

January 2006

People v. Lopez

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Recommended Citation

Geoffrey Goell, *People v. Lopez*, 51 N.Y.L. SCH. L. REV. 722 (2006-2007).

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VOLUME 51 | 2006/07

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Forgery, like beauty, is in the eye of the beholder. When the eye in question is an electronic scanner, however, what it perceives may be irrelevant under the New York forgery statute. In New York, to constitute a forgery, a written instrument altered by someone other than the maker must appear to be the work of the original maker.¹ Traditionally, determining whether a written instrument was the work of an original maker involved human inspection. What happens, however, when the instrument is presented to a scanner for processing? Until recently the New York courts had not been faced with this question. As a result of the increased processing of commercial transactions by electronic means, the courts must now apply a pre-computer age statute to determine whether criminal liability will result from the deception of an electronic eye.²

In *People v. Lopez*,³ the New York City Criminal Court addressed the question of whether a bent MetroCard⁴ constituted a forged written instrument under the New York State forgery statute.⁵ In analyzing this issue, the court looked at whether a MetroCard that is deliberately bent in order to gain free access to the subway⁶ can be classified as a written instrument that has been “falsely altered” under section 170.00(6) of the New York Penal Law (“NYPL”).⁷ The court held that a bent MetroCard cannot constitute a falsely altered written instrument because it no longer resembles the original instrument, which is a required element of the statute.⁸ This case comment contends that the court improperly placed a bent MetroCard outside the forgery statute by failing to consider the extent to which an altered instrument resembles the original in the context of the reader validating its authenticity.

In *Lopez*, a police officer observed defendant, Radames Lopez, bend a MetroCard and use it to gain access to the system.⁹ Swiping a bent MetroCard with no cash balance through a turnstile is a common method to avoid paying the

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1. N.Y. PENAL LAW § 170.00(6) (McKinney 2006).
 2. See generally PETER GRABOSKY, RUSSELL G. SMITH & GILLIAN DEMPSEY, ELECTRONIC THEFT: UNLAWFUL ACQUISITION IN CYBERSPACE 1–14 (2001) (discussing the major crimes of acquisition involving information and digital technology and the difficulty of legal systems to keep pace with technological change).
 3. 797 N.Y.S.2d 893 (Crim. Ct. Kings County 2005).
 4. A MetroCard is the commercial term for an electronic ticket issued by the New York City Transit Authority to gain passage on the subway. *In re D.U.*, 747 N.Y.S.2d 730, 731 (Fam. Ct. Queens County 2002).
 5. *Lopez*, 797 N.Y.S.2d at 896.
 6. *Id.* at 894. By bending a MetroCard, the information on the magnetic strip is altered in such a way as to cause the electronic scanner to erroneously read that a fare has been paid. *People v. Dixon*, 798 N.Y.S.2d 659, 666 (Crim. Ct. Kings County 2005).
 7. *Lopez*, 797 N.Y.S.2d at 897. N.Y. PENAL LAW § 170.00(6) provides:
A person “falsely alters” a written instrument when, without the authority of anyone entitled to grant it, he changes a written instrument, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that such instrument in its thus altered form appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer.
 8. *Lopez*, 797 N.Y.S.2d at 897.
 9. *Id.* at 895.

lawful fare.¹⁰ The defendant was arrested and charged with theft of services, resisting arrest, forgery in the third degree,¹¹ and criminal possession of a forged instrument in the third degree.¹² At the time of his arrest the defendant possessed two additional bent MetroCards.¹³

Defendant moved to dismiss both forgery charges.¹⁴ The court granted defendant's motion to dismiss on the ground that under the statutory definition of "falsely alter," a bent MetroCard cannot be considered a forged written instrument.¹⁵ The court concluded:

The New York City Transit Authority does not issue bent MetroCards to legitimate purchasers. Therefore, a bent MetroCard cannot be considered a "forged written instrument" since, in its altered form it cannot "purport to be in all respects an authentic creation or fully authorized by its ostensible maker or drawer." In other words, the bent MetroCard does not, and cannot purport to be an authentic, fully authorized MetroCard as issued by the Transit Authority since once it is bent, it no longer resembles the card issued by the Transit Authority.¹⁶

The court went on to note that while a MetroCard clearly falls within the statutory definition of a "written instrument,"¹⁷ the people's contention that defendant had falsely altered it "goes beyond the plain meaning language of applicable statutes."¹⁸

Since *Lopez*, the court has decided two additional cases involving essentially the same facts and issues. In *People v. Verastegui*,¹⁹ the defendant was alleged to have used a bent MetroCard with no cash balance to swipe passengers through the subway turnstile in exchange for money.²⁰ The defendant was arrested and charged with, among other things, criminal possession of a forged in-

10. *Id.* at 896.

11. *Id.* N.Y. PENAL LAW § 170.05 states: "A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument."

12. *Lopez*, 797 N.Y.S.2d at 894. N.Y. PENAL LAW § 170.20 provides: "A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument."

13. *Lopez*, 797 N.Y.S.2d at 894.

14. *Id.*

15. *Id.* at 897.

16. *Id.*

17. "Written instrument" means any instrument or article, including computer data or a computer program, containing written or printed matter or the equivalent thereof, used for the purpose of reciting, embodying, conveying or recording information, or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person. N.Y. PENAL LAW § 170.00(1) (McKinney 2006).

18. *Lopez*, 797 N.Y.S.2d at 897.

19. 2005 N.Y. Slip Op. 51298U (Crim. Ct. Kings County, Aug. 12, 2005).

20. *Id.* at 1.

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strument in the third degree under section 170.20 of the NYPL.²¹ In *People v. Roman*,²² the defendant was arrested for gaining access to the transit system by swiping a bent MetroCard with no cash balance through the turnstile.²³ He was charged with forgery in the third degree under section 170.05 and criminal possession of a forged instrument in the third degree. In both cases the court held that a bent MetroCard does in fact constitute a “falsely altered” written instrument.

In *Verastegui*, the court stated that whether a bent MetroCard appears or purports to be an authentic representation of the Transit Authority depends on who, or what, is reading the instrument.²⁴ The court compared swiping a MetroCard to depositing a check with a bank teller.²⁵ “In this situation the teller and the [MetroCard] turnstile reader are analogous entities. Therefore, a [MetroCard] bent in a specific way for the purpose of defrauding the MTA does constitute a ‘forged instrument.’”²⁶

In *Roman*, the court also emphasized that forgeries must be considered in light of the reader.²⁷ The court stated that “[t]o the eye of the scanner, the bent Metro[C]ard ‘purports to be in all respects an authentic creation’ of the Transit Authority.”²⁸

Under *Lopez*, in order for an altered written instrument to be considered “falsely altered,” it must appear to the human eye to be the creation of the ostensible maker or drawer.²⁹ However, in a world where transactions are increasingly conducted electronically, applying a human-eye standard to written instruments which are verified by electronic means, such as a MetroCard or an ATM card, is inappropriate because it allows for the use of written instruments that misrepresent their authenticity.³⁰ Under the human-eye standard, New York’s forgery statute could be rendered toothless in all situations where an instrument is used to defraud a machine and the instrument does not physically resemble the original in every way.

The crime of forgery, in all its forms, requires three things: “(1) a written instrument that (2) the defendant falsely makes, completes or alters (3) with the

21. *Id.*

22. 2005 N.Y. Slip Op. 51291U (Crim. Ct. Kings County, Aug. 12, 2005).

23. *Id.* at 1.

24. *Verastegui*, 2005 N.Y. Slip Op. 51298U at 4.

25. *Id.*

26. *Id.*

27. *Roman*, 2005 N.Y. Slip Op. 51291U at 2.

28. *Id.*

29. *Lopez*, 797 N.Y.S.2d at 897.

30. See generally PETER N. GRABOSKY & RUSSEL G. SMITH, CRIME IN THE DIGITAL AGE 163 (1998) (discussing card misuse and counterfeiting in electronic banking transactions).

intent to deceive, defraud or injure another.”³¹ Whether there is an intent to deceive, defraud or injure another is a question of fact for the jury. The NYPL defines “written instrument” in very broad terms, and in all the MetroCard forgery cases a MetroCard has been determined to be a written instrument, since it contains encrypted data and is “capable of being used to the advantage or disadvantage of some person.”³²

It is the second element that has become the essential legal controversy in MetroCard forgery cases. With regard to the second element, whether falsely made, completed, or altered, the instrument must “appear or purport to be the authentic creation of the ostensible maker.”³³ It is this language that has led to the difference of opinion as to whether a bent MetroCard can be considered a “falsely altered” written instrument. This clause has traditionally been interpreted to distinguish between a written instrument that is falsely made and a written instrument that is made falsely.³⁴ Only instruments that are falsely made are forgeries.³⁵ The same can be said of falsely altering or completing, because the language concerning the appearance of authenticity is identical in each subsection of the definitions and terms of the forgery statute.³⁶ A person cannot falsely make or alter an instrument if he has the authority to execute it.³⁷ This is true even if the false information is deliberately placed in the instrument: The instrument may be fraudulent, but it is not a forgery.³⁸ This distinction is exemplified in *People v. Cannarozzo*.³⁹

In *Cannarozzo*, the defendant had his class-three chauffeur’s license amended to a class-one license by a supervisor in charge of the county clerk’s branch office.⁴⁰ The defendant had not passed any of the required tests to qualify for a class-one license.⁴¹ The defendant was charged with, and convicted of, criminal possession of a forged instrument in the second degree.⁴² On appeal, the defendant successfully argued that although the license contained false informa-

31. LYNN W.L. FAHLEY, *NEW YORK CRIMINAL LAW* 678 (Richard Greenberg ed., 2002) (citing N.Y. PENAL LAW § 170.00(5)).

32. *Roman*, 2005 N.Y. Slip Op. 51291U at 1 (quoting N.Y. PENAL LAW § 170.00(1)).

33. N.Y. PENAL LAW §§ 170.00(4)–(6) (McKinney 2006).

34. NEW YORK CRIMINAL PRACTICE § 111.1(2)(b) (2005).

35. *Id.*

36. N.Y. PENAL LAW §§ 170.00(4)–(6) all require that the written instrument appear or purport to be an authentic creation of the ostensible maker.

37. NEW YORK CRIMINAL PRACTICE, *supra* note 34.

38. *Id.*

39. 405 N.Y.S.2d 528 (4th Dep’t 1978).

40. *Id.* at 529.

41. *Id.*

42. *Id.*

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tion, it was not falsely made, completed, or altered as defined under sections 170.00(4), (5), and (6) of the NYPL.⁴³ The court held that the license

was in fact the act of the ostensible maker, represented to be such, and that one does not commit the crime of forgery by making an instrument in one's own name which falsely purports to bind another if the maker is authorized to make the instrument, though the recitals of the instrument may be false and though instrument may be made with fraudulent intent.⁴⁴

Thus, under *Cannarozzo*, if the professed maker of a written instrument is in fact the maker, the instrument cannot be considered a forgery no matter how much deliberately fraudulent information is placed in the instrument. This has been the traditional interpretation of the forgery statute language that requires the written instrument to appear in all respects to be an authentic creation of its ostensible maker.

The *Lopez* court, without citing authority, has now declared that the language in *Cannarozzo* means more. Under *Lopez*, if a written instrument professes to be the work of the authorized maker, but it appears that someone other than that maker may have altered it, the altered instrument cannot be a forgery.⁴⁵ It cannot be a forgery, even if the person who altered the instrument intended to deceive another with it, because, on its face, the instrument does not resemble the kind of written instrument that the ostensible maker would produce.⁴⁶ This reasoning is tantamount to an exception for poorly executed forgeries: If the party at whom the forgery is directed should detect that the alteration was not performed by the actual maker then the person who altered the instrument with the intent to defraud the other party will not be culpable of any crime under the forgery statute. Even if the law is interpreted this way for written instruments evaluated by the human eye, a different standard should be used for written instruments evaluated by electronic means.

Inherent in the crime of forgery is the presentation of an instrument which falsely purports to be the genuine article. Without this act there is no intent to deceive, defraud or injure, and therefore no forgery. In order to properly evaluate whether or not a written instrument is the work of someone other than the ostensible maker, one must consider who, or what, is verifying the instrument. As stated in *Verastegui*, whether a written instrument in its altered form purports to be an authentic creation of the professed maker or drawer is "predicated

43. *Id.* at 531.

44. *Id.*

45. *See Lopez*, 797 N.Y.S.2d at 897.

46. *See id.*

on the entity or individual that the instrument is presented to, that will ultimately validate authenticity.”⁴⁷

The *Lopez* court seems to suggest that it applies a human-eye standard⁴⁸ to an electronic scanner because “the plain meaning of the language of the applicable statute” requires it to do so.⁴⁹ The court implies that the applicable provision in the statute is unambiguous on its face and, therefore, subject to only one interpretation regardless of the effect of that interpretation. Section 170.00(6), however, is silent with regard to the object of the forgery.⁵⁰ It neither states that the altered written instrument must appear “to the human eye” to be an authentic creation of its apparent maker, nor does it indicate that such an evaluation by a machine is impermissible. The entire statute is silent as to the means for evaluating or validating the authenticity of the written instrument. Due to the statute’s ambiguity in this regard, it is clear that the *Lopez* court in reaching its holding engaged in a misapplication of the plain meaning rule.⁵¹

A close examination of the structure of the forgery statute as a whole reveals that the legislature intended machines that verify the authenticity of written instruments to be protected. For example, sections 170.55 and 170.60 make it unlawful to defraud the owner of a coin machine by depositing a slug in such machine.⁵² Section 170.50(2) defines a slug as “an object or article which, by virtue of its size, shape or any other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill or token”⁵³ While slugs are instruments, most are not written instruments. Since all definitions of forgery are defined in terms of a “written instrument,” it seems as if the legislature required a special provision in order to protect machine owners from this kind of fraud under the statute. The legislature accomplished this goal by enacting sections 170.50, 170.55 and 170.60 into the forgery statute.⁵⁴ Based upon the above, it is clear that the legislature intended that the owners of machines be protected from fraud under the forgery statute.

47. *Verastegui*, 2005 N.Y. Slip Op. 51298U at 4.

48. “Human-eye standard” refers to the position that an altered written instrument must appear to the human eye to be genuine regardless of the method or process used to scrutinize the instrument.

49. *Lopez*, 797 N.Y.S.2d at 897.

50. See N.Y. PENAL LAW § 170.00(6) (McKinney 2006).

51. The “plain meaning rule” is a rule of statutory construction that states “when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning.” NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 113 (6th ed. 2000).

52. Compare N.Y. PENAL LAW § 170.55, with N.Y. PENAL LAW § 170.60 (adding the requirement that the slug exceed one hundred dollars). Both sections provide: “A person is guilty of using a slug when . . . he makes, possesses or disposes of a slug with intent to enable a person to insert or deposit it in a coin machine.”

53. N.Y. PENAL LAW § 170.50(2) (McKinney 2006).

54. N.Y. PENAL LAW §§ 170.50, 170.55, 170.60 (McKinney 2006).

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It is not reasonable to assert that the legislature intended owners of machines to be protected from fraudulent instruments, but not from fraudulent written instruments under the forgery statute. Other than the sections regarding slugs, the forgery statute sections make no distinction as to object of the forgery. The fact that the legislature did not see the need to insert a section to provide protection to machines from fraudulent written instruments supports the inference that machines were understood to be covered under the other sections of the forgery statute.

In 1986, the New York legislature made major changes to the NYPL in order to address the increase of computer crime.⁵⁵ One of the changes implemented was the expansion of the definition of “written instrument” to include “computer data or a computer program, containing written or printed data or the equivalent thereof.”⁵⁶ The intent was presumably to make it clear that information generated by a computer should fall within the forgery statute if it is made, completed, or altered by someone other than the ostensible maker, with the intent to defraud. The legislature acknowledged that computer programs often contain encrypted code rather than printed data and thus included the “equivalent” of printed matter within its expanded definition of written instrument.⁵⁷ Code generated by a computer is read by a computer. By acknowledging a new type of written instrument that is read by something other than a human eye, the legislature implicitly acknowledged that the means of reading that instrument could be the object of forgery. If the legislature intended a narrow a human-eye standard to be applied to computer code validated by computers, it simply could have provided for such an exemption when it expanded its definition of written instrument to include computer generated data or programs. Thus, it is clear that the legislature intended that if a machine is the reader of a written instrument, the validation of authenticity be considered in that context.⁵⁸

As of October 19, 2005, NYPL section 165.16 makes it a class B misdemeanor to, among other things, sell access to transportation services using a doctored MetroCard.⁵⁹ However, this recent addition to the theft article of the

55. *People v. Versaggi*, 83 N.Y.2d 123, 128 (1994).

56. N.Y. PENAL LAW § 170.00(1) (McKinney 2006); *Versaggi*, 83 N.Y.2d at 128.

57. N.Y. PENAL LAW § 170.00(1) (McKinney 2006).

58. *See Versaggi*, 83 N.Y.2d at 128. The New York Court of Appeals in a discussion of the changes to the NYPL regarding computer data and programs stated that, “the breadth of the changes manifests the Legislature’s intent to address the full range of computer abuses.” *See also id.* at 131, where the court in a discussion of the statutory definition of a “computer program,” citing *People v. Abeel*, 182 N.Y. 415, 420–21, noted that “enactment of criminal statutes often ‘follow[s] in [the] wake’ of the activity it attempts to penalize, courts should not legislate or nullify statutes by overstrict construction.”

59. N.Y. PENAL LAW § 165.16(1) (McKinney 2006) states:

A person is guilty of unauthorized sale of certain transportation services when, with intent to avoid payment by another person to the metropolitan transportation authority, New York city transit authority or a subsidiary or affiliate of either such authority of the lawful charge for transportation services on a railroad, subway, bus or mass transit service operated by either such

penal code does not resolve whether such a doctored card constitutes a forged written instrument under the forgery statute. Nor does it address the broader issue of whether a human-eye standard must be applied to altered written instruments verified by an electronic eye. Thus, in the future, it will very likely fall to the courts to determine if *Lopez* becomes meaningful precedent or an aberration in the interpretation of the forgery statute.

The *Lopez* case exemplifies the difficulty the legislature has in keeping laws current and relevant in the face of rapid technological changes. It is also an example of the need for our courts take these changes into consideration when applying an old law to a new technology. By failing to consider the means by which the authenticity of a written instrument is assessed, the court places a wide variety of electronic transactions outside the forgery statute. If the holding in *Lopez* is to be followed,⁶⁰ a valuable weapon in fighting electronic fraud would be removed from the state's arsenal. The public interest will be better protected if future courts adopt the standard set forth in *Roman* and *Verastegui*, which takes into account whether a forged instrument is presented to a human-eye or an electronic one when considering the extent to which the instrument appears to be the genuine article.

authority or a subsidiary or affiliate thereof, he or she, in exchange for value, sells access to such transportation services to such person, without authorization, through the use of an unlimited farecard or doctored farecard.

60. Two cases have, to date, followed the *Lopez* decision: *People v. Griffin*, 809 N.Y.S.2d 483 (Crim. Ct. Kings County 2005); and *People v. L.R.*, 2006 N.Y. Slip Op 51800U (Crim. Ct. N.Y. County Mar. 14, 2006). It should be noted that the presiding judge in *Griffin* was also the presiding judge in *Lopez*.