

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001929-MR

JAMES M. HARRIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOFF, JUDGE
INDICTMENT NO. 98-CR-002117

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BAKER and SCHRODER, Judges, and HUDDLESTON, Senior Judge.¹

HUDDLESTON, Senior Judge: James Harris was found guilty of first-degree trafficking in a controlled substance and of being a persistent felony offender in the first degree, and was sentenced to ten years' incarceration pursuant to an agreement

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

with the Commonwealth. On appeal, Harris argues that the circuit court erred by refusing to instruct the jury on the defense of entrapment.

Phillip Malone became a confidential police informant after he was caught with 17 ounces of cocaine, in violation of his parole. In the hope of receiving leniency on this new drug charge, Malone offered to buy drugs from three people he characterized as his suppliers, one of whom was Harris. Malone testified that he had purchased from Harris before. In the days preceding October 15, 1997, Malone called Harris several times, attempting to purchase cocaine. Harris changed the details of the transaction several times before selling Malone three ounces of cocaine for \$3,000.00 on October 15.

Harris denied any previous transaction between himself and Malone. In fact, Harris testified that he had not been involved with cocaine since 1994. He testified that he had known Harris for most of his life and that he lived next door to Harris' brothers at the time of the transaction. While Harris claimed that the two were not friends, he admitted knowing Malone's girlfriend and knowing several details of Malone's personal life. Furthermore, Harris testified that Malone had prompted the drug transaction by relaying to Harris a desperate need to make money quickly.

According to Harris, he changed the details of the transaction several times in an attempt to frustrate Malone enough that he would lose interest in the transaction. It was only after being called nine times in five days and being implored by Malone's proffered need for money that Harris relented and secured the cocaine.

Kentucky Revised Statutes (KRS) 505.010 defines the defense of entrapment as follows:

- (1) A person is not guilty of an offense arising out of proscribed conduct when:
 - (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and
 - (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.
- (2) The relief afforded by subsection (1) is unavailable when:
 - (a) The public servant or the person acting in cooperation with a public servant merely

affords the defendant an opportunity to commit an offense; or

(b) The offense charged has physical injury or the threat of physical injury as one (1) of its elements and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

(3) The relief provided a defendant by subsection (1) is a defense.

In refusing to instruct the jury on the defense of entrapment, the circuit court found that the Commonwealth had proved that Harris was otherwise predisposed to commit the offense, and the actions of the police informant merely afforded him the opportunity to commit the crime. The only evidence on which this decision could be based is the testimony of Malone.

Simply put, the jury was presented with conflicting testimony. If Malone is believed, he merely afforded Harris an opportunity to commit a crime he was otherwise predisposed to commit. However, if Harris is believed, he simply acquiesced following the repeated pleas of a long-time acquaintance, and would not have engaged in the criminal activity absent Malone's persistent requests. In this instance, the circuit court erred

in refusing to instruct the jury regarding entrapment. Whether Harris was entrapped hinges upon the resolution of conflicting testimony, which is a question of fact to be decided by the jury.²

Accordingly, the judgment is reversed and this case is remanded to Jefferson Circuit Court for a new trial at which an entrapment instruction shall be given.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELEE:

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² Commonwealth v. Day, Ky., 983 S.W.2d 505 (1999). See also Commonwealth v. Sanders, Ky., 736 S.W.2d 338 (1987). Both individuals have significant credibility problems: Harris is a defendant facing a felony trafficking charge with PFO enhancement, while Malone is a convicted felon attempting to curry favor with the authorities.