People v. Almeda et al.

(2018) 19 Cal.App.5th 346

Issue

Was a jailhouse informant functioning as a police agent when he elicited incriminating statements from a murder suspect?

Facts

Almeda and Villa were traveling in Sacramento County when they saw Alex Chavez driving a car in front of them. Because they thought that Chavez had been planning to conduct a drive-by shooting of Almeda's house, they decided to conduct a preemptive drive-by and kill Chavez. So they pulled up alongside his car and opened fire. Chavez was killed. Riding with him was his girlfriend Jacqueline Jones who was not injured and who immediately identified Almeda and Villa as the shooters. Both Almeda and Villa were arrested, charged with murder, and held in the Sacramento County Jail.

Over the next few weeks, Villa and his cellmate Jerry Rhodes had many conversations in which Villa freely talked about the murder and even provided a diagram of the crime scene. Seeing this as an opportunity to get a reduced sentence for his pending armed robbery charge, Rhodes notified sheriff's deputies that he had "some information" about Villa's case. This resulted in a meeting between Rhodes and a prosecutor, and this resulted in a plea agreement with Rhodes's attorney whereby Rhodes would testify against Villa and would receive a reduced sentence in return if he testified "truthfully and cooperated fully." At one point in the discussions, Rhodes asked the prosecutor if there was anything she wanted him to ask Villa and she made it clear to him that, apart from engaging in small talk, he was simply to listen and remember everything he said about the murder. Rhodes thereafter obtained additional incriminating statements from Villa.

Before trial, Villa argued that his statements to Rhodes should be suppressed because Rhodes had been functioning as a police agent and, therefore, he violated Villa's Sixth Amendment rights by deliberately eliciting incriminating information from him about the murder. The motion was denied, both Villa and Almeda were found guilty and sentenced to life without parole.

Discussion

In the landmark case of *Massiah v. United States*,[1] the Supreme Court ruled it is a violation of a defendant's the Sixth Amendment right to counsel if officers or prosecutors requested or even encouraged any of his friends, relatives, or anyone else to surreptitiously elicit incriminating information from him about the crime with which he was charged. Thus, in *In re Neely*, the California Supreme Court explained that a *Massiah* violation results "where a fellow inmate, acting pursuant to a prearrangement with the government, stimulates conversation with a defendant relating to the charged offense or actively engages the defendant in such conversation."[2]

[1] (1964) 377 U.S. 201.
[2] (1993) 6 Cal.4th 901, 915.

In *Almeda*, it was disputed whether Rhodes had deliberately elicited information from Villa. But because a *Massiah* violation cannot occur unless the defendant was questioned by a "police agent," the court resolved the matter by determining that Rhodes was not a police agent.

In most cases, a person will be deemed a police agent if any of the following circumstances existed:

Express requests or encouragement: A person will necessarily become a police agent if officers instructed, directed, or encouraged him to seek incriminating information from the defendant.[3]

Express promises: An agency relationship will also result if officers promised the informant something of value in return if he obtained incriminating information from a defendant; e.g., a reduced sentence.[4]

Implied promises: Because a promise can be implied as well as express, an informant may be deemed a police agent if the officers' words were reasonably interpreted as one.[5] However, as the Second Circuit recently observed, "A court will not readily imply an improper promise or misrepresentation from vague or ambiguous statements by law enforcement officers."[6]

Providing an incentive: An informant will likely be deemed a police informant if officers said something that made it reasonably likely he would attempt to obtain incriminating information from the suspect.[7] In other words, "[T]he critical inquiry is

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[3] See *United States v. Henry* (1980) 447 U.S. 264, 271-72 ["The arrangement between [the informant] and the agent was on a contingent-fee basis; [the informant] was to be paid only if he produced useful information."]; *In re Neely* (1993) 6 Cal.4th 901, 915 [informant may be a police agent as the result of police "encouragement, or guidance"]; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247 ["Specific direction from government agents ... can establish an implicit agreement."]. Compare *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 ["[N]o one ever made [the informant] any promise of benefit or leniency in return for his testimony."]; *People v. Martin* (2002) 98 Cal.App.4th 408, 420 [no evidence of "preexisting agreement"]; *People v. Moore* (1985) 166 Cal.App.3d 540, 547 ["There is no evidence ... that White was acting pursuant to instructions from the police"].

[4] See *In re Neely* (1993) 6 Cal.4th 901, 915 [informant may be a police agent as the result of police "promises"]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241 [an informant will be a police agent if officers gave him "direct motivation" to provide information]. Compare *People v. Howard* (1988) 44 Cal.3d 375, 401 ["[A]lthough [the informant] may have gotten the [prison] placement he desired, he had not been promised any quid pro quo in return for evidence"].

[5] See *In re Neely* (1993) 6 C4 901, 917-18 [promise of lenience implied when officer told the informant that he "could be charged with anything from first degree murder to a parking ticket, depending upon the degree of Centers's cooperation with the authorities"]. Compare *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249-50 [informant was not a police agent merely because officers and a prosecutor later testified in his behalf at the penalty phase of his capital trial]; *People v. Williams* (1997) 16 Cal.4th 153, 204 [agency relationship not established merely because the informant "subsequently received what appears to have been favorable treatment as to various penalties"]; *People v. Martin* (2002) 98 Cal.App.4th 408, 420 [no evidence of "preexisting agreement"].

[6] *U.S. v. Haak* (2nd Cir. 2018) __ F.3d __ [2018 WL 1177238].

[7] See *People v. Memro* (1995) 11 Cal.4th 786, 828 [informant was promised safe housing "after he obtained defendant's statements"].

whether the state has created a situation likely to provide it with incriminating statements from an accused."[8]

In *Almeda*, it was apparent that none of these things happened. Of particular importance, there were no direct or implied requests or encouragement because neither the sheriff's deputy nor the prosecutor said anything that could be interpreted as such. In fact, when Rhodes asked the prosecutor if there was something she wanted him to ask Villa, she responded "no" and added "Don't try and pry. If he tells you something that's fine but I don't want to get you in a situation where you have any issues with him." Although it was true that Rhodes had entered into a plea agreement with the prosecutor in return for his cooperation, the court ruled this did not render him a police agent because the prosecutor did not imply that the sentence reduction was contingent on Rhodes obtaining incriminating information. As the court pointed out, "The plea agreement did not direct Rhodes to do anything regarding his contacts with Villa."[9]

Consequently, the court ruled that, even if Rhodes had deliberately elicited incriminating statements from Villa, there was no *Massiah* violation because neither the prosecutor nor the sheriff's deputy said anything that would have rendered Rhodes a police agent.

Comment

What instructions should informants and other civilians be given to help make sure that they do not inadvertently become a police agent in these situations? The most important thing is to tell them exactly what they can and cannot do and say. It is not sufficient to merely tell him not to "interrogate" or "question" the suspect; or not to initiate a conversation about the charged crime; or to "be yourself" or "act naturally."[10] Instead, officers should explain that his role is that of a listening post—an "ear"—and that he may do nothing to stimulate a conversation about the charged crime.[11] It would, of course, be unrealistic to expect an agent to say absolutely nothing while the suspect is

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[8] *People v. Whitt* (1984) 36 Cal.3d 724, 742. Also see *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241 [an informant will be a police agent if officers gave him "direct motivation" to provide information]; *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, 1139 ["it is not the government's intent or overt acts that are important; rather, it is the likely result of the government's acts"].

[9] Also see *People v. Williams* (1997) 16 Cal.4th 153, 204 [agency relationship not established merely because the informant "subsequently received what appears to have been favorable treatment as to various penalties"]; *People v. Howard* (1988) 44 Cal.3d 375, 401 ["[A]lthough [the informant] may have gotten the [prison] placement he desired, he had not been promised any quid pro quo in return for evidence"].

[10] See *Maine v. Moulton* (1985) 474 U.S. 159, 177, fn.14 [insufficient that officers told the informant to "be himself," "act normal," and "not interrogate" the defendant]; *P v. Whitt* (1984) 36 Cal.3d 724, 742 ["[The state] may not disclaim responsibility for this information by the simple device of telling an informant to 'listen but don't ask.'"].

[11] See *U.S. v. Lentz* (4th Cir. 2008) 524 F.3d 501, 517-18 ["they instructed [the informant] that he should be only a 'listening post.' In other words, [the informant] was told that he should not directly solicit any information from Lentz or ask questions about Lentz's case. Yet, if Lentz wishes to speak about his came without prompting from [the informant], [the informant] certainly was free to listen. And [the informant] could report that information back to the government, but he was not instructed that he was under an obligation to do so. The instruction to be a listening post was repeated two or three times to ensure that [the informant] understood.

talking. (It would also be highly suspicious.) Still, agents should be instructed to keep their comments to a minimum, and to limit them to meaningless conversation fillers and acknowledgments of understanding or agreement; e.g., Yeah, OK, Sure, I hear you, Say that again.[12] POV

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[12] See *Kuhlmann v. Wilson* (1986) 477 US 436, 460 [informant merely told the defendant that his story "didn't sound too good"]; *US v. York* (7C 1991) 933 F3 1343 [informant did not deliberately elicit when he observed, "[Y]ou must have been pretty mad at the bitch."]; *U.S. v. Lentz* (4th Cir. 2008) 524 F.3d 501, 517-18 [the FBI agent told the informant "that he could 'personalize' the conversation. In other words, he could talk with Lentz about 'subjects of common interest'—e.g., family, children, or the difficulties of being locked-up—but he could not engage Lentz in any conversations about his case."].