

IN THE COURT OF APPEALS OF IOWA

No. 1-173 / 90-603

FILED

JUN 25 1991

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

REX L. GIEBECK,

Defendant-Appellant.

305

Appeal from the Iowa District Court for Scott County,
John A. Nahra, Judge.

Giebeck appeals his convictions, following a jury trial, for three counts of delivery of cocaine. He challenges the sufficiency of the evidence to negate his entrapment defense. He also challenges the instructions on his entrapment defense. Finally, he challenges an evidentiary issue. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, State Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, and William E. Davis, County Attorney, and Hugh J. Pries, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Rex Giebeck appeals his conviction of three counts of delivery of cocaine. Defendant allegedly sold the drugs to a Special Agent Daniel Roach. Defendant was found guilty after a jury trial. Defendant appeals.

Defendant contends (1) the State did not present sufficient evidence to disprove his entrapment defense beyond a reasonable doubt. He argues therefore that the evidence was insufficient to support his convictions; (2) the district court did not give adequate instructions on the elements of his entrapment defense and the burden of proof for such a defense; and (3) it was error to exclude testimony of Randy Dyer. Dyer was convicted of a drug delivery in Scott County in 1986. Dyer was prepared to testify his conviction resulted from entrapment by Jim Williams; Dyer would have described an entrapment scenario similar to what defendant contends happened in this case.

Defendant at trial sought to show he was entrapped. He contended he was given the drugs by a paid confidential informant Jim Williams who asked him to do him a favor and deliver the drugs to agent Roach.

Defendant first contends the State failed to disprove his entrapment defense beyond a reasonable doubt.

Entrapment occurs when one acting as an agent for law enforcement authorities induces the commission of an

offense, using persuasion or other means likely to cause normally law abiding persons to commit the offense. State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974). Conduct merely affording a person an opportunity to commit an offense is not entrapment. See State v. Agent, 443 N.W.2d 701, 703 (Iowa 1989); State v. Tomlinson, 243 N.W.2d 551, 553 (Iowa 1976).

The defendant has the burden of generating a fact question on a defense of entrapment. Tomlinson, 243 N.W.2d at 553. Once a question of fact exists, the burden is on the State to disprove entrapment beyond a reasonable doubt. Id; State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976).

"Take-back" entrapment occurs:

If an accused produces evidence disclosing (1) the government, through an agent or informer, supplied drugs to defendant, and (2) the government, through an agent or informer, later reappropriates any of those drugs from the accused, then a "take-back entrapment" is shown. Under those circumstances the State must come forth with evidence which contradicts either of the above two elements. In [the] event the State fails to so do then an accused is entitled to a dismissal as a matter of law. If, however, the State does produce evidence sufficient to create a fact issue as to a "take-back entrapment" the case should be accordingly submitted to the jury.

State v. Overmann, 220 N.W.2d 914, 917 (Iowa 1974); see also State v. Wedelstedt, 263 N.W.2d 894, 900 (Iowa 1978).

Jim Williams was a paid informant during each of the three transactions involving the defendant. The defendant contends the evidence was uncontroverted that Williams

provided defendant with the cocaine sold to Roach. The testimony of the defense witnesses is that the cocaine the defendant sold to Roach was obtained from Williams. However, the jury was not bound to believe this evidence. See State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984). The State argues other evidence produced by the State refutes the take-back entrapment defense. After a careful review of all the evidence, we agree.

Defendant next contends the trial court improperly instructed the jury on the entrapment defense. The defendant contends the instruction is misleading because it appears to require the State to prove the defendant was not provided with cocaine by a police officer and that no such burden existed if the cocaine was provided by an informant such as defendant contends Williams was. We find no error. See generally Estate of Smith By Smith v. Lerner, 387 N.W.2d 576, 581 (Iowa 1986).

The defendant's last challenge is the trial court abused its discretion in refusing his request to present the testimony of Randy Dyer. Dyer would have testified in 1985 Jim Williams requested him to act as a go-between while Jim was working as a confidential, informant. Dyer contended Jim provided him with cocaine that he delivered to Jim and an undercover agent at Jim's home. Defendant contends the testimony was relevant to his defense because an issue in his case is whether Jim Williams provided him

with the cocaine sold to Roach. We have examined the reasons of the trial court for denying the request. We find no abuse of discretion. See Agent, 443 N.W.2d at 704; State v. Gordon, 354 N.W.2d 783, 784-85 (Iowa 1984); State v. Sharkey, 311 N.W.2d 68, 70 (Iowa 1981). We affirm.

AFFIRMED.