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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICKY FORRESTER — APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2006-KA-0748

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RICKY FORRESTER **APPELLANT**

VS. **NO. 2006-KA-0748-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Brenda Weaver, a probationer who had violated her probation (R. 111-12), agreed to cooperate with drug enforcement authorities as a confidential informant. (R. 111-12, 131)

RICKY FORRESTER, on trial for selling and transferring a single rock of crack cocaine to Ms. Weaver, testified he sold her the cocaine because he was in love with her. (R. 288. 292. 300)

Forrester claims he was entrapped.

Specifically, he argues he was entitled to an entrapment instruction during his trial for the sale and transfer of cocaine.

The State sought to establish that Forrester, motivated by his affection for Weaver, with whom he had an ongoing intimate relationship, was predisposed to selling and/or transferring drugs to Weaver and that all Weaver did was ask Forrester to do the same things he had done *for* her, as well as *with* her, on previous occasions. (R. 307)

In this criminal appeal from his conviction of the sale of cocaine, Forrester claims the trial court erred in refusing to grant jury instructions D-6 and D-7 presenting to the jury the defense of

entrapment. (R. 324-25)

RICKY FORRESTER prosecutes a criminal appeal from the Circuit Court of Clay County, Mississippi, James T. Kitchens, Circuit Judge, presiding. Forrester was convicted of selling on January 5, 2005, a single rock of crack cocaine to Brenda Weaver, a confidential informant who had an ongoing intimate personal relationship with Forrester. (R. 288-89, 292-93) Forrester was subsequently sentenced to serve a term of eighteen (18) years in the custody of the MDOC with five (5) years of post-release supervision. Forrester was also ordered to pay a fine in the amount of $5,000.00 and to attend and complete the Alcohol and Drug Rehabilitation Program at the MDOC. (C.P. at 92)

Forrester's indictment, as it originally stood, charged, *inter alia*, that

> Count #1
>
> " . . . **RICKY FORRESTER** . . . on or about the 5th day of January, 2005, . . . did unlawfully, willfully, and feloniously, knowingly and intentionally sell a controlled substance, to-wit: Cocaine, to Brenda Weaver at approximately 4:08 p.m., for and in consideration of money, in violation of MCA §41-29-139; . . ." (C.P. at 8)

Forrester was charged in Count #2 and Count #3 with a separate sale or transfer of cocaine to Weaver and for possession of less than .1 gram of cocaine, respectively. The jury convicted Forrester of the charge contained in Count 1 but acquitted Forrester of the latter two offenses. (C.P. at 87-88)

The day of trial at the close of all the evidence, Count 1 of the indictment was amended to reflect that " . . . the language in Count 1 which reads 'at approximately 4:08 p.m.' is hereby deleted." (C.P. at 48)

Only one (1) issue is raised on appeal: "Whether the trial court erred by failing to grant the defendant jury instructions D-6 and D-7 as to the defense of entrapment."

STATEMENT OF FACTS

Ricky Forrester is a forty-seven (47) year old divorced Caucasian male with a 12th grade education. (R. 284; C.P. at 15) By his own admission, he has been addicted to cocaine for six years. (R. 295) Forrester described his drug problem as "serious" and admitted he used drugs "two, three times a week. Four maybe." (R. 293)

Brenda Weaver is a thirty-seven (37) year old Caucasian female also addicted to cocaine. (R. 292) She violated her probation after being convicted of marijuana and cocaine possession. (C.P. at 43; R. 109-111) As a special condition of her probation she was ordered by a judge in Chickasaw County to cooperate with local drug enforcement authorities. After Weaver failed to report to her probation officer her probation was revoked, and she was jailed. (R. 112)

In January of 2005, Weaver was serving as a confidential informant for the Tri-County Narcotics Task Force. (R. 130-31) According to Agent Terry Scott, Weaver was to assist the task force in buying drugs. (R. 131) One of the targets was Ricky Forrester with whom Weaver had an intimate personal relationship. (R. 292-93)

Task force agents placed Weaver in room 131 of the Southern Inn in West Point where she telephoned Ricky Forrester and asked him to bring her a $20 rock of crack cocaine. (R. 113-14)

Weaver testified that Forrester " . . . agreed to bring it to me." (R. 114)

> Q. Okay. When he showed up, tell me what happened. Tell the jury what happened when he showed up.
>
> A. When he showed up, he had the 20, and I give him the money, and we chit-chatted there for a little while, and then he left. (R. 114)

Forrester testified he used his own $20 to purchase the rock of cocaine for Weaver and gave the cocaine to her at the Southern Inn motel where Weaver paid him back. (R. 302)

During cross-examination of Forrester, the following colloquy took place:

> Q. All right. And you had enough money to go buy that?
>
> A. Yes.
>
> Q. All right. And when you got there, she gave you the money for it?
>
> A. Yes.
>
> Q. All right. Let me ask you this: When you go to McDonald's and you order a hamburger and you give them money for the hamburger, who sells you the hamburger?
>
> A. McDonald's.
>
> Q. Okay. The person there at the cash register, right?
>
> A. (Witness nods head affirmatively).
>
> Q. All right. When she gave you the money and you gave her the cocaine, who sold it to her?
>
> A. I give - - she give me the money, and I give her the crack.
>
> Q. Right. So who sold it to her?
>
> A. Well, if you're making it look like that way, I did, but I wasn't in love with McDonald's, I was in love with her. (R. 303)

Shortly after the exchange of money for the cocaine, Weaver surrendered the single rock to Terry Scott, an agent with the Tri-County task force. (R. 115)

Weaver and Forrester had an intimate personal relationship and had shared cocaine together on several previous occasions. According to Forrester they would use drugs together once or twice a week. Sometimes Forrester would get the drugs and sometimes Weaver would get them, and they would share. According to Forrester, this was "common practice." (R. 285-86)

When asked why he sold or transferred cocaine to Weaver on January 5th, Forrester told the

jury: "I did this because I was in love with Brenda, and we had a relationship together." (R. 300)

The defendant's version of the sale is found in the following colloquy:

> Q. Okay. You stated a second ago that you used drugs with her. How often did y'all use drugs?
>
> A. Once or twice a week.
>
> Q. And y'all would do that together?
>
> A. Yes.
>
> Q. And how would y'all go about getting those drugs?
>
> A. Well, sometimes I would get them and sometimes she would.
>
> Q. And then y'all would share?
>
> A. Oh, yeah.
>
> Q. Okay. And on those occasions, this was - - on these occasions, it was common practice for one of you to get them and then both of y'all to use them; is that correct?
>
> A. Yes. (R. 286)

On January 5, 2005, Brenda Weaver telephoned Forrester after he got home from work.

> Q. And what did Brenda want?
>
> A. Drugs.
>
> Q. What did she want to do?
>
> A. Get her a 20.
>
> Q. And the 20 means what, for the jury? They may not understand what that means.
>
> A. A $20 crack rock.
>
> Q. Okay. Did you have any intention of purchasing that 20 prior to her phone call?

A. No. (R. 288)

* * * * * *

Q. What was your intentions about drugs that day, prior to her phone call?

A. Nothing at the moment, at that time, because I had just got off of work, and I was dirty, and I wanted to rest.

Q. Okay. So she called, and what happened next?

A She asked me if I would get her some cocaine, and I told her - - she told me where she was, and I told her I'd be there. And I hung the phone up and left the room.

Q. And why would you do that?

A. Because she called me and asked me.

Q. Would you normally do that?

A. No.

Q. What caused you to do it for her?

A. Because I had strong feelings for her.

Q. And what were those feelings?

A. I was in love with her.

Q. After you hung up the phone and left, what did you do?

A. I went and purchased a $20 crack rock and went to the motel.

Q. And what were your intentions when you got to the motel?

A. The usual thing. We sat around and get high and just whatever - - whatever we did you know. Just usual things. (R. 288-89) [emphasis supplied]

* * * * * *

Q. You talk about your drug problem. How serious a drug problem is it?

A. It's serious.

Q. How often would you use drugs?

A. Two, three times a week. Four, maybe.

Q. And during those time periods, who would you use with?

A. Brenda. Weaver. (R. 292)

* * * * * *

Q. What was your intention on this day?

A. My intention was to do the same thing we always did when we come together, was to use drugs and maybe watch some TV, maybe sit around, maybe eat some supper, maybe have sex late. Just a common personal relationship. (R. 292-93)

Four (4) witnesses testified for the State of Mississippi during its case-in-chief, including Brenda Weaver, the State's confidential source. The gist of their testimony is that Weaver, acting as a confidential source for the narcotics task force, telephoned Forrester and asked him to bring her a $20 rock of crack cocaine.

He did as she requested because he was in love with her.

(1) Brenda Weaver testified she repaid Forrester $20 for a single rock of crack cocaine which he brought to room 131 of the Southern Inn at her request. (R. 114-15)

(2) Terry Scott, an agent at the time for the Tri-County Narcotics Task Force, testified Weaver's goal was to use the telephone and " . . make drug deals, have them come to the motel and do buys." (R. 132) Video cameras were set up inside the motel room, and Scott and another agent monitored audio from a distance. (R.132-33)

After Forrester left the room on January 5th, Scott took custody of the evidence. There were

several other transactions consummated that day by Weaver and other persons. (R. 133)

A second sale for which Forrester was acquitted took place the following day at the same location. (R. 117-19)

Video tapes of the transactions were played for the benefit of the jury. (R. 191-97)

(3) Shane Lamkin, an agent with the Tri-County Narcotics Task Force, testified he monitored the transactions on January 5th and described in particular the arrival and departure of Forrester. (R. 165-66)

Lamkin also described the transaction that took place on January 6th for which Forrester was acquitted. (R. 166-173, 179-197)

(4) Alicia Waldrop, a forensic scientist specializing in drug analysis at the Tupelo Crime Laboratory, testified the substance in question was .13 grams of a substance "... commonly referred to as crack cocaine." (R. 231)

At the close of the State's case-in-chief, Forrester's motion for a directed verdict was overruled. (R. 248-49)

The defendant, **Ricky Forrester**, thereafter testified in his own behalf that he was a crack addict in love with Brenda Weaver with whom he had an intimate relationship.

Forrester admitted he sold some marijuana twenty-three (23) years ago but had committed no felony offenses since that time. (R. 285) Forrester described his personal relationship with Weaver as "[s]exual, using drugs together, hanging out together." (R. 285)

He freely admitted selling and transferring to Weaver a single rock of crack cocaine on January 5th but claimed he did so only because she asked and because he was in love with her. (R. 288-89, 292. 300)

Other than the prior marijuana incident and the January incidents involving Weaver,

Forrester had never sold drugs to anyone before in his life, and he had no inclination to sell drugs (R. 287-288)

Forrester produced two witnesses in support of his entrapment defense, including Brenda Weaver, who he questioned thoroughly. (R. 250-266)

At the close of all the evidence, Forrester's renewed motion for a directed verdict was overruled as was his request for peremptory instruction. (R. 315-17)

The jury retired to deliberate at a time not reflected by the record. (R. 361) In due course it returned with the following three verdicts:

> "We, the jury, find the defendant guilty on count one."
>
> "Count two: We, the jury, find the defendant not guilty as charged."
>
> "Count three: We, the jury, find the defendant not guilty on count three." (R. 364)

A poll of the jury reflected the verdicts were unanimous. (R., 364)

The trial judge thereafter sentenced Forrester to serve a term of eighteen (18) years in the custody of the MDOC with five years of post-release supervision. (R. 369; C.P. at 92-94)

On January 20, 2006, Forrester filed a post-trial motion for judgment of acquittal notwithstanding the verdict. (C.P. at 102-04) The motion was overruled on March 31, 2006. (C.P. at 105)

SUMMARY OF THE ARGUMENT

Forrester failed to make out a *prima facie* case of entrapment the State was required to refute. Forrester was "merely asked to sell [cocaine] and he was caught." **Walls v. State,** 672 So.2d 1227, 1231 (Miss. 1996), quoting from **Ervin v. State,** 431 So.2d 130, 134 (Miss. 1983). *See also* **Robinson v. State,** 784 So.2d 966, 970 (Ct.App.Miss. 2000).

There was evidence of predisposition in the form of Forrester's prior sale of marijuana and his "[o]nce or twice a week" meetings with Brenda Weaver where the two shared cocaine furnished and/or supplied by Forrester. It was "common practice" for one of them to get the cocaine and then both of them use it. (R. 286) Later testimony by Forrester indicated his drug-taking escapades with Brenda Weaver were as often as "[t]wo, three times a week. Four, maybe." (R. 292)

By Forrester's own admission, he was an addict and used cocaine on a regular basis. (R. 292)

An entrapment instruction was properly refused because, try as he might, Forrester did not provide enough viable testimony to support the instruction(s). There was no testimony that Weaver sought to bribe Forrester by offering him sex and female companionship in exchange for drugs. There was no harassment or constant importuning, neither past nor present, by agents for the state; rather, Forrester's own testimony reflects that the *first indication* he had that Brenda wanted a $20 rock of cocaine was the initial telephone call on January 5th. (R. 288)

She asked; he supplied. (R. 288-89)

ARGUMENT

FORRESTER FAILED TO MAKE OUT A *PRIMA FACIE* CASE THE STATE WAS REQUIRED TO REFUTE. AN ENTRAPMENT INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE.

Forrester contends he was entitled to an entrapment instruction and complains vigorously about the denial of D-6 and D-7.

D-6 reads, in its entirety, as follows:

> The Court instructs the Jury that "Entrapment" means inducing or leading a person to commit a crime not originally planned or contemplated by that person.

> Evidence has been presented that the Defendant was induced by law enforcement officers or their agents to commit the crime. For you to find the Defendant guilty, the State must prove to your satisfaction beyond a reasonable doubt that the Defendant was already willing to sell cocaine to Brenda Weaver by having the predisposition to sell cocaine to her, and that the law enforcement officers and their agents merely gave the Defendant the opportunity to commit the crime. The evidence presented during this trial may be used by you to determine the Defendant's readiness to commit the crime which demonstrates his predisposition to sell cocaine.
>
> Therefore, if you find from the evidence in this case the state failed to prove beyond a reasonable doubt that the Defendant already possessed the willingness to unlawfully sell cocaine to Brenda Weaver, then you shall find the Defendant NOT GUILTY by reason of entrapment. (C.P. at 84)

Jury instruction D-7 reads, in its entirety, as follows:

> The Court instructs the Jury that "Entrapment" means inducing or leading a person to commit a crime not originally planned or contemplated by that person.
>
> In order to find the defense of Entrapment, you must find from the evidence presented that:
>
> 1. The State FAILED to prove beyond a reasonable doubt that Ricky Forrester was willing to sell cocaine to Brenda Weaver and law enforcement officers merely gave him the opportunity to commit the crime; and
>
> 2. The state intentionally encouraged Ricky Forrester to sell or possess the Drugs.
>
> If the Jury finds the defense of Entrapment is valid then the jury shall find the Defendant not guilty of Counts 1 and 2 sale of cocaine and Count 3 possession of cocaine. (C.P. at 85)

Whether or not to grant an entrapment instruction was argued at great length by both litigants. (R. 324-28) The defendant claimed D-6 and D-7 were supported by the defendant's testimony while the prosecution claimed the instructions should be denied because the proof demonstrated Forrester was predisposed to dealing in dope and delivering cocaine, being motivated

by his feelings for Brenda Weaver.

In the end, Judge Kitchens voiced the following ruling:

> BY THE COURT: All right. The court believes that this is not a case of entrapment. There was - - one of the most recent cases I've got is from the Court of Appeals, it's Gill v. State, it's a September 20th, 2005 case. It's 2005 Westlaw 227 7468,
>
> The Court, in that opinion says: Before the defendant can present an entrapment defense, he must show evidence to make a *prima facie* case of a government inducement and his lack of predisposition to commit the crime. The standard of review as whether an issue should be submitted to the jury is determined by whether there is evidence which, if believed by the jury, could result in resolution of the issue in favor of the party requesting the instruction.
>
> Conversely, only where the evidence is so one-sided that no reasonable jury could find for the requesting party on the issue at - - and may [the] trial court deny instruction on material issue.
>
> And they go on to say: the presence of inducement and the absence of predisposition must both be shown.
>
> Thus, in order for Gill to make his *prima facie* case, he must show both of the necessary elements; one, government inducement, and two, absence of predisposition.
>
> Then I go back and I look at the case that Judge Mills wrote when he was on the State Supreme Court, McCollum v. State, and some of the issues they talk about, because they cite an older case called King v. State, some of the issues they talked about is the number of times that someone called them to - - the King case seems to focus on the number of times somebody called them and how they pestered them to - - to - - to deliver these drugs, and these were sale cases. It was almost like a - - just a repeated just pester pestering, and call me.
>
> In this case I've got, on the 5th he called - - excuse me, Ms. Weaver called the defendant once and he brought the drugs. And on the 6th, the testimony was she called twice, but spoke to him once. One time he had left, and that was before he got there to get the money and then get the drugs.

> Quite frankly, I'm just not sure that there's enough on either element that she - - **I think all she did was give him the opportunity to do something that he had done in the past, which is bring drugs to where she was, and I know she called him, but the case law says that simply calling someone and asking them to do something that they have a predisposition to do does not constitute entrapment.**
>
> **And I think it's undisputed that she did, she called him, and that she had probably done the years prior to that before she ever started working with law enforcement.** Accordingly, I do not find that this is an entrapment instruction that I can give. (R. 328-30) [emphasis supplied]

We respectfully submit the reasoning expressed by Judge Kitchens was both judicious and correct.

Forrester relies, in part, upon **King v. State**, 530 So.2d 1356 (Miss. 1988), which states, *inter alia*, the following:

> Where a defendant admits the offense, but testifies, especially in an uncontradicted situation, that he has never sold drugs before, that he had absolutely no plan to sell or intent to sell drugs, and had it not been for the importuning of the Police, he would not have done so, at that point and at the very least, a right to have the jury instructed on the defense of entrapment arises.

In short, Forrester contends he was denied the right to have the jury pass on his sole defense. Admittedly, there have been entrapment cases with similar arguments that have caused us grave concern. *See* e.g., **McCollum v. State,** 757 So.2d 982 (Miss. 2000), cited by Forrester.

The case at bar is not one of them simply because Forrester had sold marijuana on a previous occasion and because Weaver asked only once, Forrester delivered, and he was caught. **Gill v. State,** 924 So.2d 554 (Ct.App.Miss. 2005).

But Forrester claims he sold, transferred and/or delivered the single rock because "I

was in love with her." (R. 288, 292)

No matter.

Forrester's testimony reflects he and Weaver used drugs together "[o]nce or twice" a week and that sometimes he would get them and sometime she would get them and they would share." (R. 286) Forrester acknowledged this was "common practice." (R. 286)

Our position, in a nutshell, is that Forrester was "merely asked to sell [cocaine] and he was caught." **Walls v. State**, *supra*, 672 So.2d 1227, 1231 (Miss. 1996), quoting from **Ervin v. State**, 431 So.2d 130, 134 (Miss. 1983). *See also* **Robinson v. State,** *supra*, 784 So.2d 966, 970 (Ct.App.Miss. 2001) ["Entrapment instructions are not necessary where a defendant was merely asked to sell the substance and he was caught."]

It was Forrester's burden to demonstrate both **(1)** true government inducement to sell cocaine and **(2)** absence or lack of predisposition to commit the sale. **Hobson v. State**, 625 So.2d 395, 400 (Miss. 1993); **Gill v. State,** *supra,* 924 So.2d 554 (Ct.App.Miss. 2005).

We submit that Forrester's proof simply fell short of the mark.

The defense of entrapment is an affirmative defense that must be proven by the defendant. **Morgan v. State**, 703 So.2d 832 (Miss. 1997); **Walls v. State**, *supra*, 672 So.2d 1227 (Miss. 1996); **Hopson v. State**, 625 So.2d 395, 399 (Miss. 1993).

It has been defined as "the act of inducing or leading a person to commit a crime not originally contemplated by him, for the purpose of trapping him for the offense." **Hopson v. State,** *supra*, 625 So.2d at 399 quoting from **Phillips v. State,** 493 So.2d 350, 354 (Miss. 1986). It is not enough for a defendant asserting an entrapment defense to demonstrate that the government agents merely provided the circumstances in which the offense was committed. **United States v. Jett,** 848 F.Supp. 1292 (S.D. Miss. 1994), affm 48 F.3rd 530

(1995).

Stated differently, the key concept is whether the intent to commit the crime already existed in the mind of the accused so that the inducement merely served to give the accused an opportunity to commit that which he was already predisposed to do. **Alston v. State,** 258 So.2d 436 (Miss. 1972).

Entrapment is no defense if the crime already existed in the mind of the defendant and the request or inducement merely acted as opportunity to commit what was in his mind. **Bush v. State,** 585 So.2d 1262 (Miss. 1991). Such, we submit, is the situation here.

There are two elements or requirements to successfully raise entrapment as a defense. **(1)** Proof of government inducement to commit the criminal act(s) and **(2)** proof that the defendant lacks the predisposition to commit the criminal acts. **Hobson v. State,** *supra*, 625 So.2d at 400; **Gill v. State,** *supra,* 924 So.2d at 556.

Once the defendant makes out a *prima facie* case of entrapment, **(1)** the burden of production and proof shifts to the prosecution; **(2)** evidence of predisposition becomes relevant and thus always admissible, and **(3)** the defendant is entitled to have his defense of entrapment submitted to the jury on proper instruction. **Walls v. State,** *supra*; **Tanner v. State**, 566 So.2d 1246 (Miss. 1990); **King v. State**, *supra*, 530 So.2d 1356 (Miss. 1988).

We submit the ruling made by Judge Kitchens, who gave the matter considerable thought and relied on the right cases after a meticulous on-the-record examination of the government acts allegedly inducing or enticing Forrester to transfer or deliver cocaine, was both judicious and correct. (R. 328-332)

In **King v. State**, *supra*, 530 So.2d 1360, this Court opined:

> * * * Where, as here, the defendant admitted the offense but

> testified unequivocally that he had never made a sale of marijuana before, that he had no plans, intention or disposition for making such sale, and that had it not been for the **importuning** of the Bureau of Narcotics confidential informant he would not have done so, he has made his *prima facie* case and is entitled to have the question submitted to the jury. * * * [emphasis supplied]

The word "importune" is defined by Webster as follows: "to press or urge with troublesome persistence: to beg, urge, or solicit persistently or troublesomely."

In **King** the defendant testified that Joyce Clouse, the confidential source, " . . . had been bugging him for months to sell her some marijuana . . . [and] that he finally gave in to her persistent demands." 530 So.2d at 1357. This Court characterized Clouse's constant and continuing conduct as "constant *importuning*." 530 So.2d at 1359. We don't have that in the case at bar.

There was evidence before the lower court that Forrester was predisposed to commit the crime and was not entrapped but merely asked. This evidence consisted of the following admissions by Forrester.

(1) I sold some marijuana twenty-three (23) years ago. (R. 285)

(2) I started using cocaine "[p]robably six (6) years ago. (R. 295)

(3) A guy friend and I used to do drugs. In each case, I was the one who gave him the drugs so he could use the drugs with me. (R. 295)

(4) I purchased cocaine for Weaver because I wanted to. Nobody made me bring cocaine to the hotel room. I did it because I wanted to. (R. 299)

(5) "I did this because I was in love with Brenda, and we had a relationship together." (R. 300)

(6) I did it because she called and asked me. (R. 288)

Finally, we note the following testimony from Forrester that indicates Forrester's willingness to transfer or deliver, thus negating the idea of entrapment:

> Q [BY PROSECUTOR:] Okay. Now you personally talked to her one time on January the 5th about this, right? She called you about the $20, you talked to her one time on the phone?
>
> A. Yes. (R. 306)
>
> * * * * * *
>
> Q. Mr. Forrester, you talked to her one time on the phone about the $20, and you went and got it and carried it to her. That's the truth, isn't it?
>
> A. Yes.
>
> Q. Okay. And the other times you talked to her twice, according to you, on the phone, correct?
>
> A. Yes.
>
> Q. And you went and got it and you carried it to her?
>
> A. Yes.
>
> Q. And this was nothing unusual. You have done it before like that, haven't you?
>
> A. Yes.
>
> Q. Okay. So all she was doing was asking you to do the same things you've done before?
>
> A. Yes.
>
> Q. And you were perfectly willing to do that, weren't you?
>
> A. Yes. (R. 306-07)

We look at Forrester's testimony that he had feelings for Weaver and would often, at

her bidding, supply drugs to her and use the drugs with her. This demonstrates a motivation other than inducements by government agents. Merely "asking" is not a sufficient inducement to make out a case of entrapment.

An entrapment instruction was properly denied because Forrester failed to make out a *prima facie* case of true and bona fide inducement, persuasion, and enticement by the government and a lack of predisposition to sell cocaine. There was insufficient evidence from which a reasonable, hypothetical juror could have logically and reasonably concluded that Forrester was entrapped on January 5th. **Hopson v. State,** *supra*, 625 So.2d 395, 400-01 (Miss. 1993).

The State's cross-examination of the defendant in this case is especially enlightening, and we invite this Court to review it with its usual vigor. (R. 294-307)

The bottom line is that Forrester failed to make out a *prima facie* showing of both lack of predisposition and true inducement by the government. There was no pleading, no pressure, no promises, no threats, no coercion, no trickery or deceit or undue influence, no "arm-twisting", only one simple, unadulterated request by Brenda Weaver to bring her a $20 rock of cocaine. (R. 113-14, 287-88)

The State clearly brought out a motivational factor - love, an insufficient government inducement.

At no point did Forrester appear to be "unwilling" or "reluctant" to transfer or deliver cocaine. And, this is not a case where a government agent supplied the contraband; rather, the supplier was Forrester himself, a frequent purchaser and user of cocaine.

It seems clear to us the entrapment instructions for the January 5th transaction were properly refused because entrapment was not supported by the evidence. The truth of the

matter is there was insufficient evidence, even when viewed in a light most favorable to Forrester, to support a successful defense of entrapment. It is not enough that Forrester, in the immediate wake of a simple telephonic request by Weaver, led Forrester to deliver a $20 rock of crack cocaine to Weaver. This is merely furnishing an opportunity to the defendant to supply contraband that Forrester was already predisposed to supply. This is not a case where the transferor's intent and criminal activity, which otherwise would not have existed, was instigated by the government.

A fair reading of our summary of the witnesses' testimony reflects that Forrester took the initiative after Weaver made the initial telephonic request, i.e., Brenda wanted drugs and wanted me to "[g]et her a 20." (R. 288) Forrester possessed the requisite criminal intent. He purchased the cocaine and transferred it to Brenda Weaver. (R. 114) Forrester testified his intentions when he got to the motel was "[t]he usual thing," which was to sit around and get high while sharing the cocaine. (R. 289)

Where, as here, the defendant fails to establish that he lacks the predisposition to commit the criminal act, entrapment is not a viable defense. **Hobson v. State,** *supra*, 625 So.2d at 395, 399.

Forrester could not have successfully asserted an entrapment defense for the sale committed on January 5th. There was no constant importuning by the police, only an opportunity afforded by Brenda Weaver. The State successfully refuted the idea the motivation for the sale was government inducement. One is left with the distinct impression it was Forrester's desire to please Weaver, the woman he said that he loved.

In short, Forrester was not entitled to an entrapment instruction with regard to the sale and delivery on January 5th because the defendant failed to make out a *prima facie* case the

State was required to refute. There was insufficient evidence from which a reasonable, hypothetical juror could find that Forrester, a user and abuser of cocaine, **(1)** lacked the predisposition to sell cocaine and **(2)** was a victim of true government inducement. Accordingly, this claim, although interesting, is devoid of merit.

Nothing in this record reflects that Forrester was anything but agreeable to formalizing Weaver's request that Forrester "[g]et her a 20." Forrester was ready, willing and able to comply with Weaver's request and did so free of government inducement. **Tran v. State,** 785 So.2d 1112, 1118-20 (Miss. 2001).

CONCLUSION

Defense counsel's assistance during trial was quite effective and commendable. Mr. Hosford, in his appeal to this Court, presents a legitimate entrapment issue. Nevertheless, scrutiny of the official record reflects an entrapment instruction was not required because Forrester was "merely asked to [deliver] cocaine and he was caught." **Robinson v. State,** *supra*, 784 So.2d 966, 970 (Ct.App.Miss. 2000).

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgment of conviction, as well as the sentence of eighteen (18) years in the MDOC with five (5) years of post-release supervision, imposed by the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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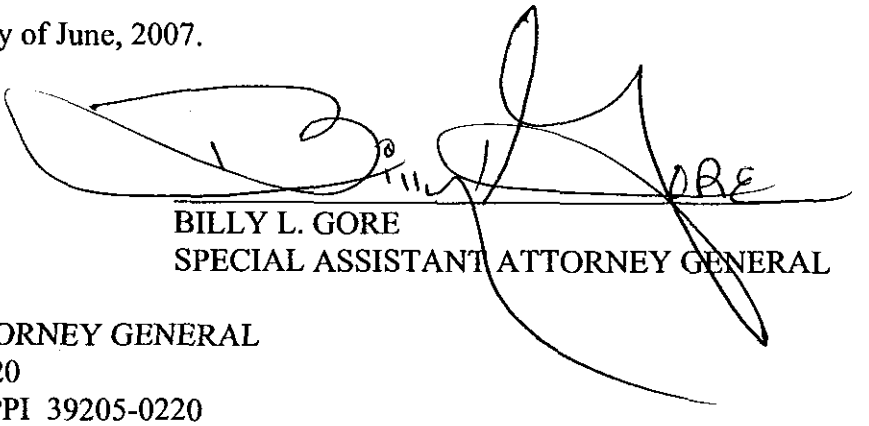
This the 18th day of June, 2007.



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