7-22-2019

State v. Jackson Appellant's Reply Brief Dckt. 46146

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. CHAVIS W. JACKSON, Defendant-Appellant,	S.Ct. No. 46146-2018 Kootenai Co. CR-2017-16226

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE RICHARD S. CHRISTENSEN,
Presiding Judge

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A. *State v. Barton does not control this case.*

Chavis argued that he could assert an entrapment defense, even though he testified that he was not guilty of the charge, as defendant need not concede that he or she committed the crime to be entitled to an entrapment instruction. *Mathews v. United States*, 485 U.S. 58, 66 (1988).

1. This Court's cases

The state argues that *State v. Barton*, 154 Idaho 289, 292 (2013), holds that "the entrapment defense in not available to a defendant that has never admitted to committing any of the underlying offenses," and controls this case. That is not so. While *Barton* states that "[t]he precedent in Idaho is clear" on this point (*id.*), it cites only to *Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397 (2003), for that assertion. In *Suits*, however, the statement that Dr. Suits was not in a position to assert an entrapment defense, due to his "defense that the criminal offense did not happen" is *dicta* because the issue was resolved on a different ground. The holding in the case is that Dr. Suits did not present sufficient evidence to justify the giving of an entrapment defense. This Court wrote: "We refuse to set aside the Board's decision because the evidence presented to the Board does not support the entrapment defense nor does it show spoliation of evidence." 138 Idaho at 400. In support of its holding, the Court noted that "Dr. Suits was given the opportunity to present evidence in support of his entrapment claim, but the jury in the criminal trial rejected the entrapment defense and the tribunals in the disciplinary

proceedings have found that the facts do not support the defense. This Court is required to defer to the Board's findings unless those findings are clearly erroneous." 138 Idaho at 400 n.2.[1]

Additional evidence that the *Suits* Court's per se bar language is dicta is found in the Court's citation to authority for that proposition: "*See State v. Mata*, 106 Idaho 184, 185-186, 677 P.2d 497, 498-499 (Ct. App. 1984) (recognizing that entrapment defense necessarily implies that defendant admits to engaging in the criminal acts)." 138 Idaho at 400. Three things stand out from that. First is that *Mata* is a Court of Appeals' opinion, not a holding of this Court. Plainly, this Court gives serious consideration to the opinions of the Court of Appeals, but is not bound by the rulings of that Court.

Second, the *Suits* Court uses the qualifier "See," which acknowledges that the authority is not on point but is supportive only when an inferential step is taken from the holding itself. The Bluebook: A Uniform System of Citation Rule 1.2(a) (18th Ed. 2005). Thus, this Court acknowledged that the Court of Appeals' opinion in *Mata* did not clearly hold that entrapment is not available to a defendant who denies committing the offense.

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[1] If the district court presiding over the criminal case gave an entrapment instruction, it must have concluded the defense was available to Suits. And if the jury rejected the entrapment defense at trial, this Court could have resolved the issue in the disciplinary proceedings on the basis of res judicata, without reaching the issue of whether entrapment was even available. However, based upon the discussion in a later case, it appears that this Court may be mistaken over whether the district court gave an entrapment instruction. The Court of Appeals in *Suits v. State*, 143 Idaho 160, 165 (Ct. App. 2006), held that Suits's trial counsel was not ineffective for failing to request an entrapment instruction. *Suits v. State*, will be discussed in greater detail below.

Third, as explained below, an examination of *Mata* shows that it is not even supportive authority for the proposition for which *Suits* cited it.

2. The Court of Appeals' cases

In *Mata*, the defendant admitted to making at least two deliveries of heroin to a police informant. The trial court gave an entrapment instruction but the defendant was convicted anyway. On appeal, he challenged the jury's determination of that issue. The entrapment instruction given to the jury was not challenged on appeal, nor was it even made part of the record. The Court of Appeals thus "presume[d] that the jury applied proper instructions to the evidence when it convicted Mata and rejected his entrapment defense." 106 Idaho at 187. It then found the jury verdict was supported by substantial, competent evidence, writing that:

> The verdict of a properly instructed jury will not be overturned if it is supported by substantial, competent evidence. The jury is entitled to draw all justifiable inferences from the evidence. *E.g.*, *State v. Greensweig*, 103 Idaho 50, 644 P.2d 372 (Ct.App.1982). Here, if the subjective approach to entrapment were applied, we believe the record contains substantial evidence upon which the jury justifiably could infer that Mata had been predisposed to engage in heroin transactions when given the opportunity to do so. Conversely, if the objective standard were applied, we believe the conduct of the government's agents would not have induced an average person, not already predisposed to engage in heroin transactions, to commit the offense charged here. There has been no showing of oppressive or coercive government conduct which might, under either the subjective or objective test, preclude a conviction. *Cf., e.g.*, *United States v. McClure*, 546 F.2d 670 (5th Cir.1977) (reversing conviction upon showing of intimidation). Accordingly, we conclude that Mata's conviction will not be set aside upon the ground of entrapment.

106 Idaho at 187.

As is manifest, the Court of Appeals' holding in *Mata* provides no support for

the proposition that the entrapment defense is not available to a defendant that does not admit committing the underlying offenses. That question was not presented, not even tangentially. Thus, in fact, neither the dicta in *Suits* nor the holding in *Mata* are clear precedent for the proposition cited in *Barton*.

In addition, *Mata* is distinguishable on its facts and its language was at best dicta. As noted, *Mata* involved a defendant accused of selling heroin. At trial Mata raised an entrapment defense and the jury was instructed on this defense. Trial testimony revealed that Mata was a heroin addict who had used drugs in the presence of the undercover agent. The undercover agent went to Mata's home and asked him to help him buy some heroin. Mata agreed and went with the agent. Mata gave the agent's money to one individual and then drove with the agent to another location where Mata obtained the drugs and gave them to the agent. Evidence was presented that Mata also helped the agent buy drugs on other occasions. *Mata*, 106 Idaho at 186-187. Mata testified on his own behalf.[2]

On appeal, the issue before the court was whether Idaho law applies an objective, subjective, or hybrid test of entrapment. The issue at hand was whether the defense of entrapment was a question for the court or for the jury. Deciding that the Idaho Supreme Court had not yet addressed the issue in a majority opinion, it went on to discuss the standard for each test. The Court of Appeals concluded, without deciding what the correct application in Idaho should be, that it would apply

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[2] The content of Mata's trial testimony is not discussed by the court, thus it is not clear whether Mata admitted any elements of the offense charged.

the subjective test to the case at hand because in previous cases the Supreme Court had discussed the question of entrapment as a question for the jury. *Id.* at 186. The court noted that an objective test would yield the same result. *Ibid.*

Nowhere in *Mata* does the Court of Appeals discuss whether a defendant raising an entrapment defense must admit to all the elements of the offense charged. The court's discussion about objective vs. subjective approaches to entrapment was addressed solely on the question of whether entrapment is to be resolved by the jury or the judge, and not whether a defendant must admit the elements of the offense in order to raise the defense.

A second issue raised on appeal by Mata was whether the court improperly limited the presentation of defense evidence when the court prohibited Mata's wife from testifying. Apparently believing that the wife's testimony might lead to an alibi defense, the trial court precluded her testimony. *Id.* at 188. In finding the trial court erred in excluding this testimony, the court nevertheless found no prejudice because there was no offer of proof as to what alibi testimony would have been given and because the alibi theory would have been inconsistent with the entrapment defense, and therefore the error was harmless. *Ibid.*

An alibi defense *is* inconsistent with entrapment because the defendant denies even being at the scene of the crime; if a defendant is not present to commit the offense, he cannot also be entrapped into committing it. In contrast, there is no reason why a defendant who admits being at the scene and committing certain acts may nevertheless also deny that he was aware of the nature of the controlled

substance or that he possessed the requisite intent should be deemed ineligible to present an entrapment defense.

In fact, the Court of Appeals has recognized that there was no binding precedent to support *Suits v. Idaho Bd.* at the time that case was decided. In the appeal from the denial of Suits's post-conviction petition, the Court of Appeals noted that, at the time of Suits's trial, "Idaho courts ha[d] not explicitly held whether this state permits a defendant to deny some or all of the elements of an offense while still claiming entrapment." *Suits v. State*, 143 Idaho 160, 163 (Ct. App. 2006). As *Mata* was decided in 1984, and Suits was not even arrested until December 31, 1998, it necessarily follows that the Court of Appeals did not consider *Mata* to stand for the proposition it was cited in *Suits v. Idaho Bd.* Otherwise, it would have stated that the rule against inconsistent defense was established at the time of the trial. *Suits v. State*, 143 Idaho at 163.

Further, the Court of Appeals did not even consider this Court's dicta in *Suits* to be the holding of the Court. Instead, it wrote, "[w]e are *constrained* to follow the Supreme Court's *indication* in *Suits* that Idaho follows the rule prohibiting inconsistent defenses." *Suits v. State*, 143 Idaho at 164 (emphasis added).

Contrary to *Mata*, but not cited by this Court in *Suits v. Idaho Bd.,* is *State v. Tucker*, 97 Idaho 4 (1976), which held that an attorney may have denied his client the effective assistance of counsel by submitting the entrapment issue to the jury rather than the judge.[3]

[3] At the time of the trial in *Tucker*, the defendant had the choice of presenting the

In *Tucker*, the defendant admitted his presence at the scene of the offense, but denied that he participated in the actual drug sale. 97 Idaho at 6-7. Nevertheless, this Court did not question whether Tucker was entitled to raise an entrapment defense even though he did not admit all the elements of the offense. Thus, there was case law support for providing an entrapment instruction defense in *Suits*, which was not considered by this Court.

In addition, this Court's approved jury instruction in no way requires a full admission of all the elements necessary to establish guilt before the jury may consider the defense. Instead, ICJI 1513 states, "Even though the defendant *may* have [e.g. sold the drugs] as charged by the state, if it was the result of entrapment then you must find the defendant not guilty." (Emphasis added.) The instruction does not require the defendant admit all the elements of the offense before he is entitled to raise the defense. This instruction was approved in *State v. Henry*, 138 Idaho 364, 367 (Ct. App 2003), as an accurate statement of the law on entrapment.

The Comment to the entrapment instruction notes that the instruction "should be given only if the defendant has produced 'some substantial evidence' supporting the defense of entrapment." *ICJI 1513, Comment.* Thus, to be entitled to an entrapment instruction there need only be a reasonable view of the evidence presented that would support the theory of entrapment. See, e.g., *State v. Canelo*, 129 Idaho 386, 392 (Ct. App. 1996) (to prevail on appeal where an entrapment was

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entrapment issue to either a judge or a jury. That issue is not relevant here, as entrapment under the current law is a jury issue.

denied, the defendant need only demonstrate that a reasonable view of the evidence presented would support the theory of entrapment instruction).

That a defendant is not required to admit all the elements of the offense charged before being entitled to an entrapment instruction is evident in *State v. Henry*, *supra*. There, the defendant, an attorney, was charged with trafficking methamphetamine after a client of Henry's told the police that he had used cocaine and methamphetamine to pay for Henry's legal services. The police recruited the client to carry out an undercover drug investigation after the client had been arrested on drug charges.

Per police instructions, the client placed a recorded telephone call to Henry, indicating that he wanted to make some payment to Henry for his legal services before leaving town. Henry agreed to meet the client later that night. An undercover agent accompanied the client to meet Henry. Henry approached the client's car and after some discussion asked, "Do you have anything for me?" The undercover agent gave Henry a clear plastic package containing a white powdery substance. Police officers arrested Henry as he drove away.

At trial, evidence was presented that Henry received methamphetamine as a form of payment for his legal fees. Henry claimed that he did not know the nature of the substance he received from the undercover agent, and if anything, he believed it was cocaine not methamphetamine. An entrapment instruction was given to the jury.

On appeal Henry objected to the pattern entrapment jury instruction (ICJI

1513) that was given to the jury. The Court of Appeal held that the jury instruction correctly stated the law and upheld the jury's verdict. Nowhere in the *Henry* decision does the court conclude, or even imply, that the entrapment instruction should not have been given because Henry denied knowledge of the nature of the illegal substance.

3. Summary

The state is incorrect in its assertion that *Barton* controls this case. *Barton* relies upon dicta from *Suits v. Idaho Bd. Of Prof'l Discipline,* which, in turn, relies upon, at most, dicta from *State v. Mata*. Moreover, in *Mata*, the alternative defense was alibi, which was entirely inconsistent with an entrapment defense, unlike in *Suits v. Idaho Bd.* or *Barton*. The Court of Appeals itself acknowledged *Mata* did not establish a bar on inconsistent defense in *Suits v. State*. At the same time, *Suits v. Idaho Bd.* does not cite to or discuss this Court's decision in *State v. Tucker* or the Court of Appeals' decision in *State v. Henry*, cases where entrapment instructions were given even though inconsistent defenses were put forth. Nor does *Suits v. Idaho Bd.* recognize the Court's own pattern jury instruction on entrapment acknowledges there may be cases where the defendant has not committed the offense but may still assert entrapment.

B. *This Court should now adopt the* Mathews *rule.*

The United States Supreme Court held in *Mathews v. United States*, "that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a

reasonable jury could find entrapment." 485 U.S. at 62. It determined that was the best rule to apply because it was in line with the "general proposition [that] a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. at 63, *citing Stevenson v. United States*, 162 U. S. 313 (1896); and 4 C. Torcia, Wharton's Criminal Procedure § 538, p. 11 (12th ed. 1976). It noted that a parallel rule had been applied in the context of a lesser included offense instruction. *Id.*

While *Mata* discussed the two justifications for the entrapment defense, that discussion does not support the *Suits* dicta because Mata indicated that Idaho cases tended to follow the subjective justification.[4] And, that was the situation in *Mathews*. As the Court wrote,

> Suffice it to say that the Court has consistently adhered to the view . . . that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. Predisposition, "the principal element in the defense of entrapment," focuses upon whether the defendant was an "unwary innocent" or instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. The question of entrapment is generally one for the jury, rather than for the court.

Mathews v. United States, 485 U.S. 62-63 (internal citations omitted).

Finally, a rule denying the presentation of inconsistent defenses denies a

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[4] The subjective justification is based upon "the principle that where criminal intent is an element of an offense, such intent must originate in the defendant's mind," not placed there by the government. The objective justification is meant "to discourage official lawlessness in the name of law enforcement." The first focuses on the defendant's subjective state of mind, the second on the objective actions of the government. *State v. Mata*, 106 Idaho at 186. The Court of Appeals noted that its holding would be the same regardless of which justification the jury was instructed upon. *Id.*

defendant his right to present his defense to the jury. See, *Chambers v. Mississippi*, 410 U.S. 284, 3012 (1973) (right to present witnesses). The United States Supreme Court has reaffirmed this basic constitutional right in *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006), which rejected a rule which limited a defendant's right to present evidence that a third party committed the offense. The requirement that a defendant fully admit his guilt in order to be able to present an entrapment defense is analogous to state law rule rejected in *Holmes*. Thus, *Mathews* is the better-reasoned rule and should be adopted by this Court.

C. *The trial court erred in refusing to give an entrapment instruction because there was sufficient evidence to support the instruction.*

A trial court must instruct the jury on "all matters of law necessary for their information" and must give a requested jury instruction if it determines that instruction to be correct and pertinent. I.C. § 19-2132(a). A requested instruction must be given where: (1) it properly states the governing law; (2) a reasonable view of the evidence would support the defendant's legal theory; (3) it is not addressed adequately by other jury instructions; and (4) it does not constitute an impermissible comment as to the evidence. *State v. Fetterly*, 126 Idaho 475, 476-77 (Ct. App. 1994).

The state does not contend that the first, second, and fourth *Fetterly* requirements are absent. It only argues that "the evidence at trial did not support an entrapment instruction." Respondent's Brief, pg. 10. However, that is not the case.

First, only slight evidence raising the issue of entrapment is necessary for

submission of the issue to the jury. *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003). "A defendant is entitled to have the jury instructed on every defense or theory of defense having *any support* in the evidence." *State v. Hansen*, 133 Idaho 323, 328 (Ct. App. 1999).

The state's citation to *State v. Whitlock*, 82 Idaho 540 (1960), does not aid its cause. There, the police simply approached Whitlock while he was at work, asked him to "fix him up" and Whitlock asked "What would you like?" before he provided illegal liquor to the officer. This evidence demonstrated that Whitlock was already in the business of selling illegal liquor and needed no persuasion to continue to engage in the business. Here, Chavis presented evidence that he was not predisposed to commit a crime and the idea for committing the crime came from an agent of the state and not from him. The same distinction holds true for *State v. Ingram*, 138 Idaho 768 (Ct. App. 2003), another case relied upon by the state.

As has been noted, in order to post a "women seeking men" ad on craigslist the user must click on a link with the notice: "By clicking on the link below, you confirm that you are 18 or older and understand that personals may include adult content." Exhibits, pg. 49. Thus, Chavis could reasonably believe the person he was chatting with was over eighteen even though she claimed to be younger. A reasonable juror could conclude, as Chavis did, that an adult was pretending to be younger. Role playing is, of course, common in such chat rooms.

Further, during the discussions with "Haley" he made it clear that he was only interested in someone over the age of consent. Chavis wrote: "Just to be clear

this is just to hang out. I am not promising anything sexual. I'm pretty sure you are the age of consent but it's kinda confusing looking online while driving. I don't wanna get in trouble[.]" In response to this, the Agent aggressively encouraged Chavis to overcome his qualms. "Natalie" responded: "wtf Tim!!! that's not what I said! I don't want to just hang outs if I wanted to hang out I wud have gone with my sister lol" and "lol seriously don't want to jus hang out.sorry.we only hav a couple hours anyway." Exhibits, pg. 37.

Next, the state writes that Chavis "erroneously claims" that Agent Sutehall was not predisposed to commit an offense. Respondent's Brief, Pg. 14. But it is the state which is mistaken. The agent testified he "cut off the communication because it didn't meet the threshold that I was looking for. I didn't feel like there was a real threat there[.]" T pg. 252, ln. 19-23. The agent testified that Chavis was not a "real threat" because he was not predisposed to commit a crime. Otherwise he would have continued to pursue Chavis. Even the trial prosecutor had to concede opening statements that this "conversation didn't really go anywhere . . . just kind of fizzled out." T pg. 114, ln. 8-9.

In any case, the state's argument that was counter-evidence to the entrapment defense misses the point. There only has to be a reasonable view of the evidence that Chavis was entrapped. *State v. Canelo*, 129 Idaho 386, 392 (Ct. App. 1996). Undisputed evidence establishing the defense is not required in order to be entitled to an instruction. It is the jury's function to determine whether the defense has been established. And, as set forth above and in the Opening Brief, Chavis

presented that quantum of evidence at trial. Thus, the trial court erred in refusing to instruct the jury on the entrapment defense. *Fetterly, supra.*

D. *The state has not proved that the error is harmless beyond a reasonable doubt.*

"A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010). Here, the state makes no attempt to argue the error was harmless. Thus, no reply is required.

III. CONCLUSION

In light of the above, Chavis Jackson asks the Court to vacate the judgment and sentence, and remand the case for a new trial where the jury is instructed on entrapment.

Respectfully submitted this 22nd day of July, 2019.

/s/ Dennis Benjamin
Dennis Benjamin
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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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Dated and certified this 22nd day of July, 2019.

/s/Dennis Benjamin
Dennis Benjamin