

STING OPERATIONS & ENTRAPMENT
NATIONAL CARGO SECURITY COUNCIL
NORWALK, CA
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Office of the Circuit Executive

Ninth Circuit Model Criminal Jury Instructions

6.2 ENTRAPMENT

The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. The government must prove the following:

1. the defendant was predisposed to commit the crime before being contacted by government agents, or
2. the defendant was not induced by the government agents to commit the crime.

Where a person, independent of and before government contact, is predisposed to commit the crime, it is not entrapment if government agents merely provide an opportunity to commit the crime.

Comment

Only slight evidence raising the issue of entrapment is necessary for submission of the issue to the jury. *United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir. 1993).

The government is not required to prove both lack of inducement and predisposition. *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995) ("If the defendant is found to be predisposed to commit a crime, an entrapment defense is unavailable regardless of the inducement."), *cert. denied*, 517 U.S. 1148 (1996); *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991) (in absence of inducement, evidence of lack of predisposition is irrelevant).

See also *United States v. Manarite*, 44 F.3d 1407, 1418 (9th Cir.) ("Inducement is government conduct that creates a substantial risk that an otherwise law-abiding person will commit a crime."), *cert. denied*, 516 U.S. 851 (1995); *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994) (listing examples of types of conduct that may constitute inducement), *cert. denied*, 513 U.S. 1171 (1995); *United States v. Garza-Juarez*, 992 F.2d 896, 909 (9th Cir. 1993), *cert. denied*, 510 U.S. 1058 (1994).

When there is evidence of entrapment, an additional element may be added to the instruction on the substantive offense, e.g., "Fourth, the defendant was not entrapped." See also Instruction 6.7 (Self-Defense).

The defendant is not entitled to an instruction that the government must show prior violations to overcome a claim of entrapment. *United States v. Martinez*, 488 F.2d 1088, 1089 (9th Cir. 1973).

The government must prove that the defendant was disposed to commit the crime *prior* to being approached by the government. *Jacobson v. United States*, 503 U.S. 540, 553 (1992). However, evidence gained after government contact with the defendant can be used to prove that the defendant was predisposed before the contact. *Id.* at 550-53. See also *United States v. Burt*, 143 F.3d 1215,

1218 (9th Cir. 1998) (previous Ninth Circuit Entrapment Instruction 6.02 erroneous "because it failed to state clearly the government's burden of establishing 'beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by the [g]overnment agents.'") (citing *Jacobson*).

A defendant need not concede that he or she committed the crime to be entitled to an entrapment instruction. *United States v. Derma*, 523 F.2d 981, 982 (9th Cir. 1975); cf. *United States v. Paduano*, 549 F.2d 145, 148 (9th Cir.), cert. denied, 434 U.S. 838 (1977).

The defendant is not entitled to an instruction allowing the jury to determine the fairness of government conduct, *United States v. Gonzales*, 539 F.2d 1238, 1240 n.1 (9th Cir. 1976), but unreasonable government conduct may result in a violation of due process. Such a violation is separate from an entrapment defense and is not a jury question. *United States v. Prairie*, 572 F.2d 1316, 1319 (9th Cir. 1978).

There are a significant number of Ninth Circuit cases describing the five factors that should be considered when determining "predisposition." It may also be helpful to include the time period requirement imposed by *Jacobsen*, 503 U.S. 540 (1992), as a factor. See also *United States v. Kim*, 176 F.3d 1126, 1128 n. 1 (9th Cir. 1993), cert. denied, 120 S. Ct. 142 (1999). The following instruction could be given:

In determining whether the defendant was predisposed to commit the crime before being approached by government agents you may consider the following:

- 1) the defendant's character and reputation;
- 2) whether the government initially suggested criminal activity;
- 3) whether the defendant engaged in activity for profit;
- 4) the nature of the government's inducement; and
- 5) any other factors related to predisposition.

See *United States v. Tucker*, 133 F.3d 1208, 1217 (9th Cir. 1998).

The Ninth Circuit has stated that an entrapment instruction should avoid instructing the jury that a person is not entrapped if the person was "already" willing to commit the crime because of the ambiguity resulting therefrom. *Kim*, 176 F.3d at 1128.

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Office of the Circuit Executive

Ninth Circuit Model Criminal Jury Instructions

6.3 ENTRAPMENT DEFENSE— WHETHER WITNESS ACTED AS GOVERNMENT AGENT

The defendant claims [he] [she] was entrapped by a government agent. Whether or not [*witness*] was acting as a government agent in connection with the crimes charged in this case, and if so, when that person began acting as a government agent, are questions for you to decide. In deciding those questions you should consider that, for purposes of entrapment, someone is a government agent when the government authorizes, directs, and supervises that person's activities and is aware of those activities. To be a government agent, it is not enough that someone has previously acted or been paid as an informant by other state or federal agencies, or that someone expects compensation for providing information.

In determining whether, and when, someone was acting as a government agent for purposes of this case, you must look to all of the circumstances existing at the time of that person's activities in connection with the crimes charged in this case, including but not limited to the nature of that person's relationship with the government, the purposes for which it was understood that person might act on behalf of the government, the instructions given to that person about the nature and extent of permissible activities, and what the government knew about those activities and permitted or used. This is not an exhaustive list of the factors to be considered, but provides examples of the types of factors you should consider in deciding whether and when a person was acting as a government agent when engaging in activities in connection with the crimes charged in this case.

Comment

See Sanchez v. United States, 50 F.3d 1448, 1452 (9th Cir. 1995); *United States v. Fontenot*, 14 F.3d 1364, 1369 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994).

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*133 F.3d 1208, *; 1998 U.S. App. LEXIS 388, **;
98-1 U.S. Tax Cas. (CCH) P50,147; 81 A.F.T.R.2d (RIA) 555*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WALTER R. TUCKER, III, Defendant-Appellant.

No. 96-50321

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

133 F.3d 1208; 1998 U.S. App. LEXIS 388; 98-1 U.S. Tax Cas. (CCH) P50,147; 81 A.F.T.R.2d (RIA) 555; 98 Cal. Daily Op. Service 306; 98 Daily Journal DAR 413

October 9, 1997, Argued, Submitted, Pasadena, California
January 13, 1998, Filed

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Central District of California. D.C. No. CR-95-00657-CBM. Consuelo B. Marshall, District Judge, Presiding.

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the judgment from the United States District Court for the Central District of California, which convicted him on seven counts of extortion and two counts of filing a false tax return, and sentenced him to 27 months of imprisonment.

OVERVIEW: Defendant was convicted of seven counts of extortion and two counts of filing a false tax return, and he was sentenced to 27 months. Defendant appealed. The court held that even if the government was required to prove quid pro quo, there was more than sufficient evidence of a quid pro quo to support his extortion convictions. The evidence supported the finding that he understood that the payments he received were made in return for official acts. Defendant's entrapment claim failed because he did not establish that the government induced him to the commit the crimes. Even if defendant had established inducement, the government proved that he was predisposed to commit the crime. There was sufficient evidence to support a finding that defendant willfully filed returns that he knew were false. Thus, there was sufficient evidence to support his convictions for filing false tax returns. Defendant's claim that the district court had authority to depart downward from his sentencing guidelines failed because he did not raise the issue in the district court and he did not offer any reason why his case differed from the heartland of cases. Accordingly, the judgment was affirmed.

OUTCOME: The court affirmed defendant's convictions because they were supported by sufficient evidence. Further, defendant did not establish that the government induced him to commit the crimes, and thus, his entrapment claim failed. The court affirmed defendant's sentence because he did not offer any reason why his case differed from the heartland of cases to support his claim that he was entitled to a downward departure in his guidelines.

CORE TERMS: quid pro quo, favorable, school board, sentence, campaign contributions, campaign, commit, depart, personal bank account, extortion, downward, entrapment,

deposited, inducement, replied, guideline, heartland, induced, viewing, payor, reluctance, sufficient evidence, public official, non-campaign, predisposed, Hobbs Act, failed to report, tax return, predisposition, comfortable

CORE CONCEPTS - [Hide Concepts](#)

 [Criminal Law & Procedure : Evidence : Weight & Sufficiency](#)

 [Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence Review](#)

✚ The standard of review for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

 [Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review](#)

✚ The appellate court reviews a district court's ruling on a motion for acquittal de novo. It applies the same test as a challenge to the sufficiency of the evidence.

 [Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review](#)

✚ The appellate court reviews an entrapment claim, as a matter of law, de novo.

 [Criminal Law & Procedure : Sentencing : Appeals](#)

 [Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review](#)

✚ The appellate court may not review a district court's discretionary refusal to depart from the U.S. Sentencing Guidelines Manual. If the district court indicates, however, that it lacked the discretion to depart, the appellate court reviews that determination de novo.

 [Criminal Law & Procedure : Criminal Offenses : Racketeering : Hobbs Act](#)

✚ See the Hobbs Act, [18 U.S.C.S. § 1951](#).

 [Criminal Law & Procedure : Criminal Offenses : Racketeering : Hobbs Act](#)

 [Criminal Law & Procedure : Trials : Burdens of Proof : Prosecution](#)

✚ A quid pro quo with the attendant corrupt motive can be inferred from an ongoing course of conduct. The government need not show an explicit agreement; the government need only show that the defendant received the payment knowing that it was made in return for official acts.

 [Criminal Law & Procedure : Defenses : Entrapment](#)

✚ There are two elements to the defense of entrapment: (1) government inducement of the crime and (2) the absence of predisposition on the part of the defendant.

 [Criminal Law & Procedure : Defenses : Entrapment](#)

 [Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury](#)

✚ Generally, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused. It is inappropriate for an appellate court to determine whether a defendant was entrapped when such a determination would necessarily entail choosing between conflicting witnesses and judging credibility.

 [Criminal Law & Procedure : Defenses : Entrapment](#)

✚ To establish inducement as a matter of law, the defendant must point to undisputed evidence making it patently clear that the government induced an otherwise innocent person to commit the illegal act by trickery, persuasion, or fraud of a government agent. Where the government has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to first being approached by government agents.

 Criminal Law & Procedure : Defenses : Entrapment

✚ In evaluating predisposition, the court considers five factors: (1) the defendant's character and reputation; (2) whether the government initially suggested criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement. Although none of these five factors controls, the most important is the defendant's reluctance to engage in criminal activity. To prove the defendant's predisposition, the government can rely upon evidence occurring after the initial contact with a government agent.

 Criminal Law & Procedure : Criminal Offenses : Fraud : Tax Fraud

 Criminal Law & Procedure : Trials : Burdens of Proof : Prosecution

✚ To prove a violation of 26 U.S.C.S. § 7206(1), the government must prove that a defendant: (1) filed a return that was false as to a material matter; (2) signed the return under penalty of perjury; (3) did not believe that the return was true as to every material matter; and (4) willfully subscribed to the false return with the specific intent to violate the law.

 Criminal Law & Procedure : Criminal Offenses : Fraud : Tax Fraud

 Criminal Law & Procedure : Trials : Burdens of Proof : Prosecution

✚ Proof of willfulness is essential to support a conviction under 26 U.S.C.S. § 7206(1). To prove willfulness, the government must show that the defendant intended to violate the law or knew that his actions would do so. The government may base its proof of willfulness on circumstantial evidence indicating that the defendant knew or must have known that his returns were false.

 Criminal Law & Procedure : Sentencing : Appeals

✚ A district court's discretionary refusal to depart from the U.S. Sentencing Guidelines Manual is not reviewable on appeal. The appellate court, however, may review the district court's conclusion that it lacked authority to depart downward under the Guidelines.

 Criminal Law & Procedure : Sentencing : Sentencing Guidelines

✚ The U.S. Sentencing Guidelines Manual allows for a downward departure in the atypical case where a guideline literally applies but where the defendant's conduct significantly differs from the norm or the heartland of cases.

 Criminal Law & Procedure : Sentencing : Sentencing Guidelines

✚ A district court's dissatisfaction with the required sentence is not a valid basis for departure. U.S. Sentencing Guidelines Manual § 5K2.0 commentary.

COUNSEL: Karyn H. Bucur, Laguna Hills, California, for the defendant-appellant.

Daniel Saunders, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

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*808 F.2d 1212, *; 1987 U.S. App. LEXIS 957, ***

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT W. DAVENPORT; THOMAS EDWARD GREER; KENNETH CHARLES FORD, Defendants-Appellants

Nos. 85-5458, 85-5459, 85-5460, 85-5461, 85-5462 85-5463, 85-5464, 85-5465

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

808 F.2d 1212; 1987 U.S. App. LEXIS 957

January 13, 1987, Decided

January 13, 1987, Filed

PRIOR HISTORY:

[1]** ON APPEAL from the United States District Court for the Middle District of Tennessee.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants sought review of their convictions by the United States District Court for the Middle District of Tennessee for transportation of stolen property in interstate commerce and a conspiracy to steal and possess goods taken from interstate commerce.

OVERVIEW: Defendants were involved in a scheme to steal merchandise that was being transported to a multi-outlet retailer and then deliver it to a buyer in another state. After his arrest, one of defendants' partners in the scheme agreed to participate in a **sting** operation and to testify for the government. Defendants were convicted for transportation of stolen property in interstate commerce and a conspiracy to steal and possess goods taken from interstate commerce. On appeal, defendants argued that the indictment charged a single conspiracy but that the government instead had proven multiple conspiracies. The court held that the alleged variance was not fatal because the evidence showed that one defendant's father was in contact from the start of the scheme with the other defendant who had acted as a middleman and that both defendants had participated in the conspiracy to some extent. The court held that the jury could have reasonably that there was one conspiracy. Although the district court failed to instruct the jury on the defense theory of multiple conspiracy, the court found the error was harmless. Finding that the evidence was sufficient, the court affirmed the convictions.

OUTCOME: The court affirmed defendants' convictions for transportation of stolen property in interstate commerce and a conspiracy to steal and possess goods taken from interstate commerce. The court held that the evidence was sufficient for the jury to conclude that there was a single conspiracy as charged in the indictment and that, although defendants were entitled to an instruction on multiple conspiracies, the omission was harmless error.

CORE TERMS: conspiracy, merchandise, load, trailer, truck, stolen, indictment, television,

rented, drove, conspirator, reversible error, variance, dispose, box, tractor-trailer, conversation, arrested, tractor, seized, stuff, failure to instruct, jury instruction, probable cause, convict, seizure, chain, beyond a reasonable doubt, interstate commerce, motion to dismiss

CORE CONCEPTS - ♦ [Hide Concepts](#)

 [Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy](#)

 [Criminal Law & Procedure : Appeals : Reversible Error](#)

⚡ If an indictment alleges one conspiracy, but the evidence can reasonably be construed only as supporting a finding of multiple conspiracies, the resulting variance between the indictment and the proof is reversible error if the appellant can show that he was prejudiced thereby. In determining whether the evidence showed single or multiple conspiracies, the appellate court must bear in mind that the essence of the crime of conspiracy is agreement.

 [Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy](#)

⚡ In order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal. However, the government is not required to prove an actual agreement among the various conspirators in order to establish a single conspiracy. In one form of conspiracy, often described as a "chain" conspiracy, the agreement can be inferred from the interdependent nature of the criminal enterprise. Because the success of participants on each level of distribution is dependent upon the existence of other levels of distribution, each member of the conspiracy must realize that he is participating in a joint enterprise, even if he does not know the identities of many of the participants. Accordingly, a single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy.

 [Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy](#)

 [Criminal Law & Procedure : Jury Instructions : Particular Instructions : Theory of Defense](#)

⚡ If the government sufficiently supports its charge of single conspiracy, evidence at trial of multiple conspiracies does not of itself create a material variance with the indictment; at most, such evidence creates a fact question and entitles the defendants to a jury instruction on the possibility of multiple conspiracies.

 [Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy](#)

⚡ One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy.

 [Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy](#)

⚡ Mere presence at the scene of an alleged transaction or event, mere association with persons involved in a criminal enterprise, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. A person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

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*174 Cal. App. 3d 1114, *; 1985 Cal. App. LEXIS 2805, **;
220 Cal. Rptr. 475, ****

THE PEOPLE, Plaintiff and Respondent, v. JERRY TOWERY et al., Defendants and Appellants

No. F002863

Court of Appeal of California, Fifth Appellate District

174 Cal. App. 3d 1114; 1985 Cal. App. LEXIS 2805; 220 Cal. Rptr. 475

November 25, 1985

NOTICE: [1]**

Certified for partial publication - Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III, V, VI, VII, VIII, and IX.

SUBSEQUENT HISTORY: A Petition for a Rehearing was Denied December 24, 1985, and Appellants' Petitions for Review by the Supreme Court were Denied March 12, 1986.

PRIOR HISTORY:

Superior Court of Kern County, No. 23702, Henry E. Bianchi, Judge.

DISPOSITION: The judgments as to all defendants are affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants appealed from a judgment of the Superior Court of Kern County (California), convicting first defendant of 12 counts of receiving stolen property, the second defendant of six counts of grand theft, and the third defendant of two counts of grand theft.

OVERVIEW: Defendants appealed convictions of receiving stolen property and grand theft. The court affirmed, finding that the trial court properly admitted tape recordings of an informant's conversation with defendants as statements of coconspirators were not hearsay and prosecution established foundational requirements of conspiracy, because the informant freely consented to the recording of telephone conversations, and because the looseness of law enforcement direction to the informant in making the tape recordings properly went to the weight given to those recordings and not their initial admissibility. The court found that defendants' Fifth Amendment due process rights were not violated because the government agents did not plant the seeds for criminal activity in completely innocent minds and the government's involvement in the criminal activity was not so pervasive as to render prosecution of the defendants otherwise violative of due process. The court also concluded that one defendant was properly convicted of receiving stolen property, because police involvement did not change that defendant's intent to steal property.

OUTCOME: The judgment was affirmed. Defendants' criminal convictions were upheld, because an informant's tape-recorded conversations with defendants were admissible and defendants received due process. The first defendant was guilty of receiving stolen property despite law enforcement's participation.

CORE TERMS: recording, conversation, tape, conspiracy, stolen, load, fuel oil, truck, informant, telephone, theft, driver, law enforcement, oil, criminal activity, government agent, stolen property, recorded, involvement, convicted, phone, cooperate, commit, receiver, coconspirator, admissible, recovered, diesel, receiving stolen property, counts of grand theft

CORE CONCEPTS - ♦ [Hide Concepts](#)

[Criminal Law & Procedure : Search & Seizure : Electronic Eavesdropping](#)

[Criminal Law & Procedure : Evidence : Admission, Exclusion & Preservation](#)

⚡ A tape recording of a conversation between a criminal defendant and a third party made with the voluntary consent of the third party is admissible in a criminal proceeding.

[Criminal Law & Procedure : Search & Seizure : Electronic Eavesdropping : Warrantless Eavesdropping](#)

[Criminal Law & Procedure : Evidence : Admission, Exclusion & Preservation](#)

⚡ The rule that a tape recording of a conversation between a criminal defendant and a third party made with the voluntary consent of the third party is admissible in a criminal proceeding is consistent with the federal rule as an exception to the general requirement that wiretaps must be authorized by a warrant. 18 U.S.C.S. §§ 2510-2520.

[Criminal Law & Procedure : Search & Seizure : Electronic Eavesdropping : Warrantless Eavesdropping](#)

⚡ See 18 U.S.C.S. § 2511(2)(c).

[Criminal Law & Procedure : Witnesses : Presentation](#)

⚡ Cooperation is not coerced merely because the informant found it to be in her own best interests to cooperate with those enforcing the law.

[Criminal Law & Procedure : Witnesses : Presentation](#)

⚡ Whether the custody of the witness operated as a compulsion was a matter of fact for the trial court to resolve; its determination of that issue is binding on the appellate court.

[Criminal Law & Procedure : Witnesses : Presentation](#)

⚡ Such factors as a promise of leniency would not necessarily vitiate consent as a matter of law. A distinction must be drawn between motivation, which may be induced by proper representations, and consent which may then either be freely granted or grudgingly conferred. Where consent is freely granted, the fact that the special employee is under arrest for a narcotic violation and cooperates following assurances that the fact of cooperation will be made known to the United States Attorney's office, will not negative that consent.

[Evidence : Privileges : Illegal Eavesdropping](#)

⚡ See Cal. Penal Code § 632(d).

[Criminal Law & Procedure : Search & Seizure : Electronic Eavesdropping](#)

⚡ See Cal. Penal Code § 633.

 Criminal Law & Procedure : Search & Seizure : Expectation of Privacy

✚ The U.S. Const. amend. IV does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

 Evidence : Hearsay Rule & Exceptions : Admissions by Coconspirator

✚ See Cal. Evid. Code § 1223.

 Evidence : Hearsay Rule & Exceptions : Admissions by Coconspirator

✚ Statements of coconspirators may be admitted pursuant to Cal. Evid. Code § 1223 upon a prima facie showing of the conspiracy which may be based on circumstantial evidence tending to show that a conspiracy existed. The foundational requirement may be met without establishing a conspiracy beyond a reasonable doubt or even by a preponderance of the evidence; only prima facie evidence of the fact is required.

 Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy

✚ Both an agreement and an intention to commit an offense are necessary components of the substantive offense of conspiracy.

 Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy

✚ If the members of an alleged conspiracy intend that an essential ingredient of the substantive offense be committed by, and only by, a government agent, the conspirators are not legally guilty of conspiracy since the government agent cannot be criminally liable for an offense committed in the performance of his duty.

 Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy

 Criminal Law & Procedure : Evidence : Circumstantial & Direct Evidence

 Criminal Law & Procedure : Evidence : Weight & Sufficiency

✚ The very crux of the conspiracy, the evil or corrupt agreement, may be shown also by circumstantial evidence. Thus, it is not necessary to prove that the parties met and actually agreed to perform the unlawful act or that they had previously arranged a detailed plan for its execution. Rather significantly, the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute. The sufficiency of evidence relative to the establishment of a conspiracy must be viewed against the background of the type involved, and if there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy.

 Evidence : Hearsay Rule & Exceptions : Admissions by Coconspirator

✚ The preliminary facts which the prosecution must establish for the coconspirators exception to the hearsay rule are: (1) the declaration was made by the declarant during his participation in the conspiracy, (2) the declaration was made in furtherance of the conspiracy, and (3) the party against whom the statement is offered was, or would become, a participant in the conspiracy. There is clearly no requirement that a statement must be between the coconspirators to be admissible under this exception.

 Criminal Law & Procedure : Defenses : Entrapment

⚡The proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, the court presumes that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect -- for example, a decoy program -- is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.

📄 Criminal Law & Procedure : Defenses : Entrapment

📄 Constitutional Law : Procedural Due Process : Scope of Protection

⚡The limitations of the Due Process Clause of the U.S. Const. amend. V come into play only when the Government activity in question violates some protected right of the defendant. If the result of the governmental activity is to implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission, the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.

📄 Criminal Law & Procedure : Criminal Offenses : Property Crimes : Receiving Stolen Property

⚡The criminality of the attempt to receive stolen goods is not destroyed by the fact that the goods, having been recovered by the commendably alert and efficient action of the police, had, unknown to defendants, lost their "stolen" status.

COUNSEL: Nancy Marsh and Eugene F. Toton, under appointments by the Court of Appeal, Richard M. Long, Smith & Dudley and Arthur Dudley for Defendants and Appellants.

John K. Van de Kamp, Attorney General, Jane N. Kirkland and Shirley A. Nelson, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Hamlin, Acting P. J., with Martin, J., and Ritchie, J., + concurring.

+ Assigned by the Chairperson of the Judicial Council.

OPINIONBY: HAMLIN

OPINION: [*1119] [***477] The Case

Six defendants were charged in a twenty-six-count information with conspiracy (Pen. Code, § 182, subd. 1) n1 to commit thefts of oil in Kern County. Defendant Lail Johnson was also charged with 12 counts of grand theft (§ 487, [**2] subd. 1) and 12 counts of receiving stolen property (§ 496). In addition to the conspiracy charge, defendant Jerry Towery was charged with two counts of grand theft, and defendant Joe Tony Samora was charged with six counts of grand theft. Of the remaining defendants, one pleaded guilty before trial, one was acquitted, and the charges against the third were dismissed; these three defendants are not involved in this appeal.

-----Footnotes-----

n1 All further statutory references are to the Penal Code unless otherwise indicated.

-----End Footnotes-----

BIOGRAPHY

1. **Name:** Dennis J. Seider, Esq. **Company:** Law Offices of Dennis J. Seider
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2. **Transportation Related Experience:** Warehouse & shipping clerk, Exclusive Products, Los Angeles, CA 1965-1966; dock worker, Ideal Meat Packing Plant, Los Angeles, CA Summer 1967; crew member, tuna boat M/V "Danny Boy," Morro Bay, CA 1964 to 1967; wiper, engine room crew, American Export/Isbrandtsten Lines S/S "Export Aid," (Haifa/N.Y.) 8-9/65; transportation attorney since 1968.
3. **Areas of specialized knowledge:** have represented both plaintiff and defendant in truck, marine and aviation cargo claims; have represented assureds and underwriters in regard to transportation, cargo, hull and P &I. insurance coverage.
4. **ADR Experience/Credentials:** Arbitrator, American Arbitration Association; International Center for Dispute Resolution; Interstate Dispute Resolution, LLC and the Alternative Resolution Centers, with offices and facilities nationwide.
5. **Education:** B.A. University of California, Los Angeles 1963; J.D. UCLA School of Law 1967; LL.M. University of London (London School of Economics) 1968; Course work in Marine Insurance, Carriage of Goods by Sea, International Law and Maritime Law.
6. **Affiliations with Transportation Associations/Groups:** Air Transport Association, American Association of General Average Adjusters, American Boat and Yacht Council, Inc., Association for Transportation Law Logistics and Policy (Aviation Editor, *Association Highlights* 1996-1998), Foreign Trade Association, Instituto Hispano Luso Americano de Derecho Maritimo (The Portuguese Spanish American Maritime Law Institute), Marine Underwriters of Southern California, Maritime Law

Association of the United States, National Association of Marine Surveyors (NAMS), National Customs Brokers and Forwarders Association of America, The Propeller Club of the United States, Transportation Consumer Protection Council, and United States Naval Institute.

7. **Transportation Awards/Recognition:** awarded "Insurance Person of the Year" by the Marine Underwriters of Southern California, 1993; Certificate of Appreciation awarded by the Marine Underwriters of Southern California for participation in their Maritime Liabilities Seminar, 1992; Plaque awarded in 1982 "In appreciation as Guest Speaker at the Marine Underwriters of Southern California Ocean Cargo Seminar."