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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 27

ANTHONY DEBELLIS

Respondent.

-----

20 Eagle Street  
Albany, New York  
October 19, 2023

Before:

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

Appearances:

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

R. GRACE PHILLIPS  
Attorney for Respondent  
Bronx District Attorney's Office  
198 E. 161st St.  
Bronx, NY 10451

Christy Wright  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Last case today is Number  
2 27, People v. Anthony 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, please.

6 CHIEF JUDGE WILSON: Yes.

7 MR. BOVA: Counsel's unreasonable failure here at  
8 the charge conference to request a defense of voluntary  
9 surrender under Penal Law 265.20 effectively led to an  
10 admission of guilt and a directed verdict against Mr.  
11 Debellis. This is not meaningful representation.  
12 Throughout the trial, counsel develops the factual  
13 predicate for a statutory voluntary surrender defense under  
14 265.20.

15 JUDGE SINGAS: Your position that if a defendant  
16 testifies, he's going to voluntarily surrender a gun, then  
17 the charge is mandatory?

18 MR. BOVA: Yes. Where - - - yes. Because under  
19 the reasonable view test, where there is some evidence, in  
20 the light most favorable to the defense, where there's some  
21 evidence the charge has to be given.

22 JUDGE SINGAS: Okay. But who decides what's  
23 reasonable, like, is that a gatekeeping function of the  
24 court? Can the court decide, you know what, I hear this.  
25 I don't think it's reasonable. I'm not giving that charge.

1 MR. BOVA: When it comes to questions of  
2 credibility and the historical facts, that's a question for  
3 the jury where there's evidence on both sides. This court  
4 held in - - -

5 JUDGE GARCIA: I see evidence on both sides,  
6 though here, because the entire encounter - - - I agree  
7 with you, if you're - - - if someone gets on the stand and  
8 says, I said I was going to turn the gun in, and the cop  
9 gets on and says, never said that. Credibility issue. But  
10 the entire incident here is taped, video and audio. And  
11 time after time, he's asked, do you have a gun and he says,  
12 no. How is that consistent with, I'm going to turn my gun  
13 in to the police?

14 MR. BOVA: Because as Mr. Debellis testified, he  
15 said it would have made no difference. A reasonable jury  
16 could easily find that someone isn't going to volunteer to  
17 the police. By the way, officer, I have a firearm because  
18 they may very well be afraid that they're going to be  
19 arrested.

20 JUDGE SINGAS: They would volunteer that if  
21 that's their whole purpose. He's saying, I want to  
22 voluntarily surrender my gun to the police. Now, he's  
23 stopped by the police, and they ask, what's going on. He  
24 doesn't say, oh, great, you're here because I wanted to  
25 voluntarily surrender my gun to you.

1 MR. BOVA: No, because when he - - -

2 JUDGE SINGAS: And it goes on for a really long  
3 time, right? You'd agree with me that - and it's not until  
4 the tow truck driver says, you know, I think you guys  
5 should look at this bag that he keeps going for, that they  
6 find a gun that's loaded and ammunition that - - - that  
7 it's known that he has a gun. So I mean, I feel like  
8 that's entirely inconsistent. Everything that's captured  
9 on tape is entirely inconsistent with a voluntary  
10 surrender.

11 MR. BOVA: Well, this is exactly the argument  
12 that the jury should have had during deliberation.

13 JUDGE GARCIA: No, but that is the gatekeeping  
14 function. There is a gatekeeping function, which is the  
15 equivalent of harmless error almost. No reasonable jury  
16 could have found this defense. And here you have the  
17 entire encounter taped, and you have him getting back in  
18 the car with a loaded weapon concealed there to get his  
19 phone charger, all the time saying, I don't have a gun.  
20 What possible reasonable view of that evidence supports, I  
21 was going to turn my gun in?

22 MR. BOVA: Well, first of all, just to get back  
23 to the standard, the gatekeeping function does not resolve  
24 questions of credibility of what's in someone's mindset.

25 JUDGE GARCIA: There's no issue as to what

1           happened here. It's videotaped. It's audiotaped. So  
2           there's no credibility issue. I said, no, you never said.  
3           We know what was said. We know how long it took to say it.  
4           We know the entire encounter. And you think it would be  
5           per se error for a judge to look at that videotape and say  
6           there's no reasonable view of this that supports this  
7           defense?

8                       MR. BOVA: No, there is - - - there is a  
9           contested question of fact, which is what is - - - what is  
10          in Mr. Debellis' state of mind. Mr. Debellis testified at  
11          that point in time, I was voluntarily surrendering the  
12          weapon on my way to the precinct, and that he didn't  
13          advertise this to the police officer - - -

14                      JUDGE GARCIA: When he denies having a gun, isn't  
15          that, I'm no longer voluntarily surrendering it at that  
16          point? And then we go on and on while he gets back in the  
17          car with a loaded weapon concealed, but it's still in his  
18          mind. He's like, I'm going to surrender this gun after  
19          they tow my car with a concealed weapon in it.

20                      MR. BOVA: No, because his immunity is already  
21          attached under 265.20. And additionally, that - - -  
22          because the statute says that immunity attaches upon  
23          voluntarily surrendering. Additionally, and perhaps - - -

24                      JUDGE GARCIA: All right. Tell me that again.  
25          So when did he voluntarily surrender the gun?

1 JUDGE GARCIA: The statute doesn't require the  
2 successful surrender. The statute - - -

3 JUDGE GARCIA: So when does immunity attach?

4 MR. BOVA: When someone is volun - - -

5 JUDGE GARCIA: When I don't have the gun?

6 MR. BOVA: When someone is voluntarily  
7 surrendering. The statute says a person voluntarily  
8 surrendering such - - -

9 JUDGE SINGAS: And did he try to voluntarily  
10 surrender?

11 MR. BOVA: Well, he testifies that he's on the  
12 way to do that. And that is a question of credibility, in  
13 fact, for the jury to decide. And additionally, if there  
14 were a rule that required someone to make this kind of  
15 announcement, which is what this would ultimately be, the  
16 only way a person could have immunity would be if they,  
17 upon being stopped during the process of surrendering the  
18 firearm, say, to a police officer, Mr. Officer, I have a  
19 firearm - - -

20 JUDGE GARCIA: Well, that's not a good rule --

21 JUDGE SINGAS: That's not - - -

22 JUDGE GARCIA: - - - for safety? I mean, when  
23 you walk up to the precinct, can you just walk through the  
24 door and say, no, I don't have a gun, and then once you get  
25 inside, take the gun out and say, hey, who do I surrender

1 this to? Wouldn't it be a good rule that you have to  
2 announce once you encounter the police that you're  
3 surrendering a gun?

4 MR. BOVA: No, it's not - - - it's not a good  
5 rule to condition immunity and - - - and whether or not  
6 someone's going to be sentenced to possibly 15 years in  
7 prison, if simply because whether they're able to have a  
8 conversation with the police officer at the scene, the  
9 statue - - -

10 CHIEF JUDGE WILSON: Would you - - - would you  
11 agree that there's some set of imaginable facts where he  
12 wouldn't be entitled to the instruction, even though he  
13 gave the testimony that he gave at trial? For example,  
14 he's got detailed instructions in the bag with a gun about  
15 how he's going to sell it to an illegal arms dealer. He's  
16 got detailed instructions in the bag that show he's going  
17 to use it to commit a murder. But he gets to the trial and  
18 says, oh, actually, I was going to turn it in. Is there  
19 some point where you could imagine a set of facts big  
20 enough that he would be disentitled to the instruction  
21 despite his testimony?

22 MR. BOVA: I think that - - - I think - - - I  
23 think no, under the reasonable view standard. Under the  
24 reasonable view standard - - - and as this court held in  
25 People versus Butts, the standard is simply whether there

1 is evidence which, if credited, justifies the defense and  
2 that - - -

3 JUDGE CANNATARO: And what's that evidence here,  
4 his testimony?

5 MR. BOVA: Mr. Debellis' testimony. And  
6 additionally, that's corroborated. It's corroborated by -  
7 - - by his testimony about his financial motive. He  
8 specifically testifies that he lost his - - - lost his  
9 long-standing job, his life was destroyed, and he was  
10 desperate.

11 JUDGE TROUTMAN: So you - - - you emphasize - - -  
12 you emphasized if credited, not necessarily accepted by the  
13 facts, right?

14 MR. BOVA: Yes.

15 JUDGE TROUTMAN: Just if and that if presupposes  
16 that it's going to be submitted to the fact finder to make  
17 that decision.

18 MR. BOVA: Yes, Judge, that's exactly what this  
19 court held in People - - - what this court held in People  
20 versus Butts. That's been the long standing - - - that's  
21 been the long standing reasonable view standard under  
22 Watts, under Padgett. If there's conflicting inferences,  
23 if there's conflicting testimony, that goes to the jury.  
24 What we really have here is a consciousness of guilt  
25 theory. We have a theory that the government can argue to



1 a jury - - -

2 JUDGE GARCIA: We got into this before, right, I  
3 think last argument? What if this person is on their way  
4 to turn the gun in and they pass a bank on the way and  
5 they're like, you know what, I'll rob the bank, but I'm  
6 going to turn the gun in. And they come out and they  
7 testify at trial. Bank cameras. You can't get me for  
8 possession of a gun in there, because I was intending to  
9 turn it in. And I think you said that would be okay. You  
10 would have immunity.

11 MR. BOVA: If the testimony is that the - - - the  
12 plan never - - - the plan never ended and he was always  
13 going to turn it in, then that would be a horrible defense  
14 that the jury would absolutely reject.

15 JUDGE GARCIA: And you get to - - - you get to  
16 submit it.

17 MR. BOVA: Yes. Yes. I mean, that's - - -  
18 that's what the reasonable view standard is getting at. It  
19 doesn't say --

20 JUDGE RIVERA: What - - - why is - - - why isn't  
21 that, this hypothetical, an example of abandoning your  
22 intent? Let's say you've got the intent. And as my  
23 colleague says, you know, you see the bank, it looks pretty  
24 good. I've decided right now I'm not on my way to turn  
25 this in. I'm on my way to - - - to rob this bank. Why

1 isn't that now an abandonment of that intent?

2 MR. BOVA: Yes. If - - - if there's never any  
3 further effort to turn it in, yes.

4 JUDGE GARCIA: It was the intent all the time.  
5 I'm always intending to turn the gun in. I just stopped to  
6 rob the bank on the way doing it.

7 MR. BOVA: I think - - - yeah. And I think what  
8 we're getting at is affirmative abandonment. I think that  
9 if there is evidence that the defendant has affirmatively  
10 abandoned it for reasons others - - -

11 JUDGE GARCIA: What you're getting at, that is  
12 inconsistency, right? It's not abandonment. I never  
13 abandoned it. I'm always intending to turn the gun in. I  
14 just want to rob the bank on the way. I'm going to go do  
15 that. That's not abandonment. That's inconsistency. And  
16 I'm telling a cop I don't have a gun, and I'm going back in  
17 to get my phone charger while it's hidden under the seat.  
18 I don't see it that much different than robbing the bank,  
19 right?

20 MR. BOVA: No, because the - - - the simple  
21 argument to the jury in this case that a reasonable jury  
22 could accept, understanding what it's like to be pulled  
23 over by the police, understanding that they may not accept  
24 a person's assertion of a defense, a reasonable jury could  
25 absolutely say, sure, if I was in that situation, I

1 wouldn't trust that officer to trust me. So I would simply  
2 stay quiet. That - - -

3 JUDGE GARCIA: But he did trust me to get back in  
4 my car with a loaded weapon hidden under the seat, right?

5 MR. BOVA: No, at that - - -

6 JUDGE GARCIA: Because I don't have to say  
7 anything. I just have my subjective intent so I can tell  
8 him I don't have a gun and get back in my car. None of  
9 that is consistent with I'm going to turn my gun in.

10 MR. BOVA: No, because the officer doesn't - - -  
11 the officer doesn't let him into the car knowing there's a  
12 weapon there. That's only found after the fact.

13 JUDGE GARCIA: No, he knows though. Right?  
14 Doesn't he get back in the car to get his charger at some  
15 point?

16 MR. BOVA: Right. But - - -

17 JUDGE GARCIA: And there's a loaded gun hidden  
18 under the seat, which presumably he knows is there, that  
19 he's going to return, but he lets the officer let him back  
20 into a car where there's a loaded weapon hidden in a  
21 grabbable area. How is that consistent with I want to turn  
22 my gun in?

23 MR. BOVA: This is all part and parcel of the  
24 same point, which is he must not have the defense because  
25 he didn't assert it on spot. It's basically a

1 consciousness of guilt post-arrest silence theory. That  
2 kind of consciousness of guilt evidence is speculative, but  
3 at best it's a classic question of fact for the jury.

4 JUDGE RIVERA: So - - - so - - - so if I'm  
5 understanding you - - - if I'm understanding your point,  
6 given the series of questions and your responses. He says  
7 one thing at the point he's stopped, and then he says  
8 another thing that he wants the jury to believe as to why  
9 he said this thing. And your point is two subjective  
10 statements, about state of mind for the jury to decide  
11 versus, I said one thing at this point, and everything  
12 else, everything else that's objective would - - - would go  
13 to the fact that my statement is on its face unbelievable.  
14 Could you see that those are two different situations?

15 MR. BOVA: I mean, I think at best, that just  
16 goes to a question of harm and a question of prejudice. I  
17 mean, whether there's objective evidence that goes against  
18 the defendant's testimony at trial as to his state of mind,  
19 that's what the jury figures out.

20 JUDGE CANNATARO: I mean, so there is no  
21 incredibility as a matter of law with respect to requesting  
22 this kind of defense?

23 MR. BOVA: I think you could imagine a situation  
24 that is incredible as a matter of law, such that - - -

25 JUDGE CANNATARO: Judge Wilson's hypotheticals,

1 the detailed steps of how to commit a murder or something  
2 like that.

3 MR. BOVA: I don't know. I mean, I don't think  
4 that necessarily does it, because that just becomes a  
5 really bad argument for the defense, but not necessarily  
6 incredible as a matter of law. I mean, it's very similar  
7 to prosecution witnesses. When the prosecution - - - when  
8 the prosecution calls a witness that gets hammered on  
9 cross, the courts never say, and this court would never  
10 hold, that that's insufficient as a matter of law, because  
11 it's so obviously incredible. Credibility questions go to  
12 a jury. The fact that a witness testifies for the  
13 prosecution that X happened and then testifies that Y  
14 happened in trial, that's a credibility question.  
15 Conflicts in the - - -

16 JUDGE SINGAS: No, that's to decide based on  
17 that, I'm not going to give the charge, whatever charge the  
18 People are requesting.

19 MR. BOVA: Oh, no, no, no. Under - - - under  
20 conflicting testimony in Delamota, that - - - that goes - -  
21 - that goes to the jury, the only situation is when it is  
22 so incredible as a matter of law that it is impossible.  
23 That's not this case. This is - - -

24 JUDGE SINGAS: But what we're describing anyway  
25 is not this case because it's not about the charge, it's

1 about whether the attorney gave a meaningful  
2 representation, right?

3 MR. BOVA: Yes. And what happened here was it's  
4 not meaningful representation to fight for a client at  
5 trial, elicit evidence from - - - elicit evidence from the  
6 client that he is surrendering the firearm, and then  
7 failing to request the only defense instruction and instead  
8 going all in--

9 JUDGE SINGAS: How about if, as - - - as his  
10 client is testifying, the attorney is looking at the jury,  
11 and they're rolling their eyes, and they're yawning, and  
12 they're clearly not buying it, and he makes a decision, you  
13 know what? I'm not going with this defense. I'm going to  
14 switch gears and I'm going with another defense. Is that  
15 the single error that we're now going to say was  
16 ineffective assistance, so clear cut when he made a  
17 conscious decision, the litigator made a trial strategy in  
18 the moment, observing the jury, observing how his client  
19 does on the stand, observing how court - - - how cross-  
20 examination is going, and says, you know what? I don't  
21 want this charge.

22 MR. BOVA: Well, that would be objectively  
23 reasonable on these facts. We know that's not what  
24 happened, because what counsel does is he requests the  
25 temporary unlawful possession defense on the factual

1 predicate that Mr. Debellis is telling the truth when he  
2 testifies that he's surrendering the firearm.

3 JUDGE HALLIGAN: So this would be a harder case  
4 for you, I take it you're saying, if there was no temporary  
5 possession charge that was requested?

6 MR. BOVA: Oh, absolutely. For example, if the  
7 evidence indicated that counsel was simply, you know, going  
8 all in on the government failed to prove its case beyond  
9 reasonable doubt and doesn't request an affirmative  
10 defense, that might be a different case, or where there's  
11 two defenses and defense counsel requests one and not the  
12 other. But here, defense counsel develops one factual  
13 predicate, which requires an admission of guilt to a C  
14 violent felony, goes all in based on that factual predicate  
15 on a baseless, temporary unlawful defense that has - - -  
16 that is completely irrational, that the government does not  
17 suggest otherwise and instead - - -

18 JUDGE GARCIA: But it's hard to tag him with that  
19 until your client testifies, right? I mean, he was going  
20 to get an instruction and then your client testifies  
21 against the advice of counsel. Maybe I'm wrong on the  
22 record. And then the judge says, based on that, you had  
23 this gun too long and you got on the train with it on your  
24 way to turn it in and all. So then he says, you're not  
25 getting the instruction. So I think - - - I take it as at

1           that point you're saying he should have switched, because  
2           he had the instruction before that.

3                       MR. BOVA:   So two things on that.   First, he  
4           can't get any defense instruction, temporary unlawful - - -  
5           temporary unlawful possession or voluntary surrender unless  
6           Mr. Debellis testifies.   The only - - - and at 1103 through  
7           1106 of the record, the court tells him that.   You can't  
8           make out a temporary possession defense without someone  
9           testifying that the possession was temporary.   So Mr.  
10          Debellis had to testify in order to get either defense.   So  
11          at this - - - but in any event, though, the critical  
12          question is, what does counsel do with the evidence that's  
13          before him at the charge conference.   Counsel goes all in  
14          on temporary unlawful, which has no basis because Mr.  
15          Debellis has possessed this firearm unlawfully for a  
16          significant period of time, as opposed to the voluntary  
17          surrender defense, which is exactly the factual theory that  
18          he's trying to get to the jury.

19                      By failing to present the only question of fact,  
20          the only question of credibility to the jury, and instead  
21          going all in on no defense at all, we have a directed  
22          verdict.   That's not meaningful representation.   The right  
23          to meaningful representation means that the jury gets to  
24          decide whether the defendant's factual defense is truthful.  
25          And that didn't happen here.   Thank you.



1 MS. PHILIPS: Good afternoon, Your Honors, and  
2 may it please the court, Reva Grace Philips for the  
3 respondent, the Bronx County District Attorney's Office.  
4 There was no reasonable view of the evidence that defendant  
5 was entitled to either of these defense charges. I think  
6 the trial court very correctly clocked the issue with the  
7 common law defense he tried to raise, which was the  
8 temporality concern. Defense did, unlike my colleague  
9 says, it wasn't a baseless claim. Defense was getting a  
10 lot of traction with the court with his claim that the  
11 temporariness was impacted by the fact that the gun was  
12 held in a safe, in a home he couldn't go to because he was  
13 banned by an order of protection.

14 JUDGE TROUTMAN: What's the standard that applies  
15 when considering whether there's a reasonable view? Is it  
16 in the light most favorable to the People, to the  
17 defendant, to whom?

18 MS. PHILIPS: Your Honor, it is in the light most  
19 favorable to the defendant. And even under that standard,  
20 defendant fails to have articulated why there was a  
21 reasonable view for either of these.

22 JUDGE TROUTMAN: And is that because the People  
23 put forth the encounter that he had with the police from  
24 beginning to end on the night?

25 MS. PHILIPS: Certainly, I think the video is



1 Your Honor, as if all clocks speaks for itself. I think in  
2 addition to the video, we don't just have a pair of  
3 statements that - - -

4 JUDGE TROUTMAN: Isn't that - - - it's not - - -  
5 is it that he must put forth a successful claim in order to  
6 get that it's going to be accepted by the jury? Or is it  
7 that you put it forth and it's for the fact finder to  
8 decide?

9 MS. PHILIPS: Your Honor, the judge has a  
10 gatekeeping function there where he has to determine  
11 whether there's a reasonable view that warrants it going to  
12 the jury. The trial court correctly determined - - -

13 JUDGE TROUTMAN: Reasonable view in light most  
14 favorable to, but the court is not the fact finder. The  
15 jury is, correct?

16 MS. PHILIPS: Correct, Your Honor. But again,  
17 here, there was no reasonable view, as I mentioned, of the  
18 temporary and innocent possession. The temporality issue,  
19 defense counsel had - - - had obviously - - -

20 JUDGE TROUTMAN: Is that because the court  
21 decided that it was incredible based upon that tape of the  
22 roadside encounter?

23 MS. PHILIPS: No, Your Honor. The court is - - -  
24 waits until after defendant testifies to finally say you're  
25 not going to get the charges based on - - -

1 JUDGE TROUTMAN: So the court is assessing the  
2 credibility of the defendant based upon the evidence and  
3 says, no, you don't get that, instead of the jury doing  
4 that?

5 MS. PHILIPS: Well, one of the specific things  
6 the court points to is the defendant's testimony. And he  
7 says specifically, the defendant testifies that he put this  
8 gun in the bag, and then the gun is recovered from  
9 underneath the floorboard. And the court actually says,  
10 I'm jammed on this charge because of his testimony, because  
11 he hides the gun, because as all of Your Honor's - - -

12 JUDGE TROUTMAN: His - - - it's not - - - and  
13 that's not credibility assessment by the court? That it's  
14 incredible, because I've decided based on the evidence.  
15 Instead of letting the jury decide it, I'm going to decide,  
16 as the gatekeeper, you don't get that charge because the  
17 evidence has been presented that when you encounter the  
18 police, you never said you were going to turn the gun in,  
19 and in fact, you went back and you were trying to get the  
20 gun out and then hide it from the police.

21 MS. PHILIPS: Well, I think the court cites to a  
22 variety of reasons it ultimately denies the charge, but  
23 certainly, I think it primarily is concerned with  
24 temporality, but it also says it's the defendant's  
25 testimony that's going to prevent him from getting this

1 charge, and specifically the fact that defendant, while  
2 testifying, fails to account for how the gun winds up  
3 hidden and why he's lying to the officer repeatedly about  
4 the gun.

5 JUDGE TROUTMAN: Lying - - -

6 CHIEF JUDGE WILSON: So is that on the temporary  
7 lawful possession charge or on the - - - the return of the  
8 gun?

9 MS. PHILIPS: So Your Honor, that was on the  
10 common law charge that counsel had requested, but for the  
11 exact same reason, the trial court was not going to grant  
12 the statutory defense. The trial court again makes very  
13 clear it's jammed on the charge issue because defendant  
14 lies to the officer.

15 CHIEF JUDGE WILSON: No, I mean, the voluntary  
16 return charge that he requested and didn't get.

17 MS. PHILIPS: Correct, Your Honor. So the  
18 requested charge fails. But what I'm pointing out here is  
19 that the trial court is also signaling to counsel for the  
20 same reasons it's not going to grant 265.20. And while we  
21 do not have defense counsel on the record saying, Your  
22 Honor, there's also 265.20 to consider, one, I would point  
23 to the fact that the trial court itself references Penal  
24 Law 265.20 at - - - pardon me - - - at (a)1390 the trial  
25 court says, based on my review of these cases and 265.20,

1 I'm denying the charge.

2 I also think that we have to look at what counsel  
3 says to the court at one point. Trial counsel is talking  
4 to the court, and the court directly asks him, was there a  
5 buyback program at the 49th Precinct. And counsel says, my  
6 client is going to testify to that. And the court says,  
7 but do we know? And the court - - - and counsel responds,  
8 my client believes that there was a buyback program. So I  
9 think the idea that if counsel had just clocked on 265.20,  
10 he would have made that argument and had success, is belied  
11 by this record. And I think when we talk about reasonable  
12 view here, that has to be, as Judge Singas pointed out,  
13 encapsulated within the fact that this claim is presented  
14 to the court under an ineffective assistance of counsel  
15 theory.

16 So defendant doesn't just have to prove there was  
17 a reasonable view that entitled him to the 265.20 statutory  
18 defense, he also has to prove the absence of any strategic  
19 reason for counsel to have made that decision. And as  
20 Judge Singas pointed out, right, that could be as simple as  
21 counsel seeing the jury's face as he's testifying and  
22 saying this doesn't look like they're buying what he's  
23 selling. We don't know from the record - - - unlike what  
24 counsel said, we don't know from the record why. Defense  
25 counsel made this decision. And that's exactly why this

1           should have been raised by way of a CPL 440.10 motion,  
2           which is what the division found, and I think is in line  
3           with this court's consistent and recent rulings that  
4           ineffective assistance claims are generally best brought  
5           under a 440.10 motion.

6                        There are many strategic reasons we can think of  
7           why counsel may have made that decision. But the fact that  
8           we don't know when we'd be engaging in speculation, I think  
9           goes to prove that defense - - - defendant here can't  
10          really prove everything he has to prove to get this court  
11          to overturn his conviction. Because in addition to the  
12          reasonable view, he also has to prove the lack of strategic  
13          reasons, and then he has to talk about prejudice. And this  
14          is a jury that heard defense counsel say, he had no  
15          criminal intent; he was on his way to a buyback. So this  
16          is a jury who may not have had the charge from the court,  
17          but certainly had before it the concept that defendant did  
18          not have the criminal intent requisite --

19                       CHIEF JUDGE WILSON: That's part of the problem,  
20          though, I think, is if they have - - - if they have  
21          testimony that might provide a defense, but they don't have  
22          an instruction from the judge about the defense, it's very  
23          hard for them to find for the defendant.

24                       MS. PHILIPS: Well, Your Honor, I think that's  
25          belied by the fact that they acquitted him of the drug

1 charges. And I think going back to the reasonable view,  
2 again, we're not just talking about defendant is in his own  
3 car driving to a police precinct. Defendant is without a  
4 license, driving an unregistered car after having traveled  
5 with this gun 50 miles, and a bag of Xanax and codeine - -  
6 - or oxycodone in addition to - - -

7 JUDGE RIVERA: But that - - - that - - - that all  
8 sounds like what goes to the jury and for the jury to  
9 decide. I know he said one thing to the cop. He's gotten  
10 on the stand. He's saying something else now, and this is  
11 the conduct, and I do, or I don't believe him, but a judge  
12 doesn't get to do that. That's the fact - - - the jury - -  
13 - this is a jury trial - - - is the one that gets to decide  
14 that. That's where I'm having difficulty with your  
15 argument.

16 MS. PHILIPS: Your Honor. Again, so I would  
17 argue first that the judge is looking at all the evidence  
18 and says there's no reasonable view given all of these  
19 things. You're unlicensed - - -

20 JUDGE RIVERA: Again, but it turns on what he  
21 said to the officer, and what he says on the stand, and his  
22 conduct. That - - - that to me is about subjective  
23 criteria goes to the jury.

24 MS. PHILIPS: Okay. So I guess, again, also, you  
25 know, defendant's not saying the court was wrong for not

1 granting the voluntary, temporary, and innocent common law  
2 defense. That's not what defendant is saying. Defendant  
3 is saying, my counsel was ineffective for not requesting  
4 the statutory defense. So one, again, even if Your Honors  
5 find there was a reasonable view that warranted the charge,  
6 that still leaves open the question of whether or not there  
7 were strategic reasons not to seek it. And I think  
8 defendant fails there as well, because, again, defense  
9 counsel is entitled to say, I have multiple defenses I can  
10 present and I'm going to pick the one I think is easiest -  
11 - -

12 JUDGE HALLIGAN: But could a reason be there to -  
13 - - to request one, but not the other?

14 MS. PHILIPS: Absolutely, Your Honor. So again,  
15 you know, as I mentioned, defense counsel, when directly  
16 asked by the court was there a buyback program, counsel  
17 says, my client believes there was.

18 JUDGE HALLIGAN: That's the reason why you think  
19 they might not have strategically chosen to request that  
20 defense?

21 MS. PHILIPS: Well, I think that we all have to  
22 guess at why defense didn't strategically request and  
23 that's why this should be a CPL 440.10. But I think that  
24 that is some evidence that - - - defendant and defense  
25 counsel are talking about the precinct, the buyback.



1 They're having conversations about that. So the idea that  
2 defense counsel is not at all aware of why his client might  
3 be headed to a buyback at the 49<sup>th</sup>, hasn't asked him any  
4 follow up questions about that claim, I think that's belied  
5 by that point in the record. I also think you have the  
6 court at sentencing saying, I looked into it, there is no  
7 buyback program. There was no buyback program.

8 JUDGE TROUTMAN: But again, couldn't that have  
9 been put to the jury after the People in response to what  
10 the defendant offered, there was no buyback program.  
11 Here's what he - - - he said one thing to the police here.  
12 He said another thing there, and the jury says, incredible,  
13 we reject. Isn't that how the process is supposed to work?

14 MS. PHILIPS: So again, I think your question  
15 actually underscores, Your Honor, the fact that we need  
16 defense counsel to talk about what he was thinking and why  
17 he strategically chose the defense he did, because I think  
18 to say the People could have rebutted the buyback program,  
19 well, under the voluntary, temporary and innocent common  
20 law, they didn't have to, right?

21 JUDGE TROUTMAN: So the defense he chose or the  
22 charge?

23 MS. PHILIPS: So what I'm saying is the defense  
24 he actually put forth, the - - - the temporary and innocent  
25 possession, he - - - we didn't have to rebut that the

1 precinct had a buyback program because that wasn't what  
2 that defense would turn on. 265.20 would.

3 JUDGE TROUTMAN: You're saying he changed things  
4 midstream.

5 MS. PHILIPS: No, Your Honor, I'm trying to  
6 articulate that if he had sought the 265.20, the statutory  
7 defense - - -

8 JUDGE TROUTMAN: Okay.

9 MS. PHILIPS: - - - the defendant now says was  
10 the appropriate one that would have won the day for him; if  
11 he'd sought that, the People would have rebutted it by  
12 presenting evidence.

13 JUDGE RIVERA: So just to be clear, you're saying  
14 the defense is unavailable if the buyback program is not in  
15 effect during the period of time that the individual says  
16 that they're trying to return the gun, even if they  
17 authentically believed that the buyback program was in  
18 effect? I just want to understand your point.

19 MS. PHILIPS: So I guess I would have to respond  
20 to two points. So one, I think this goes again to the  
21 gatekeeping function of the judge. Is there a reasonable  
22 evidence - - -

23 JUDGE RIVERA: No, that was a yes or no. That  
24 was a yes or no.

25 MS. PHILIPS: I'm sorry. Can Your Honor repeat

1 the question then?

2 JUDGE RIVERA: The question requires a yes or no  
3 response? You can - - - you can expand on it, but I need  
4 the yes or no up front.

5 MS. PHILIPS: So as to 265.20, no. I don't think  
6 a defendant would be entitled to the charge where there is  
7 no buyback program.

8 CHIEF JUDGE WILSON: So even with the intent the  
9 defendant mistakenly thought that there was and honestly  
10 thought that, or maybe had gotten some literature that had  
11 the wrong date on it and believed that there was a buyback  
12 program, it wouldn't matter if there, in fact, wasn't a  
13 buyback program? That's the end of it.

14 MS. PHILIPS: I think in light of Your Honor's  
15 hypothetical, I would change my answer. Yes, I think that  
16 there could be - - - you could be entitled to that charge  
17 where the defendant articulates some mistaken belief in the  
18 fact that there is a buyback. Here we have the opposite.  
19 We have a defendant - - -

20 JUDGE RIVERA: That was the question. Yes, my -  
21 - - my apologies, Your Honor. I would agree that there are  
22 - - - there are factual scenarios where a defendant could  
23 be incorrect about a buyback.

24 CHIEF JUDGE WILSON: But doesn't the existence of  
25 the buyback program seem as if it goes to credibility of

1 the witness, really. It's not a - - - it's not an ironclad  
2 bar to the defense.

3 MS. PHILIPS: Well, again, Your Honor, I think  
4 here we do have defendant testifying that he looks it up  
5 and that there is a buyback program. But the reason that I  
6 raised the lack of buyback isn't, again, to attack  
7 defendant's credibility. I think that's the reasonable  
8 view question. I think this goes to the 440.10 question,  
9 why this should be raised by way of a motion, because we  
10 don't know why defense doesn't seek the 265.20, but we can  
11 easily imagine that he - - - he contacted the precinct. He  
12 asked his client - - -

13 JUDGE RIVERA: Let me ask you - - - let me just -  
14 - - fair enough. So let's say we agree with you, brings  
15 the 440.10. Attorney - - - there's a hearing, the attorney  
16 gets on the stand and says, I don't remember why I did  
17 that. I have no recollection. I assume your position  
18 would be that then the motion fails because they haven't  
19 met their burden?

20 MS. PHILIPS: Well, I think a 440.10 would be  
21 useful for a variety of things. So one, I think if counsel  
22 testifies, I was unaware. Then, we look to - - -

23 JUDGE RIVERA: But in my hypothetical, the lawyer  
24 generally - - - I don't - - - I don't remember why I did  
25 that. I really don't.

1 MS. PHILIPS: So I think if counsel can't  
2 articulate a strategic reason, then we move on to assessing  
3 the prejudice. And again, I think that at a 440.10, the  
4 People would be entitled to introduce rebuttal evidence as  
5 to the 265.20 claim. And I think here where we have a jury  
6 who again gets a flavor of this defense, whether or not  
7 they get the charge from the judge, and still convicts  
8 defendant but doesn't convict him of the drugs, I think  
9 it's a hard press to believe that this is a jury that was  
10 going to acquit him, but for the lack of getting the formal  
11 charge from the judge on 265.20.

12 CHIEF JUDGE WILSON: Well, this argument is bad.  
13 The question is is it so bad that he doesn't get the  
14 instruction?

15 MS. PHILIPS: I think the answer is yes, Your  
16 Honor. And again, I think that we have more than just  
17 defendant's statement and Officer Allen's statement here.  
18 We have a wealth of evidence that proves why there was no  
19 reasonable view that this was temporary and innocent  
20 possession, or that this would have been voluntary  
21 surrender under 265.20.

22 I'll briefly turn to the conflict point. I think  
23 defense counsel's very brief remark at sentencing cannot  
24 constitute conflict warranting the necessity of replacing  
25 counsel. Counsel's merely defending his performance.

1 That's something this court has approved of before.

2 But I also think if you look at the context in  
3 which counsel statement is made, he's really trying to  
4 protect the defendant's rights by alerting the court to why  
5 it should not dismiss the motion outright on technical and  
6 procedural bars. He's trying to ask the court to please  
7 give this actually some more thought than just saying,  
8 well, he didn't file it right, so I don't have to look at  
9 it at all. And I also think the fact that this sentencing  
10 court specifically says, well, counsel, it doesn't really  
11 matter to me if you adopt the motion or not, and it doesn't  
12 really matter to me what you do, I'm going to do the same  
13 thing.

14 JUDGE RIVERA: What - - - what was the point of  
15 saying that counsel believed they were very effective?

16 MS. PHILIPS: Absolutely, Your Honor. So counsel  
17 is saying - - - first he says to the judge, here's these  
18 pieces of paper, and the court goes into this whole thing  
19 about, I don't need to look at this. You're holding a  
20 piece of paper. Counsel says, but I think I might need to  
21 be relieved. And the court says, I have no basis to  
22 relieve you. I have no motion before me. And that's when  
23 counsel is saying yes, but he is - - - he's saying I'm  
24 ineffective. And Your Honor, I'm not going to argue that  
25 because I think I was effective. And then the court gets a

1 copy of it, and then the court readily sees - - -

2 JUDGE RIVERA: Why isn't that undermining the  
3 motion?

4 MS. PHILIPS: Because it's not discussing the  
5 merits of motion.

6 JUDGE RIVERA: There's no basis for this motion.

7 MS. PHILIPS: Well, he's not saying there's no  
8 basis for this motion. I think that would be Mitchell.

9 JUDGE RIVERA: I thought you said he - - - what  
10 he says to the judge is he's arguing, I'm not effective,  
11 and I think I was very effective, so I can't support the  
12 motion.

13 MS. PHILIPS: I believe exactly what he says is,  
14 Your Honor, he's alleging things I'm not going to argue on  
15 his behalf. He's alleging I'm ineffective. I'm not going  
16 to argue that. I think I was very effective. I think - -  
17 -

18 JUDGE RIVERA: I'm saying, isn't that telling the  
19 judge there's no legal basis for the motion?

20 MS. PHILIPS: I wouldn't say that, Your Honor. I  
21 think in Mitchell we have a much more clearer case of that  
22 where the attorney actually says outright, there's no merit  
23 to this motion, and then the court replaces that - - -  
24 substitutes counsel. Here, he's using that statement to  
25 really flag for the court why they should look a little bit

1 more at this. And then the court seeing the utter paucity  
2 of facts provided by defendant.

3 JUDGE TROUTMAN: And so are you arguing - - - he  
4 could have even been cueing the court that if you want to  
5 relieve me to get counsel to explore the issue, but it's  
6 something for the court to at least consider because of the  
7 flippant way he did respond?

8 MS. PHILIPS: Absolutely, Your Honor. I think  
9 he's a hundred percent trying to make sure that the court  
10 is paying as much attention to his client's rights as it  
11 can.

12 CHIEF JUDGE WILSON: You're - - - you're - - -  
13 essentially, you're treating as if he said there's a  
14 conflict. I would have a conflict.

15 MS. PHILIPS: Certainly, Your Honor. And then  
16 the court looks at the motion and says, well, we don't have  
17 to get there, because I think this is such a frivolous  
18 motion that I'm going to dismiss it out of hand. Thank you  
19 for your time, Your Honors. And we ask that you affirm.

20 MR. BOVA: So just as to the court's decision,  
21 the argument that the - - - that a citation to 265.20 at  
22 (a)1390 is somehow the court considering the voluntary  
23 statutory defense is - - - that's the first time the  
24 government has made that argument here today. The line,  
25 though, that the court says is, this defendant's temporary



1 unlawful possession defense applies because as a matter of  
2 policy. The court's describing the law saying, temporary  
3 unlawful possession applies because as a matter of policy,  
4 the conduct is not being criminal.

5 JUDGE TROUTMAN: Was there confusion perhaps at  
6 the trial level that it's all one defense instead of two  
7 separate ones?

8 MR. BOVA: No, there was no confusion at all,  
9 because no one ever - - - the defense counsel never told  
10 the court that it should consider the statutory defense  
11 under 265.20, and at (a)1390 through (a)1395, the court  
12 expressly denies the instruction, because he says your  
13 possession is not temporary. As the court puts it, you  
14 cannot ignore court orders to - - - to surrender weapons.  
15 You cannot have unlawful possession, then all of a sudden  
16 decide that you're going to drive several hours. However,  
17 the voluntary surrender defense does not have a temporal  
18 requirement. It does not require that the possession be  
19 temporary. The big problem here, the discussion here of  
20 jury nullification, and whether or not it would be  
21 reasonable for counsel to do what he did is that he has a  
22 factual predicate for an actual defense, but he only uses  
23 that factual predicate in support of a baseless defense and  
24 a jury nullification defense.

25 CHIEF JUDGE WILSON: So why do we need a 440?



1 MR. BOVA: We don't need a 440, because we know  
2 that counsel's factual theory, his goal, his strategy is to  
3 get the question before the jury of whether Mr. Debellis is  
4 testifying truthfully when he says that he is going to  
5 surrender this firearm to the buyback program. That  
6 question of fact, however, is used by counsel to support a  
7 baseless defense as opposed to the buyback defense. This  
8 is exactly very similar --

9 JUDGE SINGAS: Are you saying that there is a  
10 legitimate - - - there is legitimacy to him pursuing a jury  
11 nullification or there's not?

12 MR. BOVA: It's unreasonable - - - it's  
13 unreasonable performance, and deficient performance, and  
14 violates effective assistance to pursue jury nullification  
15 at the expense of a real defense, especially where the real  
16 defense - - -

17 JUDGE SINGAS: Yeah, that's where I'm having the  
18 trouble, because you're saying that here, years later,  
19 looking at paper, and counsel made a decision as a litigant  
20 in that courtroom saying, I'm not going to go there. I  
21 think jury nullification for us right now, at this  
22 juncture, is better. And we now have to say that that one  
23 decision is basically ineffective assistance of this  
24 attorney. And I have a real problem with that.

25 MR. BOVA: Well, it's because of the uniqueness

1 of this record. No reasonable - - - no reasonable attorney  
2 pursues jury nullification as the only defense based on a  
3 factual theory, which is what counsel did, factual theory  
4 of voluntary surrender, instead of pursuing the real  
5 defense and then also making the same argument. It's - - -

6 JUDGE TROUTMAN: So are you saying, basically,  
7 jury nullification should have only been pursued if there  
8 was - - - if that statutory defense had not, in fact,  
9 exist?

10 MR. BOVA: Absolutely, yes. But once - - - once  
11 the court shuts down the temporary and lawful possession  
12 defense that is based on the factual predicate of buyback,  
13 any reasonable lawyer requests the applicable legal defense  
14 and does not go all in on a mercy plea, that as the judge  
15 reminds the jury over and over again, is not the law. You  
16 are not allowed to acquit someone because you feel bad for  
17 him, that he was down on his luck and was surrendering the  
18 firearm. The jury should have been able to decide,  
19 however, whether crediting that testimony justified the  
20 factual and legal defense of voluntary surrender.

21 JUDGE RIVERA: Your red light is on. Can you  
22 maybe take 30 seconds on the conflict-of-interest issue?

23 MR. BOVA: What counsel - - - so counsel says I  
24 was very effective under Washington and Mitchell. That is  
25 taking a position adverse to the merits of the motion.

1 Counsel's option is very simple. He simply says nothing,  
2 or as he does here, he asks to be relieved. The problem is  
3 that he asks to be relieved, and then he undermines the  
4 merits of the motion. This is not a difficult thing for  
5 counsel to do. It's exactly what this court is already  
6 held - - -

7 JUDGE GARCIA: Is there any law on the buyback  
8 requirement that there has to be a program of good faith  
9 belief that there is a program? Is there any law on that  
10 out there?

11 MR. BOVA: Well, there's - - - there's no  
12 question that there is a buyback program. I mean, in  
13 People versus - - -

14 JUDGE GARCIA: An active buyback program where  
15 he's going. And I think you were asked this, or someone  
16 was asked it before.

17 MR. BOVA: So - - -

18 JUDGE GARCIA: Is that - - - is that an element  
19 of this - - -

20 MR. BOVA: Just to be clear, though, the only - -  
21 - the only theory, I think what the government means when  
22 they say there was no buyback program, they just mean  
23 whether you can get money. But it is always the case for  
24 the buyback program that wherever you go you can surrender  
25 it. It's just a question of whether you're going to also

1 get the money.

2 JUDGE HALLIGAN: Well, that was the way he  
3 testified, was it not? That he was doing this to get  
4 money?

5 MR. BOVA: Yes. But either way, under the terms  
6 and conditions of the buyback program, if he gets the  
7 precinct wrong, or he goes to the 49th Precinct as opposed  
8 to the 48th precinct, he could still surrender it lawfully  
9 under the terms and conditions of the program. So whether  
10 or not he gets the monetary reward fact right, it really  
11 doesn't matter.

12 JUDGE GARCIA: There's always - - - is there  
13 always an ability to turn a gun under the statute?

14 MR. BOVA: Yes. And that is good policy. And  
15 that's why we have the statute to incentivize people to  
16 surrender firearms so they don't fear criminal prosecution.  
17 So that - - - that question of did it exist or did not  
18 really is not germane to the case.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. BOVA: Thank you.

21 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Anthony Debellis v. the People of the State of New York, No. APL-2022-107 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

Agency Name: eScribers

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

Date: October 24, 2023

