

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7631
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID MACK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
CR 92 19

May 10, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

David Mack, a former Indianola, Mississippi police officer, appeals his conviction and corresponding sentence for accepting pay-offs to protect drug-trafficking. We affirm.

BACKGROUND

David Mack (Mack) was convicted by a jury of accepting two cash payoffs in January 1992 from Lawrence Alexander (Alexander), a convicted drug dealer acting secretly as a government informant, who tape-recorded three of their four meetings. During these

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

meetings, Mack agreed, among other things, to find out whether any secret warrants² were outstanding against Alexander, and to be Alexander's "eyes and ears" within the police department; presumably to tip off Alexander in the event police became suspicious of Alexander's activities. For this information, Alexander paid Mack \$300.00.

Mack argues on appeal that (1) as a matter of law, he was entrapped by the Government, (2) a variance exists between the indictment and the evidence presented at trial, (3) insufficient evidence exists to support his conviction, and (4) alternatively, the district court erred in failing to grant him a two-point reduction in his offense level for acceptance of responsibility.

I. Entrapment

Mack raised the defense of entrapment during trial, based on the fact that Alexander initiated the first meeting with Mack.³ To raise the defense of entrapment, the defendant must first present evidence of inducement that the Government created a great risk that an individual would commit an offense that he would otherwise not readily commit. United States v. Martinez, 894 F.2d 1445, 1450 (5th Cir. 1990), cert. denied, 498 U.S. 942 (1990). Once the defendant has presented such evidence, the burden shifts to the Government to prove that the defendant was predisposed to commit

² A secret warrant is one in which the arresting officers are not informed of the individual named in the warrant until the last minute.

³ Alexander told Mack that a mutual friend had told him that Mack was "okay and sometime I might need some help from him and he could help me."

the offense. Id. Mack argues that the Government failed to prove his predisposition.

We will uphold Mack's conviction if, viewing the evidence in the light most favorable to the Government, we determine that a reasonable jury could have found beyond a reasonable doubt that Mack was predisposed to commit the crime. See Jacobson v. United States, 112 S.Ct. 1535, 1543 (1992); United States v. Arditti, 955 F.2d 331, 342-43 (5th Cir. 1992), cert. denied, 113 S.Ct. 597 (1992).

We note that a jury may find predisposition based on evidence of a lack of resistance as well as enthusiasm, eagerness, and energetic participation. Arditti, 955 F.2d at 343. In this case, although Alexander suggested the illegal scheme, Mack acquiesced immediately. Within twenty-four hours of their first meeting, Mack provided Alexander with requested information about the police department, and accepted \$200 in return. Given such evidence of Mack's unhesitating willingness to accept the pay-off from Alexander, we find that a reasonable jury could have found beyond a reasonable doubt that Mack was predisposed to commit the crime.

The Indictment

Mack argues that a variance exists between the indictment and the evidence at trial. The indictment charged that Mack had accepted cash pay-offs from Alexander "to allow Alexander to operate a cocaine distribution business in the Indianola, Mississippi area," and Mack contends that insufficient evidence was presented that he knew the pay-offs he received furthered

Alexander's cocaine distribution business.

A variance between the offense charged in the indictment and the proof introduced at trial constitutes reversible error if it affects the "substantial rights" of a defendant. United States v. Hernandez, 962 F.2d 1152, 1159 (5th Cir. 1992). The court looks to whether the indictment "notifies a defendant adequately to permit him to prepare his defense, and does not leave the defendant vulnerable to a later prosecution because of failure to define the offense with particularity." Id.

Mack does not allege that the indictment failed to give him adequate notice to prepare his defense or that it leaves him open to later prosecution because of a failure to define the offense with particularity. He is therefore not entitled to relief on this issue.

Insufficient Evidence

Mack argues that insufficient evidence exists that he acted in an "official capacity" when he accepted payments from Alexander. We will uphold Mack's conviction if a reasonable trier of fact could have found that the evidence established his guilt beyond a reasonable doubt. See United States v. Kim, 884 F.2d 189, 192 (5th Cir. 1989).

Mack agreed to investigate whether any secret warrants against Alexander existed, and to be Alexander's "eyes and ears" within the Indianola police department, acts that are certainly within the scope of his official functions as a police officer. We find that a reasonable jury could have concluded that Mack acted in an

official capacity when he accepted the pay-offs.

Acceptance of Responsibility

Mack argues that the district court erred by denying him a two-level reduction in offense level for acceptance of responsibility. Specifically, he contends that the court denied the reduction because he had expressed his intent to appeal his conviction, and that he should not be denied the reduction in retaliation for exercising his constitutional and statutory rights of appeal.

In reviewing the district court's decision, we note that "[w]hether a defendant has accepted responsibility is a factual determination 'entitled to great deference on review.' This deference is even greater than that accorded under a clearly erroneous standard." United States v. McDonald, 964 F.2d 390, 391 (5th Cir. 1992) (quoting United States v. Fabregat, 902 F.2d 331, 334 (5th Cir. 1990)).

When the court determined that Mack was not entitled to a two-level reduction for acceptance of responsibility, it specifically stated that Mack's constitutional right to a trial and an appeal did not weigh in the court's decision.⁴ The court relied on the Presentence Report, which stated that although Mack admitted he had taken the money from Alexander, he claimed not to have known that his acts were illegal, and continually maintained that he had been entrapped. The court concluded that under the Sentencing

⁴ The court stated "[t]he court recognizes the defendant's absolute constitutional right to maintain his innocence and to perfect his appeal, that does not weigh in this court's judgment."

Guidelines, Mack was not entitled to the two-level reduction.

We find no error in the court's decision. This court recognizes that a defendant contesting his factual guilt may encounter difficulty in showing his acceptance of responsibility. United States v. Stephenson, 887 F.2d 57, 62 (5th Cir. 1989), cert. denied, 493 U.S. 1086 (1990). Based on our extremely deferential standard of review, and our review of the record, we conclude that the district court was entitled to conclude that Mack had not accepted responsibility for his conduct.

CONCLUSION

For the foregoing reasons, we AFFIRM David Mack's conviction and sentence.