

Supreme Court, Appellate Division, Second Department, New York.
The **PEOPLE**, etc., Respondent, v. Santo **PANTINO**, Appellant.
Dec. 3, 1984.

Defendant was convicted in the Supreme Court, Queens County, Naro, J., of criminal possession of controlled substance in the second degree, and he appealed. The Supreme Court, Appellate Division, held that indictment charging defendant with criminal possession of controlled substance would be dismissed as sanction for State's failure to preserve tape recordings of telephone conversations police officer had with defendant where tapes, which could have constituted *Brady* material, could have made a difference in the outcome with respect to entrapment defense.

Reversed and remitted.

Criminal Law 110 700(9)

[110 Criminal Law](#)

[110XX Trial](#)

[110XX\(E\) Arguments and Conduct of Counsel](#)

[110k700 Rights and Duties of Prosecuting](#)

Attorney

[110k700\(9\) k. Loss or Destruction of](#)

Evidence. [Most Cited Cases](#)

Indictment charging defendant with criminal possession of controlled substance would be dismissed as sanction for State's failure to preserve tape recordings of telephone conversations police officer had with defendant where tapes, which could have constituted *Brady* material, could have made a difference in the outcome with respect to entrapment defense.

****334** Joseph R. Benfante, New York City (Christopher P. Gallo, New York City, of counsel), for appellant. John J. Santucci, Dist. Atty., Kew Gardens (Annette Cohen, Bellerose, of counsel), for respondent.

Before WEINSTEIN, J.P., and BROWN, RUBIN and EIBER, JJ.

****335** MEMORANDUM BY THE COURT.

***412** Appeal by defendant from a judgment of the Supreme Court, Queens County, rendered June 14, 1983, convicting him of criminal possession of a controlled substance in the second degree, upon a jury verdict, and imposing sentence.

Judgment reversed, on the law, indictment dismissed and

case remitted to the Supreme Court, Queens County, for the purpose of entering an order in its discretion pursuant to [CPL 160.50](#).

During the course of this trial, the People presented Detective George Reich as a witness. He stated several times that he had not tape-recorded any telephone conversations with defendant. Then, after several days of trial, it was revealed by Detective *413 Reich's superior, Sergeant Crebs, that the telephone conversations had been recorded, beginning with the initial contact on April 19, 1982, and that those tapes were subsequently lost. The testimony of Detective Reich and of defendant differed in significant respects regarding those early conversations, including whether or not defendant told Detective Reich that he does not sell drugs, the number of times per day that Detective Reich called defendant, and the tenor of the conversations. Defendant raised both an entrapment and an agency defense to all of the counts in the indictment. The jury apparently accepted the agency theory, because defendant was acquitted on all counts involving sales of cocaine. From the record before us, it cannot be said that the tapes, which may well have constituted *Brady* material, would have made no difference in the outcome with respect to the entrapment defense raised on the possession count (see [United States v. Bryant](#), 439 F.2d 642 (D.C.Cir.); [Brady v. Maryland](#), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215).

Under the circumstances, we find that the only appropriate sanction for the failure to preserve these tapes is dismissal of the indictment (see [People v. Kelly](#), 62 N.Y.2d 516, 478 N.Y.S.2d 834, 467 N.E.2d 498; see, also, [People v. Saddy](#), 84 A.D.2d 175, 445 N.Y.S.2d 601; [People v. McCann](#), 115 Misc.2d 1025, 455 N.Y.S.2d 212).

In light of this determination, we need not reach the other issues raised.

N.Y.A.D. 2 Dept., 1984.

People v. Pantino

106 A.D.2d 412, 482 N.Y.S.2d 334

END OF DOCUMENT