

MAY 19 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JEROME VIERRA,

Defendant - Appellant.

No. 07-10393

D.C. No. CR-06-00214-HG

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Helen Gillmor, District Judge, Presiding

Argued and Submitted February 9, 2009
Honolulu, Hawaii

Before: REINHARDT, BRUNETTI and THOMAS, Circuit Judges.

Defendant-Appellant Jerome Vierra appeals the district court's denial of his request for a downward departure at sentencing on the ground of sentencing entrapment. Vierra claims the district court misapplied the analysis set forth by

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

this court for sentencing entrapment claims. Because the parties are familiar with the factual and procedural history of this case, we do not recount it here.

As we have noted, there is a difference between a defendant's assertion of sentencing entrapment as an argument for sentence reduction and entrapment as a legal defense to the crime alleged. United States v. McClelland, 72 F.3d 717, 725 (9th Cir. 1995). A jury may reject a defendant's defense of entrapment, yet the defendant may be entitled to a sentence reduction on the basis of sentencing entrapment. Id.

A defendant's sentence should reflect "his predisposition, his capacity to commit the crime on his own, and the extent of his culpability." United States v. Staufer, 38 F.3d 1103, 1107 (9th Cir. 1994). Downward departures based on sentencing entrapment permit judges to "ensure that the sentences imposed reflect the defendants' degree of culpability" by "reduc[ing] the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government." Id. The defendant bears the burden of demonstrating that, prior to any persuasion on the part of the government, he was only predisposed to commit lesser crimes. See Staufer, 38 F.3d at 1108; United States v. Naranjo, 52 F.3d 245, 250–51 (9th Cir. 1995); United States v. Parrilla, 114 F.3d 124, 127–28 (9th Cir. 1997). The district court must then make "express findings" as to whether a

defendant has met his burden of showing lack of predisposition for a sentence entrapment claim. Naranjo, 52 F.3d at 250.

In calculating the applicable range for Vierra's sentence, the district court found Vierra was not a reluctant participant in the "sting" sales set up by the government, and had a history of drug use and selling drugs in small amounts to friends. The district court then relied on those findings to deny Vierra's request for a downward departure based on sentencing entrapment.

The district court did not make express, specific findings as to Vierra's predisposition to make sales in the quantity he made at the request of the government's informant.¹ It is not clear from the record whether the district court

¹The dissent's contrary assertion is incorrect. At the second sentencing hearing, the district court mentioned the evidence relating to Vierra's prior deals only in asserting that Vierra's sentencing entrapment argument was foreclosed by the jury's rejection of his entrapment defense. At the third sentencing hearing, after the parties had corrected the district court's misconception on this point, it again failed to address this evidence or find that Vierra was predisposed to deal in amounts above 50 grams. Instead, it disavowed the sentencing entrapment theory, stating: "[I]t is more of an argument that it's okay to be a drug addict, and if somebody then puts you in a position of being a dealer and you get some benefit from it, it really is still okay. And it's not okay. And this isn't one time. This is six times." Because the district court was required by circuit precedent to determine, in light of the evidence that Vierra's prior deals were significantly smaller than those for which he was sentenced to prison, whether Vierra was "predisposed to engage in a drug deal of the *magnitude* for which [he was] prosecuted," Staufer, 38 F.3d at 1107 (emphasis in original), its failure to make the requisite findings requires vacatur of Vierra's sentence.

differentiated between the evidence defendant was required to tender to sustain a legal defense of entrapment from the evidence required to meet his burden of proof as to sentencing entrapment. In addition, it is not clear whether the district court considered defendant's evidence that his prior drug deals involved a quantity of drugs significantly smaller than the quantity that he sold to the government's informant. Such evidence of a defendant's character prior to the government's inducement must be considered by the district court in determining whether to depart downward due to sentencing entrapment. See McClelland, 72 F.3d at 723 (requiring that a defendant's "character and reputation" be considered in evaluating the defendant's predisposition). Therefore, we vacate the sentence and remand so that the district court may make the appropriate findings regarding defendant's sentencing entrapment claim. See id. at 722-26 (describing various factors).

REVERSED AND REMANDED.