

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title K. Offenses Involving Fraud
Article 175. Offenses Involving False Written Statements (Refs & Annos)

McKinney's Penal Law § 175.05

§ 175.05 Falsifying business records in the second degree

Currentness

A person is guilty of falsifying business records in the second degree when, with intent to defraud, he:

1. Makes or causes a false entry in the business records of an enterprise; or
2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or
3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or
4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Falsifying business records in the second degree is a class A misdemeanor.

Credits

(L.1965, c. 1030.)

Editors' Notes

PRACTICE COMMENTARIES

by William C. Donnino

Definitions

Unlike forgery, which is concerned with the authenticity of a “written instrument,” falsifying business records is concerned with the falsity of a “business record” [defined in [Penal Law § 175.00\(2\)](#)].

The “business record” in issue must be of an “enterprise.” An “enterprise” is broadly defined to include virtually any person or group of persons engaged in any organized activity for which records are kept [[Penal Law § 175.00\(1\)](#)]. The “business record,” however, is restricted to records “kept or maintained” by the enterprise for the specific purpose of “evidencing or reflecting” its condition or activity [[Penal Law § 175.00\(2\)](#)]. Thus, various written records with false recitals are excluded from the scope of this crime. See *People v. Bel Air Equipment Corp.*, 46 A.D.2d 773, 774, 360 N.Y.S.2d 465 (2d Dept 1974), *affd* 39 N.Y.2d 48, 382 N.Y.S.2d 728, 346 N.E.2d 529 (1976) (while the defendants were guilty of “offering a false instrument” (i.e. a padded voucher), they were not guilty of “falsifying business records” for maintaining a “duplicate” set of the padded vouchers because the “duplicate” vouchers were “not made for record keeping purposes or to reflect the corporate defendant’s condition or activity. They were, in effect, duplicates of a bill prepared at the request of the customer”); *People v. Papatonis*, 243 A.D.2d 898, 900-01, 663 N.Y.S.2d 341 (3d Dept 1997) (“What is complained of here are false answers to questions contained in an employment application submitted to [a security company] which, presumably, [the company] has kept on file. However, the Grand Jury evidence fails to establish that such application was ‘kept or maintained’ for the purpose of evidencing or reflecting the condition or activity of [the company], as indeed it could not”). Compare *People v. Davis*, 49 N.Y.2d 910, 428 N.Y.S.2d 195, 405 N.E.2d 677 (1980) (“forms” which the Genesee County Automobile Bureau was required to prepare for the State Department of Motor Vehicles were “business records”).

Where a record is kept “is merely a factor, not determinative, of its status as a business record.” *People v. Bloomfield*, 6 N.Y.3d 165, 167, 810 N.Y.S.2d 749, 844 N.E.2d 296 (2006). Thus, fraudulent records “kept in the files of an enterprise’s legal counsel, rather than at the company’s headquarters, were ‘[b]usiness record[s].’” *Id.*

The Crimes

“Falsifying business records” is divided into two degrees. The basic offense, “falsifying business records in the second degree” [[Penal Law § 175.05](#)], covers a person who: makes or “causes” a false entry [subdivision (1)]; tampers with a true entry [subdivision (2)]; omits a true entry (which the defendant knew he or she had a duty to enter) [subdivision (3)]; or prevents or “causes” the omission of a true entry [subdivision (4)].

The crime is broadly defined and is not limited, for example, to those employees of an enterprise who “kept the books.” The employer or others who direct or otherwise cause the false entries or cause true entries to be omitted are, on the face of the statute, liable for the crime. *People v. Kisina*, 14 N.Y.3d 153, 897 N.Y.S.2d 684, 924 N.E.2d 792 (2010) (people may be guilty of falsifying business records even though they are not members of the enterprise which keeps or maintains a record for the purpose of evidencing or reflecting its condition or activity). Thus, documents submitted to an insurance company for the purpose of receiving payments for the work detailed in those documents constituted “business records” of the insurance company. Dr. Kisina was therefore liable for “falsifying business records in the first degree” when he submitted fraudulent medical documentation to an insurance company to receive monies for treatments which were unnecessary or unperformed. *Id.* See also *People v. Fuschino*, 278 A.D.2d 657, 719 N.Y.S.2d 152 (3d Dept 2000) (where a defendant impersonated a customer of a power company and the company accurately recorded on their records the information the defendant supplied but that information was false, the defendant was liable for causing “false entries” in the business records of the power company).

On the other hand, generating a document and sending it to an enterprise does not necessarily make that document a “business record,” i.e. one “kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity” [Penal Law § 175.00(2)]. See *People v. Golb*, 23 N.Y.3d 455, 991 N.Y.S.2d 792, 15 N.E.3d 805 (2014) (the sending of emails with false information to an enterprise for the purpose of having the enterprise open an investigation does not constitute “the creation or falsification” of a business record of that enterprise).

Critically, the proscribed conduct must be with the “intent to defraud.” There is no Penal Law definition of “intent to defraud.” For a commentary on “intent to defraud,” see Practice Commentary to Penal Law § 15.00 (Culpable Mental States: Intent to Defraud).

“Falsifying business records in the first degree” is committed when the miscreant commits the second-degree crime and when the miscreant’s “intent to defraud” includes an “intent to commit another crime or to aid or conceal the commission thereof.” Penal Law § 175.10. E.g. *People v. Weinfeld*, 65 A.D.2d 911, 911, 410 N.Y.S.2d 472, 474 (4th Dept 1978) (“the proof establishes that defendant with intent to defraud made or completed a false entry in the business records of an enterprise, ... and that his intent to defraud included another crime, to wit: larceny”).

The required “intent” to commit another crime or to aid or conceal its commission does not require proof that the defendant committed or was convicted of the intended crime. *People v. McCumiskey*, 12 A.D.3d 1145, 1146, 784 N.Y.S.2d 816, 817 (4th Dept 2004); *People v. Thompson*, 124 A.D.3d 448, 449, 1 N.Y.S.3d 72 (1st Dept 2015); *People v. Houghtaling*, 79 A.D.3d 1155, 1157-58, 912 N.Y.S.2d 155 (3d Dept 2010).

It should be emphasized that for the first-degree crime there must be two separate intents in that the “intent to defraud” must include “an intent to commit another crime or to aid or conceal the commission thereof.” The first degree, for example, is not committed when there is an “intent to ... conceal the commission” of a crime but no “intent to defraud.” See *People v. Reyes*, 69 A.D.3d 537, 538, 894 N.Y.S.2d 43 (1st Dept 2010) (defendant’s false logbook entry done to provide himself with an alibi and thereby conceal his commission of a sexual assault did not constitute, in the absence of an “intent to defraud,” “falsifying business records”).

It is an affirmative defense to the crime of falsifying business records that the defendant was an employee who, “without personal benefit,” was “merely” following the orders of the defendant’s superior to falsify the records. Penal Law § 175.15. The defendant has the burden of proof of establishing an affirmative defense by a preponderance of the evidence. Penal Law § 25.00. See Practice Commentary to Penal Law § 25.00.

Notes of Decisions (41)

McKinney’s Penal Law § 175.05, NY PENAL § 175.05

Current through L.2023, chapters 1 to 49, 61 to 104. Some statute sections may be more current, see credits for details.
