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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 60

MIGUEL VIRUET,

Appellant.

20 Eagle Street
Albany, New York
April 27, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 60, People v. Viruet.
3 Counsel.

4 MS. HULL: Good afternoon. May I reserve three
5 minutes for rebuttal?

6 My name is Leila Hull from Appellate Advocates,
7 representing Mr. Viruet.

8 In this case, the court should - - -

9 CHIEF JUDGE DIFIORE: Ms. Hull, would you like
10 some rebuttal time?

11 MS. HULL: Oh, I'm so sorry. I meant to reserve
12 three minutes.

13 CHIEF JUDGE DIFIORE: Three minutes?

14 MS. HULL: Yes, please.

15 This court should enforce the rule - - -

16 JUDGE RIVERA: Counsel, what - - - what is on the
17 tape, or - - - or you believe is on the tape, let's put it
18 that way, that would have been of use to the defense given
19 that the - - - the - - - a camera was not pointed in the
20 direction of the shooter. What - - - what's of value
21 there?

22 MS. HULL: So the tape, it seems to have - - -
23 have been pointed in - - - in the direction of right in
24 front of the club in this case, where both the shooting
25 took place and the events preceding it, which was

1 everything the People's witnesses actually testified to.

2 The entire People's narrative took place right in
3 front of that club, right in front of that door, where one
4 of the witnesses, Herbert (ph.), was the bouncer, and he
5 testified that he was placed there.

6 JUDGE RIVERA: Well, what is it the defense
7 disputes about that narrative?

8 MS. HULL: Well, the main issue is that the - - -
9 the - - - the one thing that defense could have disputed
10 with it is the fact that whether the witnesses, during the
11 shooting, were really in a position to have meaningfully
12 observed the shooter. There is also a good question about
13 what the vantage point of this camera was, because you
14 don't - - - because the defense is never going to be in a
15 position to conclusively establish what was or was not on
16 it.

17 The point is - - -

18 JUDGE GARCIA: But counsel, if you - - - if you
19 look at the record and go through where this was raised,
20 and I think it's just about two short inquiries with two
21 different witnesses, one bouncer and - - - and one
22 detective, I think. There really is no follow-up as to
23 where were you, you know, were you in the area covered by
24 that camera when these events were occurring. There's - -
25 - this defense counsel establishes there is a taping

1 system, generally what it covers, and I think there's some
2 discussion about taking the tape even on direct.

3 But there's no follow up by defense counsel as to
4 where those scenes you describe actually took place. And
5 there is some testimony that they may have moved to the
6 side of the door. So was there an obligation on defense
7 counsel to follow up to make that record?

8 MS. HULL: Not under this court's decision in
9 Handy. Because in Handy - - - even in Handy, there was an
10 acknowledgment that the - - - the only record available was
11 that it showed a very small part of one of two assaults.

12 And critically, the assault that actually the
13 defendant was acquitted of, and yet, because it showed part
14 of the chain of events, and even that cross-examination in
15 this case, or as part of the direct, it sh - - - we do have
16 - - - we do have a record that shows that Herbert says it
17 does show the witnesses to the shooting are at the time of
18 the shooting.

19 So even - - - so that's a very small part of the
20 overall sequence of events. So even there, you've got
21 that. And, critically, the police officer clearly
22 recognized that this was material, because after looking at
23 it, he collected it. The police's actions here are proof
24 that this was material evidence.

25 JUDGE FAHEY: In - - - in the - - - in the Handy

1 case, the evidence was destroyed. You want us to extend,
2 basically, Handy's analysis; is that right?

3 MS. HULL: No, I don't think so. Maybe I meant -
4 - - this is my reading of Handy. I don't - - - I read
5 Handy - - - and I understand telling you what my
6 interpretation when - - -

7 No, it's fine. You go ahead.

8 MS. HULL: Okay. It's dangerous ground; I'm
9 aware.

10 I - - - Handy seemed to me to be an opportunity -
11 - - the court could have exclusively limited its ruling to
12 kind of intentional destruction; and it didn't. And one of
13 the reasons - - - I - - - I assume one of the reasons for
14 that is because the way this court has always looked at
15 lost or destroyed evidence, it is - - -

16 JUDGE FAHEY: Well, the spoliation rule is lost,
17 altered, or destroyed in a civil context. It seems that
18 you're asking for something similar to that.

19 MS. HULL: But the People always have an
20 obligation, in the criminal context, to preserve evidence.
21 And that's what I think we're looking at here, and the
22 failure to preserve evidence. So it sort of doesn't matter
23 if it's lost or destroyed, that's a distinction without a
24 difference or a difference without a distinction; I always
25 - - -

1 JUDGE GARCIA: It wouldn't be reflected in the
2 charge as well, right - - -

3 MS. HULL: Yeah.

4 JUDGE GARCIA: - - - that you would ask for,
5 whether it was, I think in Handy, it would be deliberately
6 destroyed after being requested, or lost, essentially.

7 MS. HULL: Absolutely. And actually, that
8 distinct - - - that is something they could clarify. But
9 we also cared about giving the defense an opportunity to
10 look at - - - to look at evidence that is reasonably likely
11 to be material.

12 JUDGE STEIN: So it's sort of policy based that -
13 - - that whether it's lost or destroyed, you - - - you want
14 to encourage good practices of preserving the material?

15 MS. HULL: Yes. And in this ca - - - actually,
16 this case is a very good illustration on why you want to
17 take - - - why - - - why you want to care about it, and
18 even if there isn't an affirmative record that it was
19 intentionally lost, because you have a detective here who
20 didn't follow proper procedure. He was - - - he was
21 careless; he didn't have the DVDed - - - he didn't have the
22 tape put on DVD, which was proper procedure, he didn't
23 vouch for it, which was proper - - - proper procedure. And
24 when it was lost, he didn't write a report. I mean, all of
25 these things sort of point to a level of mishandling that

1 any - - - that we should be very, very concerned about.

2 Precise - - -

3 JUDGE WILSON: Are you at all worried that the
4 rule you're asking for is one that would encourage the
5 police to, in this case or cases like it, look at the
6 videotape, conclude, hum, this is really not good for the
7 prosecution, and then not take it at all?

8 MS. HULL: No, because there's already a rule
9 that the police don't have to gather exculpatory evidence.
10 I mean, that - - - that - - - that's one - - - that we
11 oftentimes have this argument in the Appellate Division,
12 which is whether the police should or should not have taken
13 the evidence. But clearly, this officer did recognize that
14 it was material.

15 JUDGE RIVERA: But what - - - what - - - if you
16 know, what's the police protocol for copying that video?

17 MS. HULL: My understanding - - -

18 JUDGE RIVERA: They do it automatically?

19 MS. HULL: My understanding, from the record in
20 this case - - -

21 JUDGE RIVERA: Uh-huh.

22 MS. HULL: - - - is that he was supposed to
23 contact the TARU unit, T-A-R-U, and have them transfer the
24 footage from the VHS onto a DVD. And presumably, the
25 reason for that is to make sure this doesn't happen. That

1 it isn't left unsecured - - -

2 JUDGE RIVERA: But my - - - I'm sorry. My
3 question was, does that happen automatically, or is there,
4 as Judge Wilson is suggesting, the potential for an
5 assessment up front so that you never copy it and never get
6 it to the precinct?

7 MS. HULL: I don't know for sure. My - - - I
8 would - - - I would make it a - - - if I could make an
9 assumption, I would assume that anything that comes into
10 the - - - into the NYPD in that form, because of the format
11 it's in, you want to preserve it.

12 JUDGE RIVERA: Um-hum.

13 MS. HULL: And so - - -

14 CHIEF JUDGE DIFIORE: Ms. Hull, was there a
15 reasonable view of the evidence for the jurors that this
16 was just sloppy police work?

17 MS. HULL: Yes, I do think so. But I don't think
18 that that - - - that that is a substitute for giving the
19 charge.

20 CHIEF JUDGE DIFIORE: No, no, no. Absolutely.

21 MS. HULL: But there is a reasonable view of the
22 record - - -

23 CHIEF JUDGE DIFIORE: Uh-huh.

24 MS. HULL: That this was sloppy police work, and
25 I think that's one reason why we have a concern about

1 making sure that both the deterrence is still valid here.
2 But also, I didn't want to lose sight of the fact that the
3 defense has - - - has lost an opportunity to view objective
4 evidence of what actually happened. The people were able -
5 - -

6 JUDGE STEIN: If - - - if we - - - if we accept
7 your proposition that Handy applies in - - - in these
8 circumstances, does harmless-error analysis apply?

9 MS. HULL: Yes. And the jury here was stuff - -
10 - stuck for de - - -deliberating for - - - over the course
11 of two days. They asked for read-backs of Jesse Garcia's
12 (ph.) testimony, as well as - - - I see my light on, so
13 I'll go quickly - - - as well as Herbert's testimony. They
14 asked for all of the exhibits. This was not an open-and-
15 shut case for the jury. And with good reason, given the
16 fact that the identifications in this case had problems.

17 And I'm happy to address Jesse Garcia's testimony
18 on - - - on rebuttal if you want me to.

19 CHIEF JUDGE DIFIORE: Fine. Thank you.

20 MS. HULL: Thank you.

21 CHIEF JUDGE DIFIORE: Ms. Talcott.

22 MS. FITZPATRICK TALCOTT: Good afternoon. May it
23 please the court. My name is Nancy Fitzpatrick Talcott - -

24 -

25 CHIEF JUDGE DIFIORE: Ms. - - -

1 MS. FITZPATRICK TALCOTT: - - - from the Office
2 of Richard A. Brown, the District Attorney of Queens
3 County, on behalf of the respondent.

4 CHIEF JUDGE DIFIORE: Ms. Talcott, if the tape
5 had not been lost, what are the People's discovery
6 obligations, vis-a-vis that tape?

7 MS. FITZPATRICK TALCOTT: As the prosecutor
8 pointed out in response to the missing evidence charge
9 request, it was not discoverable. The prosecutor did not
10 intend to submit the trial into evidence, therefore it
11 wasn't discoverable under 240.20, nor would the duty to
12 preserve apply as a matter of fairness as in the case where
13 the People, the government exclude - - - was in the
14 exclusive control of the People.

15 Because this, in fact, was made by a third party
16 to which the defendant had equal access. There was no
17 claim whatsoever that the defendant made any attempt to
18 procure a simple call to Scooby's (ph.) after he was
19 arraigned on the complaint would have sufficed.

20 CHIEF JUDGE DIFIORE: It's not potential
21 impeachment material?

22 MS. FITZPATRICK TALCOTT: No, because it's not a
23 dispute that the video camera was irrelevant to who was
24 across the street shooting. I don't think the defense
25 contends that. So then the question becomes, their

1 speculation is, we might have been able to impeach them on
2 the earlier incidents. However, defendant failed to even
3 establish that those earlier incidents were on the lost
4 video. He basically asked for a charge about evidence that
5 he didn't establish even existed.

6 JUDGE RIVERA: But how - - - how can he do that
7 when he doesn't have an opportunity to see the video, and
8 why isn't it an appropriate inference that if - - - if - -
9 - if you have a security video outside the club, it is
10 playing the entire time the club is open - - -

11 MS. FITZPATRICK TALCOTT: Simply asking Detective
12 - - -

13 JUDGE RIVERA: - - - if it's going to be on
14 later? I mean, you don't dispute that - - - that the point
15 in time when the shooting occurs, that tape is running.

16 MS. FITZPATRICK TALCOTT: Oh, no. Absolutely.
17 And that - - - and that's the tape that Detective Ragab
18 ~~(ph.)~~ saw, and that's what he testified to. Now, that it
19 showed people coming in and out of the door all evening,
20 well, of course - - -

21 JUDGE GARCIA: But counsel, that - - -

22 MS. FITZPATRICK TALCOTT: - - - it was
23 established that that was the - - -

24 JUDGE GARCIA: - - - that - - -

25 MS. FITZPATRICK TALCOTT: - - - advantage point.

1 JUDGE GARCIA: - - - tape, at a minimum, as I
2 read the transcript, shows the actual murder, right? So -
3 - -

4 MS. FITZPATRICK TALCOTT: Exactly.

5 JUDGE GARCIA: - - - it's a difficult argument, I
6 think, to say it's not material if it's actually showing
7 the killing. And I understand your point that the shooter
8 is across the street and is clearly not on this tape at
9 that time. But I think, to Judge Rivera's point, as you
10 read the testimony, there is certainly a strong suggestion
11 that all those witnesses are, at some point, in the range
12 of that camera. And given that this is basically a
13 two-witness identification case, plus I know you had a
14 cooperator, but how can that not be material?

15 When you're seeing the people on that video, at
16 some point, in these altercations or not - - - on that
17 video, and seeing what they were wearing, and seeing other
18 things that were subject of that testimony, it seems a
19 difficult argument to make that that would not have been
20 material for the defense.

21 MS. FITZPATRICK TALCOTT: Well, one, it's not
22 clear that, again, simple questions. Asking whether they
23 were within the range of the - - - you can't expect that
24 twenty people were in front of the door. They said there
25 was a big crowd at the second incident where the defendant

1 actually came. There's no indication defendant - - -

2 JUDGE FAHEY: Would - - - wouldn't there - - -

3 MS. FITZPATRICK TALCOTT: - - - was ever in view
4 of the camera.

5 JUDGE FAHEY: Excuse me.

6 MS. FITZPATRICK TALCOTT: Stephen (ph.),
7 probably, because he came out a couple of times.

8 JUDGE FAHEY: Excuse me. Wouldn't the - - -
9 doesn't the tape establish impeachment material that you
10 would use to - - - to go to those circumstances of the
11 crime itself? Even though it doesn't show the shooter, it
12 would seem it's got to be reasonably related to any
13 impeachment questions that you would want to bring to the
14 circumstances of the crime.

15 On top of that, you have someone testifying to
16 saying what was on the tape, and then the tape isn't
17 available.

18 MS. FITZPATRICK TALCOTT: Well, what you had two
19 people testify as to what was on the tape, was people
20 running in the bar as - - - as - - -

21 JUDGE FAHEY: I don't dispute with you at all - - -
22 -

23 MS. FITZPATRICK TALCOTT: Right.

24 JUDGE GARCIA: - - - the circumstances to what it
25 shows.

1 MS. FITZPATRICK TALCOTT: So we don't even know
2 whether the earlier incidents were captured on the tape.
3 So again, he's asking for a charge based on evidence.
4 Because the impeachment claim is that it would go to the
5 prior incidents. He didn't even establish the basic
6 questions whether those incidents were captured on the
7 tape.

8 JUDGE FAHEY: So - - -

9 JUDGE RIVERA: But isn't that the point? How is
10 the defendant going to do that without having an
11 opportunity to see the tape? And all they want - - - isn't
12 this the minimal request, just an adverse inference charge;
13 this is like the de minimis in many ways of what - - - what
14 they're seeking or sought.

15 MS. FITZPATRICK TALCOTT: We're not saying yes to
16 establish what was on there. But what he had to estab - -
17 - Detective Ragab, when you viewed the earlier incident,
18 did you view the tape from an hour before the shooting?
19 Say he said yes, was there any indication of any verbal or
20 physical altercation before, yes. Okay. Now, you've laid
21 your foundation.

22 Now, obviously he can't get into specifics about
23 what would - - - what that would show then, but he didn't
24 even establish that the altercations were on the tapes to
25 begin with. That's what he would have to do at a minimum.

1 JUDGE STEIN: Counselor, as I - - - as I
2 understood your argument, you were also arguing that this -
3 - - that the charge in question was overly punitive. And -
4 - - and my question to you is, if the court felt that some
5 sanction was appropriate to deter the - - - the failure to
6 follow protocol, and - - - and the apparent carelessness in
7 preserving this potential evidence, what would be an
8 appropriate sanction, short of this very permissive and
9 not, you know, adverse inference charge?

10 MS. FITZPATRICK TALCOTT: Well, I think a remedy
11 was imposed here. Given the meager, if not nonexistent
12 showing of materiality, coupled with the inadvertence,
13 sloppy - - - the prosecution admitted that throughout
14 summation, the remedy here was to give him wide latitude in
15 cross examining, and pretty much unfettered reign on
16 summation.

17 JUDGE FAHEY: So - - - so what would your test be
18 for - - - for - - - in this circumstance when the defendant
19 would get the adverse inference charge?

20 MS. FITZPATRICK TALCOTT: I think it has to be
21 assessed, as this court has indicated, on a case-by-case
22 basis, examining a number of factors, the evidence admitted
23 at trial. Here, we have, which goes to harmless error,
24 overwhelming evidence of guilt, but we also have evidence,
25 as the Appellate Division recognized, negating that this

1 video would have shown anything material.

2 Also depending on the significance of it.

3 JUDGE STEIN: But aren't you always going to have
4 that?

5 MS. FITZPATRICK TALCOTT: Well, this - - - this
6 court said - - -

7 JUDGE STEIN: Or - - - or frequently. I should
8 say frequently.

9 MS. FITZPATRICK TALCOTT: You may.

10 JUDGE STEIN: And - - - and isn't that a little
11 problematic and not - - - not to - - - to suggest any
12 impropriety on the part of any of the actors here, but you
13 know, wouldn't - - - wouldn't the detective sort of have an
14 incentive to say there was nothing exculpatory - - -

15 MS. FITZPATRICK TALCOTT: No.

16 JUDGE STEIN: - - - on the tape?

17 MS. FITZPATRICK TALCOTT: Unlike in Handy - - -
18 no, he has no cause to build a case against the defendant
19 rather than Stephen - - -

20 JUDGE STEIN: No, not - - -

21 MS. FITZPATRICK TALCOTT: - - - which is
22 (indiscernible).

23 JUDGE STEIN: - - - not to excuse his negligence?

24 MS. FITZPATRICK TALCOTT: I'm not - - - I'm not
25 saying excuse it. But the deliberateness should be a

1 factor, and this court has indicated the court can consider
2 it, because the - - - the punishment is going to vary,
3 depending on the deliberateness of the act.

4 JUDGE RIVERA: So let's get to that remedy. Let
5 me go back to what you suggested. Allow cross-examination
6 and latitude on cross and broad summation, but that is
7 still coming from defense counsel.

8 MS. FITZPATRICK TALCOTT: Right.

9 JUDGE RIVERA: You - - - you agree that that's
10 different from an instruction from the judge, right; the
11 neutral person in the trial who is not advocating for
12 either side. That that has a different impact on the jury
13 then if it's coming from counsel's advocating on behalf of
14 the client.

15 MS. FITZPATRICK TALCOTT: Yes. Absolutely. And
16 - - -

17 JUDGE RIVERA: So until then - - -

18 MS. FITZPATRICK TALCOTT: - - - (indiscernible)
19 to recognize that - - -

20 JUDGE RIVERA: - - - how can your remedy be - - -
21 be enough?

22 MS. FITZPATRICK TALCOTT: Because what the court
23 would have said would have just been kind of a neutral,
24 permissive charge.

25 JUDGE RIVERA: And that's - - -

1 MS. FITZPATRICK TALCOTT: He let - - -

2 JUDGE RIVERA: - - - the point, right - - -

3 MS. FITZPATRICK TALCOTT: Right. And he - - -

4 JUDGE RIVERA: - - - that it's a neutral charge.

5 MS. FITZPATRICK TALCOTT: And he let the
6 defendant go far beyond that. He could have limited the
7 defendant in just giving what the court would have given;
8 he didn't. In addition to - - - the defendant went far
9 beyond anything the court would have said. And in addition
10 to - - -

11 JUDGE RIVERA: But the - - - but the point is the
12 source.

13 MS. FITZPATRICK TALCOTT: Right.

14 JUDGE RIVERA: I think you're - - - you're not
15 responding to my question. The point is the source. One
16 source is an advocate - - -

17 MS. FITZPATRICK TALCOTT: Yes.

18 JUDGE RIVERA: - - - that the juror may view as,
19 of course, working zealously on behalf of the defendant.

20 MS. FITZPATRICK TALCOTT: Right.

21 JUDGE RIVERA: And the other source is the
22 neutral person in the room who is giving that kind of an
23 instruction when the judge has already said whatever the -
24 - - the lawyers say is not evidence.

25 MS. FITZPATRICK TALCOTT: But here, he went

1 further and invited them to adopt the arguments put forth
2 by counsel, which included a much broader instruction than
3 the court would have given. I agree. It's different when
4 it comes from the court, but here, given the meager showing
5 of materiality, if not, nonexistent showing, coupled with
6 the fact that it was entirely inadvertent - - -

7 JUDGE RIVERA: And to adopt defense counsel's
8 argument, or arguments of either counsel? Take it for what
9 it's worth, adopt either side.

10 MS. FITZPATRICK TALCOTT: Either. Right.

11 JUDGE GARCIA: Aren't we left again to, the jury
12 is going to decide who's the better advocate, who they're
13 persuaded by, as opposed to the neutral person in the room
14 giving them an instruction?

15 MS. FITZPATRICK TALCOTT: Well, I think they're
16 going to base it on the evidence presented. And what they
17 did during deliberation, that's speculative. We don't know
18 why they asked for read-backs, we don't know why it took
19 two days. You could argue, that's a pretty quick verdict
20 under the circumstances. That's just speculative, and we
21 can't delve into the deliberative process.

22 CHIEF JUDGE DIFIORE: Counsel, do you care to
23 address harmless error?

24 MS. FITZPATRICK TALCOTT: Absolutely. Even if
25 there were error, and obviously we would claim that there

1 is not, in exercising its discretion, the proof of guilt
2 was truly overwhelming. The defendant confessed. Jesse
3 Garcia did have a history and cut a deal in his confession,
4 but he was a longtime friend of the defendant.

5 His demeanor on the stand, that - - - that made
6 it more credible that the defendant would confess and
7 complied to him, and actually discussed with him a plan to
8 help him flee. The defendant - - - and Jesse's demeanor
9 added to his credibility, as the prosecutor noted. He was
10 sobbing on the stand. This hurt him, that he was - - - and
11 he admitted. I did it for myself, I did it for selfish
12 reasons, but he was - - - testified as to the confession
13 the defendant made. The defendant implicated himself at
14 the scene when he threatened, I'm going to be back.

15 Now, Xavier White (ph.) commented on that four
16 times. At one point, he said the defendant said they will
17 be back. Either way, and defense counsel himself
18 characterized it where defendant said, I will be back.
19 Defendant was coming back, be it by himself or with others.
20 So he implicated himself even before.

21 You have the two witness identifications, Xavier
22 White - - - they had ample opportunity to view him at the
23 earlier incident, under good lighting conditions. They
24 testified as to their vantage points. And Xavier White
25 knew Stephen. Because, you know, the claim is possibly it

1 was Stephen. Their testimony was corroborated by the
2 ballistics evidence. Robert Garcia, also his longtime
3 friend as to the events leading up. Everything was very
4 consistent. Were there minor inconsistencies? Of course.
5 Different vantage points, fast-moving (indiscernible).

6 JUDGE GARCIA: Was there any corroboration for
7 the cooperator's testimony, in terms of where they were
8 when these things happened, if they were in a mall, or
9 there were certain calls perhaps made; was anything put in
10 to corroborate at least time and place, in terms of the
11 corroborative statement?

12 MS. FITZPATRICK TALCOTT: Oh, regarding, like,
13 meeting him at the barbershop and then - - -

14 JUDGE GARCIA: Yeah.

15 MS. FITZPATRICK TALCOTT: I don't think so. I -
16 - - I don't know that they sought to dispute that, as
17 opposed to just the confession. And the jury obviously
18 credited his testimony.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MS. FITZPATRICK TALCOTT: Thank you.

21 CHIEF JUDGE DIFIORE: Ms. Hull?

22 MS. HULL: If I could just quickly address a few
23 points in response, and then I can turn to harmless error,
24 unless you want me to do it the other way around.

25 I think the fact that the - - - the People's

1 position that this was not discoverable, counsel
2 specifically requested it. And it was materially likely to
3 be relevant; this was discoverable evidence.

4 The People's argument that this was not - - -
5 this was not in their exclusive possession is entirely
6 unpreserved for this court; they never made that argument,
7 so counsel never even was able to respond to that claim.
8 Nor is that claim really supported by the record in this
9 case, because even when the police officer tried to go back
10 and get the tape, he couldn't get it. I'm not sure how
11 defense counsel could have done that.

12 In terms of defense counsel never being able to
13 establish on the video the earlier incident. When you look
14 at the Handy decision, it says quite clearly that you
15 cannot unquestionably accept the testimony of somebody
16 recounting what's in kind of objective video evidence.
17 Even if he had talked to - - - even if he had cross
18 examined Detective Ragab, and he, Ragab, had testified one
19 way or another, under Handy, Ragab's testimony isn't
20 dispositive as to materiality.

21 In terms of the deliberateness, and then I'll
22 turn to harmless error. Whether or not this was deliberate
23 destruction or carelessness, usually that bears on the
24 severity of the sanction, as this court has already stated,
25 this is the most measured sanction available.

1 Also in terms of summation and cross-examination
2 being a substitute, I think the fact that there's a court-
3 imposed sanction is quite significant. Juries are - - -
4 juries are told that argument is not evidence, and a
5 statement coming from - - - an instruction from - - - from
6 the court about how to evaluate the evidence, particularly
7 the absence of evidence, is quite critical.

8 Harmless error.

9 JUDGE GARCIA: Before you get to that, I'm sorry,
10 counsel. What about the People's argument that this is a
11 third-party tape, putting aside you could have gotten it,
12 we could have gotten it. Is a third-party tape, Handy was,
13 essentially, government, and I think a prison - - -

14 MS. HULL: Yeah.

15 JUDGE GARCIA: - - - video.

16 MS. HULL: I don't think that that's relevant
17 here actually at all. I mean, if - - - Handy can't - - - I
18 hope, cannot simply apply to video evidence that is
19 recorded within the four walls of a police precinct or a
20 prison. Handy should, in my view, apply to evidence
21 pertaining to a crime that the police have an obligation to
22 preserve. And that seems to be the overriding policy of
23 it, and it comes - - - you know, and it cites a line of
24 cases about collection of evidence from crime scenes.

25 JUDGE GARCIA: Right. And this isn't a

1 collection case, the duty to collect; it's a duty to
2 preserve.

3 MS. HULL: It's a duty to preserve, yes. But it
4 - - - duty to preserve evidence that has been taken - - -

5 JUDGE GARCIA: Yeah.

6 MS. HULL: - - - from a crime scene not - - - not
7 that happens to be, you know, not that happens to be in a
8 courtroom, for example, where we have video cameras, though
9 preserving this video is (indiscernible).

10 CHIEF JUDGE DIFIORE: Harmless error?

11 MS. HULL: Jesse Garcia's cooperation agreement
12 is quite critical to this. The People point to the fact
13 that he testified, you know, reluctantly. He also asked to
14 speak to the police at a particular point, and he obtained
15 a very, very favorable cooperation agreement.

16 JUDGE FAHEY: All - - - all of that was in front
17 of the jury.

18 MS. HULL: Absolutely. But what wasn't in front
19 of the jury is the fact that objective evidence that had
20 the potential of contradicting the People's narrative is -
21 - - is not before you, and you can infer that that - - -
22 that that would have benefited the defense.

23 There was also aspects of his - - - his - - - his
24 - - - his description of this alleged confession that
25 didn't comport with the People's narrative, and that's

1 quite critical. I mean, he's saying that someone else
2 actually - - - I mean, my client is claiming that somebody
3 else allegedly shot at him while he's standing on the
4 median of the street. None of - - -

5 JUDGE FAHEY: I thought those differences were
6 brought up in conclusion to - - -

7 MS. HULL: Right. But that, I think, may - - -
8 may explain why the jury - - - and I'm sorry, my red - - -
9 my light is on - - - that might explain why the jury asked
10 to rehear his testimony.

11 I understand that we don't want to sit there and
12 - - - and - - - and decide what the jury was thinking, but
13 it is significant that they wanted to hear his testimony
14 again, and a large part of his testimony was extensive
15 cross-examination about whether he was credible. And that
16 - - -

17 CHIEF JUDGE DIFIORE: Thank you, Ms. Hull.

18 MS. HULL: Thank you.

19 CHIEF JUDGE DIFIORE: Thank you.

20 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Miguel Viruet, No. 60 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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