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WHIPPING A GAME ON FELONS: THE ATF "STASH HOUSE" CASES

by **Tom McGettrick**

Fred Jones was convicted last summer of conspiracy to commit armed robbery and conspiracy to possess and distribute 20 kilograms of cocaine.[1] His arrest and conviction stemmed from a plot he made with a coworker, Cliff Ingram. Fred and Cliff worked together packing boxes, an unskilled, minimum-wage job. Their employer participated in a felon reentry program, through which both Cliff and Fred were hired, Fred having been convicted of armed robbery once before. After the two men became friendly, Cliff told Fred there was a drug dealer known as "Big D" who wanted someone to do a deal with him.

Fred met with Big D, who claimed to be a drug courier who wanted payback after being shorted by some dealers. He told Fred the dealers had a stash house in Naperville that was constantly guarded by three armed men. Big D proposed to lead Fred to the stash house, where Big D would buy his usual number of kilograms from the dealers and leave. After this point, Big D instructed Fred to rush in with a heavily armed crew of at least three to rob the stash house.

Fred agreed to the scheme, even though he secretly planned to rob the unsuspecting Big D of the drugs he just bought. He took Big D for an easy mark who would be outmatched by him and his crew. Cliff had already agreed to distribute the stolen cocaine for Fred.

Fred assembled the crew and some guns and brought them to a meeting with Big D on the night of the deal. Big D, however, did not lead the crew anywhere; he was really an ATF agent who had caught Fred in a sting. Big D had worn a wire to every meeting to get the evidence needed at a later trial. Fred and his crew were arrested and their guns seized.

The ATF has run this sting so many times that Judge Evans of the U.S. Court of Appeals for the Seventh Circuit recently called the setup a "rather shopworn scenario" and added that the defendants would have benefited from reading about the sting in earlier opinions.[2] The agent in Fred's case, David Gomez, testified at trial that he had run this sting at least 10 times before. Attorneys at the Federal Defender Program in Chicago refer to these as the "stash house" cases, because they always involve an imaginary stash house.[3]

Assistant Federal Defenders Imani Chiphe and MiAngel Cody see several problematic policy issues in these cases. For Cody, the most troubling is the mandatory minimum sentence triggered by the drug amounts.[4] "In fictitious stash house cases," said Cody, "there is one undeniable fact: no drugs exist. . . . the whole operation is theater."[5] The undercover agents are often the ones who fabricate the drug amount to be "robbed."[6] "The result," Cody observed, is that "a defendant who actually possesses and distributes 4.9 kilos of real cocaine is not subject to the 10-year mandatory minimum, whereas a defendant nabbed in a fictitious stash house case involving 5 kilos of make-believe cocaine is subject to the 10-year mandatory minimum."[7] Because minimum sentences for drugs are triggered by weight, crossing certain thresholds triggers higher minimum sentences.[8]

Chiphe sees other policy problems with the stashhouse cases.[9] "[F]rom a public policy perspective it is a terrible use of government resources," he said.[10] The government is creating and managing a crime that would probably not have occurred but for the actions of government agents.[11] In Fred's case, those agents were Cliff, the confidential informant, and Big D, the ATF agent.[12] The idea to rob the stash house is introduced by the confidential informant in 90 percent of cases, said Chipe.[13]

In addition, "the informant doesn't begin to record his conversations with our clients until the client agrees to participate in the robbery or starts showing some interest in the robbery," said Chiphe[14] That move by the informant is significant because the law of entrapment is subjective, turning on the predisposition of the defendant to commit a crime.[15] Since the confidential informant has no reason to turn on his recorder during conversations leading up to the formation of the scheme, possibly exculpatory evidence about the state of mind of the target will almost never be recorded.

In a recent stash house case, *United States v. Farella*, Cody filed a motion to dismiss the indictment based on a due process violation called "outrageous government conduct." An agent on the case said, "I took him in, ya know . . . I whipped a game on this guy."[16] Cody argued that the agent had thereby admitted that the government had contacted her client with the sole purpose of arresting and convicting him.[17] The defendant had never participated in any kind of robbery before and did not know his co-defendants before the government introduced them to each other.[18]

The judge denied the motion, writing that the defense of "outrageous government conduct" was not recognized in this circuit as a bar to prosecution.[19] "[T]he Seventh Circuit has noted that it has 'never taken what [it] see[s] to be an extreme step of dismissing criminal charges against a defendant because of government misconduct,'" the decision read.[20]

How judges view these cases may be changing, however. Though the *Farella* judge denied the motion to dismiss, she has granted jury instructions on the defense of entrapment for the first time in her career as a federal judge.[21] In another case, the Seventh Circuit roundly criticized the ATF's tactics.[22] "We use the word 'tawdry,'" Judge Evans wrote, "because the tired sting operation seems to be directed [at] unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them by Agent Gomez."[23] Despite

recognizing the tawdriness of the sting, Judge Evans found no legal occasion to overturn the conviction and affirmed the lengthy consecutive mandatory sentences imposed by the district court.[24]

Fred Jones awaits sentencing. He was the ringleader of the plot and his presumably less-culpable co-defendants have received 25 years and 22.5 years, while another awaits sentencing.[25]

NOTES

1 Testimony witnessed by the author in 09 CR 687 in the N.D.Ill. The names have been changed.

2 *U.S. v. Lewis*, 2011 WL 1261146 at 1 (7th Cir. 2011).

3 Email interview with MiAngel Cody, Asst. Federal Defender, Ill. Federal Defender Program, Mar. 27, 2011.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Cf.* 24 U.S.C. § 841(b)(1)(i & ii)(possessing 5 kg or more of cocaine triggers 10-year minimum, half a kilogram or more triggers 5 year minimum).

9 Email interview with Imani Chiphe, Asst. Federal Defender, Ill. Federal Defender Program, Mar. 24, 2011.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *U.S. v. Garcia*, 562 F.2d 411, 418 (7th Cir. 1977). ("[T]he heart of entrapment is predisposition, which is, itself, "a subjective mental state.")

16 Motion to Dismiss Indictment Based on Outrageous Government Conduct, docket entry 93*, U.S. v. Farella,* 09-CR-087, (N.D.Il. . 2009).

17 *Id.*

18 *Id.*

19 Order of 9/7/2010, *U.S. v. Farella,* 09-CR-087 (N.D.Ill. 2009) ("Motion to dismiss . . . is denied.") (*citing United States* v. *Childs*, 447 F.3d 541, 545 (7th Cir. 2006)).

20 *Id.*

21 Cody, *supra* note 3.

22 *Lewis*, 2011 WL 1261146 at 1.

23 *Id.*

24 *Id.*

25 *See* docket report in 09 CR 687.