

DEFENSE OF ENTRAPMENT CASES

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"YOU HAVE TO BELIEVE ME, I WAS ENTRAPPED!"

"I was entrapped!" We have all heard this claim before. The interesting thing is that it is probably the most often used claim of many a defendant. Yet, it is probably the least used or pursued as a legal defense. Complicated? Indeed. Legal defenses are based upon the facts that led up to, into, and followed the alleged crime. However, the criminal defense investigator is all too aware that such facts are rarely if ever obvious. I often wonder how many viable defenses are never uncovered due to the lack of a professional criminal defense investigator on the case. Too many. The failure of so many lawyers to use an investigator continues to send me into a state of utter bewilderment. The reasons are many and can include anal-retentive control issues, greed (not wanting to share the retainer or available funds), and lack of knowledge in respect to what an investigator can do for them. We could go on and on if we were to draw upon the collective experience of our membership. Therefore, I will stop and apologize. It is time for me to get off of my proverbial "soap box" and return to the matter at hand. Oh yes, entrapment.

Entrapment appears to be a very misunderstood concept. Therefore, I thought it would be wise as well as prudent to bring it up for discussion. Again, we should draw upon the collective wisdom of this organization to educate our ranks. Here in Florida the number of drug cases continues to grow. More significantly, the sweeps to target a suspect and then have them turn over three to five more in exchange for a free ride is outrageous. If any situation was designed to breed entrapment it is this sweep technique. I can only speak of it from my perspective as a Florida investigator. However, our ranks span the nation and the different perspectives can only strengthen our knowledge and application of investigative techniques designed to expose the truth.

Florida recognizes both a subjective entrapment defense and an objective due process entrapment defense applicable in cases of egregious police misconduct. My own experience has shown that law enforcement officers also appear to be uneducated in respect to what constitutes entrapment. I have also encountered more than a few lawyers who either don't know or choose to avoid it altogether. Why avoid it? Simple. An entrapment defense is an affirmative defense. Therefore, the burden is shifted to the defense that must now prove, by a preponderance of the evidence, that a government agent "induced" the defendant to commit the offense and that the defendant was not predisposed to do so. The burden then shifts to the prosecution to rebut this evidence beyond a reasonable doubt. Admit it. Don't you just love when I talk like that? You have to love this job. Such a defense demands the use of a professional criminal defense investigator CDI. Now we are talking about more efforts, funds, and commitment.

The CDI must accept the responsibility of pursuing the complete details surrounding the event in question. The quality of the defendant interview is key. The history, reputation, facts, circumstances, relationship of parties involved, and complete details of the events leading up to the incident must be pursued with painstaking attention to detail. The same holds true for witnesses as well. The connection

between the defendant and the government agent must be explored in detail. Their claim of predisposition based upon reputation or first-hand knowledge may be nothing but a fabrication. The truth is in the details and the defense of entrapment may be found within as well. In one Florida case the defense established entrapment by showing that the informant entered into a cooperative agreement before she knew of the defendant's involvement with drugs. Furthermore, neither she nor the detective working with her had ever heard of the defendant before the informant's boyfriend suggested that she approach the defendant. I worked on a case where a defendant was snared by law enforcement and entered into an agreement to work as an informant in exchange for her freedom. She was asked to provide five names and to set up a buy with them. One of the first things she stated was that she didn't know five people who would buy or sell. In other words, she didn't know of five people who were predisposed. It didn't matter. What she did was give up the names of friends and acquaintances in the hope that they would fall victim. She didn't care and neither did the members of the drug task force. Entrapment? I am not a lawyer but it sure looked that way to me.

Don't let that predisposition issue discourage you completely. Florida law has also determined that an entrapment defense is available even though the defendant has previously been arrested for a similar crime. Of course, when an entrapment defense has been raised, the prosecution is allowed to explore the defendant's criminal history when relevant to the issue of predisposition. However, a prior arrest and conviction for a similar charge does not necessarily constitute a predisposition. Again, the facts in complete detail as uncovered by a CDI would paint a better picture of predisposition. The subjective entrapment may also require details regarding the various contacts. Who contacted who and how many times? How many defendants have stated that they were virtually harassed and pestered by the confidential informant? We have all heard of threats and the creation of circumstances that could easily be characterized as "inducement". How about this for a set of facts? A very beautiful woman was snared in a drug sting. She agreed to work for the police to avoid prosecution and decided to set up shop in a local drinking establishment working the bar. She targeted a middle-aged man that she had never met before in her life. Admittedly, he was somewhat of a geek. Actually, he was a complete nerd. She used her feminine powers of persuasion and seduced him with promises of sex. Of course, when the time came she invited him to a hotel room but told him that her own experience was heightened when she was high. She instructed him to buy a certain drug and bring it with him or don't show up at all. He went shopping all over town for it. Reportedly, he stopped almost every surfer he could find in search of his key to a fantasy. Our hero found what he needed and delivered it to the hotel room where his fantasy woman was waiting with the drug task force. Entrapment? You be the judge. Everyone who knew this guy or looked at him could easily attest to the fact that he was not "predisposed" to randomly meet a beautiful woman who needed him to satisfy her sexual needs. This particular case met the subjective entrapment test as well as the objective entrapment test.

According to Florida law, the threshold for objective entrapment focuses upon the conduct of law enforcement and whether their conduct fell below the standard of proper use of government power. Did it? Using a community standard I would suggest that it fell below the standards of everywhere with the exception of Hollywood and Washington, D.C.

One must also consider that according to Florida law, the first prong of objective entrapment inquiry is

whether police conduct has as its goal the interruption of a specific ongoing criminal activity. The second prong is whether law enforcement has utilized means reasonably tailored to apprehend only those already involved in ongoing criminal activity. If either prong of objective entrapment inquiry is violated, there is entrapment as a matter of law and the entrapped individual is entitled to be discharged. Again, consider the circumstances of the incident and the location. I wonder if it is "specific" enough for law enforcement to have knowledge of drug activity at a certain bar or location to just target all of the customers. The second prong states that their efforts must be "reasonably tailored to apprehend only those already involved in ongoing criminal activity". The answer to such questions would be uncovered through the investigative process. Did the police conduct surveillance and investigation to identify "those already involved in ongoing criminal activity"? We have all been doing this long enough to know that very little effort and investigation is applied on such cases. Unfortunately, mediocrity and the bureaucracy of documentation have replaced the art of critical thinking and investigation.

In short, the Entrapment defense is not always a case of "crying wolf". Consider the facts and with a little effort, research, and investigation you may just uncover a viable defense.

MANDAMUS VERITAS!