

MAY 19 2009

United States v. Vierra, No. 07-10393MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Brunetti, dissenting:

I respectfully dissent.

I agree with the majority's citation to *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995), as setting forth the relevant factors for analyzing Vierra's claim of sentencing entrapment. Contrary to Vierra's position, the *McClelland* factors apply regardless of whether entrapment is raised as a trial defense or at sentencing to support a recalculation of the otherwise applicable guidelines range under 18 U.S.C. § 3553.¹ *See id.* at 726 & n.5. The only difference is that in the sentencing context the analysis is modified to focus on the defendant's predisposition to engage in drug deals "of the *magnitude* for which [he was] prosecuted," rather than his more general predisposition to commit the offenses at all. *United States v. Staufer*, 38 F.3d 1103, 1107 (9th Cir. 1994).

¹Application Note 12 to U.S.S.G. § 2D1.1 is inapplicable to this case because there were no material deviations from the agreed upon quantities and the amounts delivered, nor does this case involve a reverse sting where the government controlled the amount delivered. The circumstances giving rise to Vierra's sentencing entrapment claim are not addressed by the guidelines and therefore fall under 18 U.S.C. § 3553, which we have recognized as authorizing the sentencing court to consider sentencing entrapment as a ground not adequately considered by the Sentencing Commission and to recalculate the applicable guidelines range accordingly. *See United States v. Staufer*, 38 F.3d 1103, 1106-08 (9th Cir. 1994).

Accordingly, Vierra's evidence that his past drug dealing activities involved only smaller quantities is probative evidence of predisposition in that it goes to the first *McClelland* factor, his "character and reputation." *McClelland*, 72 F.3d at 722; *see, e.g., Stauffer*, 38 F.3d at 1108. But contrary to Vierra's arguments, past conduct is neither a proxy for nor conclusive evidence of predisposition, which properly turns on the consideration of multiple factors, most of which focus on the circumstances surrounding the commission of the present crimes, and "none of [which] is controlling." *See McClelland*, 72 F.3d at 722. The purpose of accounting for entrapment in sentencing is to "protect[] against government abuse [and] ensure that defendants will be sentenced on the basis of the extent of their culpability," *Stauffer*, 38 F.3d at 1107, not to give a fully culpable dealer a free pass at escalation just because a confidential informant happened to be involved.

I part company with the majority only in my determination that the record reflects the district court properly considered the relevant factors, the parties' arguments and their evidence and adequately stated its findings in rejecting Vierra's claim of sentencing entrapment.

This case is quite unlike *United States v. Naranjo*, 52 F.3d 245, 250-51 (9th Cir. 1995), where we were "unable to ascertain what facts it relied upon in finding that Naranjo did not prove sentencing entrapment" because the district court failed

to provide “any finding relevant” to predisposition (which in that case turned on the intent and capability test from Application Note 12 to U.S.S.G. § 2D1.1). At Vierra’s third and final sentencing hearing the sentencing judge here made express factual findings relevant to four of the five *McClelland* factors. For example, the court stated that Vierra “was heavy into drugs, concerned about his supply”; he received “clear benefits” or “profit” from his participation”; he was not “a reluctant person” but rather “a willing participant” who “went along on all these different occasions, six different occasions”; and he was not “coerced into doing this.” Moreover, speaking more generally and in a manner befitting the court’s discretion under § 3553, the court stated that it “does not see factors here that would render him a person who should be benefited by sentencing entrapment.” There is therefore no need to remand for the district court to “make appropriate findings” under *McClelland*, as the majority does. Appropriate findings have already been made.

The majority faults the district court not for anything it said, but for failing to expressly differentiate the evidence required to sustain a legal defense of entrapment from that required to prove a claim of sentencing entrapment. Our case law prohibits this type of second-guessing. We plainly held in *United States v. Carty*, 520 F.3d 984, 995-96 (9th Cir. 2008) (en banc), that we “shall not” assume

that a district court failed to apply the correct legal standard simply because it did not affirmatively say otherwise. “Trial judges are presumed to know the law and to apply it in making their decisions.” *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *quoted in Carty*, 520 F.3d at 992. Besides, on the facts of this case there was no need for the district court to expressly qualify its factual findings by separating the execution of these six transactions from their magnitude. There is no evidence that Vierra expressed any reluctance about the quantities involved in these deals. Thus, the district court’s findings regarding Vierra’s “willing” participation naturally encompass all aspects of the six transactions, including his willingness to engage in transactions *of this magnitude*.

Moreover, the record in this case reflects that the district court in fact correctly and consistently differentiated Vierra’s sentencing entrapment claim from his trial defense. When Vierra raised the issue at his first sentencing hearing, the district court specifically acknowledged that “we’re in a slightly different position than we were with respect to entrapment at trial, and now we’re talking about sentencing entrapment,” and it ordered a written response from the government. At the second sentencing hearing, the court specifically stated that sentencing entrapment was “a separate issue” from the jury’s finding that “there was no entrapment . . . as a defense,” that the court was talking about “the amounts,” and

that Vierra’s claim was based on the fact that “his previous dealings were half-gram/gram amounts.” The court’s only doubt regarding the applicable law involved what it dubbed a “reverse *Apprendi* issue”—i.e., even though “there was nothing in the jury verdict about sentencing entrapment” and “it wouldn’t be up to the jury to deal with sentencing entrapment,” whether the court lacked the authority to sentence based on quantities less than those determined by the jury’s special verdicts—which the court correctly resolved in Vierra’s favor after an additional round of briefing. Finally, in imposing sentence at the third hearing, the court continued to distinguish the two doctrines by first noting the jury’s rejection of Vierra’s entrapment defense at trial and then separately addressing sentencing entrapment as a related but distinct issue.

The record also belies the majority’s additional criticism that it is unclear whether the district court considered Vierra’s evidence of his past drug deals. As already noted, at the second sentencing hearing the court recited Vierra’s argument back to him, including the point that “his previous dealings were half-gram/gram amounts.” Also, at the third hearing the court noted that sentencing entrapment had been “briefed twice by the parties” and then rejected the argument that Vierra should be benefited by sentencing entrapment based on his small-time past, 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."

In any event, a district court is not required to address on the record every relevant piece of evidence, particularly when it finds that evidence outweighed by other factors. The court is required only to "adequately explain the sentence selected"; it "need not tick off" even all of the § 3553(a) factors "to show that it has considered them." *Carty*, 520 F.3d at 993. The rule cannot be different for a court's consideration of sentencing entrapment. Vierra's small-time past was probative of only one of the five *McClelland* factors, and in weighing all of those factors the district court undoubtedly determined that any consideration of Vierra's past conduct was outweighed by the circumstances surrounding his commission of the present crimes—most importantly, that Vierra was an uncoerced, "willing participant" who never showed any reluctance to engage in six different larger-scale transactions over the course of nearly a year. *See McClelland*, 72 F.3d at 722 (noting that reluctance is "the most important factor").

The district court received two rounds of briefing on sentencing entrapment, heard oral arguments on the issue in three different sentencing hearings, made express factual findings relevant to four of the five *McClelland* factors, and ultimately found that Vierra is not "a person who should be benefited by

sentencing entrapment.” This was more than enough. I therefore cannot agree with the majority that a more detailed analysis was required to avoid a procedural violation. *See Carty*, 520 F.3d at 995-96 (rejecting the argument that we should assume a misapplication of the law in similar circumstances).

I would affirm.