

State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711 or gspencer@nycourts.gov.

To be argued Thursday, April 27, 2017 (in White Plains)

No. 60 People v Miguel Viruet

(papers sealed)

Miguel Viruet was charged with murder for the fatal shooting of a patron of a Queens nightclub in May 2010, when Viruet allegedly fired a fusillade of bullets at the bar from across the street. Earlier that night, Viruet's brother was punched in the face outside the bar and argued with a bouncer about who had done it, then called Viruet to the scene. Viruet got into a verbal altercation with the bouncer in front of the club, drawing a group of onlookers, then left in his car with his brother and other companions. The bouncer and a patron said Viruet returned just before closing time and began firing from the other side of the street.

Before trial, Viruet's attorney made a discovery request for any video recordings of the crime scene. A detective had retrieved footage from a surveillance camera mounted outside the club's front door. He viewed the videotape with the bouncer, but then lost it. The detective and bouncer testified that the camera recorded events occurring directly in front of the nightclub, but did not show any of the area across the street where the shooter stood. Viruet requested an adverse inference charge instructing jurors that they could infer that the missing videotape would have been favorable to the defense. Supreme Court denied the request, saying "the issue here is who was across the street shooting into the club," which the tape did not record. It said there was no testimony to suggest anything on the tape "would be helpful to the defense." Viruet was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, Second Department affirmed. "Supreme Court properly declined to give an adverse inference charge with respect to a missing surveillance videotape," it said. "There was no evidence that the video camera recorded anything relevant to the case, and the evidence suggested otherwise.... Furthermore, defense counsel thoroughly cross-examined the officer about the missing videotape and utilized its loss as part of his summation, and there was no prejudice to the defendant, since the two witnesses who had seen the videotape prior to its loss testified that the shooter was not depicted in the videotape...."

Viruet argues he was entitled to an adverse inference instruction under People v Handy (20 NY3d 663 [2013]), which held that "when a defendant in a criminal case, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to an adverse inference charge." He says, "As in Handy, because the tape was lost there was no way to know precisely what it showed. But it is indisputable that documentary evidence of even a portion of the crime itself is unmatched in its objectivity. The footage could have been used as the most reliable evidence of what actually happened, as well as to impeach the People's witnesses' recollection of the events that preceded the shooting and what occurred during the shooting itself," since the camera was trained on the area where the witnesses said they were standing.

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For respondent: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696

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To be argued Thursday, April 27, 2017 (in White Plains)

No. 61 People v Jamar Bethune

Jamar Bethune fatally shot 13-year-old Marquis Perez in the victim's Brooklyn apartment in March 2008. After Perez called Bethune insulting names and startled him by jumping out from hiding, Bethune retrieved his gun from a bedroom, pointed it at the boy's head, and fired twice. Bethune told investigators -- and his attorney argued at trial -- that the shooting was accidental, that Bethune did not know the gun was loaded and did not mean to pull the trigger. The jury initially convicted him of second-degree murder and acquitted him of criminal possession of a weapon with intent to use it unlawfully, a verdict Supreme Court vacated as inconsistent.

The court directed the jury to resume deliberations on all counts and delivered a supplemental charge in which, according to the original transcript of the trial, the court several times instructed jurors that second-degree murder is an "unintentional" crime. The jury ultimately convicted Bethune of both the murder and weapon possession counts, and he was sentenced to 25 years to life in prison.

Five years later, when Bethune filed his brief at the Appellate Division, he argued the trial court violated his due process rights by instructing the jury that intentional murder was an unintentional crime. The prosecutor asked the court reporter to review her notes on the supplemental jury charge, then moved to resettle the record on the ground that the reporter had found she mistakenly typed "unintentional" five times when the trial court actually spoke of "intentional" murder. The reporter certified a new transcript in which she replaced the word "unintentional" with "intentional" each time. Bethune asked the trial court to hold a reconstruction hearing at which the court reporter could be questioned about the changes. The court rejected the request, finding a hearing was unnecessary, and adopted the new transcript.

The Appellate Division affirmed the conviction based on the new transcript, saying the transcript was "properly resettled to reflect that the challenged portions of the charge represented transcription errors." It cited People v Santorelli (95 NY2d 412), which said, "Not every dispute about the record mandates a reconstruction hearing.... [T]he Trial Judge considered, and rejected, defense counsel's recollection of what transpired.... The Judge -- 'final arbiter of the record' ... -- had a very vivid recollection of the disputed proceeding, and under the circumstances, determined a reconstruction hearing was unnecessary."

Bethune argues the Appellate Division "erred in its holding that the trial transcripts were properly resettled to materially alter the court's charge to the jury, without holding a full hearing in the defendant's presence, where there was no sworn affidavit from the stenographer attesting to the reason for the differences between certified transcripts generated almost five years apart and neither the trial judge nor prosecutor had any specific recollection of what the jury was actually told during the original charge and supplemental charges to the jury."

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For respondent: Brooklyn Assistant District Attorney Jodi L. Mandel (718) 250-2535

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No. 59 For the People Theatres of N.Y., Inc. v City of New York

Fifteen years ago, owners of adult businesses in New York City brought this action to challenge the constitutionality of amendments the City Council adopted in 2001 to strengthen its zoning regulations for topless clubs and sex-oriented theaters, video and book stores. The City's original Adult Use Zoning Ordinance was enacted in 1995 to disperse "adult establishments" to industrial and commercial zones, based on a 1994 study that found they had negative secondary effects on surrounding areas. The statute defined "adult establishment" as one where a "substantial portion" of its floor space or stock was devoted to sex-related merchandise or entertainment. When the definition was challenged as unconstitutionally vague, the City adopted the "60/40 rule" which provided that a business was not an adult establishment if less than 40 percent of its floor space or inventory was devoted to adult shows or products. Many adult businesses reconfigured their operations to stay within the 40 percent limit, becoming what were called "60/40 establishments."

The City responded in 2001 by amending the zoning law to delete the phrase "substantial portion" from the definition of "adult establishment." As a result, businesses that offer adult fare in any portion of their premises would be subject to the adult use zoning restrictions. In 2005, this Court rejected the plaintiffs' facial challenge to the amendments in For the People Theatres v City of New York (6 NY3d 63), but found that "a triable issue of fact has been presented as to whether 60/40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found ... to create negative secondary effects -- as plaintiffs contend -- or whether these businesses' technical compliance with the 60/40 formula is merely a sham -- as the City contends." It remitted the case for trial, saying, "If the trier of fact determines ... that the City has fairly supported its position on sham compliance -- i.e., despite formal compliance with the 60/40 formula, these businesses display a predominant, ongoing focus on sexually explicit materials or activities, and thus their essential nature has not changed -- the City will have satisfied its burden to justify strengthening the 1995 Ordinance by enacting the 2001 Amendments.... If not, plaintiffs will prevail on their claim that the 2001 Amendments are insufficiently narrow and therefore violate their free speech rights."

After trial, Supreme Court ruled the amendments violate the Federal and State Constitutions. It found "significant and distinct differences between the 1994 adult entities and the 60/40 entities, so that the current establishments no longer resemble their 1994 predecessors. Given their current arrangements and secondary characteristics, these entities no longer operate in an atmosphere placing more dominance of sexual matters over nonsexual ones."

The Appellate Division, First Department affirmed on a 3-2 vote, finding the City failed to justify the amendments. While the businesses' promotion and sale of explicit materials show they remain "of an 'adult nature,'" it said, their less graphic signage, ease of access to nonadult material, and relative lack of restrictions on minors "is not indicative of a predominant sexual focus in most of the stores" and clubs. The dissenters argued the City "has sustained its burden as to sham compliance by demonstrating that by and large the essential character of the 60/40 businesses has not changed, even if their physical structure has."

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