

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DERRICK HIGGINS,

Defendant-Appellee.

UNPUBLISHED

October 6, 2000

No. 220697

Wayne Circuit Court

LC No. 98-007593

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was charged with delivery of more than 225 grams but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant filed a motion to suppress the evidence and dismiss the charge, arguing that the police engaged in entrapment. After conducting an evidentiary hearing on the matter, the trial court found that defendant had been entrapped, and granted defendant's motion to dismiss. The prosecution appeals as of right. We reverse and remand.

In the present case, defendant's charge stemmed from drug-related activity between him and a police informant, James Brian King. King, who previously had been arrested and charged with delivery of cocaine, volunteered to become a police informant, hoping that his cooperation would help his own case. King arranged to purchase cocaine from defendant, who King considered an acquaintance and from whom King had purchased cocaine on numerous occasions within the past ten to fifteen years.

The drug-related activity between King and defendant led to two separate cases against defendant before the same court. Defendant argued during an evidentiary hearing relating to both cases that the police had entrapped him. At the conclusion of the hearing, the trial court held that the February 12, 1998 cocaine buy in the first case, lower court Docket No. 98-007531, was not the result of entrapment. However, the trial court found that the second buy on March 5, 1998, as charged in the case at hand, lower court Docket No. 98-007593, was the result of reprehensible police conduct, and therefore constituted entrapment.

In the present case, the prosecution's sole argument on appeal is that the trial court erred in dismissing the delivery of cocaine charge against defendant on the ground that the police entrapped him.

A trial court's ruling on a motion to dismiss is reviewed for abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). We review for clear error the factual findings underlying the trial court's ruling with respect to an entrapment issue. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991) (Brickley, J); *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998); MCR 2.613(C). The trial court's findings are clearly erroneous if this Court is left with a firm conviction that a mistake was made. *Connolly, supra*.

Michigan has adopted an objective test for determining whether a defendant has been entrapped. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999), citing *Juillet, supra* at 53. This Court has explained that determining entrapment entails a two-pronged objective test, with entrapment existing if either prong is met. *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992). As stated in *Fabiano*, entrapment exists "if (1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court." *Id.* at 526 (emphasis in original). Under both prongs, the nature of the police conduct is relevant; however, the police conduct must be more reprehensible under the second prong. *Id.* at 531. When persons who are not law enforcement officials act with official encouragement or assistance, they are treated as government agents for the purpose of determining the existence of entrapment. *People v Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1988). It is the defendant's burden of proving by a preponderance of the evidence that he was entrapped. *Juillet, supra* at 61.

In both cases against defendant, defendant argued in the trial court that the conduct of the police was so reprehensible that it could not be tolerated by the court and, impliedly, that entrapment should be found under either prong of the requisite test. The trial court found that defendant failed to meet his burden of proof with regard to the case arising from the first buy on February 12, but determined that defendant met his burden with regard to the present case. According to the trial court, in effecting the second buy, King, at the direction of the police, appealed to defendant's sympathies and to his friendship. The court found that it was the additional pressure after the first buy, as well as King's friendship with defendant, that was responsible for defendant procuring the greater quantity of cocaine, thus escalating the criminal culpability in order for King to benefit himself.

After examining the record, we conclude that the trial court erred in determining that the first buy did not involve entrapment, but that the second buy did. Here, the record reveals a fairly typical situation where an individual charged with a crime agrees to work with the police, identifies a target, and proceeds under police supervision to engage in criminal activity to uncover other crimes. There is nothing peculiar in the instant situation to suggest reprehensible police conduct based on the management of and conduct of the informant. Instead, the record reveals that the informant contacted defendant, who had supplied cocaine to the informant intermittently over a ten- to fifteen-year period, and defendant agreed to produce quantities of cocaine for purchase. The record further reveals that defendant experienced difficulties procuring the requested cocaine, but ultimately was able to provide cocaine to the informant. Transcripts of phone calls between the informant and defendant demonstrate the measures defendant took to procure cocaine for the informant.

On the basis of the evidence presented by defendant, the trial court found that the police entrapped defendant with regard to the second buy, but not the first. We find this ruling inconsistent. From our review of the record, we can find nothing objectively different in what happened before the first buy compared to what happened after the first buy and until the second buy. Therefore, the trial court's conclusion that the circumstances leading to one buy, but not the other, constitute entrapment is untenable. Either the facts supported a finding that entrapment occurred in both cases, or they supported a finding that entrapment did not exist in either case. From the record, we find that defendant and the informant were continuing a long-standing course of conduct of defendant procuring cocaine for King, who became a police informant. Neither the police's nor the informant's actions in furthering this course of conduct can be described as anything other than unremarkable. Consequently, we find insufficient grounds for entrapment as to either incident, and we conclude that the trial court's ruling to the contrary with regard to the second of the two buys is clearly erroneous.

In our opinion, the only possible basis for concluding that defendant was entrapped into making the second buy is the increased amount of cocaine purchased during the second buy. The first buy involved only four ounces of cocaine, and the second buy involved eight ounces. However, the record reveals that throughout the course of the investigation the informant requested larger quantities of cocaine, as much as a "kilo." The first buy involved only four ounces of cocaine because defendant simply was unable to procure a larger quantity. We can find no logical basis for the trial court's ruling that the second buy arose from circumstances distinct from the first buy. Rather, the second buy appears to have resulted from a continuation of the same conduct. In other words, the record reveals that the larger quantity was not first requested after the first buy, but that throughout the course of the investigation the informant had requested larger amounts. These facts in no way lead to the conclusion that the police escalated the amount to get defendant "to bite off that bigger piece of meat" for the second buy, as the trial court concluded.

In sum, we are persuaded in the present case that the evidence presented is insufficient to establish entrapment under Michigan's objective test, and thus the trial court's finding to the contrary is clearly erroneous. Accordingly, we reverse.

Reversed and remanded for trial. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh