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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 38

JOHN GIUCA,

Respondent.

20 Eagle Street
Albany, New York
April 30, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 38, the People of the
3 State of New York v. John Giuca.

4 Good afternoon, counsel.

5 MR. JOBLove: May it please the court, my name is
6 Leonard Joblove for the appellant on this appeal by the
7 People, and Your Honor, may I reserve three minutes for
8 rebuttal, please?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. JOBLove: After a hearing on the defendant's
11 440 motion, the court found that there was no proof of any
12 understanding or agreement between the prosecutor and Mr.
13 Avitto regarding providing any benefits to Mr. Avitto, and
14 the Appellate Division did not disturb that finding of the
15 440 court.

16 As a result, there was no Brady disclosure
17 obligation with respect to any alleged agreement, because
18 as the First Circuit Court of Appeals has said, if there's
19 no deal, then there's nothing about a deal to disclose.

20 JUDGE STEIN: When - - - when - - - you can see
21 the evidence of either a tacit or implied agreement or
22 understanding is - - - has to be disclosed, right? So at -
23 - - at what point do the - - - do circumstances which would
24 tend to show an implied or informal understanding become
25 enough to - - - to prove that an unspoken understanding,



1 despite any protestation by the witness that there was
2 none.

3 MR. JOBLove: That is the question in - - - in
4 the case, Your Honor, and that's - - - that's - - -

5 JUDGE STEIN: Right, and what - - - no, well, I -
6 - - the question in this case is whether that was
7 established. My question is, is what do you think is
8 necessary to establish that?

9 MR. JOBLove: Yes, Your Honor. There were have
10 to be - - -

11 JUDGE STEIN: The rule, yeah.

12 MR. JOBLove: Yes, the - - - the evidence in
13 question would have to provide a reasonable basis to infer,
14 either that there was an actual agreement between the
15 prosecutor and the witness, whether expressed or tacit, or
16 even perhaps that, in the absence of an agreement, the
17 information known to the witness might have given rise to a
18 belief on his part that there was some expectation or hope
19 on his part that he would get benefits.

20 And in this case, the evidence couldn't more
21 convincingly refute any such inference, and perhaps the
22 most obvious evidence that almost conclusively establishes
23 that there could not have been an agreement was the fact
24 that Mr. Avitto ultimately received the maximum authorized
25 sentence that was permitted under his plea agreement.



1 JUDGE WILSON: But he didn't know that at the
2 time of his testimony, right? He didn't know that at the
3 time of his testimony at the murder trial.

4 MR. JOBLove: Well, that - - - that's correct,
5 Your Honor, but that was a fact that was before the judge
6 deciding the 440 motion, and it was important - - - an
7 essential question for the 440 judge was to assess the
8 credibility of the witnesses - - -

9 JUDGE RIVERA: Yeah, but - - - but - - -

10 MR. JOBLove: - - - who appeared before him.

11 JUDGE RIVERA: But if the rule includes what - -
12 - what the witness might ac - - - expect or anticipate, a
13 belief, even if it doesn't pan out, right, that - - -
14 that's the rule, right? If it doesn't - - - it doesn't
15 matter whether it pans out or not, it's whether or not that
16 witness has the expectation of getting some benefit. And
17 the benefit might not be the one you're referring to,
18 correct?

19 MR. JOBLove: Well, yes, Your Honor.

20 JUDGE RIVERA: It might be some other benefit.
21 It need not be about the incarceratory period. It could be
22 some other benefit, right? Perhaps not having to go back
23 to jail for a violation.

24 MR. JOBLove: Well, that's certainly
25 theoretically possible that there could be some other



1 expectation. But the argument that's being advanced in
2 terms of the impeachment value of the undisclosed
3 information, is that it would have given rise to an
4 argument that there was a motive to lie to avoid facing
5 that jail alternative of three-and-a-half to seven years.

6 And what the record shows, not just in terms of
7 whether there was an agreement, but whether there was any
8 expectation or hope on the part of Mr. Avitto, because when
9 he was sentenced, he faced the sentencing court,
10 approximately a year after the trial, so it's true this was
11 not known at the time of the trial, there was not any
12 argument made by either Mr. Avitto himself or his attorney
13 that there was a deal, and okay, I'm entitled to some kind
14 of benefit now, because I cooperated with the prosecutor.

15 There wasn't even a statement that, judge, you
16 know, I thought there was a deal here, whether there was or
17 wasn't. There wasn't even an argument by either the
18 attorney or Mr. Avitto himself saying, judge, can you cut
19 me a break, because I testified voluntarily, just to do my
20 civic duty in this murder case a year ago. Even that
21 didn't come up. So what better - - -

22 JUDGE STEIN: But - - - but as I understand your
23 argument, it is that even if Avitto had some hope or
24 expectation that he was going to be benefited by his
25 testimony, that wasn't borne out by any - - - that wasn't a



1 reasonable hope or expectation, because there was nothing
2 done or said by the - - - the prosecution that would
3 reasonably have - - - have led someone to believe that. Is
4 it - - - it - - - is it - - -

5 MR. JOBLove: Well - - -

6 JUDGE STEIN: - - - am I - - - is that your
7 argument?

8 MR. JOBLove: Yes, Your Honor. That in - - - in
9 that absence of an actual agreement, it's certainly
10 possible that if there was a factual basis to believe that
11 the witness had some expectation anyway - - - I know you
12 didn't promise me anything, but I think good things are
13 going to happen to me if I testify anyway - - - a statement
14 like that, presumably that should be disclosed.

15 Or, if there's an array of circumstances that
16 would reasonably lead to an inference that this might be
17 what the witness was thinking, but at some point, the
18 prosecutor can't be expected to get into the head of the
19 witness and hear the fact that when he faced the three-and-
20 a-half to seven, there was not a peep about, I thought I
21 was going to get some kind of break, provides an insight
22 into what - - - what his thinking was.

23 And in this case, the only way that a narrative
24 can be put together that even would remotely suggest, oh,
25 maybe there was some belief on the witness' part, is really



1 by cherry-picking some of the facts out of this array of
2 evidence that was introduced in its entirety before the 440
3 court. And to say, well, if you take out of context that
4 the defendant was brought over to court by the prosecutor
5 in this case, and then, lo and behold, he was allowed to
6 stay out, if all you had was that information, you might
7 say, maybe the witness thought that one thing had something
8 to do with the other.

9 JUDGE STEIN: Well, when does it become a jury
10 question?

11 MR. JOBLove: There would have to be some
12 reasonable basis in the record from which a jury might be
13 able to infer that this was an expectation on the part of
14 the witness. And after all, under the Brady rule,
15 materiality is an essential component of the Brady
16 disclosure obligation.

17 JUDGE GARCIA: Going back to - - - to Judge
18 Wilson's question, I mean, when do we look at this? I
19 mean, you did have a long 440 hearing, and certain findings
20 were made. But at the time of the trial, here's a witness
21 testifying, and wouldn't it be relevant to their ability to
22 cross that witness, something along the lines of state-of-
23 mind of an expectation, that it was this ADA, sitting right
24 next to you, sitting right in the well of the courtroom
25 that's prosecuting this case, that brought you to that



1 courtroom. Doesn't that add value to the impeachment of
2 that witness at the time of the trial?

3 MR. JOBLove: Well, first of all, Your Honor,
4 that fact would not come out in isolation, because after
5 all, the alleged Brady violation here was not disclosing
6 the circumstances surrounding the witness coming forward,
7 the circumstances surrounding the prosecutor taking him to
8 court, and there's no reason to believe that the evidence
9 would have stopped just with regard to, okay, the
10 prosecutor on this case brought you over. Well, what else
11 happened is that when I met with the prosecutor in the
12 office, they asked me - - - she asked me, what am I looking
13 for, and I said, I'm not looking for anything.

14 JUDGE RIVERA: But what is - - - why - - - why
15 does the prosecutor get to go through that whole analysis
16 and make that decision, as opposed to just to as Judge
17 Stein asked you, why isn't that - - - you can make that
18 argument to the jury. Why isn't that left for the jury to
19 decide - - -

20 MR. JOBLove: Well, the - - -

21 JUDGE RIVERA: - - - what to make of all these
22 events that have gone on?

23 MR. JOBLove: It - - - it could be, and
24 ordinarily that's for the jury to decide, but the question
25 is whether there was a failure on the part of the People to



1 disclose information that, if disclosed, would create a
2 reasonable probability of changing the outcome of the
3 trial. And to expect the prosecutor, who has personal
4 knowledge - - -

5 JUDGE RIVERA: Probability or possibility?

6 JUDGE GARCIA: Possibility - - -

7 JUDGE RIVERA: Was isn't probability instead of
8 possibility?

9 MR. JOBLove: Because there was - - - there was
10 no specific request in this case.

11 JUDGE RIVERA: Well, let's say we disagree with
12 you, so argue your point under the reasonable possibility
13 standard.

14 MR. JOBLove: Right. So it's for the jury to
15 decide based on the totality of the information. And what
16 we're looking at is whether a prosecutor who knew that
17 there was no cooperation agreement with this witness,
18 because after all, that testimony was amply corroborated by
19 the events at Mr. Avitto's sentencing and the credibility
20 findings of the court.

21 JUDGE RIVERA: But yet that prosecutor might not
22 really know if the witness has some expectation. They
23 might - - - the prosecutor might think, well, that would be
24 unreasonable; how could you think - - - how could you have
25 such an expectation? I've never said anything to you;



1 you've never asked me for anything, right? And again, why
2 isn't that all for the jury?

3 MR. JOBLove: It is, if - - - if this information
4 came out and was put in front of the jury and then we had
5 testimony from the executive ADA and the D - - - DA's
6 Office about she meant about "special attention" and
7 testimony from Sean Ryan about the conversations he had
8 with the witness and testimony from the detectives about
9 the fact that they were stunned, but in fact, the witness
10 ultimately never asked for any benefit, it's clear enough
11 how that would be evaluated by the jury.

12 And there's no reasonable possibility that that
13 would change their assessment of the credibility of this
14 witness, and particularly, where defense counsel, during
15 his summation, was able to make precisely the argument.
16 The facts that were put before the jury - - -

17 JUDGE RIVERA: But why work so hard not to let
18 the jury hear it? Why not let the jury know that the
19 prosecuting - - - the prosecutor was the one who walked the
20 witness over to the courthouse and is the D - - - ADA who
21 actually stood before the judge? Why - - - why not make
22 that clear to, at least, defense counsel? Let defense
23 counsel make use of it what defense counsel thinks is
24 appropriate.

25 MR. JOBLove: Right, Your Honor, no one - - -



1 there's no evidence in this record that anybody worked hard
2 to prevent any of that information from coming forward.
3 What we're looking at is, a prosecutor trying this case,
4 when she knows that there's a cooperation agreement with a
5 witness, in the case of Mr. Beharry, she disclosed it
6 before he testified; she elicited it herself on direct
7 examination of the witness.

8 She knew that there was no agreement - - - there
9 was no basis to find that this witness would have any
10 expectation of a benefit. I can only infer that it never
11 occurred to her that there was anything to disclose. If it
12 had occurred to her, it - - - she could have disclosed it,
13 sure. There would have been nothing wrong with that, and
14 there's every reason to believe, defense counsel wouldn't
15 have used it, because eliciting the details about the
16 narrative that led to this witness going to court, would
17 have undermined the very argument he was able to make in
18 summation about the pros - - - about the witness having a
19 motive to lie when he came forward to the police.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. BEDEROW: May it please the court, Mark
22 Bederow for John Giuca.

23 CHIEF JUDGE DIFIORE: Mr. Bederow, what's the
24 evidence in the 440 record that would have allowed the jury
25 to conclude that there may have been a tacit understanding



1 here?

2 MR. BEDEROW: Your Honor, John Avitto is a
3 classic jailhouse informant, and the factual findings of
4 the Appellate Division clearly establish that he was in a
5 drug program. He left his program on June 9th. He
6 triggered a lengthy prison sentence at that point. He knew
7 a warrant had been issued for his arrest. And contrary to
8 his testimony that he simply called his counselor and went
9 back to court, what the jury didn't know is that, in fact,
10 Mr. Avitto went to John Giuca's prosecutor to offer his
11 cooperation.

12 The law of this state for decades has been that
13 if a witness has a possible motive to lie, that it's got to
14 be disclosed. That's been since Cwikla, and since before.
15 And what Mr. Joblove keeps talking about is an agreement or
16 understanding. There doesn't need to be an agreement or
17 understanding.

18 JUDGE GARCIA: Counsel, before we get to that,
19 just staying with the Chief Judge's question for a moment.
20 I'm having some trouble, or maybe a bit of confusion
21 understanding exactly what the Appellate Division did here.
22 So they said they did facts in law, but they said they
23 weren't disturbing credibility determinations.

24 As - - - as I understand the record at the 440,
25 Mr. Avitto testified to this statement that he got - - - he



1 left the program, and then he - - - the detectives
2 testified the other way. It's crystal clear, I think, in
3 the 440 record, that the 440 judge did not believe Mr.
4 Avitto, and made an absolute credibility finding, which the
5 Appellate Division says they are not disturbing.

6 So if you're accepting his lack of credibility,
7 and he's the only one to testify about that contact, where
8 do you get a finding that he contacted the detectives after
9 he left the program?

10 MR. BEDEROW: Your Honor, there is ample evidence
11 in the record that other evidence that was credited by the
12 trial court was also demonstrative of the fact that Mr.
13 Avitto clearly had a motive. In - - -

14 JUDGE GARCIA: No, but let's stick with my motive
15 right now.

16 MR. BEDEROW: In - - - in the Appellate Division
17 decision, they talk about a duty to disclose "the
18 circumstances surrounding Avitto's initial contact with the
19 police regarding" cooperating against Mr. Guica.
20 Obviously, if there is a duty to disclose, there's got to
21 be something that would have been favorable to the defense.

22 JUDGE GARCIA: Right. And I'm trying to figure
23 out what that is, given the state of the record.

24 MR. BEDEROW: The - - - the first piece of
25 evidence is the trial prosecutor's statement to the trial



1 court after Mr. Avitto testified, which was credited by the
2 court. There was a demand for Rosario material that was
3 made after the testimony. Specifically, the trial
4 prosecutor said, I was present at every single meeting that
5 occurred between the detectives and Mr. Avitto.

6 The trial prosecutor first met Mr. Avitto on June
7 13th, after he left the program. Additionally, in the EAC
8 records, there is an entry from June 13th, in which a
9 contemporaneous entry was made, in which Sean Ryan, the EAC
10 counselor, indicated that the trial prosecutor told Mr.
11 Ryan that Avitto contacted detectives on June 9th, the same
12 day he left the program.

13 I think another critical point is this. At
14 trial, all Mr. Avitto said was that I contacted the police
15 some time in June. His credibility was a hotly contested
16 issue, once he testified at this trial. It's strange
17 credulity that in these circumstances, the prosecutor would
18 not have asked Mr. Avitto or either of the detectives, who
19 both testified at trial - - - one of them testified only
20 against the co-defendant - - - but they never asked them
21 the very simple question, when did you first meet Mr.
22 Avitto? Where was he?

23 Had they done so, if he had been in his program
24 as the People are arguing after the fact, then perhaps that
25 would have minimized the possibility here.



1 JUDGE RIVERA: So - - - so - - - so in - - - in
2 part, are you trying to argue that it - - - it - - - the AD
3 doesn't say that it accepts those factual findings. It
4 says, "giving proper deference to the credibility
5 findings", but does have other findings of fact in that AD
6 decision that it may have found that the judge accepted
7 that credibility and could have thought that that's what
8 the police officers genuinely believed, but there's other
9 evidence that - - -

10 MR. BEDEROW: Yes - - -

11 JUDGE RIVERA: - - - tilts this in a different
12 direction.

13 MR. BEDEROW: Your - - - Your Honor, the reversal
14 is on the facts of the law. So obviously something
15 factually had to be disagreed with, but also, the - - - the
16 evidence in terms of a court - - -

17 JUDGE FEINMAN: But - - - but in that writing
18 from the Appellate Division, do they actually say what that
19 facts are that they are changing?

20 MR. BEDEROW: They - - - they don't, Your Honor,
21 but one important thing they don't say, is they don't say
22 that there was no finding of a tacit agreement to bring it
23 back to that. What the court said was that there was no
24 expressed agreement, but there was a strong inference that
25 the jury could have found that Avitto either expected a



1 benefit or had a motive to lie. So obviously, they did not
2 conclude that there was no tacit agreement.

3 JUDGE RIVERA: So - - - so are you reading this
4 language in the Appellate Division decision, at a hearing
5 on the motion, the evidence demonstrated that "after Avitto
6 left the drug program on June 9, 2005, he contacted police
7 that same day regarding providing information on the
8 defendant's case" as not being a factual finding?

9 MR. BEDEROW: No, that was a factual finding.
10 What I was reading, Your Honor, is on the next page where -
11 - -

12 JUDGE RIVERA: But that's what I'm saying, if
13 that's the factual finding - - -

14 MR. BEDEROW: Well, the court - - -

15 JUDGE RIVERA: - - - is it possible to read the -
16 - - the paragraph at the end of the writing, that says,
17 "giving proper deference to the credibility findings", that
18 the judge may have indeed thought that witnesses were
19 testifying truthfully, but that the Appellate Division
20 panel was deciding this particular fact, based on the
21 evidence.

22 MR. BEDEROW: There is other credible evidence in
23 the record, which contradicts what the detectives said.
24 What the Appellate Division did was make a fact finding,
25 which juries do every day, when there's conflicting,



1 credible evidence.

2 JUDGE STEIN: Well, my - - - my - - -

3 JUDGE FEINMAN: Is that a fact - - - I'm sorry;
4 go ahead.

5 JUDGE STEIN: My question is, is that this is
6 about im - - - impeaching - - - you - - - you called him a
7 classic - - -

8 MR. BEDEROW: Yes.

9 JUDGE STEIN: - - - jailhouse informant.

10 MR. BEDEROW: Yes.

11 JUDGE STEIN: But you know, getting - - - getting
12 back to your adversary's point, if the prosecutor knew that
13 no promises were made, and - - - and - - - and it just
14 really never occurred to her that he was actually thinking
15 that there was some tacit agreement here, the - - - the
16 fact of the matter is, is that defense counsel cross-
17 examined Avitto, like any jailhouse informant, and brought
18 out his - - - his incentive to - - - to testify falsely.
19 So what - - - what would have prompted the - - - the
20 prosecutor to think that anything more was required?

21 MR. BEDEROW: There's two critical points. The
22 first is, there's testimony from the trial prosecutor that
23 when she met with Avitto, Avitto said I wanted a different
24 program. And something very important happened when they
25 were walking back to court. It's in the trial prosecutor's



1 testimony. She said specifically that, I don't know what's
2 going to happen; you may get remanded, but we're going to
3 tell them what you said. And she did. She went to court
4 and said that he cooperated, so he sees that. In his mind,
5 is that something the jury could have determined would give
6 him a motive to lie, or that he received - - -

7 JUDGE STEIN: Well, but is that the only
8 question? You know, he - - - anything could be in his
9 mind, but doesn't there have to be enough for the
10 prosecutor to think, well, yeah, maybe - - - maybe he did
11 expect this, and maybe there was something that I did to
12 lead him to expect that, before the prosecutor has an
13 obligation to disclose. In other words, the prosecutor
14 can't be obligated to disclose something that he - - - that
15 the prosecutor doesn't even realize exists.

16 MR. BEDEROW: Your Honor, I think another
17 critical component of this, is something else the court
18 said in Cwikla, which is this inference of an expectation
19 of a benefit is increased when there is misleading conduct.
20 And one thing the court should not avert its eyes to here,
21 is that the Appellate Division also found that Avitto
22 mislead the jury with his testimony about what happened.
23 The prosecutor failed to correct that testimony, and in
24 fact, emphasized and exploited it in summation.

25 JUDGE STEIN: But the record, I thought, wasn't



1 clear about whether the prosecutor knew about some of the
2 additional - - -

3 MR. BEDEROW: Judge, the - - - the prosecutor was
4 obviously present for all the critical events on June 13th.
5 For some reason, in summation, what she chose to say was
6 that Avitto simply called his counselor, and went back to
7 court, and that he was released because the court found him
8 responsible again and again.

9 The record is clear that that's the exact
10 opposite of what happened with Avitto. Why would the
11 prosecutor literally whitewash this from the narrative?
12 Why didn't she simply correct the record and say, Mr.
13 Avitto, the DA, who was that? It's you, Ms. Nicolazzi.
14 Why wouldn't she do that? The next thing she did was say,
15 it wasn't this judge. So she kept herself from this, but
16 emphasized that Guica's judge was not the one who released
17 Avitto.

18 JUDGE RIVERA: Counsel, can I just clarify. Is
19 the claim about the "benefit" limited to the potential jail
20 time, the sentence, or is it limited to some other - - - or
21 is there a mention of any other benefit?

22 MR. BEDEROW: No, thank you, Your Honor. The
23 benefits here were simply staying out of jail and not being
24 remanded. He already had a plea agreement with the
25 prosecution, so the benefits here were simply staying out



1 of jail, and the final point - - - I - - - I see my red
2 light is on - - - to Judge Rivera's question is, it's
3 obvious he benefitted. When he was in the program, doing
4 well, he was in a restrictive environment at this program.
5 When he violated the program, and left, but cooperated,
6 what happened?

7 The DA told the court about this, and said, we
8 want him to stay at his mother's, which is ROR, and from
9 that point on throughout the time that he was a witness in
10 this case, he was in a less restrictive environment. The
11 jury had a right to know that. That's a benefit. He was
12 in a much more favorable position, only because he violated
13 his program, and he cooperated. And all of that was
14 concealed from the jury.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. BEDEROW: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MR. JOBLove: Just to address - - -

19 JUDGE RIVERA: Counsel, why - - - why - - - why
20 isn't that true that it - - - it's not necessarily waiting
21 for a benefit later on when it comes to an incarceratory
22 period, but it's that a benefit has already been received,
23 and there are these constant reminders of the benefit.

24 MR. JOBLove: Well, Your Honor's question assumes
25 that there would be a basis to infer that the treatment of



1 the witness after he returned to court had anything to do
2 with the prosecutor's conduct or the position at the DA's
3 office. Once again, if the information that was elicited
4 at the 440 hearing is viewed - - -

5 JUDGE RIVERA: What's the point of saying he's
6 cooperating if not to inform a judge - - -

7 MR. JOBLove: Oh, they - - - this was - - -

8 JUDGE RIVERA: - - - of a particular treatment
9 you're looking for - - -

10 MR. JOBLove: Right. The - - -

11 JUDGE RIVERA: - - - for this witness?

12 MR. JOBLove: The record - - - the records show
13 that this witness was interviewed - - - came to the DA's
14 office and was interviewed by the DA, in the presence of
15 two or three detectives, and then at that meeting,
16 volunteered that he had this warrant as a - - - as a result
17 of having left the drug program on the 9th.

18 The prosecutor, knowing there was an open
19 warrant, felt it was her duty to make sure that he's
20 returned. Called the part, found the part was still up,
21 and then went back to the part accompanying the witness.
22 The witness had - - - had explained to the prosecutor at
23 that meeting, by the way, the reason I left the program
24 isn't because I'm trying to avoid drug treatment; I didn't
25 think that this particular program was meeting my needs, in

1 terms of my psychiatric history.

2 And so, she went over, approached the bench, was
3 able to transmit that information to the court, period.
4 And then she made clear, both in her testimony and in - - -

5 JUDGE RIVERA: Why isn't that a benefit? Why
6 isn't having the ADA do that a benefit?

7 MR. JOBLove: She was merely transmitting
8 information to the court and then taking a complete hands-
9 off attitude, and in fact, communicated to EAC - - -

10 JUDGE RIVERA: But his own counsel couldn't do
11 any of that?

12 MR. JOBLove: It had to be communicated to the
13 counselor. She wanted to make sure that information was
14 made known - - - made known to the judge. It was simply
15 transmitting the information, and that's what she testified
16 to. It's perfectly reasonable.

17 JUDGE FEINMAN: And this - - - and this is in the
18 drug treatment court, where it's not necessarily the
19 typical adversarial role. All of the participants there
20 are supposed to be promoting the goal of the treatment
21 court.

22 MR. JOBLove: Yes.

23 JUDGE FEINMAN: Whether it's the DA, the defense
24 counsel, the counselor, the judge.

25 MR. JOBLove: Yes, Your Honor. And there was



1 evidence at the hearing about multiple chances are - - -
2 are common. This was a voluntary return on the warrant.
3 The trial prosecutor in the defendant's case made clear
4 that she knew almost nothing about drug court. She was not
5 familiar with it. She communicated - - -

6 JUDGE RIVERA: Because her goal isn't about the
7 treatment court. Her goal is about ensuring this witness
8 is available to her, and this witness is in a condition to
9 come and testify in a way that's favorable to the
10 prosecution.

11 MR. JOBLove: I dis - - - I disagree with the
12 last part of Your Honor's question. It was clear from the
13 record, that the goal of the DA's office here was simply to
14 make sure that they knew where this witness was, in case -
15 - - because he was a potential witness in this case. And
16 all the communications fit that theme that, we just want to
17 know where he is. And the prosecutor actually communicated
18 to EAC, handle the case however you see fit; I am not
19 making any recommendation. But - - -

20 JUDGE RIVERA: But when - - - why are they then
21 calling the DA's office before they go back to court with
22 him, when they're considering throwing him out of a
23 program?

24 MR. JOBLove: I don't believe that the record
25 shows that there was a court date - - - I believe it was

1 September 6th where the court, the judge, is saying
2 something to the effect that, I'm going to leave him out
3 and I don't know what the position - - -

4 JUDGE RIVERA: But I thought there were notes
5 that showed that there was a call made to the prosecutor's
6 office, couldn't get through, and sort of, that's part of
7 that conversation to the court. Why make that call?

8 MR. JOBLove: Well, the call was - - -

9 JUDGE RIVERA: If - - - if - - - if all the DA's
10 office is worried about is knowing the status, and has
11 said, do whatever you want; we're on board with whatever
12 you want to do, wouldn't you merely call them afterwards,
13 not beforehand.

14 MR. JOBLove: Well, at least, again, I'm not sure
15 spe - - - which specific date Your Honor's referring to,
16 but for example on September 19th, which is while the trial
17 was already underway, and that Mr. Avitto had been
18 discharged from a program for bringing cigarettes into the
19 program, and that there's notes from the EAC counselor - -
20 -

21 JUDGE RIVERA: Counsel, it's not the first time
22 he had fallen, right?

23 MR. JOBLove: Oh, correct, Your Honor. That's
24 correct. And there was ample evidence about the multiple
25 chances that were given to defendants and the drug



1 treatment alternative option, but the point is, that on
2 that date, the EAC counselor was notifying the prosecutor
3 about his status, his whereabouts. He was expected to be
4 called as a witness within days.

5 And if - - - if I may make just one more point
6 going back to the question that was raised during defense
7 counsel's argument about these - - - the testimony of both
8 detectives regarding the fact that Mr. Avitto had come
9 forward and talked to them and recounted the information
10 regarding the defendant's admissions well before he had
11 absconded from the drug program. And that would completely
12 eliminate this whole argument that he only came forward
13 because he had a motive to lie. That's the argument that
14 defense counsel was able to make at the trial, but it
15 wouldn't have been borne out if these facts had been
16 elucidated.

17 And to say that the Appellate Division overturned
18 the credibility findings of the 440 court regarding both of
19 these detectives, which was further corroborated by Mr.
20 Avitto's own statements to the defense investigator, which
21 were recorded, and which were in evidence at the hearing,
22 where the defense investigator in 2013, well before this
23 hearing, is apparently trying to elicit an issue about the
24 timing from Mr. Avitto in the conversation. And despite
25 five different tries, and this is at pages 2575 of the



1 record to 2577 of the record. So didn't you come forward
2 after you had already been - - - after you already
3 absconded from the program? No, it was before. I was - -
4 - I first came to talk to - - -

5 JUDGE RIVERA: So do you - - - do you take the
6 position that the Appellate Division could not have made a
7 separate - - - a different, excuse me - - - factual finding
8 from the hearing court as to when - - -

9 MR. JOBLove: It was - - -

10 JUDGE RIVERA: - - - Mr. Avitto went to the
11 police and the DA?

12 MR. JOBLove: It's generally within their
13 authority to make credibility findings, and all they said
14 about credibility findings is they were giving proper
15 deference to the credibility findings of the court - - - of
16 the 440 court, and their ability to reject credibility
17 findings would presumably be limited to having support in
18 the record, and I - - - there's not really support in the
19 record here to do that.

20 But moreover, since when would they say that
21 they're going to reject the credibility findings of the
22 court with regard to not one, but two detectives, and not
23 say that that's what they're doing? And all they say about
24 deference and credibility is that they're deferring to the
25 credibility findings of the 440 court.



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. JOBLove: Thank you.

(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 of the State of New York v. John Giuca, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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