

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**ROCHELLE E. BORINSTEIN**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**JOBY D. JERRELLS**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

CRAIG R. MESSER, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 29A05-0809-CR-512

---

APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Daniel J. Pfleging, Judge  
Cause No. 29D02-0510-FA-235

---

**April 7, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Craig R. Messer (“Messer”) was convicted in Hamilton Superior Court of Class A felony dealing in cocaine. He was sentenced to a term of twenty years with all but one year suspended to home monitoring. Messer appeals, arguing that the trial court erred in considering inadmissible hearsay evidence from the State’s confidential informant.

### **Facts and Procedural History**

On September 13, 2005, a confidential informant (“CI”) agreed to cooperate with the Hamilton/Boone County Drug Task Force in exchange for having a marijuana possession charge dropped. That same day, the CI arranged to purchase cocaine from Santiago Cruz (“Cruz”), a former co-worker. The CI and Cruz were unable to arrange a mutually acceptable time to complete the sale. According to the CI, Cruz suggested having Messer drop off the cocaine at a Super Target in Hamilton County. However, Messer changed the meeting place to a nearby gas station because of the presence of cameras and security at the Super Target. The CI entered Messer’s vehicle to complete the transaction. Messer told the CI, “Cash, carry, get in, get your business.” Tr. p. 106. The CI gave Messer \$250.00. Defendant told the CI that he would give the money to Cruz. Messer gave the CI a plastic bag containing approximately 4.62 grams of powder cocaine. Messer admitted that he delivered the cocaine to the CI. Tr. p. 162.

On October 26, 2005, Messer was charged with Class A felony dealing in cocaine. On July 2, 2008, following a bench trial, the trial court took the matter under advisement. On August 7, 2008, the trial court found Messer guilty as charged. On November 14, 2008, the trial court sentenced Messer to a term of twenty years, with all but one year suspended to home monitoring. Messer appeals.

## Discussion and Decision

Messer argues that the trial court erred by considering inadmissible hearsay testimony from the CI and that, without the improper testimony, the State presented insufficient evidence to rebut Messer's defense of entrapment. Indiana Code section 35-41-3-9 governs the defense of entrapment and provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

In Indiana, the defense of entrapment turns upon the defendant's state of mind, or "whether the 'criminal intent originated with the defendant.'" Scott v. State, 772 N.E.2d 473, 475 (Ind. Ct. App. 2002) (quoting Kats v. State, 559 N.E.2d 348, 353 (Ind. Ct. App. 1990), trans. denied). "In other words, the question is whether 'criminal intent [was] deliberately implanted in the mind of an innocent person[.]'" Id. (quoting United States v. Killough, 607 F.Supp. 1009, 1011 (E.D. Ark. 1985)). "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." Id. (quoting United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)).

The State may rebut this defense either by disproving police inducement or by proving the defendant's predisposition to commit the crime. Riley v. State, 711 N.E.2d 489, 494 (Ind. 1999). If a defendant indicates that he intends to rely on the defense of entrapment and establishes police inducement, the burden shifts to the State to

demonstrate the defendant's predisposition to commit the crime. Ferge v. State, 764 N.E.2d 268, 271 (Ind. Ct. App. 2002). "Whether a defendant was predisposed to commit the crime charged is a question for the trier of fact." Id. The State must prove the defendant's predisposition beyond a reasonable doubt. Id. "If the defendant shows police inducement and the State fails to show predisposition on the part of the defendant to commit the crime charged, entrapment is established as a matter of law." Id.

Messer argues that the CI arranged for Messer to pick up cocaine from Cruz, not that Cruz had Messer deliver the cocaine as testified to by the CI. By arguing that the CI had asked Messer to pick up the cocaine from Cruz, Messer attempted to establish that the criminal intent originated not in the mind of Messer but in the minds of the police.

While Messer did object to the first instance of testimony in which the CI stated that Cruz said he would give the cocaine to Messer and Messer would give the cocaine to the CI, Messer failed to object to the CI's testimony that he had made the deal with Cruz and that it was Cruz's idea to have Messer deliver the cocaine. Tr. pp. 100, 105. This uncontested testimony supports the State's theory that neither the CI nor any other State actor implanted the criminal intent to deliver the cocaine in Messer and contradicts Messer's defense that the CI sought him out and requested that he pick up and deliver the cocaine.

Messer failed to establish that police induced him to act as he did. The testimony presented at trial is sufficient to rebut Messer's claim of entrapment.

Affirmed.

BAILEY, J., and BARNES, J., concur.