

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0660**

State of Minnesota,
Respondent,

vs.

Rex Allen Wood,
Appellant.

**Filed December 9, 2008
Affirmed
Worke, Judge**

St. Louis County District Court
File No. 69DU-CR-06-7104

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Melanie S. Ford, St. Louis County Attorney, James T. Nephew, Assistant County Attorney, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802 (for respondent)

Matthew K. Begeske, Begeske Law Offices, 713 Board of Trade Building, 301 West First Street, Duluth, MN 55802 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Worke, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WORKE, Judge

On appeal following a *Lothenbach* proceeding, appellant argues that the district court erred in denying his motion to dismiss because the actions of police in a reverse sting operation violated his due-process rights based on the four-factor test in *People v. Isaacson*, 378 N.E.2d 78 (N.Y. 1978). We affirm.

DECISION

Appellant Rex Allen Wood argues that the police department's use of a reverse sting operation violated his due-process rights. The "due-process" defense is a matter for the district court to decide as a matter of law. *State v. Ford*, 276 N.W.2d 178, 182 (Minn. 1979). This court is not bound by and need not give deference to a district court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

The Duluth Police Department conducted an undercover operation involving the sale of 14 grams of methamphetamine to appellant by an undercover informant. The informant, who had sold methamphetamine to appellant in the past, notified appellant that he had a large amount of methamphetamine in his possession. The informant called appellant to arrange to meet at a motel. Appellant and the informant agreed that appellant would pay \$450 up-front, with an additional \$500 payable once appellant resold the drugs. Appellant was arrested as he was leaving the motel room, and was charged with two counts of controlled substance crime. The district court denied appellant's motion to dismiss, finding that appellant's due-process rights had not been violated. The parties

submitted the matter to the court pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), and the district court found appellant guilty.

The concept of fundamental fairness inherent in the guarantee of due process prevents the state from obtaining a conviction in cases when police involvement in instigating or participating in the commission of a crime reaches a demonstrable level of outrageousness. *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643 (1973); *State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978). The “due process” defense focuses on police conduct. *See State v. James*, 484 N.W.2d 799, 801 (Minn. App. 1992), *review denied* (Minn. June 30, 1992). Minnesota courts recognize the due-process defense, primarily in the criminal arenas of prostitution and drugs. *See, e.g., Morris*, 272 N.W.2d at 35-36 (holding conduct of undercover officer in exposing himself at request of suspected prostitute to show he was not a police officer was not sufficiently outrageous to violate due process and the court upheld defendant’s conviction for engaging in prostitution). Police “over involvement” is difficult to show in narcotics and other contraband prosecutions. *Hampton v. United States*, 425 U.S. 484, 495 n.7, 96 S. Ct. 1646, 1653 n.7 (1976). Mere involvement by the police in ongoing criminal matters does not rise to the level of manufacturing a crime. *See James*, 484 N.W.2d at 802 (conducting a “reverse sting” in front of a known “crack” house in a neighborhood replete with drug-trafficking was not manufacturing a crime when undercover officer waited to be approached by defendant for drug sale).

When a defendant raises a due-process defense on appeal relating to a drug crime, this court applies the four-factor test in *Isacson*, 378 N.E.2d at 83. *Id.* The four-factor test involves an inquiry into:

(1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity[;] (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice[;] (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness[;] [and] (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

Id. In *James*, this court applied the *Isacson* test and upheld a conviction obtained through a "reverse sting" operation in which an undercover officer stood in front of a house known for heavy drug trafficking and sold drugs. *Id.* at 800, 803.

Manufactured Crime or Ongoing Criminal Activity

Appellant argues that the police department manufactured every aspect of this crime: the location, providing the contraband, having the informant initiate contact with appellant, and determining the severity of the crime by providing more methamphetamine than appellant paid for. The district court found that the police merely inserted themselves into ongoing criminal activity, and they did not manufacture the crime. While it is true that the police department selected the location of the transaction, provided the methamphetamine, and had the informant initiate contact with appellant, the police conduct in this case and the informant's phone calls did not amount to manufacturing a crime. Appellant had purchased methamphetamine from the informant

in the past. Appellant merely repeated that behavior by going to the motel on his own volition and negotiating with the informant. Appellant's argument that the police determined the severity level of the crime by providing more methamphetamine than appellant paid for fails because appellant negotiated the deal with the informant at the motel. It is true that the informant arranged the buy, but that is typical of undercover-drug operations. The police department did not manufacture a crime that otherwise would not have occurred.

Conduct Repugnant to a Sense of Justice

Appellant next argues that the police department's conduct was repugnant to a sense of justice because the crime was manufactured in a city and location that was not known for drug activity, which put other motel guests at risk. The reverse sting operation in *James* was much more dangerous to the public because the transactions were conducted on the street. *Id.* at 800. The transaction here occurred in a motel room that was wired to record both audio and video. There was only one way in and out of the room, which was monitored by officers. There is nothing in the record to show that the operation presented a danger that the money or drugs would be used to harm the public. In *Isaacson*, the court determined that this factor weighed in favor of a reversal because the police physically harmed the informant until he agreed to arrange a drug sale and threatened him falsely with long prison sentences; however, there is no evidence of any similar conduct here. *See Isaacson*, 378 N.E.2d at 84. We agree with the district court's finding that the tactics used by the police in this case do not rise to a level of conduct that is repugnant to a sense of justice.

Reluctance to Commit the Crime Overcome by Government Conduct

Appellant argues that the informant overcame his reluctance to commit the crime by persistent solicitations, in the form of repeated phone calls, regarding the methamphetamine. The district court correctly found that there is no evidence to support this claim—there is nothing to show that appellant was either reluctant to purchase the methamphetamine or persuaded to do so by having his will overborne by the informant. Appellant negotiated the sale and payment terms and then willingly met the informant at the motel and paid the informant \$450 in exchange for the drugs.

Desire to Obtain Convictions or to Prevent Future Crime and Protect the Public

Finally, appellant argues that the police department was motivated by the desire to obtain a conviction rather than a desire to prevent further crime or to protect the community. There is nothing in the record to indicate an “overriding police desire for a conviction of any individual.” *See James*, 484 N.W.2d at 802-03 (stating purpose of the operation was to reduce drug trafficking and upholding the conviction of a purchaser of a small amount of drugs for personal use); *cf. Isaacson*, 378 N.E.2d at 84 (stating police desire for a conviction apparent when informant and police repeatedly requested that the defendant bring a large quantity of drugs and arranged for the sale to occur in an unmarked area so the defendant believed he was not in New York). The record shows that the police were merely motivated to stop appellant from engaging in illegal drug activity.

Affirmed.