ICJE, P.O. Box 293, Montgomery, AL 36101 * 334-280-0020

ICJE Feature Article, July 16, 2001, updated January 2, 2011

Entrapment Problems in Handling Informants

Adapted from *Informant Program Management*
A Guide to Setting Up and Administering an Informant Program
Published January, 2012, by ICJE, Inc.

Paper
ISBN 0-9704088-0-3

Robert T. Thetford, J.D.

Officers can expect entrapment to be raised as a defense in almost any criminal trial in which an informant is used. Even though the issue may never be raised in a particular trial, forewarned is forearmed in this area, and a clear understanding of entrapment from the outset of the relationship may mean the difference between winning and losing a case.

There are really two issues to be covered here: Outrageous Government Conduct and (Technical) Entrapment. Outrageous Government Conduct, although not quite meeting the technical requirements of entrapment itself, will produce a dismissal of the charges or an acquittal with perhaps more adverse consequences to the officer and department. If the defense can show that the police, either through the informant or acting through a conspiracy with the informant, engaged in illegal activities such as illegal wiretapping, assault or extortion, etc., to obtain information in the investigation, the case is going to be dismissed and the officers will face disciplinary, civil and possible criminal action.

While this is a rare occurrence, it is not rare for the defense to accuse both prosecutors and the law enforcement officers involved in the investigation of such misconduct. For this reason contact officers should be repeatedly warned that their actions in handling the informant may be examined at trial. Proof of a proper relationship between the officers and their informants and warnings given to the informants concerning illegal and unethical tactics are essential to the success of future trials. This may not prevent the informant from participating in illegal activity or unethical conduct, but it should give greater protection to the contact officer and department from liability and should also enhance the possibilities of winning at trial.

Regarding the entrapment issue itself, the defendant who claims to be the victim of entrapment must offer evidence to show that his conduct was *induced* by law enforcement officers or

informants and also that the defendant had no *predisposition* to commit the offense in the absence of the government inducement or involvement. So, “a valid entrapment defense consists of two elements: government inducement and the defendant's lack of predisposition to commit the crime prior to the inducement.”**(1)** If a defendant fails to initially show evidence that "governmental conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it," the trial court may properly refuse to accept the defendant's entrapment defense.**(2)**

What exactly is government inducement? To establish government inducement, an "element of persuasion or mild coercion" is necessary.**(3)** If there is an inducement or promise, it should be shown to be as mild or non-compelling as possible. Any threats or heavily coercive promises or suggestions will automatically show inducement.

Bear in mind that inducement by itself doesn't mean the defendant was entrapped. Upon showing evidence of inducement, the burden then shifts to the prosecution to show beyond a reasonable doubt that the defendant was predisposed to commit the crime. Predisposition has been defined in these terms: “Predisposition is, by definition, the defendant's state of mind and inclinations before his initial exposure to government agents.”**(4)**

One way of proving predisposition is to show that the “defendant responded affirmatively to less than compelling inducement by the government agent.”**(5)** Other evidences of predisposition are prior convictions, similar criminal acts, reputation, conduct during contact with the informant, nature of the crime charged and whether the defendant refused to commit similar acts on other occasions.**(6)** It then becomes a jury question.

Predisposition, then, means “the defendant's state of mind before his initial exposure to government agents.”**(7)** The prosecution must show that the defendant was predisposed to commit the crime before contact by the informant. The contacts themselves cannot create the predisposition.**(8)** The problem here is that generally the initial contact made between the informant and the defendant is not monitored by officers. Because of this, other indications of predisposition must be sought, such as prior convictions, etc. It is the investigator's job to anticipate entrapment problems in dealing with informants and to gather evidence of predisposition at the initial stages of the investigation. Doing this just before trial is an invitation to disaster.

Having each conversation between the informant and the subject monitored is clearly important to overcoming an entrapment defense and is often vital to a successful prosecution. Training in the latest consensual monitoring techniques and using good monitoring equipment, including the use of video, has become absolutely necessary to obtaining convictions in a wide variety of cases. In the future this may be necessary for the successful prosecution of almost any case involving informants.

Footnotes

.1. *U.S. v. Price*, 94-6152 (11th Cir, 1995)

2. *Beason v. State*, 27 So.3d 619 (Ala.Crim.App. 2009)
3. *U.S. v. Price*, 94-6152 (11th Cir, 1995)
4. *Clay v. State*, 95-588 (Ala. Cr. App, 1995)
5. *United States v. Burkley*, 591 F.2d 903, 916, (1st Cir. 1978), cert. denied, 440 U.S. 966 (1979).
6. *U.S. v. Dion*, 762 F. 2d 674, 687-688 (8th Cir, 1985), reversed on other grounds, 476 U.S. 734 (1986).
7. *U.S. v. Harris*, 9 F. 3d 493 (6th Cir. 1993)
8. *U.S. v. Jacobson*, 112 S. Ct. 1535, 1541 n.2 (1992)