United States District Court
Eastern District of Wisconsin

United States of America,

Plaintiff,

v. Case No. 08-CR-230

Philip Coleman,
Timothy Turner,
Tony Washington, and
Patrick Cotton,

Defendants.

Joint Brief of the Defendants in Support of Pretrial Motions

Introduction

Government agents were working with a confidential informant ("CI) during the course of investigating illegal drug trafficking and possession of firearms in the Milwaukee area. As part of that investigation the agents used the CI to set up an imaginary armed robbery involving the defendants in this case. There is no indication as to how the defendants were chosen to be the subjects of this presentation by the CI. Under this imaginary scheme the informant's uncle was to come to Milwaukee with five kilograms of cocaine and perhaps some cash. Specifically, the uncle would be taking the cocaine to a storage facility on Milwaukee's south side. The CI, with the assistance of government investigators, pitched a plan under which the defendants would rob the uncle of his cocaine and his cash when he arrived at the storage facility. Two of these defendants, Washington and Cotton, were only involved for less than 12 hours.

On August 28, 2008 the CI prompted the defendants to come to the storage facility[1]. When they arrived all were arrested. No robbery took place. No currency changed hands. No cocaine was present.

1 Timothy Turner slept through the entire faux robbery

The government indicted the defendants on numerous charges; however, relevant to these motions are the following counts: (1) conspiracy to commit armed robbery where such armed robbery affected interstate commerce; (2) conspiracy to possess cocaine with intent to distribute; (3) attempted armed robbery; (4) attempted possession of cocaine with intent to distribute; and, (5) possession of a firearm during the commission of a violent crime.

Argument

I. The indictment must be dismissed because the tactics of law enforcement violate due process.

There comes a point where law enforcement techniques are so repugnant that it violates due process. Here, that point was not only reached it was surpassed. The government used a technique to choose who they wanted to target. This was not an equal opportunity offer to the public at large. Additionally, unconstrained by reality, the government agents fashioned the lure to be as attractive as possible. In effect, the government's tactics amounted to a search of the defendants' thoughts to see whether they harbored any secret plans to commit a crime such as this. And, finally, the technique places all of the power squarely in the hands of the prosecution to decide how serious of a crime will be committed. The net effect is a profoundly unfair prosecution that simply cannot be countenanced by the court.

The Supreme Court has recognized that tactics of law enforcement may be so outrageous as to violate due process. A separate defense based solely upon governmental misconduct may be raised by "even the most hardened criminal." *See United States v. Hodge,* 594 F.2d 1163 (7th Cir. 1979). On this point the Seventh Circuit observed:

> The Supreme Court has not yet given any content to the principle that governmental misconduct may bar prosecution even absent any other deprivation of defendant's constitutional rights. However, an examination of the post-Hampton cases decided by the courts of appeals indicates that due process grants wide leeway to law

> enforcement agencies in their investigation of crime. Assuming that no independent constitutional right has been violated, governmental misconduct must be truly outrageous before due process will prevent conviction of the defendant.
>
> > In seeking to detect and punish crime, law enforcement agencies frequently are required to resort to tactics which might be highly offensive in other contexts. Granting that a person is predisposed to commit an offense, we think that it may safely be said that investigative officers and agents may go a long way in concert with the individual in question without being deemed to have acted so outrageously as to violate due process or evoke the exercise by the courts of their supervisory powers so as to deny to the officers the fruits of their misconduct.
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> *United States v. Quinn*, 543 F.2d 640, 648 (8th Cir. 1976). . . . Those few cases in which federal courts have recognized this defense have involved misconduct far removed from the facts before us today. *See United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978) (Government informer contacted defendant about manufacturing narcotics; Government supplied chemicals, glassware, and farmhouse used for manufacturing; informer did lion's share of the manufacturing while defendant's involvement was minimal); *United States v. Archer,* 486 F.2d 670 (2nd Cir. 1973) (federal agents deceived court and grand jury by staging sham crime to investigate corruption in state prosecutor's office); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (Government agent initiated contact with defendants and used veiled threats over extended period of time to convince them to produce illegal whiskey; supplied ingredients and was only customer of defendants).

United States v. Kaminski, 703 F.2d 1004, 1009 (7th Cir. Ill. 1983).

As unsavory as many law enforcement tactics may seem, there is a line that cannot be crossed. Although not a bright line the boundary may nonetheless be discerned.

For example, the line is plainly not crossed where the defendant advertises himself as a professional criminal (usually as an arsonist or as a hit-man) and government agents merely pretend to be a paying customer- all the while knowing that

the services will not actually be rendered. *See, e.g., Kaminski, supra,* 703 F.2d at 1005 where Kaminski, without any prompting, offered his services as a professional arsonist and a government agent merely posed as an interested customer.

Another way to recognize the line is by use of the "fly-paper analysis." Sting operations that merely create an opportunity for, and perhaps even attract, members of the general public who are inclined to commit such a crime (albeit an imaginary one) seem to have the approval of the courts. In other words, there is nothing wrong with the government hanging sweet-smelling fly-paper (the imaginary crime) to see who in the general public is attracted by it. The best example of this technique is where government agents pose as children seeking a sexual experience with adults who visit internet chat rooms.

Here, though, the law enforcement technique is over the line- going from fly-paper to fly-swatter. The government informant in this case proposed the crime to the defendants. The defendants never advertised themselves as professional armed robbers who were willing to accept engagements. Rather, the informant selected the defendants and then proposed the crime to them. The informant presented the details of the plan to the defendants and apparently directed the execution of the plan. As will be set forth in more detail below, then, even though the law enforcement scheme in this case does not squarely violate any independent constitutional rights the totality of the law enforcement conduct fails the smell test. It violates virtually every constitutional principle of of fair play. As such, this is one of those few cases where the court is compelled to find that the governmental misconduct violates due process.

A. Selective prosecution ("the fly-swatter")

As mentioned above, one hallmark of a permissible sting operation is that it be an equal opportunity enticement. Here, though, it was not an equal opportunity enticement. Rather, the government *selected* the persons to whom they would make the pitch.

The Fourteenth Amendment prohibits any state from taking action which would "deny to any person within its jurisdiction the equal protection of the laws." This

admonition is applicable to the federal government through the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954); *Washington v. United States*, 130 U.S.App.D.C. 374, 401 F.2d 915, 922 (1968). The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the *application* of these laws. The basic principle was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 1073, 30 L. Ed. 220 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

To show that the government engaged in improper selective prosecution, the defendant "must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *United States v. Armstrong,* 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

Again, the tactics of law enforcement here do not fall neatly under existing selective prosecution law. The *principle* underlying selective prosecution law, though, is seriously offended.

It takes little imagination to conceive of means by which this sort of law enforcement technique might be abused by the government. The government does get to choose who they prosecute. Thus, there is nothing to stop the government from closely scrutinizing some "enemy of the people" nor from zealously prosecuting him if he commits a crime- but at least they must wait until he actually commits a crime. Under the tactics used in this case, though, there is nothing to stop the government from targeting "undesirables" to see whether they may be persuaded to commit some imaginary crime. If at first they balk then simply make the lure more attractive- after all, every man has his price.[2]

The government may choose to rid itself of particularly nettlesome defense lawyers by sending in informants to offer a king's ransom in imaginary drug money as a

2 More on this in the entrapment discussion

retainer fee. Why stop there? If a journalist writes an unflattering article about some government official then send in the informant to proposed a million dollar fraud scheme and, for good measure, have the snitch tell the journalist that there is "absolutely no way to get caught." If the journalist agrees then there is a "conspiracy."

B. Entrapment ("the lure")

Although the defense of governmental misconduct is wholly separate from the defense of entrapment a discussion of the principles underlying entrapment is instructive.

> Before examining the facts of this case we should note the peculiar nature of one of these factors: the inducement offered by the Government. As stated previously, predisposition exists prior to contact with the Government. In many cases, however, there is little direct evidence of the defendant's state of mind prior to interaction with Government agents and we must instead rely upon indirect proof available through examination of the defendant's conduct after contact with the agents. Should the defendant initially reject a suggestion that he commit a crime this is indicative of a lack of predisposition. Conversely, should he initiate contact with the agents in order to commit a crime this is strong proof of predisposition. The amount of inducement offered by the Government, however, has no such logical correlation with defendant's predisposition as the Government may offer as much as it wishes to any potential defendant. The amount of inducement gains its relevance through the defendant's reaction to the lure.

Kaminski, *supra,* 703 F.2d at 1008

The tactics used by law enforcement in this case, unconstrained by reality, allowed the agents to make the lure attractive indeed. The uncle was supposed to be coming to Milwaukee with five kilograms of cocaine (i.e. nearly $125,000 worth of drugs) and he was portrayed to be an easy mark because he was coming with only one other person.

C. This is an unreasonable search of an individual's mind (i.e. "thought police" are alive and well)

In a very real sense, the tactics of the government agents in this case amounts to an unreasonable search of the defendants' minds for evidence of their predisposition to commit a crime of this sort.

Certainly there are many persons in this country who harbor secret plans to commit the perfect crime but who are more or less restrained by the reality that there probably is no perfect crime. But why wait until one of these individuals acts on his or her plan? If only the government could identify the persons who entertain such thoughts they could be arrested before they act. What better way to discover them than to have secret informers go around pitching "the perfect crime" to selected individuals. If any of these people give expression to their secret thoughts of the perfect crime then they are then guilty of conspiracy.

D. Separation of powers- this technique vests law enforcement with an unreasonable ability to control the penalty.

Like many well-intentioned plans, the tactics employed by law enforcement in this case have unintended consequences that this court ought to examine very closely. How easy it is to profess one's disgust over robbers and drug dealers and, consequently, any plan designed to remove them from society may, at first blush, seem like a good plan. But the founding fathers correctly observed that the greatest danger we face is the concentration of governmental power in any one agency. Here, law enforcement's plan concentrates a vast amount of power in the hands of the prosecutor. Law enforcement decides who will be targeted, how serious the crime will be, and consequently, how severe the penalty will be.

> [W]e . . . have recognized Madison's teaching that the greatest security against tyranny -- the accumulation of excessive authority in a single Branch -- lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch. "[T]he greatest security," wrote Madison,

> "against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." The Federalist No. 51, p. 349 (J. Cooke ed. 1961). Accordingly, as we have noted many times, the Framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S., at 122. See also INS v. Chadha, 462 U.S. 919, 951 (1983).

Mistretta v. United States, 488 U.S. 361, 381-382 (1989).

If the court approves of the law enforcement technique employed in this case then the balance of power falls squarely into the hands of the prosecutors. The prosecution will go from prosecuting crimes (of whatever severity) that a defendant decided to commit to *deciding* the seriousness of the crime that will be pitched to any given defendant. In this way the Department of Justice decides what the potential penalty will be for any given defendant.

The court should be skeptical of this expansion of governmental power given the ease of prosecuting persons charged with conspiracy to violate the uniformed controlled substances act. Turner, for example, is being prosecuted even though he showed so little enthusiasm for this faux crime that he slept though the event. A person subject to this law enforcement technique might agree to rob someone of 5 grams of cocaine, only to find him in much greater trouble because the CI suggests to the defendant that the object of the robbery might have several ounces of Heroin. With a sentence (and with no greater danger to the public or evidence of greater criminality by the defendant) the defendant's sentencing exposure is now geometrically increased

Specifically in this case the government could have imagined that the uncle would be delivering only several *ounces* of cocaine but, instead, the agents imagined that it was *five kilograms.* This is certainly an interesting choice since it just so happens that at five kilograms the law provides for a minimum mandatory prison sentence of ten years (or twenty years if there is a prior drug conviction). It certainly seems as though it is the prosecution that decided what sentence will be imposed on the defendants if

they are convicted. Constitutional law teaches that the ends never justify the means. In this scenario the government chose the ends- all the while using a CI to orchestrate the means employed.

If an individual is only a minor nuisance then, perhaps, the government will only propose that he deliver several grams of cocaine. On the other hand, no crime is too serious to propose to an individual who is a major nuisance. Several of the defendants in this case may be facing life in prison- and it was the prosecution that decided *which* crimes would be proposed to these defendants.

Conclusion

For all of these reasons the court should dismiss the indictment against the defendants because the law enforcement technique employed by the government violates due process.

Dated at Milwaukee, Wisconsin, this 26th day of September, 2008.

LAW OFFICES OF JEFFREY W. JENSEN
Attorneys for Philip Coleman
/s/ Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.9484

SCHIRO & ZARZYNSKI
Attorneys for Timothy Turner
/s/ John Schiro
State Bar No. 1009184

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.0825

LAW OFFICES OF CHRISTOPHER J. CHERELLA
Attorneys for Patrick Cotton
/s/ Christopher J. Cherella
State Bar No. 1000427

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.347.9334

LAW OFFICES OF JOEL A. MOGREN
Attorneys for Tony Washington
/s/ Joel A. Mogren
State Bar No. 1041474

633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203-1918

414.224.0825