ultimately was enacted into law. Two weeks after the legislation was enacted, McCormick received another cash payment from the foreign doctors.

Following an investigation, a federal grand jury returned an indictment charging McCormick with five counts of violating the Hobbs Act, by extorting payments under color of official right, and with one count of filing a false income tax return in violation of 26 U.S.C. § 7206(1),3 by failing to report as income the cash payments he received from the foreign doctors. At the close of a 6–day trial, the jury was instructed that to establish a Hobbs Act violation the Government had to prove that McCormick induced a cash payment and that he did so knowingly and willfully by extortion. As set out in the margin, the court defined "extortion" and other terms and elaborated on the proof required with respect to the extortion counts.

The next day the jury informed the court that it "would like to hear the instructions again with particular emphasis on the definition of extortion under the color of official right and on the law as regards the portion of moneys received that does not have to be reported as income." The court then reread most of the extortion instructions to the jury, but reordered some of the paragraphs and made the following significant addition:

"Extortion under color of official right means the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or to his office. Of course, extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law. Voluntary is that which is freely given without expectation of benefit."

It is also worth noting that with respect to political contributions, the last two paragraphs of the supplemental instructions on the extortion counts were as follows:

"It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

"In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held."

[1] West Virginia law prohibits cash campaign contributions in excess of $50 per person. W.Va.Code § 3–8–5d (1990).

The jury convicted McCormick of the first Hobbs Act count (charging him with receiving the initial $900 cash payment) and the income tax violation but could not reach verdicts on the remaining four Hobbs Act counts. The District Court declared a mistrial on those four counts.

The Court of Appeals affirmed, observing that nonelected officials may be convicted under the Hobbs Act without proof that they have granted or agreed to grant some benefit or advantage in exchange for money paid to them and that elected officials should be held to the same standard when they receive money other than "legitimate" campaign contributions. After stating that McCormick could not be prosecuted under the Hobbs Act for receiving voluntary campaign contributions, the court rejected McCormick's contention that conviction of an elected official under the Act requires, under all circumstances, proof of a *quid pro quo*, i.e., a promise of official action or inaction in exchange for any payment or property received. Rather, the court interpreted the statute as not requiring such a showing where the parties never intended the payments to be "legitimate" campaign contributions. Ibid. After listing seven factors to be considered in making this determination and canvassing the record evidence, the court concluded:

"Under these facts, a reasonable jury could find that McCormick was extorting money from the doctors for his continued support of the 1985 legislation. Further, the evidence supports the conclusion that the money was never intended by any of the parties to be a campaign contribution. Therefore, we refuse to reverse the jury's verdict against McCormick for violating the Hobbs Act."

The Court of Appeals also affirmed the income tax conviction.

Because of disagreement in the Courts of Appeals regarding the meaning of the phrase "under color of official right" as it is used in the Hobbs Act, we granted certiorari. We reverse and remand for further proceedings.

Until the early 1970's, extortion prosecutions under the Hobbs Act rested on allegations that the consent of the transferor of property had been "induced by wrongful use of actual or threatened force, violence, or fear"; public officials had not been prosecuted under the "color of official right" phrase standing alone. Beginning with the conviction involved in *United States v. Kenny*, 462 F.2d 1205 (CA3 1972), however, the federal courts accepted the Government's submission that because of the disjunctive language of § 1951(b)(2), allegations of force, violence, or fear were not necessary. Only proof of the obtaining of property under claims of official right was necessary. Furthermore, every Court of Appeals to have construed the phrase held that it did not require a showing that the public official "induced" the payor's consent by some affirmative act such as a demand or solicitation. Although there was some difference in the language of these holdings, the "color of official right" element required no more than proof of the payee's acceptance knowing that the payment was made for the purpose of influencing his official actions. In 1984, however, the Court of Appeals for the Second Circuit, en banc, held that some affirmative act of inducement by the official had to be shown to prove the Government's case. *United States v. O'Grady*, 742 F.2d 682 (1984). In 1988, the Ninth Circuit, en banc, agreed with the Second Circuit, overruling a prior decision expressing the majority rule. *United States v. Aguon*, 851 F.2d 1158 (1988). Other courts have been unimpressed with the view expressed in *O'Grady* and *Aguon*. See, e.g., United States v. Evans, 910 F.2d 790, 796–797 (CA11 1990); United States v. Spitler, 800 F.2d 1267, 1274 (CA4 1986); United States v. Paschall, 772 F.2d 68, 71 (CA4 1985).

The conflict on this issue is clear, but this case is not the occasion to resolve it. The trial court instructed that proof of inducement was essential to the Government's case, but stated that the requirement could be satisfied by showing the receipt of money by McCormick knowing that it was proffered with the expectation of benefit and on account of his office, proof that would be inadequate under the O'Grady view of inducement. McCormick did not challenge this instruction in the trial court or the Court of Appeals; nor does he here.

We do address, however, the issue of what proof is necessary to show that the receipt of a campaign contribution by an elected official is violative of the Hobbs Act. The trial court and the Court of Appeals were of the view that it was unnecessary to prove that, in exchange for a campaign contribution, the official specifically promised to perform or not to perform an act incident to his office.

Justice STEVENS in dissent makes the bald assertion that "[i]t is perfectly clear ... that the evidence presented to the jury was adequate to prove beyond a reasonable doubt that petitioner knowingly used his public office to make or imply promises or threats to his constituents for purposes of pressuring them to make payments that were not lawfully due him." Contrary to Justice STEVENS' apparent suggestion, the main issue throughout this case has been whether under proper instructions the evidence established a Hobbs Act violation and, as our opinion indicates, it is far from "perfectly clear" that the Government has met its burden in this regard.

II

McCormick's challenge to the judgment below affirming his conviction is limited to the Court of Appeals' rejection of his claim that the payments made to him by or on behalf of the doctors were campaign contributions, the receipt of which did not violate the Hobbs Act. Except for a belated claim not properly before us,6 McCormick does not challenge any rulings of the courts below with respect to the application of the Hobbs Act to payments made to nonelected officials or to payments made to elected officials that are properly determined not to be campaign contributions. Hence, we do not consider how the "under color of official right" phrase is to be interpreted and applied in those contexts. In two respects, however, we agree with McCormick that the Court of Appeals erred.

In briefing the merits in this Court, McCormick has argued that the Hobbs Act was never intended to apply to corruption involving local officials and that in any event an official has not acted under color of official right unless he falsely represents that by virtue of his office he has a legal right to the money or property he receives. These arguments were not presented to the courts below. They are not expressly among the questions presented in the petition for certiorari and are only arguably subsumed by the questions presented. Nor in view of the language of the Hobbs Act and the many cases approving the conviction of local officials under the Act can it be said that plain error occurred in the lower courts for failure to recognize that the Act was inapplicable to the extortion charges brought against McCormick. As for the false-pretenses argument, [we] have rejected the claim and many other convictions have been affirmed where it is plain that there was no misrepresentation of legal right. In view of these cases and the origin of the phrase "under color of official right," no plain error occurred below in failing to interpret the phrase as McCormick argues. Accordingly, the submission does not comply with our rules and is untimely, and we do not address it further.

First, we are quite sure that the Court of Appeals affirmed the conviction on legal and factual grounds that were never submitted to the jury. Although McCormick challenged the adequacy of the jury instructions to distinguish between campaign contributions and payments that are illegal under the Hobbs Act, the Court of Appeals' opinion did not examine or mention the instructions given by the trial court. The court neither dealt with McCormick's submission that the instructions were too confusing to give adequate guidance to the jury, nor, more specifically, with the argument that although the jury was instructed that voluntary campaign contributions were not vulnerable under the Hobbs Act, the word "voluntary" as used "in several places during the course of these instructions," App. 30, was defined as "that which is freely given without expectation of benefit." Ibid. Neither did the Court of Appeals note that the jury was not instructed in accordance with the court's holding that the difference between legitimate and illegitimate campaign contributions was to be determined by the intention of the parties after considering specified factors.[2] Instead, the Court of Appeals, after announcing a rule of law for determining when payments are made under color of official right, went on to find sufficient evidence in the record to support findings that McCormick was extorting money from the doctors for his continued support of the 1985 legislation, and further that the parties never intended any of the payments to be a campaign contribution.

It goes without saying that matters of intent are for the jury to consider. It is also plain that each of the seven factors that the Court of Appeals thought should be considered in determining the parties' intent presents an issue of historical fact. Thus even assuming the Court of Appeals was correct on the law, the conviction should not have been affirmed on that basis but should have been set aside and a new trial ordered. If for no other reason, therefore, the judgment of the Court of Appeals must be reversed and the case remanded for further proceedings.

We agree with the Court of Appeals that in a case like this it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and we agree that the intention of the parties is a relevant consideration in pursuing this inquiry. But we cannot accept the Court of Appeals' approach to distinguishing between legal and illegal campaign contributions. The Court of Appeals stated that payments to elected officials could violate the Hobbs Act without proof of an explicit quid pro quo by proving that the payments "were never intended to be legitimate campaign contributions." This issue, as we read the Court of Appeals' opinion, actually involved two inquiries; for after applying the factors the Court of Appeals considered relevant, it arrived at two conclusions: first, that McCormick was extorting money for his continued support of the 1985 legislation and "[f]urther," that the money was never intended by the parties to be a campaign contribution at all. The first conclusion, especially when considered in light of the second, asserts that the campaign contributions were illegitimate, extortionate payments.

[2] "Some of the circumstances that should be considered in making this determination include, but are not limited to, (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment."

This conclusion was necessarily based on the factors that the court considered, the first four of which could not possibly by themselves amount to extortion. Neither could they when considered with the last three more telling factors, namely, whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor; whether the official had supported legislation before the time of the payment; and whether the official had directly or indirectly solicited the payor individually for the payment. Even assuming that the result of each of these seven inquiries was unfavorable to McCormick, as they very likely were in the Court of Appeals' view, we cannot agree that a violation of the Hobbs Act would be made out, as the Court of Appeals' first conclusion asserted.

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

This formulation defines the forbidden zone of conduct with sufficient clarity. As the Court of Appeals for the Fifth Circuit observed in United States v. Dozier, 672 F.2d 531, 537 (1982):

> "A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of quid pro quo, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act."

The United States agrees that if the payments to McCormick were campaign contributions, proof of a quid pro quo would be essential for an extortion conviction.

We thus disagree with the Court of Appeals' holding in this case that a quid pro quo is not necessary for conviction under the Hobbs Act when an official receives a campaign contribution. By the same token, we hold, as McCormick urges, that the District Court's instruction to the same effect was error.

As noted previously, McCormick's sole contention in this case is that the payments made to him were campaign contributions. Therefore, we do not decide whether a quid pro quo requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value.

In so holding, we do not resolve the conflict with respect to the necessity of proving inducement.

The Court of Appeals affirmed McCormick's conviction for filing a false return on the sole ground that the jury's finding that McCormick violated the Hobbs Act "under these facts implicitly indicates that it rejected his attempts to characterize at least the initial payment as a campaign contribution." This conclusion repeats the error made in affirming the extortion conviction. The Court of Appeals did not examine the record in light of the instructions given the jury on the extortion charge but considered the evidence in light of its own standard under which it found that the payments were not campaign contributions. Had the court focused on the instructions actually given at trial, it would have been obvious that the jury could have convicted McCormick of the tax charge even though it was convinced that the payments were campaign contributions but was also convinced that the money was received knowing that it was given with an expectation of benefit and hence was extorted. The extortion conviction does not demonstrate that the payments were not campaign contributions and hence taxable.

Of course, the fact that the Court of Appeals erred in affirming the extortion conviction and erred in relying on that conviction in affirming the tax conviction does not necessarily exhaust the possible grounds for affirming on the tax count. But the Court of Appeals did not consider the verdict on that count in light of the instructions thereon and then decide whether, in the absence of the Hobbs Act conviction, McCormick was properly convicted for filing a false income tax return. That option will be open on remand.

Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

So ordered.