

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - December 17, 2007

ROBERT A. SPOLZINO, J.P.
PETER B. SKELOS
ANITA R. FLORIO
DANIEL D. ANGIOLILLO, JJ.

2005-10338

DECISION & ORDER

The People, etc., respondent,
v Frank Valletutti, appellant.

(Ind. No. 3046/04)

Bahn Herzfeld & Multer LLP, New York, N.Y. (Richard L. Herzfeld of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Shulamit Rosenblum Nemeck, and Marie-Claude P. Wrenn of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Hall, J.), rendered October 27, 2005, convicting him of criminally negligent homicide and leaving the scene of an incident without reporting, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant correctly contends that the New York City Police Department (hereinafter the police) improperly refused to execute an order issued by the trial court directing them to arrest a potential witness (*see* CPL 620.30[2][b]). Furthermore, once the trial court was made aware of that failure, it should have admitted the statement made by that witness to the police (*see generally* *People v Geraci*, 85 NY2d 359, 366-368).

However, under the circumstances of this case, the defendant was not prejudiced by the absence of that witness's testimony (*see* *People v Daly*, 64 NY2d 970, 971; *People v Cancel*, 176 AD2d 748, 749). That witness's potential testimony bore only on the credibility of the defendant on a collateral matter. The defendant's own trial testimony, even if completely believed, established

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his guilt beyond a reasonable doubt of criminally negligent homicide and leaving the scene of an incident without reporting. Thus, any error was harmless, as there was overwhelming evidence of the defendant's guilt, and no significant probability that any error contributed to the defendant's convictions (*see People v Crimmins*, 36 NY2d 230, 241-242; *People v Kavazanjian*, 16 AD3d 437).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

The defendant's remaining contention concerning alleged prosecutorial misconduct is unpreserved for appellate review. In any event, any such misconduct did not deprive the defendant of a fair trial.

SPOLZINO, J.P., SKELOS, FLORIO and ANGIOLILLO, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court