



# Buried Treasure

Determining whether the concealment of videotapes depicting crimes is a crime on its own

By Elliott Goldstein

**Q** Does concealing videotapes depicting crimes constitute obstruction of justice?

**A** The answer may be yes, depending upon whether the person(s) who concealed the videotapes intended to do so. Section 139(2) of the *Criminal Code* makes it an offence to willfully attempt in any manner to obstruct, pervert or defeat the course of justice. The penalty upon conviction is imprisonment for a term not exceeding 10 years.

A key element of the offence is that the actions of the accused must be proven to be willful (that is intentional). Since the offence requires a specific intention to obstruct justice, it does not matter that the attempt was not only unsuccessful but could not have succeeded.

This issue arose in the recent Ontario case of *R. v. Murray*<sup>1</sup>. Murray is a lawyer who, for a time, represented the infamous Paul Bernardo, a man who was charged with murder in the deaths of two young women. On instructions from Bernardo, Murray attended Bernardo's home and removed hidden videotapes, which depicted gross sexual abuse of the young women. While the tapes did not show the actual murders, they did provide strong circumstantial evidence to prove Bernardo guilty of the murders.

Murray kept the videotapes for 17 months without disclosing their existence to the Crown or the court. Shortly before trial motions were to begin, Murray sought and obtained advice from the law society. Following that advice, Murray appeared before the trial judge, who directed that the videotapes be delivered to new counsel for Bernardo. The videotapes were turned over to the police and used by Crown counsel at Bernardo's trial. Murray was later charged with attempting to obstruct justice by concealing the videotapes.

Any criminal offence has two elements: a *mens rea* (mental element) and

an *actus reus* (physical element). The *actus reus* of this offence was whether Murray's actions in withholding the videotapes had a tendency to obstruct the course of justice. The court found that they did.

The *mens rea* of the offence was based on the use of the word "willfully." This required the Crown to prove that Murray intended to obstruct the course of justice when he secreted the videotapes. The court found that Murray's actions had the tendency to obstruct the course of justice at several stages of the proceedings.

Murray could not be found guilty of obstructing justice if he had a legal justification for his conduct. However, solicitor-client privilege did not apply, as the videotapes were not "communications" between lawyer (Murray) and client (Bernardo). Instead, the videotapes were evidence of a crime that pre-existed Murray's solicitor-client relationship with Bernardo. In addition, while Murray owed a duty of confidentiality to his client, without privilege, there was no legal basis that would permit concealment of the videotapes. Neither were the tapes of any exculpatory value; they were overwhelmingly inculpatory (that is, extremely incriminating).

The lawyer Murray could not be a party to concealing the videotape evidence. Once he removed the videotapes from their hiding place in Bernardo's home, on Bernardo's instructions, Murray could not be a party to concealing them again. Nor could Murray follow any instructions from Bernardo that would result in their continued concealment. Bernardo's lawyer had three legally justifiable options once he discovered the overwhelming significance of the videotapes:

- to immediately turn them over to the Crown either directly or anonymously;

- to deposit them with the trial judge; or
- to disclose their existence to the Crown and prepare to do battle to retain them.

The trial judge found that Murray clearly intended to impede the prosecution against Bernardo by concealing the videotapes and putting them beyond the reach of the police and the Crown. So why was Murray acquitted?

Well, the court also found that Murray's strategy of using the videotapes at trial was reasonably feasible and lent support to Murray's evidence that he did not intend to permanently suppress the videotapes. The court therefore had a reasonable doubt as to the accused's intention to obstruct justice.

The court also found that Murray had made only a token effort to find out what his legal obligations were. However, the court noted that had Murray done careful research, he might have remained confused. If you assume that Murray intended to use the tapes in Bernardo's defence, there was no difficulty with the proposition that Murray may well have believed that he had no legal duty to disclose the videotapes until resolution discussions or trial.

The relevance to the security industry of the trial judge's ruling in the Murray case becomes obvious when one considers that security professionals regularly deal with surveillance videotapes depicting crimes. Fortunately, surveillance videotapes rarely depict security officers committing crimes. However, those that do cannot be concealed, especially when the security officers involved have been charged. The best course of action to follow is to hand such videotapes over to the company in question's legal counsel and remind him or her of the aforementioned three legally justifiable options set forth in the Murray case. 🍁

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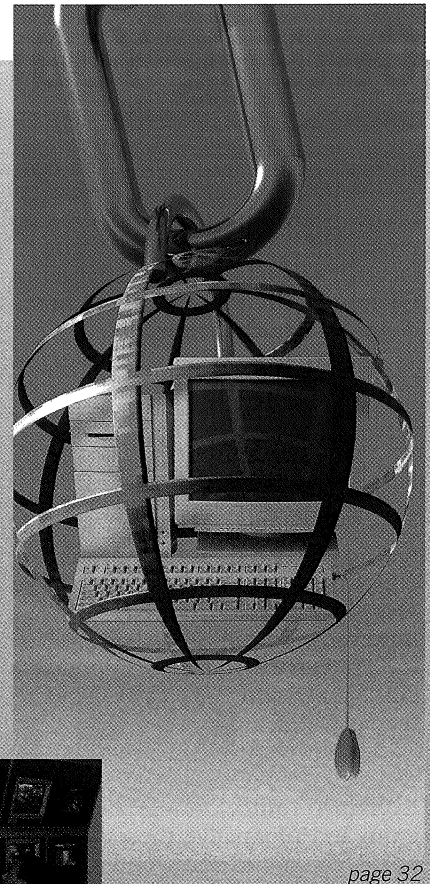
## Author's Notes

- <sup>1</sup> *R. v. Murray* (2000), 48 Ontario Reports (3d) 544 (Ont. S.C.J.).

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