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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 45

JOSE VALENTIN,

Appellant.

20 Eagle Street
Albany, New York
March 28, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
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: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is appeal
3 number 45, the People of the State of New York v. Jose
4 Valentin.

5 Counsel.

6 MS. MOLLISON: Good afternoon, Your Honors, and
7 may it please the court. Kate Mollison, Office of the
8 Appellate Defender, on behalf of Jose Valentin.

9 I'd like to reserve two minutes for rebuttal.

10 CHIEF JUDGE DIFIORE: Two minutes?

11 MS. MOLLISON: Two minutes - - -

12 CHIEF JUDGE DIFIORE: You may.

13 MS. MOLLISON: - - - yes.

14 MS. MOLLISON: Your Honors, is it - - - if this
15 was a drug sale, it was the friendliest, most leisurely
16 drug sale you could imagine. Police watched Mr. Valentin
17 and a friend as they walked and talked together strolling
18 through Mr. Valentin's neighborhood for more than - - -

19 JUDGE STEIN: Is there really - - - is there any
20 dispute really as to whether he was entitled to the agency
21 defense instruction?

22 MS. MOLLISON: No, not in - - - not in our
23 understanding, no. The prosecution attempts to suggest
24 that, but there is no question that the judge found that he
25 was - - - that it was required to - - - the court was

1 required to instruct on this charge, and Mr. Valentin,
2 frankly, was entitled to it, because the evidence screamed
3 agency.

4 JUDGE STEIN: So why is this different from any
5 Mol - - - any other type of Molineux issue where intent
6 comes in - - - a - - - a material question in - - - in the
7 case?

8 MS. MOLLISON: Well, this is different because
9 the court has always construed agency cases different - - -
10 differently. In - - - in agency cases, the court allows
11 Molineux evidence to come in when the defendant has
12 affirmatively tendered his innocence. In this case, Mr.
13 Valentin made no case as to agency. What happened was the
14 prosecution's own case made out agency.

15 JUDGE ABDUS-SALAAM: Does that mean that he
16 didn't cross-examine witnesses or in opening say, I'm - - -
17 I'm going to possibly tender an agency defense here?

18 MS. MOLLISON: He did not. I mean, he did - - -
19 he did cross-examine witnesses, but not as to furthering
20 the agency defense. The Appellate Division was very clear
21 in its finding. It made a factual finding that Mr. Valen -
22 - - that all of the evidence that supported agency was
23 elicited by the People.

24 On opening, this was - - - the agency was not at
25 all the defense that was being pursued. What the defense

1 counsel was pursuing in opening was an idea that no sale
2 occurred. He called this the "Rhashomon effect".

3 Through - - -

4 JUDGE STEIN: Well, but didn't - - - didn't
5 defense counsel make some statements during summation, and
6 - - - and - - - and asked him questions which really lead
7 into the agency defense?

8 MS. MOLLISON: Well, frankly, the questions that
9 were asked on cross-examination that the prosecution argues
10 ended up supporting the agency, or at least consistent with
11 the agency theory were questions that were so basic, for
12 example, how long where the - - - where the defendant and
13 his friends together, that if we were to say those
14 questions open the door, we're essentially saying that a
15 defendant who has prior convictions - - -

16 JUDGE STEIN: But it's not just a matter of
17 opening the door. He did affirmatively ask for that jury
18 instruction. It's not like somebody's forcing it on him.
19 You know, the People, through their evidence, and we're
20 saying, well, you must do this. Defendant chose to assert
21 this defense.

22 MS. MOLLISON: Well, what happened here is, I
23 mean, the defendant essentially sat back - - - Mr. Valentin
24 sat back and waited to see what evidence unfolded before
25 him. And when the prosecution's evidence couldn't

1 withstand an agency interpretation, when that became clear
2 on the face of the prosecution's case-in-chief, Mr.
3 Valentin was perfectly entitled to ask for that charge.

4 And sure, in this case, Mr. Valentin did ask for
5 that charge, but it could have been the court, sua sponte,
6 who had looked at that evidence and said, look, what we
7 have here is obviously agency, and it doesn't make sense
8 that because the prosecution has put on an agency case, it
9 can then bootstrap in evidence that we know to be the most
10 prejudicial evidence, essentially, in a criminal case, that
11 is evidence of Mr. Valentin's - - -

12 JUDGE STEIN: Well - - -

13 MS. MOLLISON: - - - prior crimes.

14 CHIEF JUDGE DIFIORE: Doesn't it matter that the
15 defendant has no burden of proof on a defense? So why
16 isn't it enough in this case that he - - -

17 MS. MOLLISON: Well, because the pro - - - it's
18 exactly - - - that's exactly the point, it's the
19 prosecution's burden of proof to meet the reasonable doubt
20 standard. If the prosecution's own evidence reveals that,
21 in fact, it's pretty reasonable here that Mr. Valentin was
22 not acting as a seller but was acting as a buyer, then he -
23 - - the prosecution shouldn't be allowed to bolster what is
24 otherwise a weak case, with evidence that is so prejudicial
25 that in every other case we would keep it out.

1 And I think it's - - - it's worth emphasizing how
2 prejudicial this evidence is, how prejudicial the Molineux
3 evidence is.

4 JUDGE RIVERA: What - - - defense counsel, at one
5 point, when he - - - when the judge, as I recall, you'll
6 correct me if I'm wrong. When the judge says, there will
7 be inform - - - the jury will hear about one of his prior
8 sales, the defense counsel, at that point, withdraws the
9 request - - -

10 MS. MOLLISON: I think that that's - - -

11 JUDGE RIVERA: - - - right.

12 MS. MOLLISON: - - - I mean - - -

13 JUDGE RIVERA: But the judge was not then going
14 to give the instruction regardless, correct?

15 MS. MOLLISON: In this case, no. But there's no
16 reason why a judge couldn't look at the evidence presented
17 by the prosecution.

18 JUDGE RIVERA: Even if the - - - the defendant
19 doesn't want it - - -

20 MS. MOLLISON: Over the - - -

21 JUDGE RIVERA: - - - and says I don't want that
22 instruction at all?

23 MS. MOLLISON: Exactly. Over the defendant's
24 objection. And I think that shows the kind of unfairness
25 here. I mean, the fact that - - -

1 JUDGE STEIN: But - - - but that's not - - -

2 MS. MOLLISON: - - - the prosecutor - - -

3 JUDGE STEIN: - - - what happened here.

4 MS. MOLLISON: That's not what happened here,
5 certainly. But it's - - - it's very clear - - -

6 JUDGE STEIN: And - - - and perhaps that might be
7 a different case. But - - - but certainly in this case - -
8 -

9 MS. MOLLISON: But in - - - in both instances,
10 you have a case where the defendant has done nothing to
11 advance the theory, and we're looking entirely at the
12 prosecution's own case-in-chief.

13 JUDGE STEIN: Well, doesn't asking for the
14 instruction advance the theory? Isn't - - - isn't that
15 telling the - - - the jury that you have to determine
16 whether there really was intent to sell here?

17 MS. MOLLISON: I don't think that asking for the
18 charge is that trigger. I mean, we can look to this
19 court's recent case - - -

20 JUDGE FAHEY: Well, the - - -

21 MS. MOLLISON: - - - in Gonzalez.

22 JUDGE FAHEY: - - - the problem we have though is
23 - - - is by asking for the charge, you're, in essence - - -
24 after the People have closed now, you've asked for the
25 charge, you're adding an additional element that the People

1 have to prove, and - - - the additional mens rea element at
2 this particular point. And so that's one that their case-
3 in-chief wouldn't have been designed to address. And the
4 only reason the element was added, it was in response to
5 your request to charge. So address that point.

6 MS. MOLLISON: Sure.

7 JUDGE FAHEY: Go ahead.

8 MS. MOLLISON: This court's precedent has been
9 very clear from 1978, when the agency defense was first
10 articulated by this court - - -

11 JUDGE FAHEY: Um-hum.

12 MS. MOLLISON: - - - that agency does not add an
13 additional element.

14 JUDGE FAHEY: Um-hum.

15 MS. MOLLISON: What agency does is it negates the
16 elements of sale. It says, this person before us was not
17 in the role of a seller; he was acting as a buyer. And
18 it's not that he was acting as a seller but intending to
19 profit or not intending to profit; it's not an additional
20 element - - -

21 JUDGE FAHEY: So - - - so you're saying - - -

22 MS. MOLLISON: - - - as the prosecution argues.

23 JUDGE FAHEY: - - - that you don't have to then
24 address the mens rea element at all.

25 MS. MOLLISON: No. I mean, this is the same

1 burden the prosecution has in every - - - in every drug-
2 sale case, which is to prove that the defendant was a drug
3 seller.

4 JUDGE STEIN: But in - - - in most drug cases,
5 intent is inferred from the act itself. And - - - and by
6 asking for an agency charge, aren't you saying you can't
7 improve that - - - you can't infer that intent here because
8 of these circumstances.

9 MS. MOLLISON: Well, I think the fact that the
10 pros - - -

11 JUDGE STEIN: The People didn't say that you
12 can't infer intent. They put the proof forward, and the -
13 - - and the defendant said, I think this proof shows
14 something else. And - - - and now, the People have the
15 burden of showing that it doesn't show that something else.

16 MS. MOLLISON: The charge merely allows the jury
17 to properly evaluate the evidence before it. It doesn't
18 change the elements of the crime or what the jury needs to
19 - - - needs to know in order to convict - - - or does
20 change - - -

21 JUDGE ABDUS-SALAAM: So you're saying - - -

22 MS. MOLLISON: - - - what it needs to know - - -

23 JUDGE ABDUS-SALAAM: - - - counsel - - -

24 MS. MOLLISON: - - - in order to convict the
25 crime.

1 JUDGE ABDUS-SALAAM: - - - that this jury,
2 hearing the evidence without a request by defendant for an
3 agency defense, could have decided not to convict for a
4 drug sale because they thought that this was, you know,
5 just a friendly kind of transaction that had nothing to do
6 with an intent to sell drugs.

7 MS. MOLLISON: I think that the jury needed this
8 - - - needed the charge in order to convict, because the
9 charge made it clear that Mr. Valentin was not acting as a
10 seller.

11 But I'd just like to make one final point,
12 because I realize my light is on. This court was very
13 clear in a recent case, People v. Gonzalez, that when a
14 defendant asks for a charge, jury charge, based entirely on
15 the prosecution's case-in-chief, the defendant has not put
16 on - - - put on a defense - - -

17 JUDGE ABDUS-SALAAM: Well, that - - - that case
18 though - - -

19 MS. MOLLISON: - - - such as the prosecution - -
20 -

21 JUDGE ABDUS-SALAAM: - - - involved a different
22 statute, right? The Statute required the defendant to ask
23 or to give notice that - - - if - - - if the defendant were
24 seeking an EED defense that the defendant had to give
25 notice to the People, and that didn't happen in the case.

1 MS. MOLLISON: That case did involve the question
2 of statutory interpretation, but it also answered,
3 essentially, the same dispositive question here, which is
4 that when a defendant has relied entirely on the
5 prosecution's case in order to ask for a charge, the
6 defendant has not put on a case, has not advanced any
7 evidence, that the prosecution therefore has a right to
8 rebut.

9 Essentially, because the defendant hasn't put
10 anything forward, the prosecution does not have the right
11 to rebut itself. And that was the clear holding of
12 Gonzalez.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MS. MOLLISON: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel.

16 MR. POULIOT: Good afternoon, Your Honors. May
17 it please the court. Brian Pouliot on behalf of the
18 People.

19 Your Honors, when a defendant requests and
20 secures an agency charge, he's undoubtedly presenting an
21 agency defense, because the charge instructs the jury that
22 the People have to disprove that defense. It instructs the
23 jury that the People have to prove not only that the
24 defendant sold drugs to the buyer under the Penal Law
25 definition of that term, but also that in doing so, he had

1 some profit motive.

2 I think that's why this court, every court of the
3 Appellate Division, and the CJI itself states that when an
4 agency defense is considered, the jury should consider a
5 defendant's prior drug selling crimes, subject to the
6 court's balancing on their probative versus prejudicial
7 impact at trial.

8 Now, while it is our position that the charge is
9 enough to show that a defendant's presenting an agency
10 defense, defense counsel here did more. Prior to opening
11 statements, he even said to the court, Your Honor, I think
12 there's a view of evidence that agency exists here. So we
13 know, contrary to the defense's point of view, that he
14 didn't just sit back and wait. This was at the forefront
15 of his mind throughout trial.

16 JUDGE WILSON: Is there anything in the
17 cross-examination that goes to the agency defense?

18 MR. POULIOT: Yes, Your Honor. As a matter of
19 fact, there were several facts elicited during
20 cross-examination that were used in summation to present
21 the defense. I think most importantly, the fact that
22 defendant and the buyer worked together for a long period
23 of time. And that's what defense counsel then used to say
24 that - - - that they were buddies, they were friends.

25 Also elicited was the fact that defendant only

1 had eight dollars on his person when he was stopped, which
2 wasn't enough to cover the cost of the drugs. The fact
3 that defendant wasn't a known drug dealer. Defense counsel
4 asked the officer, did you know - - - you knew the players
5 in the neighborhood? He said, yes. And they asked if they
6 knew if defendant is a drug dealer, the officer said, no.

7 And then also the fact that defendant didn't have
8 any additional drugs on his person also elicited during
9 cross-examination.

10 JUDGE ABDUS-SALAAM: Counsel, why isn't this case
11 like - - - more like Gonzalez than it is the other cases?

12 MR. POULIOT: Judge Abdus-Salaam, I - - - I think
13 - - - I know you authored it, I think you hit the nail on
14 the head. One of the first lines in Gonzalez, you stated,
15 the issue here is whether CPL 250.10 applies. This case
16 has nothing to do with CPL 250.10. That - - - that is - -
17 - is a statute that involves the People's introduction of
18 certain type of psychiatric examinations, and our
19 introduction of those examinations is triggered by defense
20 counsel's introduction of similar examinations.

21 JUDGE ABDUS-SALAAM: But if the People have to
22 prove intent to sell in any case, whether or not there is a
23 notice beforehand that certain evidence is going to be
24 introduced, doesn't the principle still apply, that if you
25 have intent, if the People have to prove intent, that there

1 is nothing to rebut?

2 MR. POULIOT: No, Your Honor, I - - - I don't
3 think so. And this is where I - - - I think I disagree
4 with defense counsel. It's not the same burden that the
5 People have before and after an agency charge or an agency
6 defense. As this court even noted in Lam Lek Chong, and
7 some of the 1978 cases, when an agency defense isn't
8 presented, the People only have to prove the Penal Law
9 definition of so, which is to give exchange or dispose of.
10 Thus, as the court said in Lam Lek Chong, any handing off
11 of drugs can constitute a sale.

12 Once the agency defense is raised and presented,
13 we now have to disprove that the defendant acted as an
14 agent, essentially as this court said in Roche, meaning we
15 have to prove that there was some type of profit motive.

16 So it's that - - - it's that intent to profit or
17 profit motive, however you want - - - you want to phrase it
18 or color it, that's different once the charge is given.
19 And since it's an ordinary difference, as I think this
20 court already pointed out, it's our burden to prove it once
21 it's raised. And thus (indiscernible) - - -

22 JUDGE RIVERA: In Chong, the - - - the defendant
23 testified, right? Does that matter?

24 MR. POULIOT: Excuse me, Your Honor?

25 JUDGE RIVERA: In Chong, the defendant testified;

1 does that matter?

2 MR. POULIOT: I don't think that matters, Your
3 Honor. Because again, once the defense is raised, it's an
4 ordinary defense, we have the burden of disproving. It
5 hinges on whether or not we have to actually prove this new
6 additional thing, not on what evidence the defendant did or
7 didn't present in furtherance of that defense.

8 And of course, as we noted in our brief, we have
9 cases from - - - from every department of the Appellate
10 Division where the defendant either didn't testify or the
11 People were allowed to introduce the Molineux evidence on
12 their direct case, showing that it's not the evidence that
13 is or isn't presented, but again, whether the defense is
14 presented. And I think the charge absolutely shows - - -

15 JUDGE FAHEY: So most of the cases, though,
16 involve the introduction of Molineux in the direct case. I
17 don't think - - - not - - - not in rebuttal.

18 MR. POULIOT: Correct, Your Honor. Here, it was
19 introduced in that direct case as well.

20 JUDGE FAHEY: Well - - -

21 MR. POULIOT: The defendant asked for - - -

22 JUDGE FAHEY: - - - it goes to the defense
23 itself.

24 MR. POULIOT: - - - the charge - - -

25 JUDGE FAHEY: And - - -

1 MR. POULIOT: - - - before we rested.

2 JUDGE FAHEY: - - - so the Molineux evidence, in
3 essence, would generally cause the defendant to forgo the
4 agency defense in most circumstances that I've seen. But
5 what difference does it make - - - make that in this
6 instance, the agency defense is purely introduced by the
7 weaknesses in your case, not in anything - - - any case
8 that they made at all?

9 MR. POULIOT: Your Honor, I don't think our case
10 can be considered weak, and I think that's an important
11 point here.

12 JUDGE RIVERA: Well, it's weak enough so that
13 they get the agency charge.

14 MR. POULIOT: But I think this goes back to - - -
15 to what I was discussing before. Before the agency charge
16 in the defense - - -

17 JUDGE FAHEY: Um-hum.

18 MR. POULIOT: - - - again, all we have to prove
19 is that defendant gave drugs to the buyer. So our case,
20 before the charge and defense was presented, was very
21 strong, because we had an undercover officer who saw the
22 buyer give money to the defendant, saw defendant cross the
23 street, come back, give two items to the buyer, the buyer
24 was stopped, and those two items were in the same pocket he
25 placed them in, two glassines of heroin. So our case was

1 very strong at that point.

2 Now, the agency defense is presented, we have to
3 prove something more; we have to prove this profit motive.
4 And again, our case can only be considered weak at that
5 point if we're barred from introducing this very probative
6 evidence of defendant's intent to profit.

7 If I may just address one more thing. I believe
8 defense counsel noted that there - - - this may be a
9 problem in some other case, where the court gives an
10 instruction over the defense's objection. I think in those
11 cases, at least in the First Department, there's precedent
12 that defendant would then have a claim on appeal that he
13 was being forced into a certain defense to accept a certain
14 charge.

15 So I don't think that's really a concern that
16 applies here. People v. Maria is the First Department
17 case.

18 JUDGE RIVERA: Could - - - could the court decide
19 that the prior convictions are just too prejudicial in this
20 case? Would that have put the People in a position where
21 they could not have made their case? Would that have been
22 error?

23 MR. POULIOT: Well, Your Honor, the court could
24 absolutely decide that. Here, I would like to point out,
25 there were three prior drug-selling crimes, and the court

1 balanced the probative versus prejudicial nature and
2 determined that only one of those crimes should be
3 admissible.

4 JUDGE RIVERA: But it sounds like you're arguing
5 that that information must always come in, because
6 otherwise you are not able to present - - -

7 MR. POULIOT: No, Your Honor, and I - - -

8 JUDGE RIVERA: - - - your case to respond to the
9 defense.

10 MR. POULIOT: I do want to make that clear. I
11 think we're talking in - - - in sort of broad terms here.
12 But we're just essentially talking about whether or not
13 it's admissible, whether or not the balancing should occur.
14 We're not saying it should automatically be admitted in
15 every case.

16 If there are no further questions - - -

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. POULIOT: Thank you, Your Honor.

19 CHIEF JUDGE DIFIORE: Ms. Mollison.

20 MS. MOLLISON: Just quickly, Your Honors. As to
21 whether or not this court has previously decided a case
22 like this, I think it's very clear that this court has
23 never been presented with a question like the one we have
24 before us today, which is where the defendant has not
25 affirmatively furthered that agency defense. And again,

1 the Appellate Division was very clear that all of the
2 evidence that supported agency in this case came directly -
3 - -

4 JUDGE STEIN: Well, the question really isn't - -
5 -

6 MS. MOLLISON: - - - from the People's case.

7 JUDGE STEIN: - - - whether the defendant
8 affirmatively asserted the defense; the question is, is
9 what - - - what is required in order to do that; is asking
10 for the charge enough.

11 And although here, I think that - - - that
12 there's at least arguably more than just asking for the
13 charge, because there's - - - there - - - as I indicated
14 earlier, I think some suggestion in summation, in
15 cross-examination, and so forth, that - - - that that was
16 something that was more than just passively accepted.

17 MS. MOLLISON: Well, respectfully, Your Honor, I
18 mean, again, just going over those questions that came up
19 in cross-examination, they were so basic that if we were to
20 say that we can't even ask those basic questions about a
21 case, a case where the defendant presumably may have been
22 an agent - - -

23 JUDGE RIVERA: I thought the People - - -

24 MS. MOLLISON: - - - the defendant has no right
25 to - - -

1 JUDGE RIVERA: - - - asserted that there was a
2 statement from counsel at opening or before opening that
3 this looked like a case that involved agency.

4 MS. MOLLISON: There - - - there was. And
5 counsel said, I'm not sure, I haven't seen the grand jury
6 testimony, and perhaps there was none, and then so I'm
7 going to wait to see what the prosecution presents. And
8 then it turns out the prosecution presented an agency case
9 far stronger than he would've even imagined. In - - -
10 indeed, the - - - the police officer testified that he saw
11 the defendant, Mr. Valentin, and his friend in the
12 neighborhood, and he thought that they were buyers.

13 JUDGE ABDUS-SALAAM: Counsel, in that
14 circumstance that you posited, that the court might sua
15 sponte determine from the evidence that comes in that an
16 agency defense is warranted, whether or not the defendant
17 is asking for it, would the court then also be able to,
18 under Molineux, say, what - - - well, but I'm going to
19 allow the People to rebut it?

20 MS. MOLLISON: I think that - - - I think that's
21 exactly the rule that the prosecution is - - - the prosecu
22 - - - what - - - the rule the prosecution would ask this
23 court to adopt is that when its own case is weak enough to
24 - - - to support an agency defense, or an agency theory, or
25 require that the jury is instructed on an agency,

1 essentially, its priors will come - - - the defendant's
2 priors will come in, I think - - -

3 JUDGE ABDUS-SALAAM: I guess my question is
4 slightly different. Would it be error for the court to
5 say, I'm going to allow this evidence of a prior conviction
6 under Molineux because I'm balancing this. I'm allowing
7 agency, I see that is - - - is there, and I'm also going to
8 allow Molineux question.

9 MS. MOLLISON: I think - - - I think that it
10 would be error under the same discretionary principle,
11 which is that this Molineux evidence is far too
12 prejudicial, especially in a case where the defendant has
13 done nothing to - - - to probe that intent, to probe that
14 intent question; it has simply relied on the weaknesses of
15 the prosecution's case.

16 And just finally, as to Judge Stein's question
17 regarding is the charge enough, I do think that Gonzalez
18 answers that question for us. I think that Gonzalez tells
19 us that asking for a charge that is relying only on the - -
20 - the People's case-in-chief to ask for a charge simply
21 does not provide the prosecution a right to rebut its own
22 case, to shore up the weaknesses in its own case.

23 Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 (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. Jose Valentin, No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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