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COURT OF APPEALS
STATE OF NEW YORK

ANTHONY DEBELISS,
Appellant,

-against-

PEOPLE,

Respondent.

NO. 27

20 Eagle Street
Albany, New York
March 16, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

MATTHEW BOVA, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorney for Appellant
120 Wall Street
28th Floor
New York, NY 10005

R. GRACE PHILLIPS, ESQ.
OFFICE OF THE BRONX DISTRICT ATTORNEY
Attorney for Respondent
198 East 161st Street
Bronx, NY 10451

Colin Richilano
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 27, People v. Debellis.

3 MR. BOVA: Good afternoon. May it please the
4 court. Matthew Bova for Mr. Debellis. I would request two
5 minutes for rebuttal.

6 ACTING CHIEF JUDGE CANNATARO: You have two
7 minutes, Mr. Bova.

8 MR. BOVA: Defense counsel here conceded weapon
9 possession and failed to request the only applicable
10 defense, effectively directing a guilty verdict against his
11 own client. This was not meaningful representation.
12 Certainly not the meaningful representation that the state
13 constitution mandates.

14 JUDGE RIVERA: So what in the record supported
15 that defense?

16 MR. BOVA: So Mr. Debellis' testimony. So at the
17 time that -- so at the time that counsel is analyzing this
18 issue -- we have to really look at the charge conference
19 and see what is before -- what is before defense counsel as
20 far as the record goes and what the law is. Mr. Debellis
21 expressly testifies that he goes to Carmel, removes the
22 firearm from the safe, brings it to the Bronx, and that he
23 is going to turn it in in exchange for cash under the NYPD
24 buyback program. That testimony has to be credited for the
25 purposes of a defense instruction. But defense counsel --



1 JUDGE GARCIA: There has to be a reasonable view
2 of the evidence that supports that testimony, doesn't
3 there?

4 MR. BOVA: No, no, under --

5 JUDGE GARCIA: No?

6 MR. BOVA: No because under -- no. Under the
7 law, under Watts and the longstanding rule as far as
8 reasonable view goes, you would credit the defense evidence
9 and here it's the defense testimony. And it becomes an
10 issue of credibility for the jury. Now, there's --

11 JUDGE GARCIA: But what if there's conceded
12 evidence and there's no reasonable view of that evidence
13 that supports that charge?

14 MR. BOVA: So the question that underlies the
15 charge is whether or not he is, in fact, in the process of
16 voluntarily surrendering a weapon.

17 JUDGE GARCIA: Right, so let's do -- let -- what
18 about a hypothetical where same facts, hypothetical though.
19 On the way down to the Bronx, he stops off and robs
20 somebody, not with a gun but with a knife, and they pull
21 him over. And he says I was on my way to the buyback
22 program to give this gun back. Does that destroy your
23 buyback defense for the gun?

24 MR. BOVA: I don't think it -- I think that goes
25 to the jury because you still have to credit it.



1 JUDGE GARCIA: Okay.

2 MR. BOVA: Because it's not factually impossible.
3 But that's a pretty -- those facts are completely different
4 because it would be very difficult to persuade -- to
5 persuade a jury on those facts, that you want to
6 participate in this buyback program which is a lawful,
7 sensible thing to do if you want to get rid of a gun and
8 acquire the money before you --

9 JUDGE WILSON: Is there some point where it could
10 become so unreasonable that you would say no, it doesn't
11 have due credit? For example, he testifies I was driving
12 along the expressway with my sunroof open and it dropped
13 into my car. Still have to get -- give the instruction?
14 And -- and I decided I would take it to the Bronx to turn
15 it in.

16 MR. BOVA: I mean, you -- I think that sounds
17 completely implausible. But under the law, you get the
18 instruction. I mean, this is not -- this is not some --

19 JUDGE WILSON: And the jury has to -- and the
20 jury has to decide whether they're going to believe that or
21 not?

22 MR. BOVA: Yes, but -- but that -- but these
23 scenarios are completely different than what we have here.
24 The -- this is the scenario that will come into play when
25 someone is surrendering a firearm, it's very similar to



1 Watson except --

2 JUDGE TROUTMAN: And how does -- how is this
3 defense impacted by the existence of an order of protection
4 to the benefit of the wife that he was supposed to have
5 surrendered already weapons?

6 MR. BOVA: So the -- the fact that there is the
7 order of protection actually confirms counsel's
8 ineffectiveness because from start to finish -- finish of
9 this case, counsel is trying to get this issue in front of
10 the jury. He's trying to get this jury to determine
11 whether Mr. Debeliss is credibly alleging that he is on his
12 way to the buyback program. But instead of --

13 JUDGE TROUTMAN: So was he trying to invoke
14 sympathy? The judge suggested that he was trying to get
15 nullification because he was putting sympathetic facts. He
16 had a fight with his wife about money because he lost his
17 job.

18 MR. BOVA: But sympathy is no substitute for a
19 real cognizable defense. Jury nullification, a mercy plea,
20 those are not real defenses.

21 JUDGE TROUTMAN: Does it matter in this instance
22 the defendant appeared sometimes, didn't appear? He had
23 different views of what should be offered. At one point,
24 he wanted to offer evidence that he was sexually assaulted
25 when he was being searched.



1 MR. BOVA: No, that -- that has no bearing on the
2 question of whether counsel was ineffective for failing to
3 request the instruction because the question is what is the
4 record that counsel is looking at. But I just want to step
5 back, too, in terms of the meaningful representation
6 question. This is not a case involving an absurd fact
7 pattern that counsel believes is a terrible defense. From
8 start to finish in this case, counsel's factual theory from
9 opening through hundreds of pages of colloquy about what
10 the defense strategy is, is that Mr. Debeliss is driving
11 his car with the weapon to surrender it.

12 JUDGE GARCIA: So I'm a bit confused by the
13 colloquy. I've read it, the 1306, whatever. And they seem
14 to talk about a buyback program in there as well. But we
15 don't force counsel to ask for an instruction that they
16 wouldn't be entitled to give which is why I'm asking about
17 the buyback instruction. I've watched the video and
18 listened to the accompanying audio. And the police
19 repeatedly ask him -- the police that he's supposedly going
20 to their precinct to turn over a gun, do you have a gun,
21 and he says no on the video. And you can hear it. So how
22 is that possibly compatible, a reasonable view of that
23 video, which there's no question that it's authentic, how
24 is the defense I was going to turn this in compatible with
25 him telling a representative of the police force he's going



1 to supposedly turn the gun in to I don't have one?

2 MR. BOVA: Well, because Mr. Debellis actually
3 directly addresses that in his testimony. He says I didn't
4 think it would do any good. Because a sensible person
5 could not -- could certainly say if I advertise to this
6 police officer that I'm on my way to the buyback program,
7 he might not believe me and instead, he's going to arrest
8 me.

9 JUDGE GARCIA: It's not even that. You know,
10 it's not even that he says I don't have one, which he does,
11 but it takes him two minutes to pull over when they're
12 behind him. And then at the very end of the video, he goes
13 in and he's doing something in the area where the gun is,
14 and that's how they find it. So all of that evidence,
15 which is, again, on the videotape and on the audio, is
16 completely inconsistent with his defense.

17 MR. BOVA: This -- this debate that we're having
18 right now I -- I think is exactly the debate that the jury
19 should have had during jury deliberation.

20 JUDGE GARCIA: No, this is the debate that the
21 judge needs to go through in deciding whether the evidence
22 is -- a reasonable view of the evidence supports the
23 charge.

24 MR. BOVA: Well, under the reasonable view
25 standard for -- since time in memoriam in this court,



1 Watts, every case involving reasonable view is you look at
2 the evidence that the defense presents and you credit it if
3 it's a question of -- it's -- it's a question of --

4 JUDGE SINGAS: You just credit it just like that,
5 just because he said it?

6 MR. BOVA: If it's a question of credibility,
7 yes, Your Honor, it goes to the jury.

8 JUDGE SINGAS: Well, what about objectively?
9 Like, what are the facts that support his statement that he
10 was going to the buyback program?

11 MR. BOVA: Well, he also testifies -- he also
12 testifies that he had a horrible work accident and had his
13 finger -- has his finger sawed off from falling from a
14 ladder. He's fallen on hard times.

15 JUDGE SINGAS: About -- about the --

16 MR. BOVA: He goes home to get --

17 JUDGE SINGAS: About the buyback program. Under
18 265.20, there's a second part of that that says the same
19 shall be surrendered in accordance with such terms
20 established by the superintendent, sheriff et cetera.
21 There's no evidence of that in his testimony. So why isn't
22 it -- even under Watts, why isn't a judge allowed to say I
23 don't find that that's a reasonable view --

24 MR. BOVA: So the first thing --

25 JUDGE SINGAS: -- I'm not submitting it to the



1 jury?

2 MR. BOVA: So the first thing is that Watson,
3 which at the time was decided a year before this trial,
4 simply says that where there's evidence indicating that the
5 defendant is in the process of surrendering the firearm,
6 the issue goes to the jury. That -- that authority was
7 available to defense counsel and defense counsel, the only
8 way he misses that is because he's not doing research into
9 this defense.

10 JUDGE SINGAS: So that evidence, for you, is a
11 self-serving statement that I was going to return this,
12 despite what the evidence overall at the trial, including
13 the three hours in the video, the fact that they waited an
14 hour before they even found the gun, a judge wasn't allowed
15 to consider that in determining what's reasonable to submit
16 to the jury?

17 MR. BOVA: No. And -- and this was never even
18 presented to the judge. The reason why the judge rejects
19 the def -- the absurd defense that defense counsel presents
20 -- because I just want to step back a second and focus --

21 JUDGE GARCIA: But that -- I -- I understand that
22 argument, but this is relevant to whether he was
23 ineffective for not requesting the charge; that's what this
24 is relevant to. I understand your argument that he only
25 argued for the temporary lawful possession on the common



1 law. But if we're going to assume -- you know, we're going
2 to take up that argument that he was ineffective for not
3 requesting this charge, we have to look at whether the
4 charge would have been given or not, and that's how it's
5 relevant here.

6 MR. BOVA: So as -- as to whether the charge is
7 given, Watts holds that you credit the defendant's
8 testimony and send the issue to the jury. What ends up
9 happening here is defense counsel is pursuing this factual
10 defense, defense counsel thinks this is -- this is a
11 reasonable enough defense to present to the --

12 JUDGE TROUTMAN: Well, are there two separate
13 charges or two separate defenses here? There's temporary,
14 lawful possession, and then the statutory I'm going to a
15 buyback program. Are they separate or are they the same?

16 MR. BOVA: Oh, no, they're very separate. So the
17 voluntary surrenders defense under 265.20 simply requires
18 that a person be voluntarily surrendering the firearm to
19 the NYPD precinct. The temporary unlawful possession
20 defense requires that you only possess the weapon long --
21 only as long enough as necessary to turn it in. The def --

22 JUDGE TROUTMAN: So the error is the way he -- he
23 proceeded down the wrong path? Is that your argument?

24 MR. BOVA: Absolutely. Defense counsel pursues
25 one factual theory which is he's in the process of



1 surrendering it, but he chooses the wrong legal defense.
2 He chooses an absurd temporary unlawful possession defense
3 even though for pages and pages of colloquy the prosecutor
4 and the Court are beating him over the head with the
5 argument that this is not temporary. You're conceding that
6 he -- you -- that your client had this firearm for over a
7 year unlawfully and didn't turn it in. There's nothing
8 temporary.

9 JUDGE TROUTMAN: But it's clear the statutory
10 buyback, doesn't matter how long you had it.

11 MR. BOVA: Yes, there's no temporary requirement.
12 So what counsel does is he hoists an element onto his --
13 onto his case that he didn't actually have to satisfy which
14 was the temporal requirement. Instead, what he should have
15 done, what any sensible lawyer would have done, was said I
16 have this factual theory, I need to convert it into a
17 defense that will be -- give this jury the opportunity for
18 acquittal. Instead, we get --

19 JUDGE TROUTMAN: Was he challenged by the fact
20 that there was no standard jury charge, CJI charge for it?
21 For the statutory buyback.

22 MR. BOVA: No, no. It does -- it doesn't matter
23 that there is no CJI defense because defen -- effective
24 counsel has an obligation to request any defense available,
25 whether or not there be a CJI defense or not.



1 JUDGE TROUTMAN: Is that because it could still
2 be crafted by the court, the charge?

3 MR. BOVA: Well, at that -- at -- at that point,
4 what he should have done was he should have said Your
5 Honor, under 265.20 the jury needs to be instructed that if
6 they determine that Mr. Debellis was, in fact, on his way
7 to surrender the firearm to the NYPD precinct that that is
8 satisfying the terms of the defense; that's -- but that's --
9 -- that's the instruction that he never asked for.

10 So instead of all of the -- instead of this whole
11 argument that we're right -- having right now on appeal,
12 this all should have been hashed out in the jury
13 deliberation room with a properly charged jury. Instead,
14 all Mr. Debellis gets is no defense at all, a con -- and a
15 concession of guilt. And meaningful representation, if it
16 means anything, means that when counsel is trying to
17 present a factual issue to the jury and when there's a
18 legal defense available, he has an obligation to request
19 that legal defense and not simply admit guilt and direct a
20 verdict against his client.

21 JUDGE SINGAS: Yeah, but sometimes defense
22 attorneys choose defenses that in hindsight would have been
23 the wrong one. So we're to punish him and call him
24 ineffective for choosing a defense that ultimately didn't
25 prevail? I mean, these choices are made.



1 MR. BOVA: No. But he didn't pursue the defense
2 that didn't -- he didn't pursue any defense that was valid.

3 JUDGE GARCIA: Didn't he pursue that defense and
4 the judge was actually on the fence about giving the charge
5 for a while, and then he makes a determination after he
6 testifies --

7 MR. BOVA: What the ju -- what --

8 JUDGE GARCIA: -- against the advice of counsel?

9 MR. BOVA: So what the judge repeatedly tells
10 counsel is I want to remind you that the CJJ requires
11 temporary.

12 JUDGE GARCIA: At one point, say I'm inclined to
13 give it?

14 MR. BOVA: When -- when they're talking about --
15 before -- when they're talking about the defense, yes, he
16 does indicate that. But he also keeps saying --

17 JUDGE GARCIA: How can that be a frivolous
18 defense if at one point the judge is saying I'm inclined to
19 give you the charge?

20 MR. BOVA: Because --

21 JUDGE GARCIA: And that's late in the trial. I
22 think it's after the people rest.

23 MR. BOVA: Because at that point, there is no
24 evidence as to how long Mr. Debellis had actually --

25 JUDGE GARCIA: And then he testifies.



1 MR. BOVA: And then he testi --

2 JUDGE GARCIA: Against the advice of counsel.

3 MR. BOVA: He -- but then he -- but he testifies.
4 So from the beginning, counsel knows that when Mr. Debellis
5 takes the stand, he is going to admit that he is possessing
6 the firearm and on his way there.

7 JUDGE GARCIA: He's advising him not to do that.

8 MR. BOVA: The whole -- no because on -- at one
9 point, defense counsel does say that. But defense counsel
10 opens on an admission of weapon possession. He opens on
11 the buyback program. In the opening --

12 JUDGE GARCIA: But at that point in the trial,
13 which again, I think is after the People rest, the judge
14 indicates I'm leaning towards giving you the charge.

15 MR. BOVA: He does say that, and then --

16 JUDGE GARCIA: The client --

17 MR. BOVA: -- common sense prevails with the
18 judge and he says as I've been telling you over and over
19 again, temporary is required.

20 JUDGE GARCIA: And he's gotten on the stand at
21 that point and said I had the gun for a year, right?

22 MR. BOVA: Yes, and that is why he's so in --
23 that is why he's unreasonable because what counsel is doing
24 is once his client testifies, as he knew he was going to
25 testify from the very beginning of this case, once he



1 testifies that he's had it for a year --

2 JUDGE GARCIA: But that's a decision he has to
3 make himself, the client. Obviously, it's his right to
4 testify or not. And if you've got this one defense and
5 you're advising your client no, no, no, don't testify,
6 don't testify, don't testify, and maybe you think at the
7 very end, since we've got this fairly good ruling by the
8 judge, he's not going to get on the stand and I'll get my
9 instruction. And then he decides to testify against that
10 advice. Now you're saying that's no defense ever, never,
11 never, he knew it from the beginning.

12 MR. BOVA: Just to correct the record, though,
13 Your Honor, at -- at A-1103 through 06 --

14 JUDGE GARCIA: Right.

15 MR. BOVA: -- what happens is there's a
16 discussion of -- there's a discussion of the prof -- the
17 proffer and the judge specifically tells him you cannot get
18 this defense without putting Mr. Debellis on the stand.
19 That -- and that makes complete sense because there's no
20 evidence until he testifies about the buyback program,
21 about anything that counsel's trying to establish.

22 JUDGE GARCIA: He makes a colloquy in a way
23 because they're also talking about the buyback program in
24 that colloquy.

25 JUDGE RIVERA: Um-hum.



1 JUDGE GARCIA: They're not only talking about --
2 you don't need the buyback program to have temporary lawful
3 possession, right. So I don't understand that discussion
4 in there.

5 MR. BOVA: So it's -- it's hard to understand
6 because it's an -- an incomprehensible defense that counsel
7 is trying to present under the common law defense because
8 what his --

9 JUDGE GARCIA: But it could be that he says you
10 don't get the buyback defense unless your client gets on
11 the stand, right?

12 MR. BOVA: Well, and also a temporary unlawful
13 possession defense because we -- there's no idea at that
14 point until he testifies as to the duration. But what
15 counsel is trying to do is he makes -- he takes the
16 position that, well, he has the gun for at least a year and
17 a half in a safe. But after that period elapses, he
18 temporarily decides at that moment to get the gun and bring
19 it to the precinct.

20 JUDGE TROUTMAN: But couldn't it be argued that
21 it was in a safe that he was not in possession of because
22 he wasn't living in the house because of the order of
23 protection?

24 MR. BOVA: No, for two reasons. The first reason
25 is that Mr. Debellis is in -- so Mr. Debellis in March of



1 2017, when he's convicted, at that point, he loses the
2 ability to have the firearm under the law, under the penal
3 law. So at that point, he had to surrender it. So it's no
4 -- the fact at that point it's in the safe, he has an
5 obligation, as the judge tells defense counsel, to turn it
6 in and surrender; that he can't just leave it there.

7 JUDGE TROUTMAN: That is true. So you're saying
8 his constructive possession. So even if it's at the wife's
9 house, in her actual possession, he ca -- it's still his
10 responsibility, he's still possessing?

11 MR. BOVA: Yes, because he has an obligation to
12 turn it -- to turn the firearm in.

13 JUDGE TROUTMAN: Even though he doesn't have
14 access to it because he has an order of protection that
15 says I can't go to that house?

16 MR. BOVA: Well, he -- as -- as a factual matter,
17 he does have access to it because mo --

18 JUDGE SINGAS: I know, but the -- they could have
19 made that argument that Judge Troutman is just making. I
20 mean, the crux of both of these is a voluntary surrender of
21 that weapon. And a defense attorney may have decided, you
22 know what, I'm not going to go with buy -- buyback after
23 he's testified because he can't give any details about this
24 buyback program and he's passed a number of police
25 precincts along the way and didn't stop to give over his

1 gun, so I'm going to try this; that maybe it was the -- the
2 difference between the actual possession and constructive
3 possession, it's still a voluntary surrender, that's the
4 defense I'm going with. Why isn't that equally reasonable?

5 MR. BOVA: No, because on this record what
6 happens is counsel, after Mr. Debellis testifies, uses the
7 buyback theory in service of the temporary in possession
8 defense. And even if any of these other defenses were
9 remotely plausible -- which they're not, but even if they
10 were, once the judge shuts it down and says I'm not
11 charging that, counsel has an obligation to say, well, my
12 whole factual theory here has been buyback. I'm going to
13 request the defense that's tailor made for that so I can
14 actually have an issue for this jury.

15 JUDGE WILSON: Is there anything ---

16 MR. BOVA: Instead, he doesn't do that --

17 JUDGE WILSON: Is there anything we --

18 MR. BOVA: -- and we have a directed verdict.

19 JUDGE WILSON: Any reason he couldn't seek both?
20 Anything incompatible about them?

21 MR. BOVA: No. No. Not at all. He could have
22 absolutely sought both. But he goes all in on the one that
23 makes no legal sense whatsoever and ignores the one that
24 simply requires the jury to determine the credibility of
25 the precise factual theory that he's been presenting to the



1 jury.

2 JUDGE TROUTMAN: So your argument is that he
3 presented the defense as if the statutory did not exist?

4 MR. BOVA: Yes, Your Honor.

5 JUDGE TROUTMAN: Okay.

6 MR. BOVA: Yes, he -- he develops the factual
7 predicate for the 265.20 defense, goes all in on the
8 temporary unlawful possession defense which has no basis in
9 law, as the prosecution concedes and has argued throughout
10 these proceedings. Prosecutor tells defense counsel your
11 defense has been demolished by the fact that he possessed
12 it for a long period of time.

13 ACTING CHIEF JUDGE CANNATARO: Okay.

14 MR. BOVA: At that point, he should have
15 requested the only available defense.

16 ACTING CHIEF JUDGE CANNATARO: Thank you,
17 Counsel.

18 MR. BOVA: Thank you.

19 MS. PHILLIPS: Good afternoon, Your Honors, and
20 may it please the court. Reva Grace Phillips for the
21 Respondent, the Bronx County District Attorney's Office.

22 Your Honors, defendant asked this court to miss
23 the forest for the -- for the trees. But this case is
24 clearly not just about whether or not defendant was
25 entitled to a specific charge, but whether it was if



1 counsel was effective. And I think more importantly, as
2 Your Honors' questions highlighted, whether or not the
3 court had a sufficient record before it and this court has
4 a sufficient record before it to make that determination.

5 JUDGE GARCIA: Counsel, I -- I look at this
6 statute 265.20. And it says a person -- (f) "A person
7 voluntarily surrendering such weapon, instrument, or
8 appliance, provided that" -- et cetera, right. And then
9 you're exempt from the pen -- relevant penal statutes. So
10 at its simplest, it seems like an act of production,
11 immunity almost, right. So the obvious case would be I
12 walk into a precinct. They have a gun buyback program. I
13 hand the gun to the officer. They can't arrest me and say
14 you were unlawfully in possession of that weapon, under the
15 statute. But it has a logical component to it that says if
16 I stop you outside the precinct on the steps and I'm
17 walking into the precinct and I'm going in to do the
18 buyback program, it's not simply the act of production of
19 me handing it over, I shouldn't be prosecuted if I'm on the
20 precinct steps, right. So how far back do we take that
21 under a reasonable view, you know, of this statute and what
22 breaks the chain?

23 MS. PHILLIPS: Your Honor, I think that's a very
24 fact specific question here. And to focus on the facts
25 here, this defendant traveled for the -- for over an hour



1 with this loaded firearm and with a bag of ammunition and a
2 spare magazine that was fully loaded. Counsel relies
3 heavily on the case People v. Watson. The defendant in
4 Watson, the court noted there, the Second Department noted,
5 that the fact that Mr. Watson had a holster, had spare
6 ammunition, and had a loaded magazine clipped into the gun
7 was good evidence that he did not intend to go and
8 surrender it.

9 The same is true here. This defendant had a
10 large amount of ammunition on him, including a backup
11 magazine. As Your Honor's questions correctly pointed out,
12 when he was asked by the officer numerous times on video,
13 you know, where is the gun, do you have a gun, hey, I see a
14 holster, where's the gun, defendant says there is no gun.
15 Defendant goes further than --

16 JUDGE RIVERA: Why isn't Counsel correct that
17 those are all questions that go to his credi -- defendant's
18 credibility and go to the jury? They're the finders of
19 fact --

20 MS. PHILLIPS: But your --

21 JUDGE RIVERA: -- and the determiners of the
22 credibility.

23 MS. PHILLIPS: Well, again, I think Your Honors
24 correctly pointed out that to get to that point, to get
25 that instruction, you first have to have a reasonable view



1 of the evidence that entitles defendant to that
2 instruction. Here, we don't. Again, the video evidence is
3 uncontradicted.

4 Defendant's own testimony, you know, is
5 essentially oh well, it wouldn't have done any good.

6 JUDGE RIVERA: What's problematic about the video
7 evidence? It -- it -- is it so unreasonable to believe
8 that someone who has a gun, has gone through this issue and
9 with -- with their spouse and is leaving under not the best
10 of circumstances, is desperate -- this is his testimony,
11 we've got to take it for what it is -- desperate for funds,
12 is stopped by the police, is not immediately going to say,
13 yeah, I got a gun right there?

14 MS. PHILLIPS: Your Honor, I think additional
15 facts --

16 JUDGE RIVERA: Or say I'm going to the buyback
17 program, who may -- who may be suspect as to whether or not
18 they are going to be allowed to pursue what he claims was
19 his purpose and intent with having the gun in the car to
20 get to the buyback program.

21 MS. PHILLIPS: So Your Honor, I think defendant's
22 testimony again sort of blows up his own -- his own request
23 here. Defendant testifies that he looks into whether or
24 not there are precincts in his area, that he looks into
25 where there are buyback programs. On cross-examination,



1 though, he admits that he wasn't aware that there was an
2 upstate buyback program just three days before he was
3 stopped by Ofc. Allen (ph.). He acknowledges that he knows
4 there's all these precincts he's passing. And I think very
5 importantly, he does not testify that the 49th precinct
6 actually has an ongoing buyback program at the time. And
7 as the court says, it does its own research, there is no
8 buyback program at the time.

9 And I think it's important to distinguish between
10 a buyback program and the fact that the NYPD will allow you
11 to surrender under 265.20 at any point. Not every precinct
12 at every day is having an actual buyback program where they
13 will give you cash for the gun. That program actually
14 rotates. And I think Your Honors can take --

15 JUDGE RIVERA: That -- that may be something that
16 he's not fully aware of, but the fact that he had this
17 intent -- the question is his intent. He says this is what
18 I was going to do. The fact that he may not be successful
19 in that moment because the precinct is not the correct one
20 strikes me as not the issue regarding the charge because
21 this is all about whether or not you get the charge, not
22 whether or not the jury should believe him or not believe
23 him.

24 MS. PHILLIPS: Well, I guess I would respond with
25 two points. So the first being, you know, again, I think



1 defendant's testimony undercuts the idea that he's going to
2 -- to actually go to a buyback program because, again, he
3 says he did the research. So he's saying in his own
4 testimony, well, I looked into it --

5 JUDGE WILSON: Well, you know, I --

6 MS. PHILLIPS: -- and that's why I thought I was
7 going to get cash.

8 JUDGE WILSON: I res -- I research all kinds of
9 things and miss something sometimes, right. I mean, again,
10 it seems like it goes to credibility.

11 MS. PHILLIPS: Again, Your Honor, I think this is
12 all sort of in the totality of defendant's testimony. And
13 the fact that he has these orders of protection against him
14 for over a year and he has this open case and you know, he
15 also loses his permit, it's the totality of defendant's
16 context and his own testimony and the video and everything
17 that piles up to make it so that there is no reasonable --

18 JUDGE GARCIA: I'm not sure that works because, I
19 mean, I think the gun buyback program is aimed at people
20 who may have a gun where they still have an ord -- they
21 have an order of protection or they may have even committed
22 a crime with the gun before, but you want the gun off the
23 street. So there's an incentive. Oh, right, I haven't
24 complied with that order of protection, but now I'm getting
25 the gun off the street. That -- that seems to me kind of

1 the whole purpose of the gun buyback program.

2 MS. PHILLIPS: I would absolutely agree with Your
3 Honor that the point of the buyback program and the point
4 of 265.20 is to encourage folks to give their guns up.

5 JUDGE GARCIA: Right.

6 MS. PHILLIPS: But it's to encourage them to do
7 that locally and to do that without traveling and causing
8 this sort of reckless situation which the court actually
9 talks about in one of these colloquies, where it talks
10 about, you know, am I going to give this charge or not.
11 And he says, you know, and I'm also considering the fact
12 that he sort of recklessly takes a loaded firearm on public
13 transit and then he's in an unregistered vehicle when --

14 JUDGE RIVERA: But what -- what does that have to
15 do with the fact of his intent? What does that have to do
16 with that? Maybe they won't accept the gun when he gets
17 there, but what does that have to do with the charge?

18 MS. PHILLIPS: Well, Your Honor, I think it -- it
19 goes to whether or not, again, there's a reasonable view of
20 the evidence here. And I think the court expressly says,
21 you know, I'm considering the public policy ramifications.
22 The point here is to encourage --

23 JUDGE RIVERA: Oh, because he's reckless in
24 pursuing the buyback program?

25 MS. PHILLIPS: What I think the court is talking



1 about is the point of -- the public policy interest here.
2 And I'm trying to give effect to that is, is to encourage
3 surrender. And it's --

4 JUDGE RIVERA: Yes, no questions asked, right?
5 No questions asked, right?

6 MS. PHILLIPS: No questions asked. However, Your
7 Honor, I would note, you know, I think defendant cites to a
8 Wayback Machine, like I think this goes to another point I
9 would have which is this really should be raised by way of
10 a 440 motion; that's the criminally recognized way of
11 having, you know, a Wayback Machine. But I think in terms
12 of this question of, you know, was he actually on his way
13 to the 49th for any kind of, you know, buyback program,
14 it's an open question. And if Your Honors actually look at
15 the --

16 JUDGE TROUTMAN: Are there two different charges
17 that could have been pursued here?

18 MS. PHILLIPS: I do believe that defense counsel
19 could have requested two defenses. However, the fact that
20 defense counsel didn't request both defenses doesn't render
21 him ineffective. Defense counsel may reasonably and
22 strategically decide to pursue one defense without the
23 other for any number of reasons.

24 JUDGE WILSON: Well, but are they -- but they're
25 not incompatible, so what would be the reason not to ask



1 for the charge that better fits his testimony and better
2 fits the opening?

3 MS. PHILLIPS: Your Honor, he could have felt,
4 for instance, that if he presented both to the jury that
5 this would muddle the jury's, you know, interpretation of
6 the issues. He could have felt that the trial court would
7 select which one it felt was better and he wanted to pick
8 the one that he thought was going to be more convincing.

9 JUDGE RIVERA: But it's pretty much -- I mean,
10 maybe you see the record differently, but counsel's
11 argument, he's pretty much argued it. He's just not
12 requesting the charge. He's pretty much done what I think
13 you fear which is presenting scenarios that would confuse
14 the jury or direct them in one -- to come out instead of at
15 acquittal with -- with a -- the guilty verdict. It seems
16 these are the things that he's done, he's just not gone the
17 last step that Counsel argues is logical and what any
18 defense lawyer in his shoes would have done which is then
19 say, well, give me the charge. We've laid the groundwork.
20 Give me the charge.

21 MS. PHILLIPS: Right, Your Honor. And -- and so
22 I think that, again, this should be raised by way of a 440
23 motion because we simply don't know why defense counsel
24 selected one of the strategies over the other.

25 As I was about to say, the NYC city official



1 website gun buyback program directly instructs if you
2 intend to surrender, call the police precinct first to let
3 them know, so that they can tell you what the proper
4 policies and procedures are; that's the website today.

5 This 440 hearing would allow defendant to explore
6 what did that look like at that time. And I think it's
7 reasonable to believe that this defense counsel could
8 easily have read the McKinney's instructions we cite in our
9 brief, could easily have asked his defendant, hey, you
10 know, did you look into this? Did you actually call the
11 precinct? Because it says online you should. We don't
12 even know actually where defendant's address is at the
13 time. From this record, we don't know where his mother's
14 house is, where he's living. We don't know if defendant
15 considers his mother -- mother's house his residence.

16 Under 265.20 and under People v. Ditore, there
17 has to be strict compliance with policies and procedures at
18 the local precinct. We don't actually know if defendant
19 did any of that groundwork.

20 JUDGE RIVERA: I'm not -- I'm still having
21 difficulty. So the jury doesn't go for it. Okay.

22 MS. PHILLIPS: And Your Honor, I think --

23 JUDGE RIVERA: But why not ask for it once you've
24 laid the groundwork for it?

25 MS. PHILLIPS: Well, again, I think that, you



1 know, defense counsel chose which of the defenses he
2 thought he was more likely to get, based on the judge's
3 ruling. Judge Troutman went into the constructive
4 possession part.

5 JUDGE WILSON: Well, even if you -- even if you
6 thought that, once the court says okay, you're not getting
7 your first choice, why don't you then say okay, I've got
8 plan B here?

9 MS. PHILLIPS: Again, you know, I think that for
10 the same reasons the court is denying the -- the common law
11 instruction, the court is signaling it would deny the
12 statutory instruction. And just as Your Honors asked
13 Counsel --

14 JUDGE WILSON: Really?

15 MS. PHILLIPS: Yes, Your Honor. I mean, the
16 court is engaging in an in-depth colloquy talking about the
17 buyback program. And he's saying I find it really hard to
18 believe he was actually on his way.

19 JUDGE WILSON: Did anyone point the statute out
20 to the court? No, right?

21 MS. PHILLIPS: Pardon me?

22 JUDGE WILSON: Nobody's pointed the statute out
23 to the court at all.

24 MS. PHILLIPS: Not that we're aware of. Again,
25 we don't know what was said at all of the bench



1 conferences. We don't know what defense counsel and
2 defendant talked about.

3 JUDGE SINGAS: Wouldn't the defense attorney have
4 just said you know what, I'm not going to go with either of
5 these. I'm going to go with this is sort of a pathetic
6 person who's down on his luck who's, you know, leaving.
7 His wife asked him to move out. I'm going to go for
8 sympathy and pity for the jury. I know if I ask for these
9 charges that technically once they hear the charge, I may
10 not meet those requirements, and then that will water down
11 my sympathy defense. I mean, why isn't that a legitimate
12 defense that an attorney could pursue?

13 MS. PHILLIPS: I think that's absolutely a
14 legitimate defense. And I think that from the record being
15 --

16 JUDGE RIVERA: Why isn't it sympathetic that he's
17 trying to get money from the buyback program because he's
18 financially desperate?

19 MS. PHILLIPS: Well, Your Honor, in the court's
20 colloquy with defense counsel where he's talking about what
21 -- what he needs to get over his problems with issuing this
22 charge, he talks to counsel. And he says explicitly, I
23 don't want to blindside you, basically. If he testifies --

24 JUDGE RIVERA: Um-hum.

25 MS. PHILLIPS: -- that this is temporary and



1 honest possession, it's going to open the door to these
2 orders of protection.

3 JUDGE RIVERA: Um-hum.

4 MS. PHILLIPS: And defendant's decision to
5 testify against counsel's advice opened him up to -- to a
6 devastating cross-examination where he has to admit he has
7 orders of protection that ban him from seeing his children
8 and wife, so it directly cuts against his sympathetic
9 defense where he is saying, you know, I was a great father,
10 I care for my autistic son, all of these things. And --
11 and then to have him on cross say oh, well, but there are
12 two orders of protection actually banning me. And
13 defendant even tries to be cute and say oh, well actually
14 that order, no. That's a temporary order. And --

15 JUDGE GARCIA: Counsel, to that point.

16 MS. PHILLIPS: Yes, Your Honor.

17 JUDGE GARCIA: And I see your time is up, but the
18 way this works, if he raises the defense and the judge says
19 okay, you've raised it, do the people get an opportunity to
20 rebut?

21 MS. PHILLIPS: Yes, Your Honor. I believe if the
22 court was going to issue the instruction, it would give the
23 people an opportunity to rebut that.

24 JUDGE GARCIA: And we don't know on this record
25 what that rebuttal would have looked like because he never



1 raised the defense, right?

2 MS. PHILLIPS: I think that we can have some
3 sense of what the rebuttal would have looked like because
4 the people had already put in a substantial --

5 JUDGE GARCIA: It would have more of a sense if
6 you had a 440, right?

7 MS. PHILLIPS: That's absolutely right, Your
8 Honor. And for those reasons, this court should affirm the
9 Division's decision and find that this should have been
10 raised by way of CPL 440. Thank you, Your Honors.

11 MR. BOVA: So the ineffective assistance analysis
12 focuses on the relevant period at the record which is the
13 charge conference. Counsel has an obligation to request
14 the charges based on the evidence. So once Mr. Debellis
15 testifies, he has to request defenses based on that.

16 JUDGE GARCIA: At the point -- at the point your
17 client says I don't have a gun, is he unlawfully in
18 possession of it from that point, going forward? I mean,
19 even if he was really going to bring this to a buyback
20 program and a police officer pulls you over and he says to
21 you do you have a gun and you say no, how is that
22 compatible with them taking the gun back, even if you were
23 before that? Isn't it from -- because what I'm struggling
24 with is this chain, how far back can it go, and do you
25 always have to just give this evidence. Again, if the gun



1 falls -- say the gun fell from the sky. So at that point,
2 where the officer of the precinct that you're supposedly
3 turning it in to says do you have a gun and you say no,
4 aren't you from that point forward unlawfully possessing
5 it?

6 MR. BOVA: No, because the statute says that
7 someone who is voluntarily surrendering the firearm --

8 JUDGE GARCIA: But you're not anymore. You're
9 saying I don't have one.

10 MR. BOVA: But the statute grants immunity for
11 those that are doing it. So this off and on immunity --

12 JUDGE GARCIA: You're doing that. Not forever.

13 MR. BOVA: But you have done it, you are in the
14 process of doing it.

15 JUDGE GARCIA: But I rob a bank with it, but I
16 was in the process of doing it. I still have immunity from
17 the possession count?

18 MR. BOVA: No, because on those facts, if you're
19 robbing a bank, it's impossible to believe that you're
20 surrendering the firearm, but --

21 JUDGE GARCIA: If you're lying to a police
22 officer from the precinct that you're supposed to turn it
23 in to.

24 MR. BOVA: No. Besides the -- besides that being
25 inconsistent with the text of the statute which



1 acknowledges that there is an immunity for the voluntary
2 surrender, that would create a gotcha game, where --

3 JUDGE GARCIA: I think if -- you could argue that
4 if he had said yes. And here I was, turning it in, then I
5 think you could have a pretty good argument under this
6 statute. I don't know if it would win, but you would
7 probably get the charge, but --

8 MR. BOVA: If the legislature had intended for
9 immunity to hinge on one's ability to have that
10 communication with the officer, they would have just
11 written that into the statute.

12 JUDGE GARCIA: I just think that's a facts and
13 circumstances case, right. So you look at the -- what's in
14 the record here to see if what you are arguing for is any
15 reasonable view of that evidence. And there's no dispute
16 as to what happened because there is a video and audio of
17 it here.

18 MR. BOVA: No. There is a dispute that counsel
19 is trying to present to the jury throughout this entire
20 case. And the dispute is whether Mr. Debellis is telling
21 the truth when he says he's on his way to the precinct;
22 that's the dispute.

23 JUDGE GARCIA: But even if he was, even if he
24 was, may -- accept that for a second in the hypothetical
25 and the cop pulls him over and he says I don't have a gun.



1 Why doesn't that -- no more you're taking this in, you're
2 lying about having a gun now and you're unlawfully in
3 possession of it?

4 MR. BOVA: Because his immunity has already --
5 his immunity has already attached at that point.

6 JUDGE GARCIA: But then why not when he robs the
7 bank?

8 MR. BOVA: Well, there's two --

9 JUDGE GARCIA: Because it's already attached.

10 MR. BOVA: There's two --

11 JUDGE GARCIA: Because I was on my way. I
12 stopped off. I robbed the bank. But I had immunity
13 because I was going to turn my gun in.

14 MR. BOVA: If -- if someone -- if someone is, in
15 fact, in the process of voluntarily surrendering the
16 weapon, that is when the immunity attaches.

17 JUDGE GARCIA: So then I robbed a bank.

18 MR. BOVA: The --

19 JUDGE GARCIA: I'm -- I'm doing it. I'm really
20 going. And I see a bank and I'm, like, oh, well, I'm going
21 to go in and I'll rob it, but then I'm going to go to the
22 precinct.

23 MR. BOVA: Now I think I understand the
24 hypothetical better now. No, then you get prosecuted for
25 robbery, but you have immunity for the weapon.



1 JUDGE GARCIA: So you wouldn't get prosecuted for
2 unlawfully having a weapon in that case?

3 MR. BOVA: No because that's what that -- the
4 statute gives you immunity. You would be prosecuted for
5 armed robbery, though, and you would get a lot of time for
6 that. But I mean, it's not -- it's -- it's -- the
7 legislature did not require an announcement, so.

8 JUDGE RIVERA: You're pretty unlikely to persuade
9 the jury.

10 MR. BOVA: Yes, and that's why that factual
11 scenario is so much different than this because this is
12 just a man who is down on his luck, who is in financial
13 trouble, who tells -

14 JUDGE GARCIA: But you would get the charge in
15 that case, if you robbed a bank, because in your view, you
16 would have immunity for the weapon?

17 MR. BOVA: If -- yeah, I mean, if the person
18 testifies to that fact, you would get the charge. But
19 there are -- I just want to, like, just as -- I just want
20 to reiterate, though. There are a lot of, like, very
21 ridiculous things that someone could testify to and jurors
22 decide whether it's ridiculous or not. But the fact that -
23 -

24 JUDGE GARCIA: But the judge has to make a
25 gateway determination which is I think where we have a bit



1 of a disconnect here. The judge has to make a
2 determination whether that charge goes to the jury, whether
3 there's a reasonable view of the evidence to give that
4 charge.

5 MR. BOVA: Yes, and the reasonable view analysis
6 is based on what the ev -- whether there's some evidence
7 supporting the defense. And this is not a re --

8 JUDGE SINGAS: And then according to you, the
9 some evidence is just him saying so. So on any gun
10 possession case moving forward, a defendant takes the stand
11 and says I was going to a gun buyback, regardless of what
12 the other evidence shows, they're entitled to that charge?

13 MR. BOVA: And then it goes to the jury like
14 jurors assess credibility all the time. And that was the
15 law under Watson at the time this case was tried.

16 JUDGE SINGAS: On every gun possession charge,
17 regardless of what the evidence is?

18 MR. BOVA: Just like in every homicide case, a
19 defendant could in theory take the stand and say I thought
20 I saw a knife first, and then there is a charge on
21 justification. This is how the jury system works. But
22 those are --

23 JUDGE SINGAS: No. That's not how the juries --
24 the judges make a determination, especially in the
25 justification charge, looking at the reasonableness and how

1 the evidence was proffered.

2 MR. BOVA: The judges look at --

3 JUDGE SINGAS: So you're saying in this
4 situation, the judge doesn't have that obligation?

5 MR. BOVA: The judges don't look at credibility
6 at the charge --

7 JUDGE SINGAS: I'm not saying credibility.

8 JUDGE GARCIA: What if there was a video in that
9 case with the guy just has his hands up the entire time and
10 the defendant shoots him and he says, oh, I thought he had
11 a knife. But you can see his hands and his fingers are
12 spread and there's no knife. Get a charge?

13 MR. BOVA: No, because you have video evidence
14 conclusively proving that that makes no sense. Here, we
15 just have a theory based on consciousness of guilt because
16 he was not sophisticated in announcing his legal defenses
17 at the time of his arrest; that is the kind of issue that
18 goes to the jury. The scenarios that we discuss, they are
19 -- they are ridiculous. I still think they would go to the
20 jury. But this is not that. This is a sensible defense
21 based on the facts and it is the defense that counsel is
22 trying to get before the jury, he just botches the analysis
23 and we get a directed verdict.

24 ACTING CHIEF JUDGE CANNATARO: Thank you.

25 MR. BOVA: Thank you.



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MS. PHILLIPS: Thank you, Your Honors.

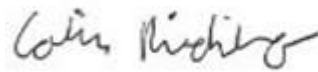
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C E R T I F I C A T I O N

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Debellis, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: March 27, 2023

