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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 198

JULIO VELEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
October 16, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 198, People v. Velez.

2 Okay, counsel. You want some rebuttal
3 time, counsel?

4 MR. DIAMOND: Three minutes, please.

5 CHIEF JUDGE LIPPMAN: Three minutes, go
6 ahead.

7 MR. DIAMOND: Excuse me, I beg your pardon.
8 Good afternoon, Your Honors, my name is Mark Diamond.
9 I represent - - - represent the appellant, Mr. Velez.

10 The point of our appeal is that you make
11 your bed; you lie in it. The government decided not
12 to indict Mr. Velez for three-and-a-half years after
13 they knew he committed the crime, and that decision -
14 - -

15 CHIEF JUDGE LIPPMAN: What was the
16 prejudice from - - - from that?

17 MR. DIAMOND: Well, prejudice is - - -

18 CHIEF JUDGE LIPPMAN: To your client?

19 MR. DIAMOND: Of course; there's one of
20 five factors. No prejudice was claimed by defense
21 counsel at - - - during the Singer hearing.

22 JUDGE GRAFFEO: It was within the statute
23 of limitations, right?

24 MR. DIAMOND: It was.

25 JUDGE GRAFFEO: Five-year statute of

1 limitations?

2 MR. DIAMOND: It was about two or three
3 months before the statute of limitations expired.

4 CHIEF JUDGE LIPPMAN: Does there have to be
5 prejudice?

6 MR. DIAMOND: No, there doesn't have to
7 prejudice.

8 CHIEF JUDGE LIPPMAN: Why - - - why not?

9 MR. DIAMOND: Because under the cases of -
10 - - well, Singer actually specifically states that
11 "whether or not there is any indication that the
12 defense has been impaired by reason of the delay is
13 not necessarily an issue. In a criminal prosecution,
14 the sheer length of delay is important because it is
15 likely that all other factors being equal, the
16 greater the delay, the more probable it is that the
17 ac - - - that the accused will be harmed thereby."

18 JUDGE READ: So even though there was a
19 change of circumstances here after the fact, they
20 couldn't go back and reconsider?

21 MR. DIAMOND: Reconsider - - - I'm sorry.

22 JUDGE READ: Well, they couldn't go back
23 after - - - they couldn't - - - couldn't decide to
24 prosecute the case after there was the change and
25 they lost - - - they couldn't do that - - -

1 MR. DIAMOND: I got you.

2 JUDGE READ: - - - they're not - - -
3 they're prohibited from doing that?

4 MR. DIAMOND: It depends on the reason for
5 the delay. First of all, the extent of the delay was
6 quite - - - it was quite an extensive delay; it was
7 three-and-a-half years. Now the courts have said,
8 both the state - - - both you and the Supreme Court
9 have said that that might not be long - - - too long,
10 if the prosecutor had a - - - the government had a
11 reason for the delay.

12 JUDGE READ: It - - -

13 JUDGE SMITH: What's so terrible about the
14 reason they had? This guy already has one life
15 sentence. We have better things to do than give him
16 two?

17 MR. DIAMOND: Well, two - - - I will answer
18 that in two ways. First of all, the public has the
19 right to have these cases tried in an expeditious
20 manner, regardless of whether it might - - -

21 JUDGE SMITH: But - - - but there are some
22 - - - but - - - an exercise of prosecutorial
23 discretion not to prosecute is sometimes justified -
24 - -

25 MR. DIAMOND: Yes.

1 JUDGE SMITH: - - - and that's - - - that's
2 a perfectly good reason for it.

3 MR. DIAMOND: That's right. But they
4 weren't justified.

5 JUDGE SMITH: Well, does it come back to
6 Judge Read's question, is it okay for them to say,
7 oh, wait a minute; he hasn't got a life sentence
8 anymore; I'm changing my mind?

9 MR. DIAMOND: No, because we have a - - -
10 because defendants have a right to a speedy trial, to
11 a prompt trial, and they have a right to due process.
12 And unless there's a reason for abrogating that right
13 to a speedy trial - - -

14 CHIEF JUDGE LIPPMAN: Is Singer still good
15 law?

16 MR. DIAMOND: I beg your pardon?

17 CHIEF JUDGE LIPPMAN: Is Singer still good
18 law?

19 MR. DIAMOND: I don't see why not, Judge.
20 In fact - - -

21 CHIEF JUDGE LIPPMAN: What about
22 Taranovich? How does that fit in to this - - -

23 MR. DIAMOND: Well, Taranovich specified
24 the five factors that the court will - - - the court
25 should look at. So the first is the reason for the

1 delay. And in this case, they just didn't want to
2 try the case. They specifically said we wanted to
3 save office resources, and that's why we didn't try
4 the case. That's not a good enough reason.

5 The second Taranovich factor is the nature
6 of the underlying charge. Here it was burglary
7 second, not murder. The home was unoccupied at the
8 time of the crime. There was no allegation that
9 anyone was injured. So that bodes in favor of Mr.
10 Velez.

11 The third Taranovich factor was whether or
12 not there's been an extended pre-trial incarceration.
13 And yes, there was. He was incarcerated almost the
14 entire time - - -

15 JUDGE SMITH: But none of that - - - none
16 of that was attributable to this case.

17 MR. DIAMOND: You mean the delay - - - the
18 reason he was incarcerated?

19 CHIEF JUDGE LIPPMAN: The incarceration.

20 MR. DIAMOND: No, that's correct. But in
21 Singer, the court said "the defendant's imprisonment
22 for another crime cannot excuse the delay". Also in
23 Prosser, Winfrey, and Hooey, a Supreme Court case.

24 And the reason for that is "waiting for a
25 defendant to complete a current sentence may produce

1 special hardships. His ability to prepare his case
2 may be impaired because of imprisonment. The delay
3 may effectively extend the period of incarceration by
4 foreclosing the possibility of a current - - -
5 concurrent sentence. And it may also interfere with
6 his rehabilitation." That's Smith v. Hooey, a
7 Supreme Court case.

8 The fourth Taranovich factor is whether or
9 not there's any indication that the defense has been
10 impaired by reason of the delay, which we've
11 discussed already. There was no specific allegation
12 in this case, but I think it would be fair because of
13 the length of the delay to presume that he - - - that
14 his ability to defend himself was dela - - - was
15 impaired.

16 And the fifth factor which we also
17 discussed was the extent of the delay, which was
18 three-and-a-half years. How - - -

19 JUDGE RIVERA: So - - - so is your position
20 then that the only good cause would be for
21 investigatory purposes?

22 MR. DIAMOND: No, if he had absented - - -

23 JUDGE RIVERA: What might be other
24 examples?

25 MR. DIAMOND: If he had absented himself

1 from the state, for example, or he was hiding; but he
2 was in jail the whole time. If he did anything
3 actively to prevent the investigation from happening,
4 which he didn't do.

5 CHIEF JUDGE LIPPMAN: What about Decker?

6 MR. DIAMOND: What about Decker?

7 CHIEF JUDGE LIPPMAN: Yes, how does it fit
8 in?

9 MR. DIAMOND: I - - - I'm not familiar - -
10 - not familiar with the case.

11 CHIEF JUDGE LIPPMAN: Okay, the fifteen-
12 year-delay, but go ahead.

13 MR. DIAMOND: Okay. Well, I am familiar
14 with the case; I take it back.

15 JUDGE READ: So - - - so the prosecutors -
16 - - so what were the prosecutor's choices then? The
17 prosecutor had to - - - to pursue each one of those
18 cases at the - - - and couldn't - - - I mean, that
19 was the only choice he had. He had to take it - - -

20 MR. DIAMOND: And done.

21 JUDGE READ: - - - he had to do that and
22 take his chances as to what might happen on appeal.

23 MR. DIAMOND: Well, what the prosecutor's
24 done is indict in a timely manner. They had evidence
25 three-and-a-half years earlier that he had committed

1 interested; don't bother us anymore. He waited
2 another - - - he waited another few months. He
3 called back, said, look, I'm going to close this case
4 unless you prosecute. And the prosecutor said a
5 second time, we're not going to prosecute this;
6 forgot about it.

7 So the Decker case, the fifteen year - - -
8 that fifteen-year delay was excusable because they
9 were in the process of obtaining - - - they didn't
10 have - - - they didn't know where he was - - - they
11 didn't know where the defendant was for most of that
12 time.

13 JUDGE GRAFFEO: What about the Vernace case
14 where we said that whether the prosecution has a
15 justifiable reason is a mixed question of law and
16 fact. Doesn't that somewhat affect our jurisdiction
17 here to reach a different conclusion? We've got
18 affirm - - - we've gotten an affirmance here by the
19 Appellate Division.

20 MR. DIAMOND: That's right. And our
21 argument is first of all, everything is a mixed
22 question of law and fact, but even - - - our argument
23 is that - - - we're not arguing the facts that were
24 adduced at the hearing or that the Appellate
25 Division, presumably, considered, although they

1 didn't say what they considered.

2 What we're saying is that had they applied
3 the appropriate stand of the five Taranovich factors,
4 they would have had no option but to dismiss this
5 indictment on appeal. So our argument is that on the
6 law, they just didn't apply the appropriate standard
7 to the facts that were brought out during the Singer
8 hearing.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.
10 You'll have your rebuttal.

11 MR. DIAMOND: Thank you very much, Your
12 Honors.

13 CHIEF JUDGE LIPPMAN: Thank you, counsel.

14 MR. DIAMOND: I spoke as fast as I could.

15 CHIEF JUDGE LIPPMAN: That's okay; you'll
16 have a little more time.

17 MR. DIAMOND: Thank you.

18 MR. BENDER: Steve Bender for the
19 Westchester District Attorney's Office. Good
20 afternoon.

21 The Appellate Division's finding and the
22 trial court's finding of good cause and good faith
23 for the forty-three month delay is a mixed question
24 of fact and law, which is supported by the records,
25 specifically the testimony, that was found credited -

1 - - credible and plausible by the trial court.

2 JUDGE GRAFFEO: Did they apply the - - -

3 MR. BENDER: Police Officer Burn - - -

4 JUDGE GRAFFEO: - - - correct standard?

5 MR. BENDER: And they applied the correct
6 standard. They applied the Singer standard and the
7 law is still Singer, as recently interpreted by
8 Decker. And in fact, this court reached this similar
9 issue in Fuller, 57 NY2d 152, a 1982 case, where it
10 concerned the application of Taranovich to a crime
11 that's less than an A felony.

12 And the court said that the statute of
13 limitations is the legislature's determination, that
14 if a prosecution is brought timely within the
15 limitation period, it is presumptively consistent
16 with due process, absent special circumstances.

17 JUDGE PIGOTT: He got - - - he got - - -
18 did he get the life sentences for the November
19 burglary?

20 MR. BENDER: He - - - yes, he did, Judge.

21 JUDGE PIGOTT: And those were, what, four
22 weeks after this one?

23 MR. BENDER: Actually, a little less - - -

24 JUDGE PIGOTT: A little less.

25 MR. BENDER: - - - about three-and-a-half

1 weeks.

2 JUDGE PIGOTT: So if - - - if he were to
3 demonstrate that, you know, you had this string of
4 burglaries going on. You caught him on the two, and
5 this one was sitting over there, and the - - - and
6 the fingerprints, you know, ultimately matched. Is
7 there - - - is there a standard by which a defendant
8 can argue, you know, come on; I mean, obviously, if
9 you'd arrested me on the October one along with the
10 November one, we would have - - - we would have boxed
11 these, and I'd gotten one sentence and I'd be - - - I
12 don't know.

13 MR. BENDER: Well, I think that's a good
14 point. What - - - what Your Honor is raising is that
15 there's no prejudice. Because had we boxed him into
16 one indictment - - -

17 JUDGE PIGOTT: He'd still be doing life?

18 MR. BENDER: - - - he would have probably
19 gotten twenty, maybe twenty or twenty-one to life.
20 He would have gotten the same - - - virtually the
21 same sentence that he got now.

22 And, you know, of course the trial court
23 again, and the Appellate Division, found that the
24 fourteen-month period where there was a shortage of a
25 key person, a latent fingerprint examiner in the

1 Yonkers' Police Department. And the efforts to
2 replace that person, we all know that forensics - - -
3 particularly forensics as applied within a police
4 department - - -

5 JUDGE PIGOTT: Did you have latent
6 fingerprints in the November case?

7 MR. BENDER: Actually we had one latent - -
8 - there were two burglaries in November. And they
9 were on Tibbetts and Lee Streets - - - they're close
10 - - - close by in Yonkers. And in the second
11 burglary, there was a latent fingerprint found on a
12 jar, on a bed, but he was caught red-handed in - - -
13 you know, right after the Tibbetts burglary with
14 proceeds, and so it was never actually processed.

15 JUDGE SMITH: Suppose - - - let me
16 interpret the facts maybe a little differently from
17 the way you interpret them. The People have the guy
18 in jail on a - - - on a something-to-life sentence.
19 An appeal is pending on the suppression issue. They
20 sit around and say to themselves, eh, let's wait a
21 year or two and see how that appeal turns out. If -
22 - - if we lose it, we'll prosecute him. Is that
23 okay?

24 MR. BENDER: You know, in - - - in - - -
25 the difference with your hypothetical, Judge - - -

1 JUDGE SMITH: I und - - - yeah, I
2 understand that - - - I understand it's a little
3 different from this case.

4 MR. BENDER: - - - is - - - is that it
5 actually - - - that's - - - that's more - - -
6 actually, your hypothetical is closer to Singer,
7 because there the prosecutor kind of waited til
8 Singer got out of jail in the second one.

9 JUDGE SMITH: Okay, but I mean - - - I - -
10 - I understand that you can - - - but - - - but can't
11 you characterize the same facts differently? I mean,
12 isn't - - - didn't I just give you a slightly more
13 hostile version of your - - - of exactly the facts in
14 this case?

15 MR. BENDER: No, I respectfully disagree,
16 because you know what? We seriously declined
17 prosecution of this individual, because he was
18 serving a life sentence. And you know, your question
19 raises a very important point, and it also addresses
20 what the Chief Judge wrote in Decker, which is the
21 significant discretion that this court has recognized
22 given to a prosecutor. And that discretion must
23 include a good faith declination of prosecution to
24 conserve resources.

25 JUDGE SMITH: But it does - - - but I - - -

1 I think you're - - - you're sounding like it doesn't
2 say - - - it doesn't include a good faith decision to
3 wait around and see how the appeal comes out?

4 MR. BENDER: Sure, if it's in good - - - I
5 mean, sure, sure.

6 JUDGE SMITH: You think my hypothetical
7 might be okay.

8 MR. BENDER: Yes. Why not? As long as
9 it's in good faith. Again, this court has always
10 said that for a defendant, the safety valve is a
11 hearing. Is a hearing. And it's a very - - - you
12 know, it's a very case-specific - - -

13 JUDGE GRAFFEO: But - - - but you're
14 claiming they suffered no prejudice at all due to the
15 forty-three months?

16 MR. BENDER: I don't - - - I don't see any
17 apparent prejudice on this record.

18 CHIEF JUDGE LIPPMAN: But is - - - but - -
19 -

20 JUDGE GRAFFEO: Wouldn't be hard - - -
21 wouldn't be harder for them to prepare their defense
22 now - - -

23 MR. BENDER: Sure, sure.

24 JUDGE GRAFFEO: - - - three-and-a-half
25 years later?

1 MR. BENDER: And it's harder for us;
2 although we have the burden, it's harder for us. We
3 lost the jewelry in the case from the October
4 burglary.

5 CHIEF JUDGE LIPPMAN: But Singer says there
6 that you don't need prejudice, right?

7 MR. BENDER: You're absolutely right.
8 Singer says you don't need prejudice, but Vernace
9 says and Decker says that if there's good cause and
10 good faith for the delay, even some prejudice will
11 not defeat - - -

12 JUDGE PIGOTT: How about if it - - -

13 MR. BENDER: - - - will not make out a due
14 process claim.

15 JUDGE PIGOTT: Does negligence fit in here
16 anywhere?

17 MR. BENDER: The only case that I saw about
18 negligence was again, Singer. And Singer was kind of
19 an unusual case, because they didn't actually have a
20 hearing on the issue, so it was remanded. But there
21 the - - - the court used - - - I think the language
22 they used was not negligence, but they just sat on
23 it. They didn't do anything. Of course - - -

24 JUDGE SMITH: There was negligence in
25 Taranovich, wasn't there? That was the one where

1 they - - - where the grand jury indictment got lost
2 for a year?

3 MR. BENDER: Was that Taranovich or Staley,
4 Judge? You may be right. But there was one case
5 where it was actually post-charge, was dismissed, and
6 then the People didn't do anything for two-and-a-half
7 years. There was an absolute unexplained - - - un -
8 - - it was unexplained two-and-a-half year delay. So
9 I guess that could figure in, but you don't have that
10 here.

11 JUDGE PIGOTT: Well, if at the hearing it
12 was demonstrated that - - - that you had this
13 fingerprint in October - - -

14 MR. BENDER: Sure.

15 JUDGE PIGOTT: - - - and you had a
16 fingerprint in November, and you chose - - - you got
17 - - - you got a neighborhood burglar going on around
18 here, and it wouldn't have been hard for somebody to
19 say, this guy that burgled the two in November, maybe
20 he burgled the one in October? And let's check the
21 fingerprints, but you say, well, we caught him red-
22 handed in this one, so we're not going to check the
23 fingerprints to match it to this one.

24 MR. BENDER: That's - - - there certainly
25 no evidence of that here. But certainly if - - - if

1 that could be developed factually, it certainly would
2 be a problem, but hardly the delay is - - -

3 JUDGE PIGOTT: It would be a factor.

4 MR. BENDER: It would be a factor. Of
5 course, here, Detective Deering testified, he was
6 looking at twenty to thirty burglaries committed in
7 October and November. I mean, that's - - - that's
8 how much property they found in this man's house,
9 which ultimately, of course, was suppressed. So we
10 only - - - only were left with the two burglaries.

11 CHIEF JUDGE LIPPMAN: Anything else,
12 counsel?

13 MR. BENDER: No, thank you.

14 CHIEF JUDGE LIPPMAN: Thank you, counsel.
15 Counsel, rebuttal?

16 MR. DIAMOND: Yes, briefly. So, when - - -
17 look, we're not saying that Mr. Velez did or didn't
18 commit the crime. What we're saying is that it has
19 nothing to do with Mr. Velez. The question is, do
20 you want to send a message to the prosecutor that
21 they can sit on evidence for three-and-a-half years,
22 and not do anything knowing that they have the
23 evidence - - -

24 CHIEF JUDGE LIPPMAN: What's the standard -
25 - - the issue, really, the question is what's the

1 standard for the message? What would we be saying?
2 What's the rule, given all the cases we've talked
3 about today, what's the rule?

4 MR. DIAMOND: What I would say,
5 respectfully, Judge, is that if you wait three-and-a-
6 half years without a good reason, that's it. All
7 bets are off.

8 And if the statute - - -

9 CHIEF JUDGE LIPPMAN: So are you agreeing
10 with your adversary that basically the whole issue
11 here is good cause?

12 MR. DIAMOND: Yeah, actually, I am, Judge.
13 I'm saying - - -

14 JUDGE READ: And it's not good cause to
15 wait and see how you fare in the Appellate Division
16 on suppression?

17 MR. DIAMOND: No, it's not good cause,
18 because we have - - - specifically have speedy trial
19 and due process provisions. If the statute of
20 limitations was the only standard that we go on, we
21 wouldn't have speedy trial in the statutes, and we
22 wouldn't have due process statutes. It's an
23 additional - - - it's an additional set of
24 protections that are afforded defendants beyond the
25 statute of limitations, not just a civil case, this

1 is a criminal case. And where people in this country
2 are accused of - - - in the state accused of crimes
3 are afforded additional protections. Thank you very
4 much, Your Honors.

5 CHIEF JUDGE LIPPMAN: Okay, thank you both.
6 Appreciate it.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Julio Velez, No. 198 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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