Failure to Request a Jury Instruction on Informants

Author : Jeff Welty

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I was catching up on the Fourth Circuit's recent opinions this weekend when I came across United States v. Luck. It raises some interesting issues that are not specific to federal court, so I thought I'd put together a post about it.

The defendant in *Luck* was charged with drug and gun crimes. The government's evidence came primarily from two informants: one was working off charges, while the other was working to help the first, and for money. Although one of the informants made two supervised drug purchases from the defendant, she was not searched thoroughly prior to the purchases. There was virtually no other corroboration of the informants' testimony. Nonetheless, the defendant was convicted and sentenced to 444 months in prison.

The case was affirmed on direct appeal. The defendant then sought collateral review, arguing in pertinent part that his trial lawyer was ineffective for failing to request a jury instruction on informant testimony, i.e., an instruction that informants' testimony "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness" because of their particular interests and biases. The federal district court denied relief on this claim, but the Fourth Circuit reversed, vacating the defendant's convictions.

The court began by suggesting, but not actually holding, that such an instruction should be given as a matter of course in many cases: "Among the other circuits that have considered this question, there is a consensus that an informant instruction is necessary when the informant's testimony is uncorroborated by other evidence." Although the court found this consenus "persuasive," implying that judges should give such instructions sua sponte in some instances, it held only that defense counsel performed deficiently in not requesting such an instruction in the case at bar, given that counsel's strategy focused on the informants' motives and lack of credibility.

The court then discussed whether the defendant was prejudiced by counsel's failure to request the instruction. It concluded that the district court likely would have given the instruction if requested, and that even though the district court gave a general instruction on witness credibility, including bias, an informant instruction would have been "more effective[]" and would have "alert[ed] jurors to the potentially unique problems that inhere where an individual is paid to inculpate a defendant." Because the government's case depended so heavily on the informants' testimony, the court found a reasonable probability that an informant instruction would have changed the outcome of the trial. One judge dissented on this point; he would have held that even if counsel's performance was deficient, there was no prejudice because the jury was clearly aware, through defense counsel's cross-examination and closing argument, of the informants' motives.

Turning to North Carolina law, there is, of course, a pattern jury instruction for informants. N.C.P.I. Crim -- 104.30, entitled "Informer or Undercover Agent," reads as follows:

You may find from the evidence that a State's witness is interested in the outcome of this case because of the witness' activities as an [informer] [undercover agent]. If so, you should examine such testimony with care and caution in light of that interest. If, after doing so, you believe the testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

A couple of asides. First, it strikes me as odd that this instruction covers undercover officers as well as informants, given that officers generally are not considered interested witnesses. *State v. McQueen*, 181 N.C. App. 417 (2007). What makes undercover officers more interested than uniformed ones? However, by its terms, the instruction clearly does apply to undercover officers, and failure to give the instruction in a case involving an undercover officer was held to be reversible error in *State v. Black*, 34 N.C. App. 606 (1977). Second, this instruction is not as strong as the instruction discussed in *Luck*. It tells the jury only to view an informant's testimony with "care," not with "greater care than the testimony of an ordinary witness[]." That makes me wonder whether defense lawyers in some cases might reasonably request an instruction that is more robust than the pattern.

In any event, *Black* and other cases make it perfectly clear that the instruction must be given when requested and appropriate. Is failure to request the instruction when appropriate then ineffective assistance of counsel? I don't think there's a North Carolina case on point, but the reasoning of *Luck* is persuasive: in at least in some circumstances, the answer may well be yes.