

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

D27882
Y/prt

_____AD3d_____

Argued - September 18, 2009

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
PLUMMER E. LOTT, JJ.

2007-11384

DECISION & ORDER

The People, etc., respondent,
v Radames Acosta, appellant.

(Ind. No. 1683/07)

Lynn W. L. Fahey, New York, N.Y. (Kendra L. Hutchinson of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, and Danielle Hartman of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered December 6, 2007, convicting him of robbery in the first degree, robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree (two counts), unauthorized use of a vehicle in the third degree, and criminal possession of a weapon in the fourth degree, after a nonjury trial, and imposing sentence. The appeal brings up for review the denial (Roman, J.), without a hearing, of that branch of the defendant's omnibus motion which was to suppress physical evidence. By decision and order of this Court dated October 13, 2009, the matter was remitted to the Supreme Court, Queens County, to hear and report on that branch of the defendant's omnibus motion which was to suppress physical evidence, and the appeal was held in abeyance in the interim (*see People v Acosta*, 66 AD3d 792). The Supreme Court, Queens County (Latella, J.), has now filed its report.

ORDERED that the judgment is affirmed.

The People "have an affirmative obligation to preserve all discoverable evidence within their possession" (*People v James*, 93 NY2d 620, 644; *see People v Hernandez*, 285 AD2d 559).

June 22, 2010

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Here, when a surveillance videotape was destroyed, it had not been “gathered by the prosecution or its agent” (*People v Kelly*, 62 NY2d 516, 520; *see People v James*, 93 NY2d at 644), and there is no indication that the People otherwise had the videotape “within their possession and control” (*People v O’Brien*, 270 AD2d 433, 434). Accordingly, the defendant was not entitled to an adverse inference charge regarding the videotape (*see People v Tutt*, 305 AD2d 987).

That branch of the defendant’s omnibus motion which was to suppress physical evidence was properly denied (*see People v Ruppert*, 42 AD3d 817, 817-818; *People v Green*, 41 AD3d 162, 162-163).

MASTRO, J.P., BALKIN, DICKERSON and LOTT, 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