



DPS TRAINING BULLETIN

LEGAL BULLETIN NO. 169
June 1, 1992

ENTRAPMENT

Reference: Keith Jacobson
v.
United States

United States Supreme Court
60 LW 4307 (No. 90-1124)

FACTS:

In February 1984, Jacobson ordered two magazines entitled "Bare Boys I" and "Bare Boys II" from a California book store. The magazines contained photographs of nude preteen and teenage boys. The boys depicted in the magazines were not engaged in sexual activity and receipt of the magazines was legal under both Federal and Nebraska (where Jacobson was living) laws. Within three months of the time Jacobson received the magazines, Congress passed the Child Protection Act of 1984, which criminalized the knowing receipt through the mails of a "visual depiction [that] involves the use of a minor engaging in sexually explicit conduct..."

In the very month that this provision became law, postal inspectors found Jacobson's name on the California bookstore's mailing list. Over the next two and one-half years, repeated efforts were made by two government agencies--postal and customs--through five fictitious organizations and a bogus pen pal, to explore Jacobson's willingness to break the law by ordering sexually explicit photographs of children through the mail. Although Jacobson had responded to surveys and letters during this time period, the government had no evidence that he had ever intentionally possessed or been exposed to child pornography. Some of the correspondence sent to Jacobson by the government described itself as "an organization founded to protect and promote sexual freedom and freedom of choice." It went on to say, "the most appropriate means to accomplish its objectives is to promote honest dialogue among concerned individuals and to continue its lobbying efforts with State Legislators." The lobbying efforts were to be financed through catalog sales.

Jacobson ultimately received a catalog and ordered a magazine depicting young boys engaged in sexual activities. He was arrested after postal authorities made a controlled delivery. A search of his residence revealed no materials other than those sent by the government and the two "Bare Boys" magazines.

ISSUE:

Did the government carry its burden of proving beyond reasonable doubt that Jacobson was predisposed to break the law and hence was not entrapped?

HELD: No.

REASONING:

1. In their zeal to enforce the law, government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute.

2. Where the government has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by the government agents.

3. Jacobson was acting within the law at the time he received "Bare Boys I" and "Bare Boys II." The law was changed (in 1984 by the Federal government and in 1988 by Nebraska) after he had received the magazines.

4. The evidence that Jacobson was ready and willing to commit the offense came only after the government had devoted two and one-half years to convincing him that he had or should have the right to engage in the very behavior proscribed by law.

NOTES:

There is nothing in this opinion which suggests you cannot provide the opportunity for a suspect to commit a crime. The following Alaska cases (no Legal Bulletins) have addressed the defense of entrapment:

Pascu v. State, 577 P2d 1064--the Alaska Supreme Court ruled in a drug case that Pascu had been entrapped by a police informant; "...officials cannot implant in the mind of an innocent person the disposition to commit alleged offense and induce its commission in order that they may prosecute."

Vaden v. State, 768 P2d 1102--this case involves a sting operation with a hunting guide; "...an agent posed as a hunter and complied with the guide's suggestions that the agent take various types of game illegally."

Before carrying out any sting operations involving sale of drugs or liquor store sales of alcohol to minors, etc., contact the local prosecutor for advice regarding possible entrapment defense.

NOTE TO SUBSCRIBERS TO THE ALASKA LEGAL BRIEFS MANUAL:

Add this case to Section Q, "Miscellaneous Cases of Interest," of your Contents and Text. File Legal Bulletin No. 169 numerically under Section R of the manual.