The Appellate Advocate:
A Recap of Recent Decisions by NJ's Appellate Courts

State v. Simmons
No. A-3449-22

At what point is a law enforcement officer in plainclothes, conducting surveillance, an "undercover" officer? These are the types of questions I ask myself when watching Point Break. Come to think of it, that is just one of many questions you ask while watching Point Break (Why did the FBI use one of the most recognizable college football players to infiltrate California's syndicate of President-cosplaying, bank-robbing surfers?). But I digress. Let's talk about this case.

In State v. Simmons, the Appellate Division affirmed the five-year prison sentence of Antwan T. Simmons, who pleaded guilty to unlawful possession of a handgun but reserved the right to challenge the indictment on appeal. Simmons maintained that a missing video raised questions of bad faith by law enforcement and should have led to dismissal of the case.

At the center of the dispute was Detective Nicholas Palermo, a member of Camden County's Narcotics Gang Unit, who claimed to have spotted Simmons adjusting a handgun in his waistband while riding a bicycle in Camden's Centerville neighborhood in October 2021. Although eight other officers provided body-worn camera footage, Palermo's recording was never recovered. The defense argued that his failure to activate the camera—combined with an allegedly false report claiming Simmons had sold drugs to an undercover officer—undermined the integrity of the case. The prosecution countered that Palermo was working undercover (an assertion the defense disputed), which in turn meant he was not required to activate a body-worn camera.

The appellate judges declined to adopt the defense's arguments. In their written decision, they noted that there was no evidence Palermo deliberately destroyed or withheld footage, and it was unclear whether the video had ever existed. The panel emphasized that Simmons would still have the opportunity to challenge Palermo's credibility through cross-examination.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

"Dismissal of an indictment is a draconian remedy and should not be exercised except on the clearest and plainest ground," the panel wrote, citing long-standing precedent. They concluded that the absence of the recording did not amount to bad faith or manifest prejudice against the defendant.

The ruling underscores the judiciary's reluctance to toss indictments even in the face of potential violations of New Jersey's body-worn camera statute, which requires officers to record most encounters with the public. While the law creates a presumption in favor of defendants when recordings are missing, the court stressed that such protections stop short of automatic dismissal.

For Simmons, the ruling leaves intact his negotiated plea agreement (which he had negotiated after the trial court denied his motion to dismiss the indictment) and the five-year prison term, which includes a mandatory 42-month parole disqualifier under the Graves Act, a law that imposes strict sentences for firearms offenses.

About Thomas Cotton

Thomas Cotton is a litigation partner at Schenck Price, representing clients in trial and appellate courts throughout the United States. In addition to his practice, he authors *The Appellate Advocate*, a semi-weekly blog offering thoughtful yet accessible commentary on recent appellate rulings.

973-540-7333
tjc@spsk.com

About Schenck Price

Founded in 1912 as a two-person law firm in Morristown, New Jersey, Schenck Price has entered its second century as a full-service firm with 80+ attorneys in its New Jersey and New York offices. Our Firm's long history of legal excellence in the areas of litigation, corporate transactions and governance, construction, health care, trust and estate planning, real estate, family law, banking, and environmental law has expanded as the Firm has grown.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP