

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO. XXXXXXXXX

vs.

XXXXXXXXXXXXXXXXXXXXX

X, Defendant.

ORDER DISMISSING THE INFORMATION

THIS CAUSE comes before the Court on the Defendant’s “Amended Motion to Dismiss Information Based upon Entrapment,” filed pursuant to Fla. R. Crim. P. 3.190(c)(4) on May 22, 2014. Having reviewed the motion, the State’s traverse, the case file and the applicable law, and upon due consideration, the Court finds as follows:

The Defendant is charged with unlawful travel to meet a minor (Count 1) and computer solicitation of a child (Count 2). The Defendant filed a Motion to Dismiss based on entrapment on May 31, 2013, which was denied by this Court because reasonable persons could differ over the interpretation of the communications at issue. The Defendant has filed an amended motion containing additional information and asserts that the undisputed material facts establish both subjective and objective entrapment.

Pursuant to Fla. R. Crim. P. 3.190(c)(4) a motion to dismiss may be granted if “[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant.” Pursuant to Fla. R. Crim. P. 3.190(d), “A motion to dismiss ... shall be denied if the state files a traverse that, with specificity, denies under oath the material fact or facts alleged in the motion to dismiss.” In considering a motion to dismiss, the “court must resolve all questions and inferences in favor of the State.” State v. James, 928 So. 2d 1269,1271

(Fla. 2d DCA 2006). A motion to dismiss cannot be granted even if the court “concludes that the case would not survive a motion for judgment of acquittal.” Id.

The Defendant asserts that he is entitled to have the charges dismissed because the undisputed facts establish subjective and objective entrapment. The State did not file a traverse to the Defendant’s amended motion. The facts in the Defendant’s amended motion are based upon the email exchanges and chats between the Defendant and the undercover officer, who identified himself as a thirteen year old boy, and upon the deposition of said undercover officer. Copies of the emails and the deposition are attached to the Defendant’s amended motion. The undisputed material facts establish that there was an operational plan in place at the time of this investigation and that the plan was designed to ensure that law enforcement officers do not cross the line into entrapment during undercover internet chat sessions. It is also undisputed that the undercover officer failed to follow the procedures set forth in the operational plan. A copy of the operational plan is attached to the Defendant’s amended motion. In particular, the undisputed fact establish that the officer failed to get his supervisor’s approval for selecting the Defendant to be investigated and the officer controlled the tone, pace and subject matter of the online conversation, pushing toward a discussion of sexual activity.¹ Based upon these failures as well as the nature of the exchanges, the Defendant asserts that the information should be dismissed based upon entrapment.

Florida recognizes both subjective and objective entrapment. To establish subjective entrapment a defendant must establish that the government agent “induced [him or her] to commit the offense charged” and that he or she was not “predisposed to commit the offense charged.” Munoz v.

¹ Based upon the operational plan, it appears that had the officer sought supervisory approval to pursue the Defendant he would not have received it as there was no indication that a child was in danger of being victimized by the Defendant or that the Defendant had engaged in aggressive solicitation of children.

State, 629 So. 2d 90,99 (Fla. 1993). “Unlike the subjective entrapment² defense which focuses on the defendant's predisposition, the objective entrapment defense focuses on the conduct of law enforcement,” and bars prosecution when law enforcement engages in “methods [that so offend] one's sense of justice” that they amount to a violation of due process. Dial v. State, 799 So. 2d 407,409 (Fla. 4th DC A 2001) (quoting Munoz, 629 So. 2d at 98). The issue of entrapment may be ruled upon by the trial court as a matter of law, when “the material facts are undisputed.” State v. Dawson, 681 So. 2d 1206 (Fla. 3d 1996) (citing Munoz, 269 So. 2d at 99). When assessing whether law enforcement's conduct violates due process, “the court must weigh the rights of the defendant against the government's need to combat crime.” Bist v. State, 35 So. 3d 936,939 (Fla. 5th DCA 2010).

Examining the undisputed material facts in this case, it is clear that the incriminating statements by the Defendant came at the end of a conversation initiated by the officer, who responded to an ad placed by the Defendant seeking a sexual encounter but not soliciting such from a minor. Despite the fact that the officer had previous contact with the Defendant during which the Defendant informed the officer that he was not interested in engaging in a sexual relationship with a minor, the officer decided, without obtaining his supervisor's approval, to make the Defendant a target of an investigation. This was contrary to the operational plan.² During their exchanges, it was the officer steering the conversation toward what type of sexual activity the Defendant wished to engage in with the officer, and he persisted at such until the Defendant finally provided the answer the officer was looking for. This was also contrary to the operational plan.

In balancing the rights of the Defendant against the needs of law enforcement to prevent

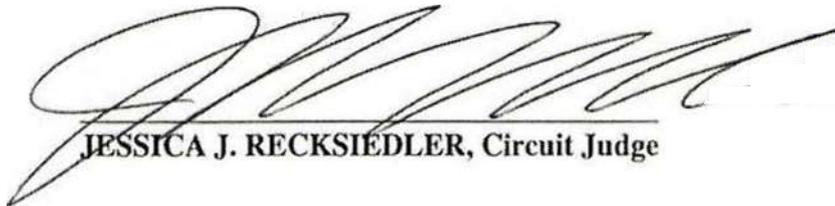
² While not raised in the Defendant's motion, the Court notes that the operational plan also prohibits using images of individuals under 18 as part of undercover online activity, but the officer in this case sent the Defendant several images, which the officer testified were of an actual 13 year old boy.

crime, this court notes that at the time the Defendant became the target of this investigation, he “was not involved in an existing criminal undertaking in need of detection by law enforcement.” Farley v. State, B48 So. 2d 393, 397 (Fla. 4th DCA 2003). Given that the officer in this case failed to follow the procedures set in place to ensure that these type of undercover operations uncover crime instead of create crimes and the officer’s continued pressure on the Defendant until he gave in and provided an incriminating response, this Court finds that the officer’s conduct went beyond the bounds of what due process will allow and that his conduct constitutes objective entrapment.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant’s amended motion is GRANTED

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida, this 23
day of June, 2014.


JESSICA J. RECKSIEDLER, Circuit Judge

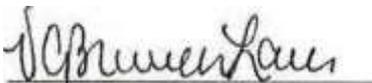
and Information is DISMISSED.

Copies furnished this. 6) day of iJ

2014 to:

Adam Pollack, Esq.
Law Office of Adam L. Pollack,
P.A. 5151 Adanson St., Suite 100
Orlando, FL 32804

Eugene A. Feliciani, Esq.
Office of the State
Attorney 101 Bush Blvd.
Sanford, FL 32772


JUDICIAL ASSISTANT