IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

SHAWN HOWARD RASKIN,

Defendant.
_____/

CASE NO.: 2007-CF-008564-O

DIVISION: 16

Clerk

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This motion came on to be heard before the undersigned in the Ninth Judicial Circuit Court, Division 16, on March 11th, 2008. The state was represented by Deborah Barra, and the defendant was represented by Warren Lindsey.

FACTS

On May 23rd, 2007, Deputy McMullen, of the Orange County Sheriff's Office, was conducting undercover on-line chat investigations utilizing a computer internet service. While on-line and using the screen name of "MeganFL14", he received an instant message from another user (the defendant) who utilized the screen name of "SoundSR". After exchanging instant messages over the course of a few days, the "chat" began to get sexually explicit. Finally, on June 11th, 2007, the defendant asked "MeganFL14" if she (Deputy McMullen) wanted him to come over. He did so and was promptly arrested and charged with Solicitation of a Minor Via a Computer.

The defendant contends the deputy's on-line responses to him amounted to both subjective and objective entrapment, and as such, the case should be dismissed. The state argued that the deputy's on-line responses to the defendant did not amount to entrapment, and that the standard of proof for the issue of entrapment is clear and compelling evidence.

CONCLUSIONS OF LAW

Here the defendant was charged by Information with Solicitation of a Minor Via a Computer in violation of Fla.. Stat. Section 847.0135(3). It is undisputed that prior to the date of the charged offense, the defendant never used or attempted to use a computer on-line service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to commit a violation of Section 847.0135(3). Further, prior to his arrest in this case the defendant had never been arrested or charged with any criminal offense.

According to case law, there are two different theories of entrapment. Objective entrapment analysis focuses on the conduct of law enforcement, and operates as a bar to prosecution in those instances where the government's conduct so offends decency or a sense of justice that it amounts to a denial of due process. Davis v. State, 937 So.2d 300, 302 (Fla. 4th DCA 2006) (quoting State v. Blanco, 896 So.2d 900, 901 (Fla. 4th DCA 2005)). Subjective entrapment, on the other hand, "is applied in the absence of egregious law enforcement conduct and focuses on inducement of the accused based on an apparent lack of predisposition to commit the offense". Id.

SUBJECTIVE ENTRAPMENT

The first question that must be addressed under the subjective test for entrapment is whether an agent of the government induced the accused to commit the offense charged. On this

issue the accused has the burden of proof, and pursuant to 777.201 must establish this factor by the preponderance of the evidence. Munoz v. State, 629 So.2d 90, 99 (Fla. 1993). In the instant matter, the transcripts of the internet conversations between the defendant ("Sound SR") and ("MeganFL14"), lead this court to the inescapable conclusion that the defendant was induced by the deputy. Almost from the outset, the deputy attempted to direct the conversation by invoking sexual overtones. Within moments of their first contact, the following exchange occurred after the deputy revealed the age of "MeganFL14" to be 14:

SoundSR:	your young
MeganFL14:	its just a number
SoundSR:	you like older guys?
MeganFL14:	sure, boys my age act so silly
SoundSR:	i can show a good time
MeganFL14:	how
SoundSR:	i can get free tickets to Islands of Adventure and Universal
MeganFL14:	u work there
SoundSR:	yep
MeganFL14:	cool
MeganFL14:	what do u do there
SoundSR:	i work has [sic] an entertainment technician at the Sinbad Show
MeganFL14:	sounds fun
SoundSR:	we could go to blizzard beach too
MeganFL14:	u work there too
SoundSR:	nope, but i heard its a cool place to hang out
MeganFL14:	yeah u just wanna see me in be [sic] bikini
SoundSR:	nope i just wanna hang out and have fun on my day off from work instead of staying at home being bored

A short time later the following exchange occurred between the defendant and Deputy McMullen:

MeganFL14:	are u gonna try anything funny
SoundSR:	nope. I would go to jail
MeganFL14:	not if nobody knew about it
SoundSR:	why what do u want
MeganFL14:	I don't know

SoundSR: your too young to be ready for that
MeganFL14: ready for what
SoundSR: you know fooling around
MeganFL14: youd be surprised at what some kids at my school do
SoundSR: are u they your age?
MeganFL14: yeah
SoundSR: what did they do?
MeganFL14: my friend had sex with her bf
SoundSR: how old were they?
MeganFL14: shes 14 and hes 17

The above exchange clearly indicates that the defendant was not interested in engaging in sexual activity with a 14 year old girl. In an attempt to change the defendant's mind, the deputy asserts that no one will go to jail if nobody knows about the incident. Then, when the defendant asserts that "MeganFL14" is too young to be engaging in that activity, the deputy again attempts to assuage the defendant's worries by indicating that it goes on with all of her friends.

In a later exchange, Deputy McMullen attempted to persuade the defendant to come to the home of "MeganFL14":

SoundSR: well I g2g now and get ready for work
MeganFL14: its only 130
SoundSR: I have to take a shower, eat breakfast, and go to the bank
MeganFL14: thought u wanted to come over
SoundSR: I can come over tomorrow, I don't have to be at work until 6pm tomorrow
MeganFL14: my mom will be here tomorrow but maybe fri
SoundSR: ok ill look for you online on Friday
MeganFL14: k be thinking bout what u wanna do:-*
SoundSR: ok bye

Once again on June 7th, 2007, Deputy McMullen attempted to entice the defendant to come to the home of "MeganFL14" by volunteering that she would be alone that night:

SoundSR: whats up
MeganFL14: not much
SoundSR: me either

SoundSR: so what are u doing tonight
MeganFL14: nothing my moms going out and ill be alone

Finally, on June 7th, 2007, Deputy McMullen misrepresents the legality of sexual activity between the defendant and the alleged 14 year old victim:

MeganFL14: u mean sex
SoundSR: well that would be illegal for me and I would get arrested for that
MeganFL14: not if nobody knows but what do you mean by some?

It is clear to the court that the internet conversations establish that the defendant was the subject of inducement in this matter. A review of the transcript of the instant messages do not reveal a lewd, licentious adult who is "hell-bent" on having sex with a minor. Indeed, the messages indicate the contrary. While the messaging between the deputy and the defendant does eventually reach a fairly explicit stage, it seems to be "ratcheted up" at virtually every opportunity by the deputy. His repeated attempts to allay the defendant's concerns about illegality, by indicating that the defendant would not go to jail if no one knew about the illicit liaison is a blatant attempt to persuade him to engage in the act by invoking the old adage, "no harm no foul". This is, in fact, inducement. Further, this has been proven by a preponderance of the evidence.

Once this first question is answered in the affirmative in the subjective entrapment theory, the remaining two questions must be answered, i.e., "whether the accused was predisposed to commit the offense charged" and "whether the matter of subjective entrapment should be put to the jury". Id.

As to whether the accused was predisposed to commit the offense charged, defense counsel engaged the services of an expert, Dr. Deborah Day, a psychologist who examined the defendant. Her findings were telling. First, she evaluated the defendant on two separate occasions and spent a total of 10-12 hours engaged in evaluation and review of his prior school

records, as well as the tests she administered. She indicated that the defendant had impaired cognition based on a very serious brain injury, that he suffered at the age of two. She also indicated that the defendant was learning disabled, and even though his current age was 27 (26 at the time of this episode) his emotional age was much closer to 13-15, and his diminutive physical stature fit this lesser age range. Dr. Day also indicated the defendant had a verbal IQ of 73, which is borderline mentally retarded, with a full-scale IQ of 78, which represents the lower 7 percent of all United States citizens. Dr. Day further testified that the defendant did not live independently, and relies to a great extent on family and roommates.

Dr. Day also stated that the defendant responds favorably to and is very compliant with authority. She felt he was sexually immature, and could not knowingly understand and waive his Miranda rights. She indicated he had very poor insight, and a significant deficit in terms of verbal understanding of such items as the terms of Miranda. She testified, unequivocally, that this defendant was very susceptible to inducement. She further indicated that this defendant had absolutely no predisposition to commit a crime, and that if the deputy had simply agreed with his original assertion that he would go to jail if he had sex with a 14 year old, the sexual discussion would have ended at that point. It is clear to the undersigned that the defendant was not predisposed to commit the offense charged.

The final issue remaining is whether the matter of subjective entrapment should be put to the jury. Since the state was unable to present rebuttable evidence of predisposition, it did not carry its burden on this element. Because the facts and law at hand clearly established entrapment rather than crime, this matter should be dismissed. In other words, as a matter of law, entrapment

existed, and thus, the jury has nothing left to consider. See Beattie v. State, 636 So.2d 744 (Fla. 2nd DCA 1993), and Farley v. State, 848 So.2d 393 (Fla. 4th DCA 2003).

The court finds that the defendant has proven inducement by a preponderance of the evidence as required. The state argued that the standard for establishing inducement and hence, entrapment, was clear and convincing evidence. For this proposition, the state cited Irsula v. State, 850 So.2d 912 (Fla. 2nd DCA 2001). In Irsula the trial court denied the defendant's Motion for Judgment of Acquittal after he argued that he had established the defense of entrapment at trial. The trial court disagreed, as did the Second District, commenting as follows:

> Unlike the compelling and unopposed evidence in Robichaud, the evidence presented in this case clearly required submitting the issue of entrapment to the trier of fact. Further, the evidence adduced at trial supports the guilty verdicts. Id.

In other words, as to the state's argument that clear and compelling evidence is required to establish inducement and entrapment, Irsula makes no such finding. In the final paragraph of the opinion the Second District merely comments on the fact that the evidence in the Robichaud matter was both compelling and unopposed, which required submitting the issue of entrapment to a jury. The language cited has nothing to do with the standard by which entrapment must be proven.

OBJECTIVE ENTRAPMENT

Since the defense has met its burden regarding subjective entrapment, the court has not given serious consideration to objective entrapment, wherein the conduct of law enforcement operates as a bar to prosecution where the government's conduct so offends decency or a sense of justice that it amounts to a denial of due process.

Therefore, being duly advised in the premises, this matter is dismissed.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, this 14th day of March, 2008.

STAN STRICKLAND
Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing order has been furnished via U.S. Mail or hand delivery to Deborah Barra, Esquire, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; and to the attorney for the defendant, Warren Lindsey, Esquire, P. O. Box 2728, Winter Park, Florida 32790-2728, this 14th day of March, 2008.

Judicial Assistant