

File 8/23/06 P. v. Ney CA3

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTINE SUZANNE NEY,

Defendant and Appellant.

C048122

(Super. Ct. No. 02F09957)

During the spring and summer of 2002, defendant Christine Suzanne Ney played various roles in Women Helping Women (WHW), a pyramid scheme. In a pyramid scheme early participants recover more than they contribute. The additional money must be paid in by those who join later. As new and necessarily larger generations join in, the structure resembles a pyramid. Inevitably, since the number of possible participants is finite, growth of such a scheme has to end. This stops the payouts, causing the great majority of participants at the base levels of the pyramid to lose money.

In November of 2002, defendant was charged with operating an "endless chain" as defined in and prohibited by Penal Code section 327.¹ After a jury trial she was convicted of that offense. She appeals from the judgment granting her probation on conditions of community service and payment of restitution and fines.

Her principal claim on appeal is that WHW was not an endless chain within the definition of section 327 because it did not require every participant to introduce new participants in order to obtain compensation. She also contends she did not "operate" the scheme within the meaning of section 327 because she did not have management authority over the whole scheme. As her contentions lack merit we shall affirm the judgment.

FACTUAL BACKGROUND

WHW called itself a "gifting club." Participation was limited to women. The WHW terminology, like the name "Women Helping Women," has a homey, domestic theme. WHW purported to be "a group of women devoted to helping and supporting one another."

A typical WHW attestation tugs the charitable heartstrings: "I first heard about WHW from my sister who is a manicurist in Shingle Springs. She told me about this gifting club that was for women only, and the intent of the club was to help women

¹ Undesignated statutory references are to [the](#) Penal Code. The text of section 327 is in footnote 2, at page 7, *post*.

like ourselves. Women who have big bills to pay, who have faced cancer [and] have hospital bills, who are raising children on their own, who have family members in need or kids to put through college, women who have [gone] through bankruptcy, who are getting divorced, who have attorney bills or are just plain struggling."

The core of the WHW scheme is as follows: Entering participants make a cash "gift" for the purpose of receiving eight times their initial investment. The entering participants' subscriptions fill eight positions of \$5,000 each at the first level of the scheme. These positions were called "appetizer plates." Participants could subscribe for the whole \$5,000 plate and receive \$40,000 at payout or they could subscribe for a portion of a plate, e.g., one-quarter for \$1,250 resulting in a \$10,000 payout. Each plate was divided into eighths, worth \$625 apiece.

If the following second generation of recruits' subscriptions fill in 16 appetizer plates, the entire first generation advances through the second level of the scheme. The second level positions were called "soup and salad plates."

If the following third generation of recruits' subscriptions fill in 32 appetizer plates, the entire first generation advances through the third level of the scheme and the entire second generation through the second level. The third level positions were called "entree plates."

If the following fourth generation of recruits' subscriptions fill in 64 appetizer plates, the entire first generation advances through the fourth level of the scheme ("dessert plates") and receives the eightfold \$40,000 payout, a so-called "birthday," from those subscriptions. The second and third generations also move up a level.

As each subset generation of eight appetizer plates ascended a level they were divided into two fiscally separate groups. Thus, if recruitment goes well, after three generations, each is at the apex of a subordinate pyramid, or in WHW lingo a "chart," of two entrees, four soup and salads, and eight paying appetizers.

As a result of this division, the charts are free to proceed independently, at different rates. Some chart branches with successful recruiters proliferate rapidly, while others could take longer to generate payouts, if at all. Defendant did not feel sorry for charts that were progressing slowly, as "they weren't working hard enough."

Under WHW's guidelines personal recruitment of new participants was not a "mandatory" requirement to reach the payout apex of the pyramid. However, personal recruitment of three additional participants per chart was explicitly urged as a duty of all. For example, the guidelines provide that if those a participant bring in do not recruit their share, they "need to take that responsibility and work to bring their [three] ladies in for them." If a participant fulfills her duty

to recruit three others then, after her "birthday" payout, she was permitted to rejoin, to ascend another derivative chart toward another payout.

WHW became a sizeable enterprise. It claimed to have 10,000 participants from Auburn to Bakersfield and to have paid out over \$11 million. WHW's administration was provided by the participants.

Potential recruits, sometimes as many as 100 at a time, were given a sales pitch at a WHW social event by a "presenter." The presenter was required to understand the WHW program and to explain it to potential recruits. WHW provided a detailed script for the presenter's pitch. The presenter was also responsible for dealing with "uninvited guests (District Attorney, Police, troublemakers, etc.)"

The key event of the WHW organization was the "birthday party," where the cash subscriptions for appetizer plate status were paid to the dessert plate participant(s) at the apex. A WHW "officiator" was in charge of the entire event, seeing to organization of the room, security, calling upon the appetizer plate women to make their payments, responding to problems, and turning in reporting documents to WHW.

The "counter" had the role of counting the payments for the officiator and paying them over to the birthday girls. The counter was also responsible for signing and dating the receipt sheets.

"Hostesses" provided their home or a business facility for use for a meeting. They would provide WHW literature and snacks and soft drinks.

A "chart leader" was the participant on a WHW chart who documented the activity of the chart. Chart leaders would communicate with chart participants weekly, encouraging them and inviting them to WHW dinner parties. They taught other participants their responsibilities concerning birthday parties.

When a chart was complete the chart leader made the arrangements for scheduling and conducting the birthday party. This included telephoning (or delegating the task to a "gift line confirmer") to confirm the lineup of appetizer plate participants making the cash payments.

Defendant first became involved in WHW in April of 2002. She became a participant on 49 charts. Subtracting money she reinvested into the scheme, she drew about \$55,000 in payouts from WHW, all or part of the proceeds from seven WHW birthdays.

She was the chart leader on 12 charts. She was a hostess, using her home for several WHW events. She served as a gift line confirmer, a counter and an officiator. She was also a frequent, enthusiastic and accomplished presenter. Her voluminous WHW e-mail correspondence evinces an intense, time-consuming and sustained role in administering WHW charts and exhorting her compatriots on in their recruitment efforts.

DISCUSSION

I. WHW Qualified as an Endless Chain

The defendant claims WHW was not an "endless chain" as defined by section 327.² She argues that definition requires the participants to bring in new members in order to receive compensation. She submits that was not the case with WHW because personal recruitment of additional participants was not mandatory. Her argument is not persuasive and the contentions of error based upon it are not meritorious.³

Section 327 defines an "endless chain" as a scheme where "a participant" pays to receive compensation for introducing others into the scheme. Defendant argues that since the WHW guidelines allowed compensation even if a participant did not recruit any additional persons it cannot be an endless chain.

² Section 327 provides as follows:

"Every person who contrives, prepares, sets up, proposes, or operates any endless chain is guilty of a public offense, and is punishable by imprisonment in the county jail not exceeding one year or in state prison for 16 months, two, or three years.

"As used in this section, an 'endless chain' means any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant. Compensation, as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme."

³ The Attorney General requests that we take judicial notice of many items in the legislative history of section 327. We deny the request as we find no assistance in the proffered documents on the questions presented.

The provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (§ 4.) The manifest object of section 327 is to prevent the fraudulent losses inevitable in a pyramid scheme, i.e., one where ongoing compensation requires recruitment of an endless chain of new participants. The inherent fraud is that earlier participants acquire their gains at the expense of the later participants who are left holding the bag when the scheme collapses.

That pernicious outcome remains inevitable in a scheme like WHW where recruitment by every participant is not technically "mandatory." Nonetheless, the early participants must on average recruit approximately three new participants each or there is no payout and the chart fails. If one does not "take that responsibility . . . [another participant must] work to bring their [three] ladies in for them." Review of the history of defendant's group of WHW charts revealed that overall 13 percent of the participants were "winners" and 87 percent were "losers."

Regardless of the chance of a non-recruiter/participant receiving compensation through WHW, it is still a fair description of *the scheme* to say that "a [typical, average, usual, or ordinary] participant pays" to receive compensation for introducing others into the scheme. (§ 327.) The introduction of others into the scheme is the essential element

on which compensation depends. No recruits equal no compensation.

A non-recruiting WHW participant may occasionally have reached the apex of a four-generation pyramid chart and received compensation. But even in that unusual case, as a group, the "participant[s] pay[] a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme [or when those persons introduce others]." (§ 327.) As a group, the participants' compensation from the WHW scheme necessarily depends upon their recruitment of new participants.

Another way to pose the defendant's question is to ask whether the phrase "a participant pays" in section 327 should be read in the singular only as "every participant pays" or, in the plural, as "the participants pay." The defendant, in effect, suggests that the singular reading is required.

Section 7 says: "[T]he singular number includes the plural, and the plural the singular." This allows the singular in statutory language to be read as including the plural, when necessary to achieve the manifest purpose of a provision.

In *In re Mathews* (1923) 191 Cal. 35, the defendant sought to avoid liability for violating an ordinance banning one person from keeping goats within a prescribed distance of another's dwelling because the goats were owned by several persons in common. The Supreme Court answered as follows: "The ordinance involved herein would be entirely ineffectual, if not

discriminatory, if it made the keeping of goats lawful when done by several persons and unlawful when done by one. Construing the word 'person' as including the singular only, the intention of the [L]egislature would be defeated and an absurd result reached. We are therefore of the opinion it should be read as including the plural" (*Id.* at p. 43.)

Similar reasoning applies here. If those who contrive, prepare, set up, propose or operate an endless chain scheme could evade section 327 by allowing for a few rare participants to receive compensation without personal recruitment, the statute would be entirely ineffectual and a similarly absurd result reached. Accordingly, we read section 327 to include the plural in the definition of an "endless chain": It is a scheme in which "[the participants pay] for the chance to receive compensation for introducing one or more additional persons into participation in the scheme" (*Ibid.*) WHW was such an endless chain scheme.

Therefore, defendant's several contentions that turn on the claim that WHW is not within the definition of section 327 lack merit. The contention that there is no substantial evidence of an endless chain fails because WHW was within the statute's definition.

The defendant's request for an instruction that WHW was not an endless chain if it "does not require participants to recruit new members" was properly denied as an incorrect statement of the law. (See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 31.)

Defendant's trial counsel did not provide ineffective assistance in failing to call witnesses who received payouts without personal recruitment. The testimony would have been immaterial, as well as duplicative.

Lastly, section 327's definition of "endless chain" is not unconstitutionally vague in including WHW within its reach. There are a number of distinct kinds of vagueness claims. (See Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court* (1960) 109 U.Pa. L.Rev. 67 (hereafter Amsterdam.) The defendant's vagueness claim is one analogous to the common law canon that penal statutes are to be strictly construed. (See *ibid.*, fn. 3.) She suggests that the definition in section 327 is ambiguous as to inclusion of the WHW and for that reason fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.'" (*People v. Heitzman* (1994) 9 Cal.4th 189, 199.)

Our earlier discussion implicitly rejects this view. In order for section 327 to be ambiguous, it must be reasonably susceptible of two constructions. (See *People v. Irwin* (1984) 155 Cal.App.3d 891, 897.) However, as we have explained, there is no reasonable basis to conclude that the definition in section 327 is meant to exclude a pyramid scheme on the extraneous basis that a few participants could achieve a payout without personal recruitment of new participants. That construction is not reasonable and affords no tenable basis for

the claim that the statute is vague for failing to provide fair warning.

Defendant argues that "proof positive of the confusion created by section 327" is "[t]he fact that WHW [unabashedly] held itself out as a legal organization." This is, of course, no proof at all. The question is whether the statute provides fair warning, not whether those self-interested in evading its proscription take that warning.

Moreover, an organization confident of its legality does not instruct its functionaries on how to deal with the police and district attorney when they arrive at its presentations. WHW materials advising that it was not a pyramid scheme and did not violate section 327 are irrelevant.

It is common knowledge you do not get something for nothing. An eightfold return from new subscriptions manifestly cannot be sustained indefinitely. The vagueness doctrine will not lend itself to the pretextual evasion of section 327. (See *Amsterdam, supra*, 109 U.Pa. L.Rev. at p. 87, fns. 98 & 99.)

II. Defendant "Operated" the Endless Chain

The defendant's remaining contention is that the evidence is insufficient to show she "operated" the WHW endless chain within the meaning of section 327. She argues that term requires "managerial say in" or "managerial control over" the endless chain and the evidence does not show she was a manager of the WHW organization. The argument is unpersuasive and the contention of error fails.

Defendant points to the following definition of "operate" in *People v. Sanchez* (1998) 62 Cal.App.4th 460, 471 (*Sanchez*): "[T]o cause to function usu[ally] by direct personal effort: work (a car) (operat[e] a drill press) . . . to manage and put or keep in operation whether with personal effort or not (operate[] a grocery store).' Unlike the words 'contrives,' 'prepares,' 'sets up' or 'proposes,' which envision preparatory activity, the word 'operates' denotes ongoing conduct which advances the progress of an existing entity. This term stands apart from the others, which describe various stages of formulation of the scheme; one who 'operates' a scheme may carry it along after its inception. We reject [the defendants'] claim that 'operate' applies only to the creators and designers of the scheme. [¶] The word 'operate' does not, however, as the drafters well understood, encompass mere participation, as would the phrase 'aids in the operation.' The meaning of 'operates'--to manage and to keep in operation--clearly precludes 'participation' in an endless chain scheme as a basis of guilt."

Defendant seizes on the word "manage" in the foregoing passage and asserts that because she did not set policy for WHW she was not a manager and could not have "operated" the scheme.

As the Attorney General notes, the definition "to manage and to keep in operation," was satisfied in the *holding* of *Sanchez*: "The role of each [defendant] as testified to by the prosecution witnesses can aptly be described as that of one who

'operate[d]' the endless chain. [The defendants] called the other individuals to announce the time and location of the meetings, most of which were held at the home of [the defendants]. [The defendants] then conducted the meetings, lectured at the meetings, explained the rules and requirements, prepared pyramid charts, and collected the money." (*Sanchez, supra*, 62 Cal.App.4th at p. 469.) The *Sanchez* holding squarely fits defendant's role in "operating" WHW.

We agree with the *Sanchez* opinion that to "operate" an endless chain does not require control of the entire scheme. (Accord, *People v. Ramirez* (2000) 79 Cal.App.4th 408, 414-415 [operation only requires "active involvement," not a supervisory role].) The line between participant and operator drawn in section 327 is that between victim and victimizer.⁴ The defendant's activities are of the latter order.

Defendant kept the scheme going and growing by her active, energetic efforts. She bears responsibility for a large number of participants joining and staying active; at one point she boasted the number of "[m]y girls" was "about 100." Her

⁴ Defendant notes that Civil Code section 1689.2 allows a participant in an endless chain scheme to recover losses, notwithstanding the ordinary bar of *in pari delicto*. She submits this implies that one can remain a mere "participant" rather than an "operator" despite having received a "birthday" payout. We do not rest our view that defendant was properly found an "operator" solely upon her payouts from the scheme. Moreover, section 1689.2 has no application to a participant like defendant whose payouts exceed the consideration she paid into the scheme.

activities were far beyond the level of a mere participant. The evidence is adequate to show that she "operated" the WHW endless chain scheme within the meaning of section 327.

DISPOSITION

The judgment is affirmed.

_____ BUTZ _____, J.

We concur:

_____ MORRISON _____, Acting P. J.

_____ HULL _____, J.