Gordon D. Schaber Competition

2022-23

Moot Court

Spencer Laredo v.

Placerado Unified School Distirct

FACT

Situation

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

--oOo--

SPENCER LAREDO, a Minor, by and through his parents, Robert and Andrea Laredo, Plaintiff & Appellant, vs. PLACERADO UNIFIED SCHOOL DISTRICT, Defendant & Appellee.	Case No.: 2022-501 FACTS

The parties agree the following facts are undisputed:

During the 2021-22 school year, 17-year-old Spencer Laredo was a senior at Placerado High School in the Placerado Unified School District (School District). With the Covid-19 pandemic winding down, all of Placerado High School's classes started the school year by returning to in-person lessons. Spencer's parents relocated to Placerado from the bay area during the pandemic, and this was Spencer's first year at Placerado High School. Spencer's parents decided to relocate, in part, because Spencer was not doing well in school.

Spencer had "gotten mixed up in with the wrong crowd" at the beginning of his sophomore year. Spencer started skipping school and drinking alcohol several times a week. When the Covid-19 pandemic started, Spencer stopped going to class instruction altogether, choosing instead to hang out with his friends. When not at school, Spencer and his friends typically drank alcohol, played video games, listened to music, and surfed the internet. Every once in a while, when Spencer's parents were out of town, the group threw parties at Spencer's house. Spencer's behavior continued until halfway through his junior year when he was arrested and expelled from school for supplying alcohol to minors at one of his parties. Spencer spent the rest of the year and summer complying with probationary terms and taking classes at a junior college to make up school credits. At the end of summer, Spencer moved to Placerado and then started his senior year at Placerado High School.

During the pandemic, Placerado, like other cities throughout the country, experienced an increase in teen drug abuse as well as the proliferation of fentanyl-laced street drugs. In the last school year, multiple Placerado High School students overdosed on fentanyl-laced counterfeit prescription pill, only to be saved by medical intervention. One student died after ingesting a fentanyl-laced street drug at home alone. Because of these well-publicized tragedies, the Placerado community demanded action from the Placerado School Board and School District employees.

Given this public outcry, the School District decided to conduct an undercover sting operation at Placerado High School. The School District hired school resource officer Murphy Dominguez, who looked like a teenager, even though he was actually 23 years old. "Murphy" enrolled in Placerado High School as a student with the purpose of befriending various students and investigating possible sources of fentanyl trafficking at the school. One of the students targeted by the investigation was Spencer given the information contained in Spencer's school records.

Murphy took ceramics class with Spencer twice a week. At the first class, Murphy engaged Spencer in conversation and the two started talking about Spencer's recent move to Placerado. Spencer told Murphy he hated being new in town and that he had no friends. Murphy told Spencer he had moved to Placerado the year before and made friends by throwing a party. Spencer told Murphy his party days were over, and that he was not going to throw a party. The two talked the remainder of the class period about their interests. They discovered they both liked skateboarding and horror movies.

Over the course of the next month, Spencer became better friends with Murphy. Every Wednesday after school, the two hung out together at a skate park or at Spencer's house to watch a movie. Eventually, Spencer told Murphy about his old high school and how he got into trouble. Murphy told Spencer about his parents' divorce and his "move" with his mother to Placerado. Spencer voiced concern about having not made friends at school yet and Murphy again told Spencer he should

throw a party to get to know people. Spencer laughed and said he would think about it.

At the same time Murphy got to know Spencer, Murphy also got to know Placerado High School student Marli Malone. Marli was dating a college guy, who Murphy knew to be a drug dealer. Murphy took history with Marli and befriended her. After several class sessions Murphy asked Marli if she could get him some drugs. Murphy subsequently bought marijuana from Marli. The next week, Murphy again asked Marli for drugs, but this time for prescription pills. Murphy subsequently bought two pills from Marli and gave them to his commanding officer for testing.

Before Murphy knew the results of the test, Marli asked Murphy if he knew other people who would be interested in buying prescription pills from her. Murphy told Marli about other contacts he had made at Placerado High School, but also about Spencer. Murphy described Spencer as a new kid in school who wanted to be liked. Murphy told Marli that Spencer had a huge house that was perfect for parties. The only problem, Murphy said, was that Spencer was hesitant to throw a party because of some trouble he had gotten into at his old school. Murphy told Marli he believed he could invite a lot of people to the party who would buy prescription pills from her. Marli told Murphy she would help him convince Spencer to throw a party.

On the next Wednesday Murphy and Spencer were scheduled to meet, Murphy brought Marli to Spencer's house. Murphy told Spencer he wanted to introduce the two because he thought they would get

along. Marli started off the conversation by talking to Spencer about school and his hobbies. After some conversation, Marli told Spencer she really liked his house and thought it was perfect for throwing a party. Marli asked Spencer if he had ever considered throwing a party. Spencer told Marli he used to love throwing parties, but had gotten in a lot of trouble, so had not thrown a party in a while. Marli told Spencer he should not throw a huge party, but a party for 15 to 20 people so Spencer could get to know the people better. Murphy volunteered that he knew 15 to 20 people they could invite to the party. Spencer agreed to throw a party at his house the next time his parents were out of town.

The next week, Spencer told Murphy and Marli his parents were going out of town in two weeks and that they should throw the party when his parents were away. Marli and Murphy agreed and the three started planning the party. Murphy said he would get alcohol for the party and Marli said she would bring marijuana and prescription pills. Spencer told Marli he did not want prescription pills at his party but gave into the idea after Marli and Murphy convinced him the presence of the pills was not a big deal. Marli assured Spencer the drugs would be safe, and Murphy assured Spencer the drugs would be there for people who wanted them, and no one would be forced to do anything they did not want to do. In the end, both Marli and Murphy told Spencer they thought the presence of prescription pills would make Spencer look like a laid back and mature student who more people would want to be friends with.

In preparation for the party, Murphy invited some of the other students he had met at Placerado High School. These students had all been flagged during the preliminary investigation as possible sources of fentanyl trafficking. Still, Murphy did not have 15 students to attend the party, so he arranged for four undercover officers to attend the party as well.

As the party drew nearer, Spencer became excited about the prospect of making new friends. Spencer was also happy about the friends he had already made -- Murphy and Marli. Spencers parents noticed he was in better spirits and seemed happier about the move to Placerado. Spencer even started posting on social media again. Two days before the party, Spencer posted a picture to Facebook of himself with Murphy and Marli hanging out at the skate park. In the caption, Spencer wrote: “It’s great to have friends again. Can’t wait to see the big slash we’ll make this weekend. Come to my house to enjoy in the fun.” After the message, Spencer included an emoji of a popped champagne bottle and two Christmas trees.

At school the next morning, Marli approached Spencer before the first bell rang. She told him she was excited about the party the next day, but that her parents were forcing her to go to her grandmother’s 80th birthday party. Because the party would not be done until after 9:00 p.m., she feared she would not get to Spencer’s party with the marijuana and prescription pills until too late. To make sure Spencer had a fun party, she offered to give the drugs to Spencer then, so he would have them at the start of the party if people wanted them.

Spencer was hesitant to accept the drugs from Marli but decided to take them from her to make sure the party went as planned. The bell rang and Spencer went to his first period class, English, with the drugs in his backpack.

Mr. Kim, Spencer's English teacher, had spent his morning looking at Facebook and the profiles of his students who did not have privacy settings. One of those students was Spencer. Mr. Kim noticed the picture Spencer posted of himself with Marli and Murphy. Mr. Kim did not approve of Spencer's friendship with Marli because he knew Marli to use marijuana and skip school on occasion. Mr. Kim did not know Murphy was an undercover officer. Still, Mr. Kim thought Murphy was a bad influence on Spencer because he once saw Murphy drinking alcohol in a bar across town on the weekend. Mr. Kim was convinced Murphy gained access to the bar with a fake identification. Mr. Kim knew of Spencer's past at his old school, but thought Spencer was moving beyond that experience and focusing on his education. Mr. Kim's assumptions were dashed that morning, however, when he saw the popped champagne and Christmas tree emojis on Spencer's Facebook post. Mr. Kim knew these emojis to represent partying and marijuana.

Right before the bell rang, Mr. Kim saw Spencer talking with Marli before entering the classroom. Mr. Kim did not see Spencer or Marli exchange anything outside of the classroom. When Spencer walked into Mr. Kim's classroom, Mr. Kim asked Spencer about his plans for the weekend. Spencer said, his parents were going to be out of

town and he was planning on spending the whole weekend watching horror movies. Mr. Kim told Spencer he did not believe him and that he thought Spencer was going to throw a party with alcohol and marijuana. Spencer denied that he was going to throw a party. Mr. Kim asked to see Spencer's backpack and Spencer refused. Mr. Kim took the backpack and, upon a search, discovered marijuana and prescription pills in Spencer's bag.

The School District's alcohol and drug policy states: "Students possessing, using or selling alcohol or other drugs or related paraphernalia shall be subject to disciplinary procedures including suspension or expulsion and/or referral to law enforcement in accordance with law. Such students may be referred to an appropriate counseling program, transferred to an alternative placement, and/or be restricted from extracurricular activities, including athletics."

The School District expelled Spencer for attempting to distribute illicit drugs and possessing drugs on campus. Spencer, through his parents, as guardians ad litem, filed a civil complaint in the United States District Court for the Eastern District of California, against the School District. Spencer's complaint alleges the School District violated Spencer's Due Process right under the Fourteenth Amendment by engaging in outrageous government conduct and entrapping him into violating the School District's drug policy. Spencer further alleges the School District violated his right against unlawful search and seizures by searching his backpack without lawful justification.

After an expedited summary judgment proceeding, the district court granted summary judgment in favor of the School District. Spencer, through his parents, has appealed to the United States Court of Appeals for the Ninth Circuit. Three issues are now pending before the Ninth Circuit:

1. Did the district court err by concluding the School District did not entrap Spencer into violating the drug policy as a matter of law?
2. Did the district court err by concluding the School District's conduct was not outrageous?
3. Did the district court err in concluding the School District lawfully searched Spencer's backpack?

LIBRARY

53 S.Ct. 210
Supreme Court of the United States

SORRELLS
v.
UNITED STATES,

No. 177.
|
Argued Nov. 8, 1932.
|
Decided Dec. 19, 1932.

Defendant was indicted for possessing and selling one-half gallon of whisky in violation of the National Prohibition Act (27 USCA). At trial he relied on the defense of entrapment. The court refused and ruled that 'as a matter of law' there was no entrapment. Verdict of guilty followed. The Circuit Court of Appeals affirmed the judgment (57 F. (2d) 973), and this Court granted a writ of certiorari limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment. 287 U.S. 584, 53 S.Ct. 19, 77 L.Ed. 511.

The substance of the testimony is as follows: For the government, one Martin, a prohibition agent, testified he lived in Haywood County, N.C., and posed as a tourist. One day, he visited defendant's home near Canton, accompanied by three residents of the county who knew defendant well. He was introduced as a resident of Charlotte who was stopping for a time at Clyde. The agent learned defendant was a veteran of the World War. The agent informed defendant he was also an ex-service man and a former member of the same Division, which was true. Witness asked defendant if he could get the witness some liquor and defendant stated he did not have any. Later there was a second request without result. Another man present, who was also an ex-service man, and the conversation turned to the war experiences of the three. After this, witness asked defendant for a third time to get him some liquor, whereupon defendant left his home and after a few minutes came back with a half gallon of liquor for which the witness paid defendant $5. The agent also testified he was 'the first and only person among those present at the time who said anything about securing some liquor,' and that his purpose was to prosecute the defendant for procuring and selling it.

Defendant called as witnesses the three persons who had accompanied the agent. In substance, they corroborated the agent's story but with some additions. The first witness testified the agent introduced himself 'as a furniture dealer of Charlotte.' Further, the agent was at defendant's home 'for probably an hour or an hour and a half and during such time the agent asked defendant three to five times to get the agent some liquor.' Defendant said 'he would go and see if he could get a half gallon of liquor,' and he returned with it after an absence of 'between twenty and thirty minutes.' The first witness added that at that time he had never heard of defendant being in the liquor business, he and the defendant were 'two old buddies,' and he believed 'one former war buddy would get liquor for another.'

The second witness testified that defendant was an employee of the company he worked at and had been 'on his job continuously without missing a pay day since March, 1924.' The second witness identified the time sheet showing this employment. This witness and three others who were neighbors of the defendant and had known him for many years testified to his good character.

To rebut this testimony, the government called three witnesses who testified that the defendant had the general reputation of a rum runner. There was no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question.

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation; but the question whether it constitutes a defense has given rise to conflicting opinions.

It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. Grimm v. United States, 156 U.S. 604, 610, 15 S.Ct. 470, 39 L.Ed. 550. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, and thus to disclose the would-be violators of the law. 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.

The federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of Butts v. United States (C.C.A.8th) 273 F. 35, 38; as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.' The judgment in that case was reversed because of the 'fatal error' of the trial court in refusing to instruct the jury to that effect.

The federal courts have also approved of Circuit Judge Woods statement in Newman v. United States (C.C.A.) 299 F. 128, 131: 'It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and lawabiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.'

Still, it is said that where one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by the law in those circumstances, he intentionally breaks the law in the only sense in which the law considers intent. Ellis v. United States, 206 U.S. 246, 257,. Moreover, that as the statute is designed to redress a public wrong, and not a private injury, there is no ground for holding the government estopped by the conduct of its officers from prosecuting the offender. To the suggestion of public policy the objectors answer that the Legislature, acting within its constitutional authority, is the arbiter of public policy and that, where conduct is expressly forbidden and penalized by a valid statute, the courts are not at liberty to disregard the law and to bar a prosecution for its violation because they are of the opinion that the crime has been instigated by government officials.

We are unable to conclude that it was the intention of the Congress in enacting this criminal statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them

But in a criminal prosecution, the statute defining the offense is necessarily the law of the case. To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. We conceive it to be our duty to construe the statute here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction, confessedly contrary to public policy.

The argument is pressed that if the defense is available it will lead to the introduction of issues of a collateral character relating to the activities of the officials of the government and to the conduct and purposes of the defendant previous to the alleged offense. The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.

We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and that the trial court was in error in holding that as a matter of law there was no entrapment.

Judgment reversed.

112 S.Ct. 1535
Supreme Court of the United States

Keith JACOBSON, Petitioner
v.
UNITED STATES.

No. 90-1124.
|
Argued Nov. 6, 1991.
|
Decided April 6, 1992.

Petitioner Keith Jacobson was indicted for violating a provision of the Child Protection Act of 1984 criminalizes the knowing receipt through the mails of a visual depiction that involves the use of a minor engaging in sexual conduct. 18 U.S.C. § 2252(a)(2)(A). Petitioner defended on the ground that the Government entrapped him into committing the crime through a series of communications from undercover agents that spanned the 26 months preceding his arrest. Petitioner was found guilty after a jury trial. The Court of Appeals affirmed

We disagree. The Government overstepped the line between setting a trap for the "unwary innocent" and the "unwary criminal," *Sherman v. United States,* 356 U.S. 369, 372 (1958), and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested.

I

In February 1984, petitioner, a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska, ordered two magazines and a brochure from a California adult bookstore. The magazines contained photographs of nude preteen and teenage boys. The contents of the magazines startled petitioner, who testified that he had expected to receive photographs of "young men 18 years or older."

The young men depicted in the magazines were not engaged in sexual activity, and petitioner's receipt of the magazines was legal under both federal and Nebraska law. Within three months, the law with respect to child pornography changed; Congress passed the Act illegalizing the receipt through the mails of sexually explicit depictions of children. In the very month that the new provision became law, postal inspectors found petitioner's name on a mailing list for the magazines. There followed over the next 2 ½ years repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new law by ordering sexually explicit photographs of children through the mail.

The Government began its efforts in January 1985 when a postal inspector sent petitioner a letter supposedly from the American Hedonist Society, which in fact was a fictitious organization. The letter included a membership application and stated the Society's doctrine: that members had the "right to read what we desire, the right to discuss similar interests with those who share our philosophy, and finally that we have the right to seek pleasure without restrictions being placed on us by outdated puritan morality." Petitioner enrolled in the organization and returned a questionnaire that asked him to rank on a scale of one to four his enjoyment of various sexual materials. Petitioner said he enjoyed "[p]re-teen sex," but indicated he was opposed to pedophilia. *Ibid.*

For a time, the Government left petitioner alone. But then a new "prohibited mailing specialist" in the Postal Service found petitioner's name in a file, and in May 1986, petitioner received a solicitation from a second fictitious consumer research company, "Midlands Data Research," seeking a response from those who "believe in the joys of sex." Petitioner responded: "Please feel free to send me more information, I am interested in teenage sexuality. Please keep my name confidential." *Ibid.*

Petitioner then heard from yet another Government creation, "Heartland Institute for a New Tomorrow" (HINT), which proclaimed that it was "an organization founded to protect and promote sexual freedom and freedom of choice. We believe that arbitrarily imposed legislative sanctions restricting *your* sexual freedom should be rescinded through the legislative process." The letter also enclosed a second survey. Petitioner indicated his interest in "[p]reteen sex" material was above average, but not high. In response to another question, petitioner wrote: "Not only sexual expression but freedom of the press is under attack. We must be ever vigilant to counter attack right wing fundamentalists who are determined to curtail our freedoms."

HINT replied, portraying itself as a lobbying organization seeking to repeal "all statutes which regulate sexual activities, except those laws which deal with violent behavior, such as rape. HINT is also lobbying to eliminate any legal definition of 'the age of consent.' " These lobbying efforts were to be funded by sales from a catalog

to be published in the future "offering the sale of various items which we believe you will find to be both interesting and stimulating." *Ibid.* Although petitioner was supplied with a list of potential "pen pals," he did not initiate any correspondence.

Nevertheless, the Government's "prohibited mailing specialist" began writing to petitioner, using a pseudonym. The letters employed a tactic known as "mirroring," which the inspector described as "reflect[ing] whatever the interests are of the person we are writing to." Petitioner responded at first, indicating that his interest was primarily in "male-male items."

Petitioner's letters to the specialist made no reference to child pornography. After writing two letters, petitioner discontinued the correspondence.

By March 1987, 34 months had passed since the Government obtained petitioner's name from the mailing list of the California bookstore, and 26 months had passed since the Postal Service had commenced its mailings to petitioner. Although petitioner had responded to surveys and letters, the Government had no evidence that petitioner had ever intentionally possessed or been exposed to child pornography.

At this point, a second Government agency, the Customs Service, included petitioner in its own child pornography sting, after receiving his name on lists submitted by the Postal Service. Using the name of a fictitious Canadian company the Customs Service mailed petitioner a brochure advertising photographs of young boys engaging in sex. Petitioner placed an order that was never filled.

The Postal Service also continued its efforts, writing to petitioner as another fictitious company.

The letter said:

> "[W]e have devised a method of getting pornography to you without prying eyes of U.S. Customs seizing your mail.... After consultations with American solicitors, we have been advised that once we have posted our material through our system, it cannot be opened for any inspection without authorization of a judge."

The letter invited petitioner to send for more information. It also asked petitioner to sign an affirmation that he was "not a law enforcement officer or agent of the U.S. Government acting in an undercover capacity." Petitioner responded. A catalog was sent, and petitioner ordered a pornographic magazine depicting young boys engaged in various sexual activities. Petitioner was arrested after a controlled delivery of a photocopy of the magazine.

When asked why he placed the order, petitioner explained the Government succeeded in piquing his curiosity:

> "Well, the statement was made of all the trouble and the hysteria over pornography and I wanted to see what the material was. It didn't describe the-I didn't know for sure what kind of sexual conduct they were referring to in the Canadian letter."

In petitioner's home, the Government found the materials the Government had sent to him in the course of its protracted investigation, but no other materials that would indicate that petitioner collected, or was actively interested in, child pornography.

The trial court instructed the jury on the petitioner's entrapment defense, petitioner was convicted, and a divided Court of Appeals for the Eighth Circuit, sitting en banc, affirmed, concluding that petitioner was not entrapped as a matter of law. 916 F.2d 467, 470 (1990). We granted certiorari.

II

There can be no dispute about the evils of child pornography or the difficulties that laws and law enforcement have encountered in eliminating it. Likewise, there can be no dispute that the Government may use undercover agents to enforce the law. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises."

In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells, supra,* 287 U.S., at 442. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. *United States v. Whoie,* 925 F.2d 1481, 1483-1484 (1991).

Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use

because the ready commission of the criminal act amply demonstrates the defendant's predisposition. See *United States v. Sherman,* 200 F.2d 880, 882 (CA2 1952). Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner-who must be presumed to know the law-had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. *Mathews v. United States,* 485 U.S. 58, 66 (1988).

But that is not what happened here. By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner since January 1985. *Sorrells, supra,* 287 U.S., at 442.

The prosecution's evidence of predisposition falls into two categories: evidence developed prior to the Postal Service's mail campaign, and that developed during the course of the investigation. The sole piece of preinvestigation evidence is petitioner's 1984 order and receipt of two magazines. It may indicate a predisposition to view sexually oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition.

Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution. Hence, the fact that petitioner legally ordered and received the two magazines does little to further the Government's burden of proving that petitioner was predisposed to commit a criminal act. This is particularly true given petitioner's unchallenged testimony that he did not know until they arrived that the magazines would depict minors.

The prosecution's evidence gathered during the investigation also fails to carry the Government's burden. Petitioner's responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails.

On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.

Petitioner's response to these solicitations cannot be enough to establish beyond reasonable doubt he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails. See *Sherman,* 356 U.S., at 374. The evidence that petitioner was willing to commit the offense came only after the Government had devoted 2 ½ years to convincing him he had or should have the right to engage in the very behavior proscribed by law. As was explained in *Sherman,* where entrapment was found as a matter of law, "the Government [may not] pla[y] on the weaknesses of an innocent party and beguil[e] him into committing crimes which he otherwise would not have attempted." *Id.,* at 376.

Law enforcement officials go too far when 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." *Sorrells v. U.S.,* 287 U.S. 435, at 442 (emphasis added). Like the *Sorrells* Court, we are "unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.,* at 448. When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.

Because we conclude that this is such a case and that the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails, we reverse the Court of Appeals' judgment affirming the conviction of Keith Jacobson.

13 F.4th 140
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
John E. CABRERA, Defendant-Appellant.

No. 19-3363-cr
|
August Term 2020
|
Argued: September 15, 2020
|
Decided: September 8, 2021

John Cabrera engaged in four drug transactions with his barber, who was a government informant. Cabrera's sole defense was entrapment, which (as the district court acknowledged) was a close call as to the element of inducement. He appeals chiefly on the grounds that: the charge misstated his burden by requiring the defendant to *establish* that the government initiated the crime.

Cabrera and his barber gave opposite accounts of who first proposed partnering in the drug trade. It was therefore crucial that the charge accurately state Cabrera's burden: the slight burden of adducing "some credible" evidence that the government initiated the crime. The charge overstated that burden, effectively requiring that the jury weigh the evidence and definitively accept Cabrera's account as a precondition to considering predisposition.

We vacate Cabrera's conviction and remand for a new trial.

I

Cabrera is a legal permanent resident who came to New York from the Dominican Republic in 2013, when he was 20. After arriving, Cabrera held several minimum-wage jobs before becoming a carpenter. Around 2014, he met a barber and fellow Dominican immigrant named Marcos. Cabrera's apartment was located near the barbershop where Marcos worked, and Cabrera began visiting him weekly for a shave and haircut.

Marcos had immigrated to the United States in 1992 when he was 17; but in 2001 he was deported after serving a sentence on a drug conviction. He reentered illegally that same year. In 2016 Marcos became a paid informant for the Drug Enforcement Administration ("DEA"). He received cash payments and deportation deferrals renewed annually so long as he remained an informant.

Over a two month period in late 2017, Cabrera and Marcos partnered to sell drugs. Cabrera delivered pills containing fentanyl, and Marcos, under the DEA's direction, paid Cabrera and pretended to resell the pills to customers in North Carolina. There were five transactions. On September 7, Cabrera gave Marcos a small free sample. Six days later, Cabrera sold Marcos 200 pills for $3,000; a week later, 198 pills for $3,000; and another six days later, 397 pills for $3,000 up front and $3,000 in two days. Following a month-long gap, they met again on October 27 to exchange 1,000 pills for $15,000, and agents arrested Cabrera; he had 1,100 pills on him.

Cabrera--conceding he sold the pills to Marcos--claimed he was entrapped. He testified as follows. Marcos asked him several times during barbershop visits to supply drugs; Cabrera refused, telling Marcos he already made sufficient money as a carpenter. But Marcos renewed his invitation approximately five or six times until, in early 2017, Cabrera relented, having become desperate after losing his job, girlfriend, and apartment--and confiding his problems to Marcos. Cabrera began searching for a supplier; after six months, he found one at a nightclub, and told Marcos that he was ready: Cabrera would serve as the middleman, earning $2 from the supplier for each pill that he sold to Marcos, who would then resell to (fictitious) customers in North Carolina.

Marcos's version of events, as follows, was different in every material respect. Marcos first learned in 2016 that Cabrera dealt drugs when Cabrera told him that his supplier had unfortunately been arrested. At that point, Cabrera and Marcos had known each other for eight months. Cabrera then disappeared for a year, during which time Marcos became an informant. When Cabrera returned to the barbershop in September 2017, he told Marcos that he was back in business. Cabrera was looking to sell oxycodone pills and asked Marcos if he knew any buyers. When Marcos said that he knew some in North Carolina, Cabrera proposed that the two do business together. Marcos promptly contacted his handlers at the DEA.

Trial evidence included government recordings of meetings and phone calls between Cabrera and Marcos, all of which post-date the agreement to partner. Cabrera boasted of his experience selling drugs, telling Marcos, for example, that "with me there will always be many

good things," and "I'm only 24 ... but I'm not new at this." Cabrera and Marcos occasionally pushed each other to do bigger deals. At their second meeting (their first sale), Marcos voiced frustration at being unable to buy pills in greater bulk; and soon after, over the phone, Cabrera expressed disappointment about how long it was taking to plan their next deal. On a call following their third meeting, Cabrera urged Marcos to visit North Carolina more frequently; when Marcos demurred, Cabrera offered to give him more pills on credit. Later, Marcos asked Cabrera to locate a pure form of heroine called China White, but this time it was Cabrera who declined.

Cabrera went silent after their September 29 meeting. He testified that he wanted to cut ties with Marcos because he regretted breaking the law and feared he was under DEA surveillance. Marcos left multiple voicemails throughout October, pushing Cabrera to resume deals. At the DEA's direction, Marcos showed up at Cabrera's workplace to ask where he had been. On October 25 at the barbershop, they planned the fifth deal in an unrecorded meeting; according to Marcos, Cabrera was scared he had been followed and insisted on increasing the deal to 1,000 pills.

After a six-day trial, the jury convicted Cabrera on all counts. Cabrera was sentenced to concurrent terms of 48 months' imprisonment on each count.

II

The first issue is whether the jury instruction on entrapment contained error, specifically as to the element of inducement.

A

The affirmative defense of entrapment consists of "two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." Mathews v. United States, 485 U.S. 58, 63 (1988). "[W]hen a defendant has presented credible evidence of inducement by a government agent, the government has the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the crime." United States v. Flores, 945 F.3d 687, 717 (2d Cir. 2019) (citing Jacobson v. United States, 503 U.S. 540, 548-49 (1992)).

That approach balances two considerations. The government may not manufacture crime where there would be none by "implant[ing] in the mind of an innocent person the disposition to commit the alleged offense and induc[ing] its commission ...." Jacobson, 503 U.S. at 553 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)). At the same time, "stealth and strategy are necessary weapons in the arsenal of the police officer." Sherman v. United States, 356 U.S. 369, 372 (1958). The entrapment defense thus seeks to protect the "unwary innocent" while leaving room for investigative techniques that catch the "unwary criminal who readily availed himself of the opportunity to perpetrate the crime." Mathews, 485 U.S. at 63.

The first element is relatively straightforward. Inducement happens when the government has "initiated the crime." United States v. Brand, 467 F.3d 179, 190 (2d Cir. 2006) More broadly, inducement covers "soliciting, proposing, initiating, broaching or suggesting the commission of the offence charged." United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952) The degree of pressure exerted, and the type, are matters that bear mainly on the element of predisposition. United States v. Dunn, 779 F.2d 157, 158 (2d Cir. 1985)

We have long held the jury instruction on inducement should not specify a burden of proof; it should require only "some" or "credible" evidence the government initiated the crime. United States v. Braver, 450 F.2d 799, 805 (2d Cir. 1971). At the same time, we have previously characterized the defendant's burden to establish inducement as a burden of proof by a preponderance. United States v. Williams, 23 F.3d 629, 635 (2d Cir. 1994).

We now recognize this "preponderance" burden is inconsistent with the jury instruction we have endorsed. As our sister circuits recognize, a "some evidence" instruction on inducement communicates a burden of production, not one of persuasion. See, e.g., Mayfield, 771 F.3d at 440. And in this Circuit, "some evidence" describes a burden of production in the context of burden shifting. United States v. Archer, 671 F.3d 149, 173-74 (2d Cir. 2011). "Some evidence" is evidence that is detected or recognized--without being weighed, as would be needed to find a thing by a preponderance.

In light of this confusing – and inconsistent – case law describing the defendant's burden to establish inducement, we now reconsider the burden that a defendant bears at trial.

We hold that the defendant has the burden to produce "some credible" evidence--but need not prove by a preponderance of the evidence--that the government induced him to commit the crime. Compared to a "some evidence" instruction, the phrase "some credible

evidence" makes explicit what is implicit-that a jury need not consider evidence it finds unworthy of credit or belief.

By definition, "some credible" evidence suggests a burden of production. And, as a matter of administration, requiring a jury to apply two different burdens of proof to a single defense would "tend[ ] to distract the jury from the real issue and may result in the imposition of too heavy a burden on the defendant." Dunn, 779 F.2d at 160. "[T]he ultimate question basic to all claims of entrapment" is whether the defendant was "ready and willing to commit the offense if given an opportunity to do so." United States v. Martinez-Carcano, 557 F.2d 966, 970 (2d Cir. 1977). Predisposition--not inducement--is the "principal element" of entrapment. Mathews, 485 U.S. at 63, 108 S.Ct. 883. Inducement is merely the threshold inquiry for whether "the defense of entrapment is at issue." Jacobson, 503 U.S. at 549, 112 S.Ct. 1535.

Traditionally, the defendant's burden on an affirmative defense, when the government has the ultimate burden of persuasion, is to produce evidence creating an issue of fact. See Archer, 671 F.3d at 173 (collecting examples). There is no reason to depart from that principle here. A defendant's prima facie case of inducement raises an issue of fact: whether the defendant "likely would have never run afoul of the law" but for the hand of the government. Jacobson, 503 U.S. at 549; see also Sherman, 356 U.S. at 376, 78 S.Ct. 819. The government must then justify its conduct, see Henry, 417 F.2d at 270, and undertake its proper burden to prove "beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents," Jacobson, 503 U.S. at 549, 112 S.Ct. 1535.

B

The instruction on Cabrera's entrapment defense implied that the jury could not consider predisposition unless it made a finding that the government "did initiate" the crime. That was legal error.

No matter what standard of proof the jury applied or intuited--whether it was a preponderance, beyond a reasonable doubt, or a standard from the jury's imagination--there was error. Cabrera was obliged to produce no more than "some credible" evidence of inducement.

IV

Nor is Cabrera's predisposition clear beyond a reasonable doubt. To prove predisposition, the government may present evidence of, but not limited to, "(1) an existing course of criminal conduct similar to the crime for which [the defendant] is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." Flores, 945 F.3d at 717.

The government first contends that Cabrera was keen to do deals with Marcos. According to Marcos's testimony and recorded conversations, Cabrera gave Marcos a free sample before the first sale, told Marcos that "with me there will always be many good things," and gave similar assurances. Cabrera also admitted at trial that he was eager to sell Marcos more pills more frequently after their first deal; eagerness which showed in the quick succession and increasing size of new deals, and Cabrera's wariness of surveillance.

But the government's argument is off target. What matters is Cabrera's "state of mind *prior* to" when they first broached transacting drugs. United States v. Cromitie, 727 F.3d 194, 208 (2d Cir. 2013); see Jacobson, 503 U.S. at 549 n.2, 112 S.Ct. 1535 ("[T]he proposition that the accused must be predisposed prior to contact with law enforcement officers is ... firmly established."). The government's evidence of eagerness lacks probative value as to Cabrera's state of mind at the time Marcos--in his capacity as informant--and Cabrera made contact. As the government acknowledged, its evidence "pick[s] up midstream" in Cabrera and Marcos's venture. And Cabrera (if he is to be believed) had repeatedly refused to partner in drug deals even before they struck an agreement. It is therefore far from clear whether Cabrera's eagerness was "independent and not the product of the attention that the Government had directed at [him]." Jacobson, 503 U.S. at 550. The government's only evidence of a "prompt response" to an early solicitation was Marcos's disputed claim that Cabrera returned to the barbershop and proposed partnering in the drug business. United States v. Harvey, 991 F.2d 981, 993 (2d Cir. 1993).

The government also contends that it proved Cabrera's predisposition with evidence showing that he was an established drug dealer. The government cites: Cabrera's advice to Marcos on how to evade detection by speaking in code, avoiding police, changing phone numbers, and hiding drugs in hidden car compartments; Cabrera's touting of his experience selling drugs; and Cabrera's possession of 1,104 pills when arrested even though

Marcos had only agreed to buy 1,000, from which the government infers that Cabrera must have "had other drug customers to whom he was selling those pills."

We disagree. Most notably, the government could identify no other customers, even though it had visually surveilled Cabrera, collected historical cell-cite location and call information, and searched his phone post-arrest. Moreover, Cabrera's advice to Marcos was not the counsel of a mastermind; it could have been given by a novice. And the district court discounted Cabrera's boasts to Marcos as "puffery."

CONCLUSION

For the foregoing reasons, we **VACATE** Cabrera's conviction and **REMAND** for a new trial**.**

96 S.Ct. 1646
Supreme Court of the United States

Charles HAMPTON, Petitioner,
v.
UNITED STATES.

No. 74-5822.
|
Argued Dec. 1, 1975.
|
Decided April 27, 1976.

This case presents the question of whether a defendant may be convicted for the sale of contraband which he procured from a Government informant or agent. The Court of Appeals for the Eighth Circuit held he could be, and we agree.

I

Petitioner was convicted of two counts of distributing heroin. The case arose from two sales of heroin by petitioner to agents of the Drug Enforcement Administration (DEA) in St. Louis on February 25 and 26, 1974. The sales were arranged by one Hutton, who was a pool-playing acquaintance of petitioner and also a DEA informant.

According to the Government's witnesses, in late February 1974, Hutton and petitioner were shooting pool when petitioner, after observing "track" (needle) marks on Hutton's arms told Hutton he needed money and knew where he could get some heroin. Hutton responded he could find a buyer and petitioner suggested he "get in touch with those people." Hutton called DEA Agent Terry Sawyer and arranged a sale for 10 p. m. on February 25.[2]

At the appointed time, Hutton and petitioner went to a prearranged meetingplace and were met by Agent Sawyer and DEA Agent McDowell, posing as narcotics dealers. Petitioner produced a tinfoil packet from his cap and turned it over to the agents who tested it, pronounced it "okay," and negotiated a price of $145 which was paid to petitioner. Before they parted, petitioner told Sawyer that he could obtain larger quantities of heroin and gave Sawyer a phone number where he could be reached.

The next day Sawyer called petitioner and arranged for another "buy" that afternoon. Petitioner got Hutton to go along and they met the agents again near where they had been the previous night. They all entered the agents' car, and petitioner again produced a tinfoil packet from his cap. The agents again field-tested it and pronounced it satisfactory. Petitioner then asked for $500 which Agent Sawyer said he would get from the trunk. Sawyer got out and opened the trunk which was a signal to other agents to move in and arrest petitioner, which they did.

Petitioner's version of events was quite different. According to him, in response to his statement that he was short of cash, Hutton said that he had a friend who was a pharmacist who could produce a non-narcotic counterfeit drug which would give the same reaction as heroin. Hutton proposed selling this drug to gullible acquaintances who would be led to believe they were buying heroin. Petitioner testified that they successfully duped one buyer with this fake drug and that the sales which led to the arrest were solicited by petitioner[3] in an effort to profit further from this ploy.

Petitioner contended that he neither intended to sell, nor knew that he was dealing in heroin and that all of the drugs he sold were supplied by Hutton. His account was at least partially disbelieved by the jury which was instructed that in order to convict petitioner they had to find that the Government proved "the defendant knowingly did an act which the law forbids, purposely intending to violate the law." Thus the guilty verdict necessarily implies that the jury rejected petitioner's claim he did not know the substance was heroin, and petitioner himself admitted both soliciting and carrying out sales.

Petitioner was found guilty. He appealed to the United States Court of Appeals for the Eighth Circuit, claiming that if the jury had believed that the drug was supplied by Hutton he should have been acquitted. The Court of Appeals rejected this argument and affirmed the conviction, relying on our opinion in United States v. Russell, 411 U.S. 423 (1973). 507 F.2d 832 (1974).

II

In Russell we held that the statutory defense of entrapment was not available based solely on a Government agent suppling a necessary ingredient in the manufacture of an illicit drug. We reaffirmed the principle of Sorrells v. United States, 287 U.S. 435 (1932), that the entrapment defense "focus(es) on the intent or

predisposition of the defendant to commit the crime," Russell, supra, 411 U.S., at 429, rather than upon the conduct of the Government's agents. We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.

In holding that "(i)t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." 411 U.S., at 436. In view of these holdings, petitioner correctly recognizes that his case does not qualify as one involving "entrapment" at all. He instead relies on the language in Russell that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S., at 431-432.

In urging that this case involves a violation of his due process rights, petitioner misapprehends the meaning of the quoted language in Russell, supra. Admittedly petitioner's case is different from Russell's but the difference is one of degree, not of kind. In Russell the ingredient supplied by the Government agent was a legal drug which the defendants demonstrably could have obtained from other sources besides the Government. Here the drug which the Government informant allegedly supplied to petitioner both was illegal and constituted the Corpus delicti for the sale of which the petitioner was convicted. The Government obviously played a more significant role in enabling petitioner to sell contraband in this case than it did in Russell.

But in each case the Government agents were acting in concert with the defendant, and in each case either the jury found or the defendant conceded that he was predisposed to commit the crime for which he was convicted. The remedy of the criminal defendant with respect to the acts of Government agents, which, far from beg resisted, are encouraged by him, lies solely in the defense of entrapment. But, as noted, petitioner's conceded predisposition rendered this defense unavailable to him.

To sustain petitioner's contention here would run directly contrary to our statement in Russell that the defense of entrapment is not intended "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." 411 U.S. at 435, 93 S.Ct., at 1644, 36 L.Ed.2d, at 375.

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the Defendant. Here, as we have noted, the police, the Government informant, and the defendant acted in concert with one another. If the result of the governmental activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . .," Sorrells, supra, 287 U.S., at 442, the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. See O'Shea v. Littleton, 414 U.S. 488, 503, 94 S.Ct. 669, 679, 38 L.Ed.2d 674, 687 (1974); Imbler v. Pachtman, 424 U.S. 409, pp. 428-429, 96 S.Ct. 984, 994, 47 L.Ed.2d 128, 142-143 (1976). But the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights.

Affirmed.

Petitioner, Charles Hampton, contends that the Government's supplying of contraband to one later prosecuted for trafficking in contraband constitutes a Per se Denial of due process. As I do not accept this proposition, I concur in the judgment of the Court and much of the plurality opinion directed specifically to Hampton's contention. I am not able to join the remainder of the plurality opinion, as it would unnecessarily reach and decide difficult questions not before us.

In United States v. Russell, 411 U.S. 423, 431 (1973), we noted that significant "difficulties (attend) the notion that due process of law can be embodied in fixed rules." See Rochin v. California, 342 U.S. 165, 173. We also recognized that the practicalities of combating the narcotics traffic frequently require law enforcement officers legitimately to supply "some item of value that the drug ring requires." 411 U.S., at 432. Accordingly, we held that due process does not necessarily foreclose reliance on such investigative techniques. Hampton would distinguish Russell On the ground that here contraband itself was supplied by the Government, while the phenyl-2-propanone supplied in Russell Was not contraband. Given the characteristics of phenyl-2-propanone, this is a distinction without a difference and Russell Disposes of this case.

But the plurality opinion today does not stop there. In discussing Hampton's due process contention, it enunciates a Per se Rule:
"(In Russell,) (w)e ruled out the possibility that the defense of entrapment could Ever Be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established." Ante, At 1649. (Emphasis supplied.)

"The remedy of the criminal defendant with respect to the acts of Government agents, which . . . are encouraged by him, lies Solely In the defense of entrapment." Ante, At 1649. (Emphasis supplied.)

The plurality thus says that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances.

I do not understand Russell or earlier cases delineating the predisposition-focused defense of entrapment to have gone so far, and there was no need for them to do so. In those cases the Court was confronted with specific claims of police "overinvolvement" in criminal activity involving contraband. Disposition of those claims did not require the Court to consider whether overinvolvement of Government agents in contraband offenses could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process. Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses. Cf. United States v. Archer, 486 F.2d 670 (CA2 1973). In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles.[4]

I therefore am unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition.

727 F.3d 194
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
James CROMITIE, aka Abdul Rehman, aka Abdul Rahman, David Williams, aka Daoud, aka DL, Onta Williams, aka Hamza, Laguerre Payen, aka Amin, aka Almondo, Defendants–Appellants.

Docket Nos. 11–2763(L), 11–2884(con), 11–2900(con), 11–3785(con).
|
Heard: Nov. 5, 2012.
|
Decided: Aug. 22, 2013.

This is an appeal by a defendant convicted of planning and attempting to carry out domestic terrorism offenses. The appeal presents issues concerning the extent to which a government informant may lawfully urge the commission of crimes, issues framed as claims of entrapment and outrageous government conduct in violation of the Due Process Clause.

We reject the defendant's claims of entrapment as a matter of law, outrageous government conduct in the instigation of the offenses. We therefore affirm.

Background

All the charged offenses resulted from an elaborate sting operation conducted by the FBI using an undercover informant. An indictment filed in June 2009, charged the four defendants with eight offenses related to terrorism.

A government informant, Shahed Hussain, conducted an undercover investigation for several months in 2008 and 2009. As a confidential informatant, Hussain's goal was to locate disaffected Muslims who might be harboring terrorist designs on the United States.

By June 2008, Hussain had been attending services at a mosque in Newburgh at the direction of the FBI. Hussain presented himself at the mosque as a wealthy Pakistani businessman with knowledge of Islamic teachings. During a period of several months, Hussain cultivated a friendship with Cromitie, who subsequently recruited three individuals.

Cromitie, 42 years old, was "an impoverished man," who sustained himself by committing petty drug offenses for which he had repeatedly been caught and convicted. In addition, he worked a night shift at a local Walmart store, earning less than $14,000 per year.

On June 13, 2008, Cromitie walked up to Hussain in the parking lot of the mosque. Hussain testified that Cromitie, claimed his father was from Afghanistan. After a short conversation, Hussain drove Cromitie home from the mosque. On the way, Cromitie asked Hussain about violence in Afghanistan that had been reported recently on television. When Hussain asked Cromitie if he would like to travel to Afghanistan, Cromitie responded by saying he would love to. He then said, in the first indication of his proclivity to terrorism, that he wanted "to die like a shahid, a martyr" and "go to paradise," and immediately thereafter said, "I want to do something to America." As he said these words, he pointed his right index finger in the air in a gesture Hussain testified is used by "somebody[ ] in radical Islam" to mean "taking an oath in front of Allah to do take part of [*sic*] crime or Jihad act they want to do." During that first encounter, Hussain told Cromitie that a lot of military planes flew from what was later identified as Stewart Airport to take arms and ammunition to Afghanistan and Iraq.

Hussain met with Cromitie three more times in the summer of 2008. Hussain testified that during these meetings Cromitie said that he hated Jews and Americans and that he would kill the President of the United States "700 times because he's an antichrist." After learning of these remarks, the FBI instructed Hussain to tell Cromitie that he, Hussain, was a representative of a terrorist group in Pakistan. On July 3, 2008, Hussain, following these instructions, Hussain told Cromitie he was flying to Pakistan to meet with the group and asked Cromitie if he wanted to attend. Cromitie said he did and then volunteered that he wanted to join the terrorist group.

Hussain recorded four conversations with Cromitie in the

fall of 2008. In a conversation recorded on October 19, Cromitie said American Muslims could do something similar to the attacks of September 11, 2001. In a conversation recorded later that day, Cromitie said, "I have zero tolerance for people who disrespect Muslims." In a conversation recorded on October 29, Cromitie said, "When the call come[s], I'm gonna go, '*Allahu akbar,*' and I'm gone. There's nothing no one can do. I'm gonna go all the way." On November 14, Hussain told Cromitie that he could obtain guns and rockets.

In late November, Hussain drove Cromitie to a conference of the Muslim Alliance of North America in Philadelphia. On November 28, during the ride to the conference, Cromitie, in a recorded conversation, boasted that he had stolen three guns from Walmart, two .25 automatics and a snub nose, and had "stashed" them. Also during the ride, Cromitie indicated he could put "a team together," and said he was "gonna try to put a plan together." Earlier that day, Cromitie for the first time expressed interest in buying "stuff" from Hussain. Hussain had previously told Cromitie that he could get "[a]ny stuff that you need," specifically guns and missiles.

On the second day of the conference, November 29, Cromitie's talk became more specific after Hussain asked Cromitie if his "team" had ever "thought about doing something here [in the United States]." Cromitie responded by saying that his team never considered doing that, but that he had and that he had "been wanting to do that since I was 7." Cromitie claimed he had bombed a police station in the Bronx in 1994, but wanted to do something "a little bigger," because he had "to make some type of noise to let them know."

Hussain asked Cromitie what targets he wanted to hit in the New York area, and Cromitie said he wanted to "hit" the George Washington Bridge. When Hussain said that bridges are too hard to hit, Cromitie replied, "Hit some small spots.... This had to be a terrorist act." Later, while Hussain and Cromitie were watching television coverage of a terrorist attack in Mumbai and the funeral of a Jewish man who had been killed in that attack, Cromitie made disparaging and offensive remarks about the Jewish man.

Hussain recorded conversations with Cromitie on three occasions in December 2008. On December 5, Cromitie, after quoting a "brother" saying, " 'I think it's time we make jihad right here in America,' " "I agree with the brother.... [I]t makes sense to me." On December 17, when Hussain said, "Let's pick a target," Cromitie suggested "Stewart Airport."

On December 18, Hussain traveled to Pakistan and returned eight and one-half weeks later.

In a meeting with Cromitie on February 23, 2009, Hussain asked, "The synagogue, where is it in Bronx or in Brooklyn?" Cromitie replied, "[T]here's one in [t]he Bronx, I mean you got like, uh two or three of them in Brooklyn." The next day, Hussain bought Cromitie a camera and drove him to Stewart Airport where they conducted surveillance. While there, Cromitie took photos. Cromitie was recorded stating, "Imagine if we hit all the planes in one spot." He also told Hussain he was going to speak to another man about being a lookout and would "talk to some of the guys" and tell them they would receive $25,000 to "just look out."

Six weeks passed without any contact between Cromitie and Hussain. On April 5, 2009, Cromitie reached out to Hussain. In a recorded conversation, he told Hussain of his financial problems and said, "I have to try to make some money brother." Hussain responded, "I told you, I can make you 250,000 dollars, but you don't want it brother. What can I tell you?" At this, Cromitie answered, "Okay, come see me brother. Come see me."

On April 7, Hussain told Cromitie his terrorist group had already taken significant steps to support the operation, stating, "The missile was ready." Later in that conversation Cromitie said he would "take ... down" "a whole synagogue of men." Cromitie and Hussain then discussed the need for lookouts.

On April 10, Hussain picked Cromitie up at Cromitie's house and was introduced to a man standing in front of the house. This man, known as "Daoud," was defendant David Williams. All three men drove to the Riverdale section of the Bronx, where Cromitie photographed the Riverdale Jewish Center and the Riverdale Temple. Later that day Cromitie took photographs of airplanes at Stewart Airport.

On April 23, the three men met again. Cromitie asked at what distance could an IED (improvised explosive device) be detonated. When Hussain said 100 miles and explained, "You can sit down here, and it blows up there," Cromitie and David Williams celebrated by bumping fists. When Hussain said he would train Cromitie how to use a rocket launcher, David Williams said that he wanted to participate. The next day, the three men drove to Stewart Airport. David Williams asked Cromitie for the camera and took surveillance pictures. Later, they discussed taking rooms at a nearby Marriott Hotel to hide out after the planned attacks. After Hussain outlined the attack plans, David Williams said the airport attack would be the "tricky one," compared to the

synagogue attack, which would be "smooth" because the bombs would be detonated remotely from a hotel.

In less than a week, Cromitie and David Williams recruited Onta Williams and Laguerre Payen. On April 25, in a recorded telephone call David Williams told Cromitie to call Hussain and "[t]ell him I got the other brother." By April 28, when all four defendants met with Hussain, Payen had been recruited. At this meeting, when Cromitie explained that "Yahudi" means "Jews," Payen said, "Yeah you told me that," which permitted the jury to infer that Cromitie had recruited Payen.

Bombing two synagogues and launching missiles at Stewart Airport was specifically discussed at this meeting. Payen asked how long every job would take; Hussain told him ten minutes. Cromitie suggested the grop identify themselves in phone calls by code names. They also agreed on other code words. Cromitie ended the meeting by saying, "This is going down in history."

April 30, David Williams purchased a semi-automatic pistol. Two days before, Onta Williams had tried to purchase two guns. On May 1, Payen took Hussain to the apartment of a person Payen said was willing to sell guns, but there was no response to a knock at the door.

Later on May 1, Hussain and all four defendants drove to Stewart Airport to conduct more surveillance. All agreed on the best spot from which to launch Stinger missiles. They also discussed the locations where Onta Williams and Payen would be stationed as lookouts. The whole group then drove to Hussain's house and discussed plans for the attack.

On May 6, Hussain drove Cromitie, David Williams, and Payen to a warehouse in Stamford, CT, where the FBI had stored three fake bombs and two fake missiles. After one missile and the bombs were loaded into Hussain's car, the four drove to a storage facility in New Windsor, NY, where Hussain had rented storage lockers. Cromitie, David Williams, and Hussain unloaded the weapons and placed them in the lockers while Payen acted as a lookout. The group later agreed to carry out the attacks on May 20.

On May 13, the group, without Hussain, conducted surveillance on the Riverdale Jewish Center. On May 19, the group conducted a final surveillance of Stewart Airport. The group returned to Hussain's house to review the plans for the next day.

On May 20, the group drove to the New Windsor storage facility, where they picked up the three bombs and drove to Riverdale. Acting according to their plan, they stopped near where the two cars had been parked by the FBI for the operation. Hussain let Onta Williams, David Williams, and Payen out to take up their positions as lookouts. Cromitie then placed one of the fake bombs in the trunk of the Pontiac and two others on the back seat of the Mazda. Moments later, FBI agents arrested Cromitie, Onta, Williams, and David Williams.

The jury found Cromitie guilty on all counts.

Discussion

Cromitie makes two claims on appeal: (1) the evidence established entrapment as a matter of law; and (2) the Government's conduct in persuading Cromitie to participate in the plan was outrageous conduct in violation of the Due Process Clause.

I. Entrapment

(A) Elements of Entrapment

"[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in criminal conduct." *Mathews v. United States,* 485 U.S. 58, 63, *Sherman v. United States,* 356 U.S. 369, 376-78 (1958). "Predisposition, the principal element in the defense of entrapment, focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime." *Mathews,* 485 U.S. at 63. "[T]he fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Jacobson v. United States,* 503 U.S. 54. The defendant has the burden of showing inducement, *see United States v. Bala,* 236 F.3d 87, 94 (2d Cir.2000), and, if inducement is shown, the prosecution has the burden of proving predisposition beyond a reasonable doubt, *see United States v. Al–Moayad,* 545 F.3d 139, 153 (2d Cir.2008).

Judge Learned Hand observed that the Supreme Court in *Sorrells* had not spelled out "precise limits" as to when government inducement alone would no longer suffice to preclude a valid conviction. *See United States v. Becker,* 62 F.2d 1007, 1008 (2d Cir.1933). Filling the void, he postulated the three circumstances, any one of which would become the accepted means in this Circuit of establishing a defendant's predisposition: "an existing course of similar criminal conduct; the accused's already formed *design* to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance."

Id. Twenty years later, when Judge Hand endeavored to quote verbatim the *Becker* formulations, he changed "complaisance" to "compliance." *See United States v. Sherman,* 200 F.2d 880, 882 (2d Cir.1952).

There is normally little controversy as to what constitutes prior "similar criminal conduct." *See* Paul Marcus, *The Entrapment Defense* § 4.05I (4th ed.2009). "Ready compliance" is usually indicated by the promptness of a defendant's agreement to commit an offense. What is meant by a pre-existing "design" is more problematic. As far as we have been able to determine, no decision of our Court has encountered a jury's rejection of an entrapment defense where the prosecution's claim of predisposition rests solely on the defendant's already formed "design," *i.e.,* without prior criminal conduct or prompt agreement to commit the offense.

(B) Entrapment as a Matter of Law

On appeal, defendant contends that entrapment was established as a matter of law, a claim we understand to mean that on the facts of this case, no reasonable jury could find predisposition beyond a reasonable doubt. *See Jacobson,* 503 U.S. at 553.

(a) *Inducement.* Because the conduct of government agents is the focus of the inducement component of the entrapment defense and is the entirety of a claim of outrageous government conduct, the factual predicates of the entrapment and the due process claims are somewhat related, although the applicable legal principles are distinct. In assessing the inducement component of Cromitie's entrapment claim, we will consider only the facts sufficient to show inducement, leaving the additional details of the Government's alleged misconduct for assessment of the outrageous government conduct claim below. *See* Part II(A)-(E).

In this case, Hussain's efforts to persuade Cromitie constituted inducement. As the District Court forcefully stated, "I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition." The record fully supports this statement. Hussain's efforts to persuade Cromitie to commit the charged offenses persisted throughout the eleven-month period from their initial meeting until the arrest. In addition to proposing specifics of the planned attacks and supplying bombs and missiles, Hussain's inducements included offers of $250,000, a barber shop at a cost of $70,000, a BMW, and an all-expense-paid, two-week vacation to Puerto Rico for Cromitie and his family.

(b) *Predisposition.* With respect to the three means of proving predisposition, it is clear that Cromitie had not engaged in a course of similar conduct prior to the Government's inducement, nor did he readily agree to committing the charged offenses. Thus, the issue becomes whether, prior to inducement, he had an "already formed *design* to commit the crime or similar crimes." *Becker,* 62 F.2d at 1008.

On the first day that Hussain met Cromitie, Hussain quotes Cromitie as saying, "I want to do something to America." The potentially ominous meaning of these words was clarified by Cromitie's immediately preceding statement that he wanted "to die like a shahid, a martyr," and the fact that, as he said them, he pointed his right index finger in the air in a gesture Hussain testified is used "by somebody in radical Islam" to "mean taking an oath in front of Allah to do take part [in a] crime or Jihad." The jury was entitled to think that wanting to die like a martyr, coupled with wanting to do something to America, meant a willingness to engage in terrorist acts.

Cromitie expressed many more statements confirming his initial statements to Hussain revealed a pre-existing design to commit terrorist acts against the interests of the United States. Cromitie's statements gave indisputable meaning to Cromitie's initial ominous, though somewhat generalized, words about wanting to "do something to America" and "die like a shahid, a martyr." The later statements also gave the jury ample basis for believing Hussain when he testified about what Cromitie had said to him during their first unrecorded conversation.

Even though Cromitie's commitment to the terrorism plot was not unwavering. Despite moments of wavering, which do not preclude a finding of predisposition, *see United States v. Davila–Nieves,* 670 F.3d 1, 4 (1st Cir.2012) (predisposition despite seven-month interval between informant's contacts with defendant); *United States v. Evans,* 924 F.2d 714, 716 (7th Cir.1991) ("second thoughts following initial enthusiasm do not establish entrapment"), Cromitie revealed his willingness, indeed his eagerness, to commit acts of terrorism through his own recorded statements.

From everything that Cromitie said, the jury was entitled to find that he had a pre-existing "design" and hence a predisposition to inflict serious harm on interests of the United States, even though Government officers afforded him the opportunity and the pseudo weapons for striking at specific targets. "[T]he fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Jacobson,* 503 U.S. at 548, 112 S.Ct. 1535. "It is sufficient if the defendant is of a frame

of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion." *Williams,* 705 F.2d at 618.

II. Outrageous Government Conduct

As a claim distinct from his claim of entrapment as a matter of law, defendant contends his convictions should be reversed because the Government's conduct in persuading Cromitie, and the others through Cromitie, to commit the charged offenses was so outrageous as to violate the Due Process Clause.

In *Hampton v. United States,* 425 U.S. 484 (1976), the Supreme Court, by a vote of 5 to 3, ruled that, even as to a defendant predisposed to commit an offense, outrageous government conduct could invalidate a conviction. The conduct of the law enforcement officials must reach a "demonstrable level of outrageousness before it could bar conviction." *Id.* at 495 n. 7 (Powell, J., concurring in the judgment). We have recognized the same principle. "Government involvement in a crime may in theory become so excessive that it violates due process and requires the dismissal of charges against a defendant even if the defendant was not entrapped." *Al Kassar,* 660 F.3d at 121. We also recognized this possibility in *United States v. Rahman,* 189 F.3d 88, 131 (2d Cir.1999), although cautioning that the alleged misconduct must "shock the conscience" in the sense contemplated by *Rochin v. California,* 342 U.S. 165, 172 (1952) (forced stomach pumping). *See also United States v. Myers,* 692 F.2d 823, 836 (2d Cir.1982) ("Unlike the entrapment defense, which focuses on the defendant's predisposition, th[e] due process claim focuses on the conduct of the government agents.")..

Courts acknowledging the possibility of dismissal for outrageous government conduct have said little about what conduct would be considered constitutionally "outrageous.". In *Al Kassar,* we said, "[W]hether investigative conduct violates a defendant's right to due process cannot depend on the degree to which the government action was responsible for inducing the defendant to break the law. Rather, the existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it 'shocks the conscience' regardless of the extent to which it led the defendant to commit his crime." *United States v. Chin,* 934 F.2d 393, 398 (2d Cir.1991)

The D.C. Circuit has said that due process limits are violated only where government misconduct includes "coercion, violence or brutality to the person." *United States v. Kelly,* 707 F.2d 1460, 1476 (D.C.Cir.1983).

In asserting their claim of outrageous conduct, defendant focuses on the Government's role in the planning of, and preparing for, the aborted attacks; Cromitie cites in addition Hussain's suggesting that he had a religious obligation to commit the crimes, exploiting professed love for Hussain, and offering him large financial benefits.

(A) Government's Role in Planning the Crimes

There is no doubt that Government agents planned the entire operation with respect to launching missiles to destroy airplanes at Stewart Airport. The idea of bombing synagogues appears to have originated with Cromitie, although Government agents supplied the fake bombs and instructed the defendants how to detonate them.

But as with all sting operations, government creation of the opportunity to commit an offense, even to the point of supplying defendants with materials essential to commit crimes, does not exceed due process limits. *See Russell,* 411 U.S. at 431-32. Once the FBI learned that Cromitie, in his very first encounter with Hussain, had expressed a desire to "do something to America" and had given an ominous meaning to this statement by saying he wanted to die like a martyr, the FBI agents would have been derelict in their duties if they did not test how far Cromitie would go to carry out his desires. Determining whether Cromitie would go so far as to launch missiles at military aircraft was not outrageous government conduct.

(B) Exploiting Religious Views

Cromitie amplifies the outrageous conduct claim by arguing that Hussain "engaged in proselytizing [him] to convert him from a moderate if angry, Muslim, to one committed to violent terrorism in the name of religion."

It is an unfortunate aspect of the modern world of Islam that within the ranks of the hundreds of millions of law-abiding Muslims exists a small number of jihadists who have the distorted view that acts of violence serve Allah. When a government agent encounters a Muslim who volunteers that he wants to "do something to America" and "die like a shahid," the agent is entitled to probe the attitudes of that person to learn whether his religious views have impelled him toward the violent brand of radical Islam that poses a dire threat to the United States. Such probing does not remotely implicate the religion clauses of the First Amendment, as Cromitie argues, nor constitute outrageous government conduct.

(C) Monetary and Other Benefits

Finally, Cromitie argues that the monetary and other

benefits Hussain offered him were so large as to exceed due process limits on government conduct. The principal benefit was a cash offer of $250,000, as well as a barbershop, a new BMW, and a two-week vacation.

Our Court has not encountered a government-offered cash inducement as large as $250,000. The Abscam cases in this Circuit involved bribe payments of $50,000, and we found no due process violation. *See, e.g., Myers,* 692 F.2d at 827. In *Al Kassar,* we ruled that a cash inducement of 125,000 did not constitute outrageous conduct. *See* 660 F.3d at 116, 121. The D.C. Circuit has ruled in another Abscam case that an offer of $100,000 to a congressman did not violate due process, *see United States v. Jenrette,* 744 F.2d 817, 823-24 (D.C.Cir.1984), and the Ninth Circuit has ruled that a finder's fee of $200,000 to a potential supplier of large quantities of cocaine did not cross the due process line, *see United States v. Emmert,* 829 F.2d 805, 812 (9th Cir.1987).

Even if we were to accept the premise that an offer of money might, in some unlikely circumstances, be so large as to constitute outrageous government conduct, we do not believe a line should be drawn at a fixed dollar amount. Such an absolute line would be inconsistent with the flexible standards usually informing due process limitations. *See Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). An amount of money that might constitute a due process violation should be measured in relation to the inducement available for a particular criminal act from nongovernmental sources and the nature of the act itself. A large sum reflecting the going rate for a murder-for-hire might exceed due process limits if offered to induce the sale of a small quantity of marijuana.

With respect to the outrageous government conduct claim, the burden of proof rested with defendant, and they presented no evidence to indicate that $250,000 (plus assorted other benefits) was more than might plausibly be required to purchase the services of a person willing to recruit and lead a team to launch Stinger missiles at an air force base and bomb synagogues. Whatever the going rate for such terrorist activities, only an offer significantly higher would require us to consider whether due process limits had been exceeded. The monetary benefits offered to Cromitie did not violate the Due Process Clause.

Conclusion

The resulting judgments of convictions and sentences of all four defendants are affirmed.

DENNIS JACOBS, Chief Judge, dissenting:

I respectfully dissent because James Cromitie was entrapped as a matter of law.

I

It is common ground on this panel that the government induced Cromitie to commit the terrorist crimes charged, and that it became the government's burden to prove beyond a reasonable doubt that Cromitie was "predisposed" to commit them. Since Cromitie had no similar criminal background, and since the government informant enlisted him only after a dogged and year-long campaign of nagging, pursuit, and temptation, this panel is in agreement that the government had to prove an "already formed design."

In my view, there was no evidence of an "already formed design." At the outset, Cromitie told of wanting to "do something to America" and "die like a martyr," but this big talk does not amount to a design -- to *do* what? -- never mind one that was "already formed." The design here was entirely formed by the government, and fed to Cromitie. He liked it, but he didn't form it. It is not enough to infer a formed design to commit an act of terror from a sense of grievance or an impulse to lash out. These disquiets are common, and in most people will never combust.

The majority opinion relies heavily on post-inducement acts and statements that do not reflect the defendant's state of mind *before* the initial inducement, and therefore do not bear on predisposition. *See Jacobson,* 503 U.S. at 551-52. Cromitie did what he was induced to do, and seemed happy doing it, but that cannot suffice; otherwise the induced act would always evidence the predisposition to do it.

No reasonable jury weighing only the evidence of predisposition admissible under *Jacobson* could conclude that Cromitie had an "already formed design" to commit an act of terror. The government agent supplied a design and gave it form, so that the agent rather than the defendant inspired the crime, provoked it, planned it, financed it, equipped it, and furnished the time and targets. There simply was no evidence of predisposition under our settled definition of that term.

I would therefore reverse Cromitie's conviction as the product of entrapment.

27 F.3d 1515
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Alphonso PEDRAZA, Defendant–Appellant,
UNITED STATES of America, Plaintiff–Appellee,
v.
Peter Brent IRELAN, Defendant–Appellant,
UNITED STATES of America, Plaintiff–Appellee,
v.
Enrique PEDRAZA, Defendant–Appellant.

Nos. 92–2042, 92–2054 and 92–2084.
|
June 30, 1994.

The relevant facts for purposes of this appeal are as follows. Edward Mitchell and George Anthony Seek were longtime drug dealers who had been acquainted since the seventies. While incarcerated together on unrelated drug charges in the early eighties, the two discussed engaging in future drug smuggling operations upon release from prison. On November 25, 1988, Mitchell, who had escaped from a halfway house and was a fugitive from the United States residing in Colombia, South America, placed a telephone call to Seek, who had been released and was residing in New Mexico. During that call, Mitchell informed Seek he was arranging a deal to import a large amount of marijuana into the United States. Mitchell asked Seek to assist in arranging for the transportation of the marijuana into the United States in exchange for a large amount of cash, and Seek expressed interest.

At the time of his November 1988 conversation with Mitchell, Seek was working as an informant for the United States Customs Service, in exchange for the government's recommendation that he receive probation for pleading guilty to a 1986 unrelated drug charge. For his assistance in the case against Defendants, the government compensated Seek in the amount of $100,000.

Following the November 25, 1988 conversation between Mitchell and Seek, the two spoke several times and discussed the logistics of smuggling marijuana into New Mexico via aircraft. At some point, Seek introduced the idea of importing cocaine instead of marijuana and informed Mitchell that he knew some people in the United States who were interested in purchasing cocaine. Nearly one year after this conversation, Mitchell became involved with individuals in the cocaine business, and he notified Seek that plans were being formulated to smuggle 500 kilograms of cocaine into Florida by aircraft. In order to facilitate the cocaine-smuggling plan, Mitchell provided Seek with Alphonso's telephone number in Miami, and informed Seek that Alphonso would contact him regarding expense money for the operation. Mitchell also informed Seek that Alphonso's brother Enrique, who was a fugitive from the United States living in Colombia, was involved in the cocaine-smuggling plan.

On November 17, 1989, Alphonso telephoned Seek and informed him that he was going to ship $20,000 in expense money from Florida to Seek in New Mexico. The money was to finance a plan that called for Seek to fly into Colombia and pick up the cocaine and transport it to Miami where it would be delivered to Alphonso. Seek retrieved the $20,000 at the Albuquerque airport. Shortly thereafter, Seek advised Alphonso that another $5,000 was needed for the transportation of the cocaine. On November 20, 1989, Seek met Alphonso at a Miami shopping mall and Alphonso gave Seek the additional $5,000. On November 21, 1989, Seek notified Mitchell that he was departing from Florida by aircraft to Colombia to transport the cocaine. However, because the Customs Service was unable to obtain country clearance for the trip, Seek called Enrique and told him that the aircraft had been seized and that additional funds would be required to obtain another aircraft to transport the cocaine. On December 13, 1989, Enrique advised Seek that Alphonso was attempting to arrange another drug deal to raise money to pay for the transportation of the cocaine.

While alternative smuggling plans were being formulated, Mitchell and Enrique began having difficulty obtaining expense money from the cocaine owners. Around this time, Mitchell informed Seek that he was so unhappy with his living conditions in Colombia that he was tempted to return to the United States and turn himself over to authorities. Mitchell informed Seek that Enrique was also miserable in Colombia and was "about ready to split too." Seek reassured Mitchell that the deal could go forward. On January 20, 1990, Mitchell was arrested by Colombian authorities. On February 6, 1990, Alphonso was arrested by Florida state officials on unrelated drug charges.

Following Alphonso's arrest, Irelan and Nelson Pedraza ("Nelson") entered the picture. Irelan called Seek and reassured him that the deal was still on, and informed Seek that he would arrange to get an additional $30,000 in

expense money. In order to assure Seek, Enrique informed him Nelson and Irelan were reliable and that Seek could speak freely with them concerning the pending operation.

In March 1990, the cocaine owners agreed to provide the expense money. Enrique informed Seek that the money could be picked up in California. Seek and a Customs Service official traveled to Los Angeles and retrieved the $30,000 from an unidentified male. On March 13, 1990, Enrique informed Seek that Irelan would send additional expense money. On March 14, 1990, Irelan sent $5,000 to Seek in New Mexico.

In April 1990, Enrique and Seek conceived a new plan for smuggling the cocaine into the United States. Enrique proposed that Seek land a seaplane off the Colombian coast and pick up the cocaine from Enrique who would come alongside the seaplane in a boat. The cocaine would then be flown to New Mexico. On May 11, 1990, Irelan and Nelson traveled to New Mexico to help unload the cocaine upon its arrival, and Irelan brought an additional $4,900 in expense money. On May 17, 1990, Seek departed for the coast of Colombia, however, high seas prevented a safe water landing. As a result, the attempt had to be aborted, as did a second attempt on May 19, 1990.

After these unsuccessful attempts, Seek proposed that Enrique transport the cocaine by small boat into the waters off the coast of Colombia where a ship would pick up the cocaine and transport it to an area where the seaplane could safely land. Enrique readily agreed to the plan and agreed to provide additional expense money. On May 24, 1990, Irelan sent Seek an additional $19,950.

On June 13, 1990, an undercover Customs Service ship, "The Hope," met a small boat off the coast of Colombia. The skipper of The Hope was Joseph Goulet, a Customs Service employee. Enrique and Jamie Martinez were on board the small boat. At trial, Goulet testified that The Hope was approximately fifteen miles off the coast of Colombia in international waters when the cocaine transfer occurred. However, after trial it was discovered that some native fishermen had seen The Hope as close as five miles off Colombia's coast.

In any event, thirty-six bundles of cocaine, amounting to 707 kilograms, were transferred from Enrique's boat to The Hope, and Enrique and Martinez came aboard. The Hope then left to meet Seek's seaplane at an agreed-upon location. On June 15, 1990, The Hope arrived off the coast of Puerto Rico and the cocaine was transferred to the seaplane. Enrique and Martinez boarded the seaplane, which departed for Florida for refueling, and then landed at an undercover airstrip in New Mexico.

Undercover Customs Service agents met the seaplane in New Mexico. Agent Jim Stokes, Enrique, Martinez, and Seek then drove to an Albuquerque hotel and met Irelan and Nelson, who had arrived in New Mexico to await the delivery of the cocaine. At the hotel, Enrique placed several telephone calls to Colombia to inform his associates that the cocaine had arrived. He then made arrangements to obtain the money to pay Seek for the transportation of the cocaine. On June 17, 1990, Nelson and Seek flew to California and Nelson received $400,000 from Jairo Salazar. Nelson later turned the money over to Seek.

On June 22, 1990, the Customs Service arrested Enrique, Irelan, Martinez, and Nelson. On July 4, 1993, Salazar was arrested at Miami International Airport.

Following the arrests, the Customs Service held a press conference where it displayed the cocaine and stacks of money that had been confiscated upon Defendants' arrest. Following the press conference, the Select Committee of the United States House of Representatives conducted an investigation into the June 22, 1990 arrests, and Chairman Charles Rangel and Representative Bill Richardson issued a joint statement. In that statement, Rangel and Richardson criticized the Customs Service for misstating the facts surrounding the investigation. The statement went on to criticize the Service for "publicly laud[ing] the bust in an effort to glamorize its role in the war on drugs." Finally, the statement criticized the Service for failing to inform the public that "government agencies had orchestrated the bust from the beginning."

On July 11, 1990 a federal grand jury returned a two-count indictment against Alphonso, Enrique, and Irelan. Defendants were tried jointly before a jury. At trial, it was discovered that while working with Customs Service, Seek had been instructed to record all relevant telephone conversations. Nearly 200 telephone calls made by Seek to Colombia, however, lacked corresponding tapes. Seek testified that he had attempted to record all telephone calls he placed to Colombia, but was not always successful.

On November 15, 1991, the jury found all three Defendants guilty of Count I, and found Enrique guilty of Count II.

On appeal, all three Defendants raise the issue of outrageous government conduct.

I. OUTRAGEOUS GOVERNMENT CONDUCT

Defendants claim the district court erred in failing to dismiss the indictment based on outrageous government conduct. Defendants recited a litany of alleged improper actions on the part of the government during its undercover operation, the totality of which, they claimed, constituted outrageous government conduct. Defendants argued the government created the crime for which they were indicted and coerced them into participating in the criminal activity. The district court denied Defendants' motion to dismiss finding that the government did not engineer and direct the criminal enterprise from beginning to end, and was not "overly involved" in the creation of the crime. Defendants have the burden of proving outrageous government conduct, *see United States v. Clonts,* 966 F.2d 1366, 1369 (10th Cir.1992), and we review this issue de novo, *United States v. Diggs,* 8 F.3d 1520, 1523 (10th Cir.1993).

"When the government's conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct," *United States v. Mosley,* 965 F.2d 906, 908 (10th Cir.1992), because prosecution in such a case would offend the Due Process Clause of the Fifth Amendment. *Id.* The outrageous conduct defense, however, is an extraordinary defense that will only be applied in the most egregious circumstances. *Id.* at 910.[3] In order to prevail, the defendant must show that the challenged conduct violates notions of "fundamental fairness" and is "shocking to the universal sense of justice." *United States v. Harris,* 997 F.2d 812, 816 (10th Cir.1993) (citations omitted). In determining whether the government's conduct is outrageous, we look to the totality of the circumstances. *Mosley,* 965 F.2d at 910.[4]

To succeed on an outrageous conduct defense, the defendant must show either: (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime. *Mosley,* 965 F.2d at 911. Excessive government involvement occurs if the government "engineer[s] and direct[s] the criminal enterprise from start to finish." *Id.* However, it is not outrageous for the government to infiltrate an ongoing criminal enterprise, or to induce a defendant to repeat, continue, or even expand previous criminal activity. *Id.* In inducing a suspect to repeat or expand his criminal activity, it is permissible for the government to suggest the illegal activity, provide supplies and expertise, and act as both a supplier and buyer of illegal goods. *Id.* at 911–12.

The second theory underlying an outrageous government conduct defense is significant governmental coercion. Only governmental coercion that is particularly egregious rises to the level of outrageous conduct. *Id.* at 912. Examples of government behavior that have been argued by defendants as constituting outrageous conduct include the holding of a defendant on trumped-up charges and excessive bail, where the only way the defendant could make bail was to agree to a drug transaction initiated by the government, *United States v. Bogart,* 783 F.2d 1428, 1430 (9th Cir.1986), very large financial inducements, including offering narcotics at a "shockingly cheap" price, *see Mosley,* 965 F.2d at 912–13, or, in certain situations, distribution of narcotics to a known addict. *See Harris,* 997 F.2d at 816–18 (refusing to hold that government distribution of narcotics to known addict is always coercive, but speculating that government entering ***1522** rehabilitation center and selling heroin to a recovering addict may offend due process).

Regardless of which theory a defendant proffers to support an outrageous government conduct defense, he must still prove that the government's conduct directly affected him. *Mosley,* 965 F.2d at 914. No matter how outrageous the government's conduct, due process is not offended unless the government's actions "had a role in inducing the defendant to become involved in the crime." *United States v. Gamble,* 737 F.2d 853, 858 (10th Cir.1984); *see also United States v. Warren,* 747 F.2d 1339, 1343 (10th Cir.1984) (no outrageous conduct where government prepared phony accident reports and guilty pleas because no evidence defendant relied on phony documents in submitting falsified medical bills). A defendant may not assert an outrageous conduct claim based on conduct that harms third parties. *Mosley,* 965 F.2d at 914.

A. *Creation of the Crime*

Defendants first claim the government created the crime for which they were indicted because Seek first suggested to Mitchell that they arrange to smuggle cocaine instead of marijuana into the United States. Defendants also claim that the government's conduct amounted to creation of the crime because the government directed and controlled every aspect of the cocaine-smuggling operation, and the operation could not have taken place without the government's involvement.

In *Mosley,* 965 F.2d at 913, we held that the government did not engage in outrageous conduct when an agent, who had been approached by the defendant for purposes of purchasing marijuana, offered to sell the defendant cocaine. We held that the agent's behavior did not result in the government "creating" the crime because the defendant initiated the contact with the agent, had a

history of trafficking in both marijuana and cocaine, and was given several days to decide whether to voluntarily accept the agent's cocaine offer. *Id.* Likewise here, Mitchell, not the government, initiated the contact with Seek in an effort to arrange a marijuana-smuggling operation. Moreover, Mitchell, as well as Alphonso and Enrique, had an extensive drug trafficking history prior to his contact with Seek. Finally, Mitchell was given ample time to decide whether to agree to Seek's suggestion. In fact, the record indicates that Mitchell did not formally agree to the plan to smuggle cocaine until months after Seek's initial suggestion. Because the government is free to induce a suspect to repeat, continue, or even expand previous criminal activity, *id.* at 911, we conclude Seek's suggestion to Mitchell that they smuggle cocaine instead of marijuana did not rise to the level of outrageous conduct.

We further conclude that, although the government was heavily involved in the cocaine-smuggling plan, that involvement did not rise to the level of outrageous conduct. "Even substantial participation by a government agent does not necessarily amount to outrageous conduct." *Clonts,* 966 F.2d at 1369. We find this to be especially so here because, although the government provided transportation alternatives, Defendants arranged for and obtained the cocaine and the transportation money from outside sources unknown to the government. *See Harris,* 997 F.2d at 816 (no outrageous conduct where defendant acted as an intermediary between a source, who was unknown to the government, and the government). In fact, during the course of the cocaine-smuggling operation, Defendants came up with over seven hundred kilograms of cocaine and close to $500,000 to fund the transportation of the cocaine. Given these pivotal roles played by Defendants in the smuggling operation, and the fact that Defendants' sources of the cocaine and transportation money were unknown to the government, we cannot say the government "engineered and directed the criminal enterprise form start to finish." *See Mosley,* 965 F.2d at 911.

We also disagree with Defendants' claim that the cocaine-smuggling operation could not have taken place without the government-provided transportation. Defendants have not carried their burden of proving that they "[lacked] the capacity to commit the crime without the government's assistance." *See United States v. Lomas,* 706 F.2d 886, 891 (9th Cir.1983). Defendants have failed to provide any evidence that alternative modes of transportation of cocaine into the United States, for the amounts of money to which Defendants had access—nearly $80,000 prior to the transportation and ultimately nearly $500,000—were unavailable. Moreover, experience teaches that means of smuggling cocaine into the United States are all too readily available. As in *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), where the government provided the defendants with a necessary chemical for the production of methamphetamine, the fact that the government provided an instrumentality that may have been difficult but not impossible for Defendants to obtain without government assistance does not violate due process.

B. *Coercion*

Defendants next claim the government coerced them into participating in the conspiracy. Defendants argue the government used financial inducements as a means of coercion. Enrique also claims the government coerced him to import the cocaine as a means to escape Colombia, and Irelan and Alphonso claim they were coerced because of their familial relationships to Enrique.

We conclude Defendants have failed to show that the government engaged in "particularly egregious," *Mosley,* 965 F.2d at 912, coercive tactics in the form of financial inducements. First, there is no evidence that the government promised Defendants any particular "cut" from the sale of the cocaine in the United States, nor is there any suggestion that the government, as transporter, would have been in a position to make any such offers. Moreover, the only evidence of financial reward actually promised by the government included small amounts of spending money, an occasional meal, and an occasional hotel room. We hold that these do not qualify as "very large financial inducements," *see id.,* sufficient to induce Defendants to participate in a huge cocaine-smuggling venture.

Furthermore, Enrique cannot seriously contend that his only option in leaving Colombia was to join an expansive cocaine-smuggling operation. Unlike the situation described in *Bogart,* 783 F.2d 1428, where it was asserted that the government wrongfully detained a suspect and offered a drug transaction as the suspect's only means of making bail, Enrique was a fugitive from justice, and was present in Colombia by choice. The government was in no way responsible for Enrique's presence in Colombia, and if he became unhappy with his living conditions there he certainly had the option of surrendering to the United States. Instead, he chose to join a cocaine conspiracy—a choice which had nothing to do with any coercion on the part of the government.[5] We likewise reject Irelan and Alphonso's claim that because of their familial relationships, Enrique's situation led them to be coerced into joining the conspiracy.

C. *Other Instances of Outrageous Conduct*

Finally, Defendants list numerous actions by the government that they claim amount to outrageous government conduct. These actions include the government's assistance in smuggling several kilograms of cocaine into the United States, choice of an unseemly character like Seek with whom to do business, payment to Seek of large sums of money, support of Seek's light sentence on prior drug charges, grant of permission to Seek to pilot the seaplane without a license, failure to record or destruction of some 200 telephone conversations between Seek and Defendants, encouragement of Mitchell to go forward with the deal after he indicated he wanted to turn himself in, entrance into Colombian waters without permission, and misrepresentations in a press conference following the Defendants' arrests. The short answer is none of these actions, individually, or taken as a whole, can support an outrageous conduct defense because Defendants have failed to show that any of these government actions played a role in inducing them to join the cocaine-smuggling operation. *See Warren,* 747 F.2d at 1343.

We AFFIRM.

797 F.3d 792
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Alex Joseph PEDRIN, Jr., aka Alex Pedrin, Jr.,
Defendant–Appellant.

No. 11–10623.
|
Argued and Submitted March 13, 2015.
|
Filed Aug. 17, 2015.

OPINION

W. FLETCHER, Circuit Judge:

In this appeal, we again address what constitutes "outrageous government conduct" in the context of a reverse sting operation.

I. Background

For several decades, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") has conducted reverse sting operations in order to identify and apprehend people who can be enticed into robbing fictitious drug "stash houses." In these "stash house stings," an undercover agent poses as a disgruntled drug courier with knowledge about a stash house protected by armed guards and containing a large amount of cocaine. The agent suggests to targets of the reverse sting that they join forces, rob the house, and split the proceeds. Once the targets have taken steps to rob the fictional house, they are arrested and charged with conspiracy to violate federal narcotics laws.

The defendant in this case, Alex Pedrin, Jr., was the target of a stash-house sting in Arizona in August 2009. The sting was planned by agent Richard Zayas, at the time a 20–year veteran of the bureau. According to Zayas, he has planned "hundreds" of stash-house stings, beginning in Miami, Florida in the 1990.

Zayas met Pedrin through a confidential informant, Jesus Contreras. Contreras was working with Zayas in the ATF's Tucson office. Contreras told Zayas that his nephew, Omar Perez, had called him to "ask[ ] for work," which Contreras understood to mean work stealing drugs. Contreras set up a meeting between Zayas, Perez, and Pedrin on August 17, 2009. The meeting took place in Zayas's car. During a videorecorded conversation in the car, Zayas described himself to Perez and Pedrin as a disgruntled cocaine courier. He told the two men that he knew about a local stash house, guarded by two armed men, that contained between 40 and 50 kilograms of cocaine. Zayas said he was looking for "someone to go in there and take everything." He asked the men, "What do you think? ... Can that be done?" Each man assented.

Zayas met with Perez and Pedrin again on August 19. The men agreed that the robbery would take place two days later, on August 21. Zayas pressed Perez and Pedrin for details about their plan. Pedrin responded, "We'll just ... go right when you go in so we're all together, you know what I mean? ... Put everybody down. Make them tell us where everything is at and then we leave and then we go split it up." In response to Zayas's questions, Pedrin said he and Perez had recruited three other men. Two of them would go into the house with Pedrin and the other would stay outside with Perez. Pedrin told Zayas that he had obtained "walkie talkies and scanners" to facilitate the operation. The details were planned by the defendants themselves. At no point did Zayas instruct Pedrin and Perez how to carry out the robbery.

On August 21, the day of the planned robbery, Zayas met with all five men. Zayas stated again that the stash house contained between 40 and 50 kilograms of cocaine and that it was guarded by at least two armed men. Zayas then instructed Pedrin and the others to follow him to a storage locker at which they were to drop Zayas's share of cocaine after the robbery. On the way to the locker, however, the men became suspicious and pulled into a nearby trailer park. One of the men took a different car to the storage locker location, where he saw ATF agents. He called the others and warned them that it was a sting. The men fled but were picked up by federal and state officers shortly afterward.

Pedrin was charged with conspiracy to possess with intent to distribute 40 to 50 kilograms of cocaine. One of Pedrin's codefendants, Terry Bombard, testified at Pedrin's trial in exchange for a lighter sentence. Bombard said that he had met Pedrin over four years earlier in connection with another robbery of a drug stash house. Pedrin, he said, had organized a "gang" of nine men to steal between 200 to 250 pounds of marijuana. Bombard testified that he had participated in thirteen or fourteen stash-house robberies, most or all of them with Pedrin. Pedrin was convicted.

Pedrin challenges his conviction arguing his prosecution resulted from "outrageous government conduct." We review the district court's decision not to dismiss the indictment for outrageous government misconduct de novo, viewing the evidence in the light most favorable to the government. *Black,* 733 F.3d at 301. We affirm.

II. Discussion

A prosecution results from outrageous government conduct when the actions of law enforcement officers or informants are "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431-32 (1973). A federal court must dismiss a prosecution based on such actions. The standard for dismissal on this ground is "extremely high." *United States v. Smith,* 924 F.2d 889, 897 (9th Cir.1991). Dismissals are "limited to extreme cases in which the government's conduct violates fundamental fairness." *United States v. Gurolla,* 333 F.3d 944, 950 (9th Cir.2003). An indictment can be dismissed only where the government's conduct is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Stinson,* 647 F.3d 1196, 1209 (9th Cir.2011) (quoting *United States v. Restrepo,* 930 F.2d 705, 712 (9th Cir.1991)).

Pedrin argues that the reverse sting operation that led to his conviction was "outrageous government conduct" under this standard and that his indictment accordingly should be dismissed. We considered and rejected a similar argument in *Black,* 733 F.3d 294. Like Pedrin, the defendants in *Black* were the targets of a stash-house sting operation planned by Agent Zayas. *Id.* at 298-301. They argued that Zayas, by initiating contact with the defendants, describing the fictitious stash house, and suggesting that they rob it—all without any individualized suspicion about the defendants' criminal history—had engaged in "outrageous" conduct, and that their indictments should be dismissed. *See id.* at 306. We expressed "concerns" with the ATF's tactics, but we ultimately concluded that they "did not cross the line." *Id.* at 307, 310. *Black* compels the same conclusion here.

In *Black,* we identified six factors "as relevant to whether the government's conduct was outrageous": (1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue. *Id.* at 303.

We noted that "the first three are most relevant to the way in which the government set up the sting," while "the fourth and fifth look to the propriety of the government's ongoing role in the sting," and the last focuses on the justification for the operation. *Id.* at 303-04. Attempting to distinguish this case from the facts of *Black,* Pedrin focuses on the first three factors. He contends that Zayas knew less about the defendants' propensity to commit crimes in this case than he knew about the defendants' similar propensities in *Black.* We disagree.

First, the "major" concern present in *Black*—that the government found the defendants in that case by "trolling for targets," *id.* at 303—is not present here. In *Black,* the confidential informant visited "a bad part of town, a bad bar, you know ... bars where you've got ... a lot of criminal activity" in order to identify and recruit targets. *Id.* We wrote in *Black,* "The risk inherent in targeting such a generalized population is that the government could create a criminal enterprise that would not have come into being but for the temptation of a big payday...." *Id.* Here, by contrast, one of the defendants—Omar Perez, Pedrin's co-conspirator—approached the informant to look for work stealing drugs. The government thus had little reason to suspect that Pedrin and Perez were "vulnerable" persons "who would not otherwise have thought of doing such a robbery." *Id.*

Second, as in *Black,* the government's subsequent inquiries "mitigated" any concerns it might have had that the defendants were reluctant participants in the operation. *See id.* at 307. On August 17, when they first met with Zayas, Pedrin and Perez readily agreed to carry out the robbery. Two days later, they had recruited three other men; had obtained "walkie talkies and scanners" to facilitate the robbery; and had assigned roles and responsibilities during the robbery. Although Pedrin and Perez were less voluble than the defendants in *Black,* who boasted loudly of their criminal records, their conduct —like the conduct of the *Black* defendants—gave rise to an inference that they had previously committed similar crimes. *See id.* at 300, 307.

We note that in assessing whether the government's conduct was "outrageous," the relevant question is what the government knew when it was setting up the sting, not what it learned later. On appeal, the government argues that Pedrin's criminal record shows that Zayas "infiltrated [a] home invasion gang that was already engaged in criminal activity." But the government admits that Zayas was not aware, as he was setting up the sting, that Pedrin

had previously robbed other stash houses. Instead, the government learned of Pedrin's alleged prior involvement in stash house robberies only after it had apprehended and interviewed Bombard, one of the co-conspirators. As we suggested in *Black,* the question is not whether a defendant *in fact* "may have been predisposed to commit a stash house robbery." *Id.* at 306 n. 9. Rather, it is whether the government had reason to believe, in light of what it knew as it was setting up the sting, that a defendant was so predisposed. If *Black* was less than clear on this point, we make it clear today: What the government learns only after the fact cannot supply the individualized suspicion that is necessary to justify the sting if the government had little or no basis for such individualized suspicion when it was setting up the sting.

In this case, however, the government knew enough about Pedrin as it was setting up the sting to eliminate the possibility that "it sought to manufacture a crime that would not have otherwise occurred." *Id.* at 307. One of Pedrin's co-conspirators, Perez, reached out to the government, and not vice versa; Pedrin readily agreed to participate in the supposed stash-house robbery; and Pedrin supplied plans and materials. This provided a sufficient basis for the government to infer that Pedrin had a predisposition to take part in the planned robbery. Like the majority in *Black,* we do not lightly dismiss the "concerns about the risks of government overreaching inherent in fictitious stash house sting operations." *Id.* at 310 n. 13. But we are compelled by *Black* to conclude that the government's conduct here was not "so grossly shocking and so outrageous as to violate the universal sense of justice." *Stinson,* 647 F.3d at 1209 (quoting *Restrepo,* 930 F.2d at 712).

Conclusion

Pedrin's prosecution did not result from "outrageous government conduct." For that reason, we **AFFIRM**

469 U.S. 325
Supreme Court of the United States
NEW JERSEY
v.
T.L.O.

No. 83–712.
Argued March 28, 1984.
Reargued Oct. 2, 1984.
Decided Jan. 15, 1985.

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school. On the basis of the

confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County. Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress.

II

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." *Elkins v. United States,* 364 U.S. 206, 213 (1960). Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 637 (1943).

III

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court, supra,* 387 U.S., at 536–537. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. *Terry v. Ohio,* 392 U.S. 1, 24–25, 88 S.Ct. 1868, 1881–1882, 20 L.Ed.2d 889 (1967). We have also recognized that

searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross,* 456 U.S. 798, 822–823, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572 (1982). A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

* * *

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara v. Municipal Court,* 387 U.S., at 532–533, we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. See, *e.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 273 (1973). However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required." 413 U.S., at 277 (POWELL, J., concurring). Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. See, *e.g., Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975); *Delaware v. Prouse,* 440 U.S. 648, 654–655, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a

standard.

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," *Terry v. Ohio*, 392 U.S., at 20, 88; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV

There remains the question of the legality of the search in this case. We recognize that the "reasonable grounds" standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second the search for marihuana. Although it is the

fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T.L.O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. Second, even assuming that a search of T.L.O.'s purse might under some circumstances be reasonable in light of the accusation made against T.L.O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T.L.O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had "a good hunch."

Both these conclusions are implausible. T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T.L.O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T.L.O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T.L.O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.Rule Evid. 401. The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation. See *Warden v. Hayden,* 387 U.S. 294, 306-307 (1967). Thus, if Mr. Choplick in fact had a reasonable suspicion that T.L.O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation. *Ibid.*

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr.

Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch,' " *Terry v. Ohio,* 392 U.S., at 27; rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. *United States v. Cortez,* 449 U.S. 411, 418 (1981). Of course, even if the teacher's report were true, T.L.O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment ...." *Hill v. California,* 401 U.S. 797, 804 (1971). Because the hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes.

Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey

Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

Reversed.

116 S.Ct. 1657
Supreme Court of the United States

Saul ORNELAS and Ismael Ornelas–Ledesma, Petitioners,
v.
UNITED STATES.

No. 95–5257.
|
Argued March 26, 1996.
|
Decided May 28, 1996.

REHNQUIST, C.J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, *post,* p. 1663.

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioners each pleaded guilty to possession of cocaine with intent to distribute. They reserved their right to appeal the District Court's denial of their motion to suppress the cocaine found in their car. The District Court had found reasonable suspicion to stop and question petitioners as they entered their car, and probable cause to remove one of the interior panels where a package containing two kilograms of cocaine was found. The Court of Appeals opined that the findings of reasonable suspicion to stop, and probable cause to search, should be reviewed "deferentially," and "for clear error." We hold that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo.*

* * *

Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with " 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Illinois v. Gates,* 462 U.S. 213, 231, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983) (quoting *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949)); see *United States v. Sokolow,* 490 U.S. 1, 7–8, 109 S.Ct. 1581, 1585–1586, 104 L.Ed.2d 1 (1989). As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." *Gates, supra,* at 232, 103 S.Ct., at 2329. We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, *United States v. Cortez,* 449 U.S. 411, 417–418, 101 S.Ct. 690, 694–695, 66 L.Ed.2d 621 (1981), and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found, see *Brinegar, supra,* at 175–176, 69 S.Ct., at 1310–1311; *Gates, supra,* at 238, 103 S.Ct., at 2332. We have cautioned that these two legal principles are not "finely-tuned standards," comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. *Gates, supra,* at 235, 103 S.Ct., at 2330–2331. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed. *Gates, supra,* at 232, 103 S.Ct., at 2329; *Brinegar, supra,* at 175, 69 S.Ct., at 1310 ("The standard of proof [for probable cause] is ... correlative to what must be proved");

Ker v. California, 374 U.S. 23, 33, 83 S.Ct. 1623, 1630, 10 L.Ed.2d 726 (1963) ("This Cour[t] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"; "[e]ach case is to be decided on its own facts and circumstances" (internal quotation marks omitted)); *Terry v. Ohio,* 392 U.S., at 29, 88 S.Ct., at 1884 (the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases").

The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman–Standard v. Swint,* 456 U.S. 273, 289, n. 19, 102 S.Ct. 1781, 1791, n. 19, 72 L.Ed.2d 66 (1982).

We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination. See, *e.g., Brinegar, supra* (rejecting District Court's conclusion that the police lacked probable cause); *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (conducting independent review and finding reasonable suspicion). A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Brinegar, supra,* at 171, 69 S.Ct., at 1308. Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

* * *

100 So.3d 1289

District Court of Appeal of Florida,
Second District.

T.S., Appellant,
v.
STATE of Florida, Appellee.

Nov. 28, 2012.

T.S. appeals the disposition order that withheld adjudication for one count of possession of marijuana and one count of possession of drug paraphernalia, contending that the trial court erred when it denied her dispositive motion to suppress. Because the State presented no evidence that the search of T.S.'s bookbag was justified at its inception, we reverse and remand for T.S.'s discharge.

T.S. was charged with possession of marijuana and possession of drug paraphernalia after a search of her bookbag by school officials turned up these items. T.S. moved to suppress this evidence, arguing that the search of her bookbag was not supported by reasonable suspicion. At the hearing on T.S.'s motion, the evidence showed that on the day in question T.S. arrived at school early with her mother for a meeting with Barbara Meshna, the school's guidance counselor. At that time, T.S. had a bookbag with her. After the meeting, Meshna reminded T.S. that school rules prohibited students from carrying bookbags in the halls during the school day, and Meshna offered to allow T.S. to leave the bookbag in her office. Meshna testified that T.S. did so "without any issue at all." At that time, T.S. had not violated any school rule, nor was she suspected of violating any law.

On four different occasions during the day, T.S. came to Meshna's office asking to have access to her bookbag. Meshna testified that she did not notice anything out of the ordinary about T.S.'s attitude or demeanor when T.S. made these requests. Citing the school policy on bookbags, Meshna denied each of T.S.'s requests. Nevertheless, she became suspicious because of the number of times T.S. requested access to her bookbag. As Meshna explained, "I was thinking about how many times she came to try to retrieve her book bag, [and] I started wondering why it was so important to her." So without any consent or other information, Meshna initiated a search of T.S.'s bookbag, which revealed the marijuana and paraphernalia at issue in this case.

At the close of Meshna's testimony, T.S. argued that the search of her bookbag was improper because school officials had no reasonable suspicion based on articulable facts that she was violating the law or school rules so as to justify the search. The trial court disagreed, finding that the fact that T.S. brought her bookbag to school despite school policies that discouraged bookbags subjected that bookbag to a search without any further suspicion. The trial court subsequently found T.S. guilty as charged and sentenced her accordingly. T.S. now seeks review of the trial

court's ruling denying her motion to suppress.

Searches of students by school officials are analyzed, like all searches, under the Fourth Amendment, but they have their own slightly modified standard of reasonable suspicion. To justify the search of a student by a school official, there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985). To establish reasonable grounds for a search, the State must " 'elicit specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant the intrusion.' " *S.V.J. v. State*, 891 So.2d 1221, 1223 (Fla. 2d DCA 2005) (quoting *A.H. v. State*, 846 So.2d 1215, 1216 (Fla. 5th DCA 2003)); *see also A.N.H. v. State*, 832 So.2d 170, 171 (Fla. 3d DCA 2002). "A 'gut feeling' or hunch that something is wrong does not constitute a reasonable suspicion to justify the search." *S.V.J.*, 891 So.2d at 1223.

For example, in *A.S. v. State*, 693 So.2d 1095, 1095 (Fla. 2d DCA 1997), the assistant principal saw A.S. and three other boys huddled in a group before school. One of the boys had money in his hand, and A.S. was "fiddling" in his pockets. The assistant principal found this activity suspicious, and she brought all the boys to her office and searched their belongings. The search uncovered marijuana in A.S.'s wallet. The trial court denied A.S.'s motion to suppress, but this court reversed. In doing so, we noted that "[t]he presence of money in the hand of one boy and [A.S.] 'fiddling' in his pocket is not enough to amount to reasonable suspicion," in large part because the assistant principal did not see any contraband and did not see any money change hands. *Id.* at 1096.

Similarly, in *A.N.H.*, a teacher contacted the school counselor because A.N.H. had bloodshot eyes, was not acting like himself, and the teacher believed that "something wasn't right" with him. 832 So.2d at 171. The counselor searched A.N.H. and found marijuana in his pocket. *Id.* The trial court denied A.N.H.'s motion to suppress, but the Third District reversed. The court noted that A.N.H.'s bloodshot eyes and unusual behavior could have resulted "from a variety of non-criminal circumstances, including the appearance and behavior associated with a common cold." *Id.* at 172. The court held that there were no reasonable grounds to suspect that A.N.H. was involved in any criminal activity and that the search was thus invalid. *See also R.S.M. v. State*, 911 So.2d 283, 284 (Fla. 2d DCA 2005) (holding that an assistant principal who was escorting R.S.M. to the office because he had skipped class and who noticed that R.S.M. was "reaching towards his pockets and then jerking his hands back" had nothing more than a hunch of illegal activity rather than the reasonable suspicion necessary to support the search of his pockets).

In contrast, in *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 372

(2009), a student handed the assistant principal a white pill and told him that he had gotten it from Marissa Glines. After determining that the pill was available only by prescription, the assistant principal called Glines out of class. *Id.* A search of Glines revealed additional pills. *Id.* When the assistant principal asked Glines where she got the pills, Glines indicated that Savana Redding had provided them to her, along with a day planner. *Id.* The assistant principal knew that Glines and Redding were friends and knew that they had had alcohol and cigarettes at a school dance a few weeks earlier. *Id.* at 373. At that point, the assistant principal had Redding brought to his office. With Glines no longer present, he asked Redding whether the day planner was hers, and she said that it was but that she had given it to Glines. *Id.* at 373. The assistant principal then showed Redding the pills taken from Glines and asked if she knew anything about them. *Id.* at 368. After Redding denied any knowledge of them, the assistant principal searched her belongings, but no further pills were found. *Id.* The Supreme Court held that the totality of the assistant principal's knowledge, including Glines' statement that the pills came from Redding, was "sufficiently plausible to warrant suspicion that [Redding] was involved in pill distribution" and was "enough to justify a search of [Redding]'s backpack and outer clothing." *Id.* at 373.

Like the searches in *A.S.*, *A.N.H.*, and *R.S.M.*, the search in this case was based on nothing more than Meshna's unsupported hunch that something wasn't right. None of the facts known to Meshna when she initiated the search of T.S.'s bookbag establish reasonable grounds for suspecting that a search of that bag would turn up evidence of activity that violated either the law or school rules. T.S. clearly wanted something from her bookbag during the school day, but that something could have been any number of lawful items, such as change for a vending machine, feminine hygiene products, or a piece of gum. Meshna testified that she became suspicious about what might be in the bookbag because, in her opinion, T.S. seemed overly anxious to have it. However, unlike the facts in *Redding*, Meshna had no prior information that T.S. was involved in any type of illegal activity and no reasonable basis for suspecting that T.S. would have contraband either in her bookbag or on her person. Absent some evidence from which Meshna could draw a reasonable inference that T.S. had some type of contraband in her bookbag, T.S.'s interest in retrieving her bookbag, taken alone, is not a specific and articulable fact which reasonably warranted the search of the bookbag. Even taking into account the relaxed standard of reasonable suspicion applicable to searches of students by school officials, the search in this case, like the searches in *A.S.*, *A.N.H.*, and *R.S.M.*, was improper, and the evidence resulting from the search should have been suppressed.

Because the State presented insufficient evidence to establish that Meshna had a reasonable suspicion that T.S.'s bookbag would

contain contraband, the trial court should have granted T.S.'s motion to suppress. Hence, we reverse the disposition order and sentence and remand for T.S.'s discharge.

Reversed.

977 So.2d 684
District Court of Appeal of Florida,
Third District.
C.A., a juvenile, Appellant,
v.
The STATE of Florida, Appellee.

No. 3D07–1638.
March 5, 2008.

Before WELLS, ROTHENBERG, and SALTER, JJ.

SALTER, J.

C.A., a juvenile, appeals the denial of a motion to suppress evidence obtained in an in-school search. Finding that the search was not the result of a reasonable suspicion of criminal activity by C.A., we reverse.

At the time of the in-school incident, C.A. was fourteen years old. His teacher was working one-on-one with another student in her classroom during the break between classes. Although C.A. was also taught by that teacher during a different part of the school day, C.A. was not supposed to be in her classroom during the break.

The teacher asked C.A. to leave the classroom, and she asked him what he was doing there. C.A. answered that he "came to get something." The teacher escorted C.A. to the door and went back to the student who had been talking with C.A. When she returned to that student, the teacher immediately smelled a strong smell of marijuana. Importantly, she had not smelled the odor of marijuana as she escorted C.A. to the door—she only recognized the smell when she returned to the other student after C.A. had left the room.

The teacher left the classroom and asked the head of school security to investigate both C.A. and the other student. C.A. was then taken to the assistant principal's office and questioned by the school security officer. When asked to empty his pockets, C.A. complied. Another school official asked if C.A. had anything in his wallet. When C.A. hesitated, the school official instructed C.A.: "If you have anything, go ahead and give it up so we don't have to go through all of this."

C.A. then opened his wallet and removed a bag of marijuana. A one-count petition for delinquency was filed charging C.A. with possession of cannabis. C.A. filed a motion to suppress, and this was denied by the trial court. Citing the "totality of the circumstances," the trial court ruled that (a) no search under the Fourth Amendment had occurred, because the opening of the wallet by C.A. was voluntary, and (b) there was a reasonable basis for the school officials to ask C.A. whether he had anything he should not have.

C.A. entered a plea, reserving his right to appeal the denial of the motion to suppress. This appeal followed.

"Reasonable Suspicion" for the Search

In light of the State's concession that the

marijuana was obtained during a search, C.A.'s appeal turns on the reasonableness of the grounds for that search. In a school, the more relaxed "reasonable suspicion" standard applies. *New Jersey v. T.L.O.*, 469 U.S. 325, 333, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). A "reasonable suspicion" requires proof that the school officials have "specific and articulable facts that, when taken together with the rational inferences from those facts, reasonably warrant the intrusion." *C.G. v. State*, 941 So.2d 503, 504 (Fla. 3d DCA 2006). Although a "hunch" or an "intuition" may in some instances disclose wrongdoing, these more ephemeral precursors to questioning are insufficient as a matter of law.

In this case, the teacher's concern regarding the student in her classroom visited by C.A. and bearing the odor of marijuana (but only *after* C.A. had left the classroom) was based on specific, articulable facts and appropriate inferences from those facts. The same cannot be said of the facts regarding C.A., however. The teacher did not smell marijuana while in C.A.'s presence or while escorting him to the door, she did not see him take anything from (or pass anything to) the other student, and she simply associated C.A. with her suspicion that the other student possessed marijuana.

C.A. is correct that suspicion by association or transference is not "reasonable suspicion." [FN*] *See* *M.S. v. State*, 808 So.2d 1263 (Fla. 4th DCA 2002); *R.J.M. v. State*, 456 So.2d 584 (Fla. 3d DCA 1984).

> We emphasize the vital role played by teachers in reporting suspicious activity in schools. In this case, the teacher properly reported to school security what she saw, heard, and smelled. In such cases, school security officials then have the difficult, but equally important job of ascertaining whether there are sufficient specific, articulable facts, and appropriate inferences from those facts, to warrant a search.

Conclusion

C.A.'s points on appeal are well taken. The school officials' instructions constituted a Fourth Amendment search, and that search was not founded upon a "reasonable suspicion" directed at C.A. himself. Accordingly, it was error to deny the motion to suppress.

Reversed.