UNDERCOVER TECHNIQUES: AVOIDING THE ENTRAPMENT DEFENSE

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Proc. Ann. Conf. S.E. Assoc. Fish & Wildl. Agencies 34:658-663

There are many facets of undercover training that are important to the successful preparation of a law enforcement officer to meet the challenge of this dangerous, stressful, and personally taxing aspect of investigative work. The officer, who works undercover by infiltrating and pretending to be a part of the very criminal activity he seeks to discover and terminate through successful prosecution, must be trained to cope with the stress and danger to himself. At the same time, he must be keenly aware of the rights of citizens and the legal implications of his conduct.

One important aspect of this training that deserves the attention of departments and training officers alike is an emphasis on the law of entrapment and the techniques that will enhance an officer's ability to avoid a defendant's use of this defense to thwart a successful prosecution.

The use of informants and undercover agents has always been a valuable weapon in law enforcements' arsenal in the war against crime. Undercover work by its very nature involves the use of deception, fraud and trickery.[1] The officer pretends to be someone he is not in order to develop information, determine the identity of violators or obtain sufficient evidence to support a prosecution that would not be available to law enforcement officers openly identified as such.

As the profitability in large-scale, commercially oriented violations of fish and wildlife laws increases, the stakes are higher and more money and resources are available to the criminal violators. So, it becomes more difficult to develop evidence and identify principal violators without the use of well trained, competent undercover agents.

THE ESSENCE OF THE ENTRAPMENT DEFENSE

Whenever a law enforcement officer becomes involved in a criminal activity in an undercover capacity, there is always the potential for the violator, once discovered, to allege that the criminal activity was not his fault. He will claim that he was tricked, lured, enticed by the government agent to participate in a crime of the government agent's making, not his own. In other words, the violator, who cannot deny that he committed a criminal act, will allege that he was a victim of entrapment and should not be prosecuted.

What is "entrapment"? How is it applied by the courts and what can undercover agents do to prevent its application to their cases? These are all questions that every law enforcement officer should be able to answer. Entrapment is a word that almost everyone is familiar with. We see it mentioned in television and newspaper accounts involving law enforcement investigations as though everyone should know what it means. Most people know that it connotes something bad, some sinister conduct attributed to unethical, overzealous law enforcement officers attempting to trap innocent people. Yet, they have no idea what conduct does or does not constitute entrapment.

As a rule of criminal procedure, entrapment occurs when officers or agents of the government conceive and plan an offense and then induce an otherwise innocent person to commit a criminal act, not contemplated by him, for the purpose of initiating a criminal prosecution. The Supreme Court has stated it this way:

> The function of law enforcement is the prevention of crime and the apprehension

1. *Sorrells v. U.S.*, 287 U.S. 435, at 453, 53 S. Ct. 212, at 217, (1932)

of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[2]

Entrapment is an affirmative defense which may be raised on a plea of not guilty. The burden rests on the accused to establish a *prima facie* case that he was induced or persuaded by the illegal acts of law enforcement officers into the commission of an offense. Once such a showing is made, it then becomes the responsibility of the government to prove beyond a reasonable doubt that the defendant had a predisposition to commit the offense.[3]

The claim of Entrapment portrays the defendant as an innocent person—a victim of intense government persuasion, who through a character weakness, not criminal intent, has been ensnared in a criminal activity. Entrapment is often the only defense available to an individual who has clearly been caught in the commission of an illegal act. The defendant attempts to shift the responsibility for his criminal act away from himself and upon the law enforcement officers.

THE LAW OF ENTRAPMENT

Entrapment as a defense to a criminal prosecution is not new. One of the earliest Supreme Court cases addressing the defense of entrapment is *Grimm v. U.S.* in 1895.[4] A postal inspector suspected that the defendant was a dealer in obscene materials. So he wrote to the defendant asking for a price list and a sample of his products. After the defendant responded by sending obscene matter through the mails, he was prosecuted. The defendant thought that he had been the victim of a dirty trick and claimed that he had been entrapped into the commission of a criminal act. The Supreme Court rejected his entrapment defense and held that it is not entrapment for law enforcement officers to conviently provide a potential defendant with the opportunity to commit a crime.

Many people believe that entrapment exists if an undercover officer tempts a defendant. For example, in an effort to catch a thief, an officer may leave valuables in an apparently unguarded area or lay a trap by offering to purchase contraband or stolen goods. This is not entrapment! The Supreme Court has specifically santioned legitimate undercover tactics to determine whether an individual is predisposed to commit criminal acts if given the opportunity: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[5]

This distinction between conduct which constitutes entrapment and legitimate law enforcement tactics pivots on the issue of the predisposition of the defendant towards criminal conduct. This is the test applied in the federal judicial system[6] and has been adopted by the vast majority of state courts including the Supreme Court of Tennessee, which formally recognized the defense of entrapment in March, 1980.[7] In order to understand how the U.S. Supreme Court has applied the predisposition test for entrapment, it is necessary to examine some of the major cases.

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2. *Sherman v. U.S.*, 356 U.S. 369, at 372, 78 S. Ct. 819, at 820, (1958). *U.S. v. Russell*, 411 U.S. 423, at 435, 93 S. Ct. 1637 at 1644, (1973). *Hampton v. U.S.*, 425 U.S. 484, at 490, 96 S. Ct. 1646, at 1650 (1976).
3. *U.S. v. Jones*, 575 F. 2d. 81 (CA 6. 1978).
4. 156 U.S. 604, 15 S. Ct. 470 (1895).
5. *Sherman v. U.S.*, 356 U.S. at 372, 78 S. Ct. at 821, (1958).
6. *U.S. v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, (1973).
7. *State v. Jones*, 598 S.W. 2d. 209 (Tenn., 1980).

The first Supreme Court case to affirm the defense of entrapment was *Sorrells v. U.S.* in 1932.[8] A government Alcohol Tax Unit agent, staying at a defendant's tourist lodge, asked the defendant if he had any liquor. The defendant denied having any alcohol and denied selling any. The agent kept persisting that he wanted some liquor and wanted the defendant to get it for him. Each request was refused with the emphasis that the defendant was not in the illegal alcohol business. After several more hours of conversation it developed that the defendant and the undercover agent had been in the same unit in World War I and knew some of the same people. The undercover agent then used the sympathy appeal of this newly discovered relationship to entreat the defendant to obtain some whiskey for an "old army buddy". The defendant reluctantly agreed to see what he could do and left the premises. The defendant returned a short time later with liquor for the undercover agent. This action formed the basis of the government's prosecution against the defendant for violating the National Prohibition Act.

The Court found that the actions of the officer in *Sorrells* went beyond the mere offering of an opportunity for a person to commit a crime. Here the officer created a crime by inducing an otherwise innocent person to commit a criminal act by repeated requests and appeals to his sympathy. There was no evidence that the defendant had any predisposition to commit any criminal offense, nor had he sold or obtained illegal alcohol before.

Twenty-six years later, in 1958, the Supreme Court rules on 2 major cases involving the defense of entrapment. In *Sherman v. U.S.*[9], the Court sustained the defense of entrapment. A government informant who was obtaining evidence of narcotics sales for the Federal Bureau of Narcotics met the defendant in a narcotic rehabilitation clinic. The informer induced the defendant not only to procure a source of narcotics, but also to return to narcotics addiction. After several sales of narcotics to undercover agents over a period of several months, the defendant was arrested and prosecuted.

The government tried to claim that since the defendant had stayed in the narcotics business after his contacts with the informer terminated, predisposition had been established for the subsequent sales to the undercover officers. The Supreme Court rejected the government's contentions and found that the defendant had been entraped by the government informer. The sales to the undercover agents were held to be part of a course of conduct which were a product of the illegal inducements of the informer and thus could not form the basis of a criminal conviction.

An important point to remember here is that the acts of government informants as well as law enforcement officers can lead to entrapment. This case is another example of conduct that goes beyond merely affording the opportunity to commit a crime. Here the numerous pleadings and appeals to sympathy to engage the otherwise innocent defendant in a criminal activity made the crime the product of the "creative activity" of the law enforcement officials.

Do these entrapment decisions, where repeated requests or offers are made to a defendant, mean that once a defendant refuses to become involved in criminal activity that law enforcement officials must cease any further efforts to determine the culpability of the defendant? The second case decided by the Supreme Court in 1958, *Masciale v. U.S.*[10], addressed this issue. The defendant in this case was approached by an undercover agent posing as a large-scale narcotics buyer. The defendant originally denied being in the narcotics business and was reluctant to do any business with the agent. The agent advised the defendant that he was only interested in buying large quantities of high quality heroin

8. 287 U.S. 435, 53 S. Ct. 212, (1932).
9. 356 U.S. 369, 78 S. Ct. 819, (1958).
10. 356 U.S. 386, 78 S. Ct. 827, (1958).

and was not interested in small-time pushers. The defendant then began to demonstrate that he did have some knowledge of the drug traffic and knew some "big people". After approximately 10 meetings with the defendant, the agent gained the confidence of the defendant and negotiated a price for a large heroin transaction. The sale was completed and the defendant prosecuted.

The Court affirmed the defendant's conviction finding that he had not been entraped. Here the defendant's reluctance was found to be the result of caution and mistrust of the agent and not motivated by innocence. The court relied on evidence of the defendant's own statements to the agent concerning his knowledge of narcotics and the drug trade to find the predisposition. The Court held that the agent in this case merely supplied an opportunity for the defendant that he could have refused.

Another interesting aspect to this case is that the defendant was unable to convince the court that entrapment should result from the offer of large profits in connection with the proposed narcotics deal. Financial profit and greed are the usual motivators of criminal activity. Therefore a thief who will steal a $500.00 television, but not steal a $25.00 radio, is still a thief, although a discriminating one. It is possible that a court may find that a defendant was not predisposed to commit any offense, and thus was entraped by an offer of an exceptionally high amount of money to lure him into criminal activity. The general situation where a defendant has been offered a reasonably high profit will not, however, adversely affect the determination of whether the defendant was predisposed to commit the offense for which he is prosecuted.

Some defendants have claimed that entrapment should be found where the law enforcement officers actually participate in the illegal conduct or provide essential products or services in connection with the alleged crime. The Supreme Court has consistently rejected that claim.

The *U.S. v. Russell*[11], in 1973, the court reemphasized that the principal element in the defense of entrapment is the defendant's predisposition to commit the crime. In this case the defendants had set up a lab to manufacture illegal drugs (Methamphetamine). Before they could make the drugs however, they needed 1 key ingredient. Although the ingredient was not illegal, it was extremely hard to obtain through legal channels. An undercover agent investigating the defendants, contacted them and made a deal whereby he would supply the necessary ingredient for a percentage of the profits. The agent supplied the ingredient and after the defendants manufactured the Methamphetamine, they were all arrested and convicted. The Court found that these defendants were already predisposed to commit the crime. Thus, even though the government supplied a necessary ingredient, without which the crime could not have been committed, there was no entrapment.

Another case alleging entrapment as a result of the degree of government participation in the criminal activity is *U.S. v. McGrath.*[12] In this case, Secret Service agents infiltrated a newly formed counterfeiting operation to such an extent that the number of undercover agents exceeded the number of defendants. The agents all but took over the enterprise by providing supplies and supervising and arranging the actual printing and delivery of the counterfeit currency to the defendants. However, since the predisposition of the defendants to engage in the illegal operation was established, the defense of entrapment was rejected.

The latest case from the Supreme Court on entrapment is *Hampton v. U.S.*[13]. This case

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11. 411 U.S. 423, 93 S. Ct. 1637, (1973).
12. 468 F. 2d. 1027, (CA 7, 1972); vacated and remanded 93 S. Ct. 2769; rehearing 494 F. 2d. 562 (CA 7, 1974).
13. 425 U.S. 484, 96 S. Ct. 1646, (1976).

reconfirmed the rule in *Russell* that where evidence of a defendant's predisposition is established, the defendant cannot rely on the defense of entrapment. In *Hampton*, the defendant indicated to a government informant that he was interested in making some money and could find buyers for heroin but did not know where he could obtain heroin. The government informant then obtained a quantity of heroin from agents of the Drug Enforcement Administration and supplied it to the defendant. After the defendant sold the heroin to another undercover agent, he was arrested and convicted. Since the defendant was determined by the Court to be predisposed to commit the crime, it was not entrapment for the government to provide the opportunity and the necessary contraband item for the defendant to complete his illegal plan. This was not a trap for an unwary innocent.

GUIDELINES FOR LAW ENFORCEMENT OFFICERS

In analysis, there are some definite guidelines to be learned from these cases that will, if recognized and followed, minimize the risk of a successful entrapment claim being made against undercover investigators.

1. Remember that predisposition of the defendant is the key to blocking a claim of entrapment. Predisposition may be established by evidence of prior, similar crimes or by showing that the defendant was ready and willing to engage in the illegal activity charged. The first contacts with the defendant where criminal activity is discussed are extremely important to establish that the criminal conduct was not the creative act of the government. Where possible, undercover agents or informants should be wired to record statements and conversations with the defendant in order to use his own words to refute any claim that he is an unwary innocent. Evidence of a defendant's reputation may also be admissible to establish his predisposition.

2. Officers should never use threatening conduct, overzealous pressure, aggressive persistance or appeals to sympathy to wear down a person's resistance to temptation. Remember that it is against public policy to punish a man for crime he evidently would never have committed were it not for the initiation, inspiration and persuasion of officials of the law.[14]

3. Conduct that induces, incites or lures a person to commit a crime when he does not have the intent can not only result in dismissal of the case but can subject the officers to civil and criminal liability if they engage in illegal acts beyond the scope of their duties.[15] In 1949, for example, 2 state game wardens in Colorado were convicted and fined for the offense of criminal solicitation as a result of their initiation of an illegal beaver trapping scheme in an attempt to entrap an otherwise innocent defendant into commiting a crime not previously contemplated by him.[16]

4. When dealing with informants who will be in contact with defendants in order to obtain evidence of criminal activities, always advise the informants of the law of entrapment and their own responsibilities under the law. The government is responsible for the acts of its' informants working under law enforcement direction.

5. Law enforcement officers need to be trained to be aware of what type of conduct does and does not constitute entrapment. Officers should also be familiar with techniques for recognizing and establishing evidence of a defendant's predisposition. Officers should

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14. *U.S. v. Klosterman*, 248 F. 2d. 191 (CA 3, 1957); *Green v. U.S.*, 10 CrL. 2225 (CA 5, 1971).

15. *Hampton v. U.S.*, 425 U.S. at 490, 96 S. Ct. at 1650. (1976).

16. *Reigan v. People*, 210 P. 2d. 991 (Co. 1949).

increase their own awareness in these areas by reading cases such as are cited in this article as well as other publications available to them.[17]

CONCLUSION

Undercover work is an acceptable, often essential tool of law enforcement. The infiltration of criminal organizations, association with violators and limited participation by law enforcement officers in the criminal's illegal operations and plans, if conducted responsibly, is a legitimate use of stealth and strategy to ferret out criminal conduct and identify those responsible. The officers may even afford convenient opportunities or provide necessary supplies or facilities for the defendant's commission of a crime without violating due process or defeating the prosecution. Departmental officials and officers should, however, be well versed in those tactics that avoid the entrapment defense. There is enough genuine criminal activity prevalent in society for us in law enforcement to concentrate on, that we don't need or deserve criticism alleging that we create our own crimes for prosecution.

17. For example, see: Park, *The Entrapment Controversy*, 60 Minn. Law Review 163 (1976); Hardy, *The Traps of Entrapment*, 3 Am. J. Crim. L. 165, (1974); Rossum, *The Entrapment Defense and the Supreme Court*, 7 Memphis St. Law Review 367 (1977).