

18-2990 (L)
United States v. Percoco

United States Court of Appeals For the Second Circuit

August Term 2019

Argued: March 12, 2020
Decided: September 8, 2021

Nos. 18-2990, 18-3710, 19-1272

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH PERCOCO, STEVEN AIELLO, JOSEPH GERARDI,
LOUIS CIMINELLI, ALAIN KALOYEROS, AKA DR. K,

Defendants-Appellants,

PETER GALBRAITH KELLY, JR.,
MICHAEL LAIPPLE, KEVIN SHULER,
*Defendants.**

Appeal from the United States District Court
for the Southern District of New York
No. 16-cr-776, Valerie E. Caproni, *Judge.*

* The Clerk of Court is respectfully directed to amend the case caption to conform with the caption above.

Before: RAGGI, CHIN, AND SULLIVAN, *Circuit Judges*.

Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of one count of conspiracy to commit honest-services wire fraud and found Percoco guilty of two counts of conspiracy to commit honest-services wire fraud, as well as one count of solicitation of bribes and gratuities. On appeal, the defendants principally challenge the district court's instruction that (1) the jury could convict them of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber "as opportunities arise" and (2) the defendants could be liable for conspiracy to commit honest-services fraud for actions that Percoco agreed to undertake while he was not formally employed as a state official. Although the as-opportunities-arise instruction fell short of our recently clarified standard, which requires that the honest-services fraud involve a commitment to take official action on a particular matter or question, that error was harmless. The second contested instruction was not error at all. In so concluding, we reaffirm our decades-old decision holding that a person who is not technically employed by the government may nevertheless owe a fiduciary duty to the public if he dominates and controls governmental business, and is actually relied on by people in the government because of some special relationship. Finding no merit in the other arguments raised on appeal, we **AFFIRM** the judgment of the district court.

Matthew D. Podolsky (Robert L. Boone, Janis M. Echenberg, Won S. Shin, *on the brief*), Assistant United States Attorneys, *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY, *for Appellee* United States of America.

Michael L. Yaeger, Carlton Fields, P.A., New York, NY (Walter P. Loughlin, New York, NY, *on the brief*), *for Defendant-Appellant* Joseph Percoco.

Alexandra A.E. Shapiro (Daniel J. O'Neill, and Fabien Thayamballi, *on the brief*), Shapiro Arato Bach LLP, New York, NY *for Defendant-Appellant* Steven Aiello.

RICHARD J. SULLIVAN, CIRCUIT JUDGE:

This case, which concerns public corruption in New York State, requires us to again consider the reach of the federal fraud and bribery statutes. Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and found Percoco guilty of both conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and solicitation of bribes or gratuities, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2.¹

On appeal, the defendants argue that the district court committed reversible error when it (1) instructed the jury that it could convict defendants of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber “as opportunities ar[i]se”; (2) charged the jury that the defendants could be liable for conspiracy to commit honest-services fraud

¹ The district court held a second trial on separate, fraud-related counts in which Aiello, Alain Kaloyeros, Joseph Gerardi, and Louis Ciminelli were convicted on several conspiracy and substantive wire fraud counts, and Gerardi was convicted on a false statement count. Although the cases were consolidated upon appeal, the fraud trial is addressed in a separate opinion in *United States v. Aiello*, Nos. 18-3710-cr, 18-3712-cr, 18-3715-cr, and 18-3850-cr.

for actions Percoco took while he was not formally employed as a state official; (3) instructed the jury that Percoco could be liable under § 666 for soliciting, demanding, accepting, or agreeing to accept a gratuity as a reward for certain action; (4) constructively amended Aiello's indictment by permitting his conviction to be based on acts Percoco committed while he was not a public official; (5) denied defendants' motions for a judgment of acquittal based on the insufficiency of the evidence at trial; and (6) ordered forfeiture against Percoco in the amount of \$320,000. Finding none of these arguments persuasive, we **AFFIRM.**

I. BACKGROUND

A. Facts

This case involves two schemes in which Percoco – a longtime friend and top aide to former Governor Andrew Cuomo – accepted payment in exchange for promising to use his position to perform official actions. For the first scheme, Percoco promised to further the interests of an energy company named Competitive Power Venture (“CPV”). For the second, Percoco agreed with Aiello to advance the interests of Aiello's real estate development company, COR Development Company. Drawing from the evidence introduced at trial, we

briefly describe the facts of these schemes in the light most favorable to the government. *See United States v. Silver*, 948 F.3d 538, 546 n.1 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 656 (2021).

1. The CPV Scheme

The CPV scheme started in 2012, when Percoco served as a high-level official in the Governor’s Office, also called the Executive Chamber. For all his political influence, Percoco found himself financially constrained. So he reached out to his friend Todd Howe, who was an influential and corrupt lobbyist. Percoco confided in Howe that money was tight, and he asked if any of Howe’s clients would hire Percoco’s wife. Sometime later, Howe approached Peter Galbraith Kelly, Jr., whose energy company, CPV, was angling for a so-called “Power Purchase Agreement” that would have required New York State to purchase power from CPV.

Percoco, Howe, and Kelly met over dinner to discuss an arrangement whereby Percoco would help CPV secure the Power Purchase Agreement in exchange for securing employment for – and sending payments to – Percoco’s wife. Throughout the fall of 2012, Percoco pressured Howe to close the deal with Kelly so that Percoco could earn what he and Howe code-named “ziti” – a

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