IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
NOVEMBER SESSION, 1997

FILED

April 8, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**No. 02C01-9706-CC-00203**
Appellee	)	
	)	**CARROLL COUNTY**
vs.	)	
	)	**Hon. Julian P. Guinn, Judge**
STEPHEN NEIL KENNEDY,	)	
	)	**(Felony Possession of Cocaine**
Appellant	)	**with intent to sell)**

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(ON APPEAL and
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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Stephen Neil Kennedy, appeals his conviction by a Carroll County jury for the class B felony of possession of cocaine with the intent to sell or deliver. Following a sentencing hearing, the trial court imposed an eight year sentence of imprisonment in the Department of Correction.

The appellant argues on appeal that the State's involvement in securing a conviction in this case is so abhorrent and fundamentally unfair as to violate principles of due process.[1] Specifically, the appellant contends that the State's "contingent/commission" fee arrangement with the informant in this case, which involved a reverse sting operation, violates constitutional standards and invites less than reliable results in our system of criminal justice. As its remedy, the appellant argues dismissal of the charge or, in the alternative, a new trial purged of the State's overreaching conduct.

After review, we affirm the judgment of the trial court.

BACKGROUND

Our review of the proof, in the light most favorable to the State, reveals that, in June of 1996, Detective Mike Moncher of the Savannah Police Department was contacted by a confidential informant, Ronald Harris, who advised Moncher that he was in touch with an individual who wanted to buy a large quantity of drugs. Harris, a resident of Hardin County, had been a reliable informant of the police department for

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[1]Although not identified as a separate issue, the appellant raises, in his brief, a related issue of whether the State's failure to fully disclose the informant's fee arrangement violates Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). We find this claim procedurally defaulted for several reasons. Most importantly, the appellant failed to raise this issue in his motion for new trial. Therefore, it is improperly raised for the first time on appeal. Tenn. R. App. P. 3(e); see also Tenn. R. App. P. 36(a); Tenn. R. App. P. 27(a)(4). Moreover, in view of the ruling in this case, we find this issue without merit.

a number of years. Harris related to Detective Moncher that he was personally acquainted with this individual, the appellant in this case, and that the appellant moved a lot of cocaine through Savannah, out of Missouri. Harris informed Moncher that, the previous year, the appellant had resided in Hardin County where he had been employed in his family's sawmill operation. However, after a fire at the sawmill, the appellant returned to Van Buren, Missouri, to continue work in another family milling operation.

Detective Moncher then contacted Steve Lee, the director of the drug task force in that judicial district which includes Carroll County. A plan was developed for Harris to introduce the appellant to Lee, who would be posing as a drug dealer. It was agreed that the drug transaction would take place at a motel in McKenzie. Prior to the transaction, Harris advised the appellant that he had arranged the purchase of four ounces of cocaine at the price of $1,100 per ounce.[2] On the scheduled date, Harris and the appellant arrived at the motel, where two motel rooms had been rented by the drug task force. The room where the purchase was to be made was occupied by Lee and contained a hidden video camera; the second room contained a receiver to monitor the drug transaction and was occupied by Detective Moncher. The video taped drug transaction was introduced at trial.

The appellant and Harris entered the motel room. After approximately five minutes, Lee produced the cocaine and placed it on a table at which time the appellant asked if he "could snort a line of it." The appellant then took out his knife and cut a straight line of cocaine, rolled up a dollar bill and ingested the cocaine through his nose. He then weighed the cocaine on a set of scales that he had brought with him. He stated that the cocaine was "pretty good stuff" and paid Lee $4,400 for the drugs. The appellant remarked that, at a later date, he would like to buy fifteen to twenty-five

[2]The cocaine to be used in this transaction was evidence from previous drug cases in which disposition had been made.

pounds of marijuana and one-half pound of cocaine because he could "move a lot of it." The appellant was arrested as he walked out of the motel room.

At trial, the appellant relied upon the statutory defense of entrapment. Pursuant to pre-trial discovery process, the appellant was orally advised that the informant, Harris, was paid $485.00 for his role in the drug transaction. At trial, the appellant learned that Harris' fee was first contingent upon setting up a "sting." If the "sting" was successful, Harris was then to be paid a fee based on a percentage commission of the money exchanged in the drug transaction, plus any additional monies seized. The percentage established was ten percent. Accordingly, Harris received $485.00 based upon seizure of $4,850 from the appellant on this date. The informant, Harris, was not called by the State to testify. Detective Moncher stated that Harris had moved and was no longer in the Hardin County area.

ANALYSIS

A. Due Process Entrapment

The appellant argues "that the unchecked practice of the State in targeting citizens and obtaining convictions through the overt acts of an operative who is paid on a contingency and commission basis undermines our system of due process in the administration of law and is, therefore, unconstitutional." He contends that the "shocking" conduct of the State warrants dismissal of the charge, based upon both principles of due process and the supervisory power of the court to administer justice. The appellant cites no authority where an indictment in this state has been dismissed upon either of these grounds, nor are we aware of any such authority. Cf. State v. Bragan, 920 S.W.2d 227, 239 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996).

Implicit within our review of whether application of "due process entrapment" is warranted are the preliminary questions of (1) the authority of this court to recognize such a defense and (2) whether the challenged conduct is, in fact, "outrageous." The appellant's argument of "due process entrapment" and its other labels of "objective entrapment" and "outrageous conduct" are rooted in the United States Supreme Court decision in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637 (1973), which, in dicta, held:

> While 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 process to obtain a conviction, cf. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952), the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment.

Russell, 411 U.S. at 431-32, 93 S.Ct. at 1643.[3]

While the defense of "due process entrapment," spawned by the dicta of Russell, remains, at best, a tenuous defense, no ruling of the United States Supreme Court has ever recognized this defense based solely upon an objective assessment of the government's conduct in inducing the commission of crimes. In United States v. Tucker, 28 F.3d 1420, 1426 (6th Cir. 1994), the Sixth Circuit Court of Appeals observed that "this court has recognized the availability of this defense only in dicta because, in every case in which the issue has been raised, the government's conduct has been held not to have been 'outrageous.'" Moreover, the court in Tucker noted that United States v. Twigg, 588 F.3d 373 (3d Cir. 1978), the only federal appellate decision which firmly holds that an objective assessment of the government's conduct in a particular case may bar prosecution, without regard for the defendant's predisposition, has been greatly criticized, often distinguished, and recently, disavowed in its own circuit. Id. In sum, Tucker holds that the "due process entrapment" defense, based upon government

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[3] In Hampton v. U.S., 425 U.S. 484, 490, 96 S.Ct. 1646, 1650 (1976), the Supreme Court rejected the defendant's "due process" defense and held that claims of inducement, outrageous or otherwise, must be analyzed under the law of entrapment. Similarly, other courts that have recognized "due process entrapment" recognize that this form of entrapment is very similar to statutory entrapment based on the objective point of view. See United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983).

misconduct, regardless of how objectively outrageous the government's conduct was, may not be utilized where the predisposition of the defendant to commit the crime was established. Id.

The ruling in Tucker was grounded, in part, upon the court's recognition that a "due process" entrapment defense stands as an invitation to violate the constitutional separation of powers. Tucker, 28 F.3d at 1427. Execution of the federal laws under our Constitution is reserved primarily to the executive branch of the government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. Russell, 411 U.S. at 435, 93 S.Ct. at 1644. The defense of entrapment was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. Id. at 435, 93 S.Ct. at 1644.

There are two recognized tests for entrapment. In enacting the defense of entrapment in Tennessee, our General Assembly chose to adopt the "subjective test," thus, implicitly rejecting the "objective test" urged upon the court by the appellant.[4] Tenn. Code Ann. § 39-11-505 (1991). The "subjective test" requires the jury to focus on the subjective intent of the defendant and determine if the defendant was predisposed or intent on performing the criminal act, with the police only furnishing an opportunity to do so, or whether the defendant was an innocent person lured into committing the crime. Latham, 910 S.W.2d at 896. The jury, by their verdict in this case, rejected the appellant's claim that the State's conduct induced him into committing a crime which he was not otherwise predisposed to commit. Moreover, the defense of entrapment lacks a constitutional foundation. Russell, 411 U.S. at 435, 935 S.Ct. at 1644. Thus, whether the legislature of this state wishes to enact an entrapment defense and the type of test they choose to adopt, be it "objective" or "subjective," lies with that body and not this court. Adopting the rationale of Tucker, we

[4]Under the less commonly applied "objective test," which a number of state jurisdictions have adopted, and recognized, to some extent, by one federal circuit, the focus is on the nature of the police activity involved, without reference to the predisposition of the defendant. State v. Latham, 910 S.W.2d 892, 896 (Tenn.Crim.App. 1995).

reject the appellant's argument for application of a "due process entrapment" defense in this case.

B. Outrageous Conduct

Having determined that this court is without the authority to apply a "due process" entrapment defense, we, nevertheless, turn briefly to the question of whether the alleged conduct is outrageous.

The appellant argues that the shocking nature of the "commission/contingent" fee arrangement violates due process. He relies upon Williamson v. United States, 311 F.2d 441, 444 (5th. Cir. 1962), holding that a contingent fee agreement to produce evidence against a particular named defendant to a crime not yet committed "might tend to 'frame up,' or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intention to commit." Thus, under Williamson, a conviction is invalid in the absence of a justification or explanation for a contingent fee arrangement. It is important to note, however, that no other federal circuit has expressly followed Williamson. In United States v. Grimes, 438 F.2d 391, 395 (6th Cir. 1971), the Sixth Circuit rejected the holding in Williamson and its rule that a contingent fee arrangement to a paid informer violated due process. While this type of a fee arrangement may raise a question as to the credibility and weight to be given the informant's testimony, it does not invalidate the testimony. Id. at 396. In a more recent case, United States v. Branham, 97 F.3d 835, 852 (6th Cir. 1996), the court found that the government's payment of a contingency fee of twenty percent to a government informant in a reverse sting operation was not outrageous conduct. Furthermore, the court concluded that the outrageous conduct claim was nothing more than an entrapment defense. Id.; see also United States v. Pipes, 87 F.3d 840, 842 (6th Cir. 1996), cert. denied, --U.S.--, 117 S.Ct. 391 (1996); United States v. Mack, 53 F.3d 126, 128 (6th Cir. 1993), cert. denied, --U.S.--, 116 S.Ct. 153 (1995).

In sum, the State's alleged "shocking" conduct in this case violates no independent constitutional right of the appellant.[5] Hampton v. United States, 425 U.S. 484, 490, 96 S.Ct. 1646, 1650 (1976). The use of paid informants to combat drug trafficking and to infiltrate criminal enterprises is recognized as necessary and permissible. Hampton 425 U.S. at 495, 96 S.Ct. at 1652 (Powell, J., concurring) (citation omitted). The proof in this case clearly establishes that the appellant was predisposed to commit the crime with which he is charged. Moreover, the proof shows that he actively participated in the criminal activity that gave rise to his arrest. We conclude that neither the paid informant's commission/contingent fee arrangement nor the State's conduct was "shocking" or "outrageous." Accordingly, we find this issue without merit.

The judgment of conviction is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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GARY R. WADE, Judge

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JOE G. RILEY, Judge

[5]See, e.g., United States v. Pollock, 417 F.Supp. 1332 (D.Mass. 1976) (repeated misconduct by prosecuting attorneys including intentional withholding of vital evidence); United States v. Acosta, 386 F.Supp. 1072 (S.D. Fla. 1974) (condoning false testimony and cash payments to government witnesses to "get" the defendants); United States v. Banks, 383 F.Supp. 389 (W.D. S.D. 1974) (intentional destruction of subpoenaed records).