COURT EXPRESSES RELUCTANCE TO APPLY DEFENSE OF ENTRAPMENT IN NARCOTICS VIOLATION CASE

State v. Good
110 Ohio App. 415, 165 N.E.2d 28 (1960)

The defendant was convicted for the crimes of possession for sale and sale of narcotics.[1] He appealed his conviction, assigning as error the refusal of the common pleas court to charge the jury on entrapment and duress. The court of appeals affirmed because there was no evidence of entrapment and even if there were, entrapment is an affirmative defense which is not available when defendant denies committing the acts charged. Furthermore, the court said that entrapment is a defense when a criminal act is committed at the sole instigation of a police informer, but where the informer merely provides an opportunity to commit a crime which is voluntarily accepted by the defendant, the defense of entrapment is not available. The court felt that the defense of entrapment should not be recognized in narcotics cases; however, it followed existing law and conceded that entrapment is a defense when the criminal act is at the sole instigation of the police.

The defendant was approached by a police informer whom he had previously known. The informer asked Good for narcotics, but he declined to give him any or disclose any source of narcotics. The informer persisted and Good twice took the informer's money on the pretext of procuring narcotics but gave the informer a harmless non-narcotic instead. Only after the informer threatened defendant with a gun did Good disclose a source of narcotics and agree to act as an intermediary in their purchase. Good did not keep either the money or narcotics for himself. The facts were in dispute as to Good's apprehension of harm from the informer and his willingness to cooperate with him.

Entrapment, generally recognized as a defense to a criminal charge, is subject to various interpretations. The federal view is that if a consideration of the police methods and the predisposition of defendant to commit the crime shows the criminal intent did not originate with the defendant, the entrapment defense will bar conviction.[2] The defense is based on statutory interpretation; the court concluding that the legislature could not have intended the criminal statute to be applied to a person unduly enticed to commit the crime.[3] Another view considers only whether the police methods used create a substantial risk that crimes will be committed by persons other than those otherwise ready to commit them. This view, which excludes consideration of the accused's state of mind, is based not on statutory interpretation but rather on the inherent powers of the court to control the

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[1] Ohio Rev. Code § 3719.20 (Supp. 1959).

[2] Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

[3] *Ibid.*

administration of justice.[4] The majority of state courts have adopted the position of the federal courts. However, they regard entrapment as a common law defense based on the public policy of discouraging police from unduly influencing persons to commit crime rather than on statutory interpretation.[5] The Ohio courts have defined entrapment in terms of the conduct of the police and the predisposition of the accused to commit the crime in accord with the majority view.[6]

The court in the principal case emphatically affirms the practice of considering the predisposition of the accused to commit the crime as well as the conduct of the police.[7] Although this is in accord with the general practice, those who believe entrapment should be concerned only with the conduct of the police object that introducing evidence of past convictions, general criminal reputation, and past criminal activities subjects the defendant to conviction because the jury may be prejudicially impressed by his criminal record.[8]

The court in the principal case held that entrapment is an affirmative defense and is not available to a defendant who denies committing the acts charged. This principle was heretofore not a part of Ohio criminal law. This view, for which there is substantial support,[9] causes entrapment to be less

[4] Sherman v. United States, *supra* note 2 (concurring opinion); Sorrells v. United States, *supra* note 2 (concurring opinion); See Model Penal Code § 2.10, American Law Institute; Williams, "The Defense of Entrapment and Related Problems in Criminal Prosecutions," 28 Ford. L. Rev. 399 (1959); Donnelly, "Judicial Control of Informers, Spies, Stool Pigeons and Agent Provocateurs," 60 Yale L. Jour. 1091 (1951). The Williams and Donnelly articles contain excellent discussions of the law of entrapment.

[5] People v. Makovsky, 3 Cal. 2d 366, 44 P.2d 536 (1935); State v. Love, 229 N.C. 99, 47 S.E.2d 712 (1948); Falden v. Commonwealth, 167 Va. 549, 189 S.E. 329 (1937).

[6] State v. Gutilla, 94 Ohio App. 469, 116 N.E.2d 209 (1952); State v. Miller, 85 Ohio App. 376, 88 N.E.2d 615 (1948); State v. Schubert, 80 Ohio App. 132, 75 N.E.2d 217 (1947); State v. Foster, 75 N.E.2d 214 (Ohio App., 1947).

[7] This is apparent from the court's use of the phrase ". . . and the tendencies of the accused clearly indicate his intention to disregard the public good . . ." in the opinion and syllabus 3.

[8] This view was expressed by Justice Frankfurter thus: "The intention referred to, therefore, must be a general intention or predisposition to commit, whenever the opportunity should arise, crimes of the kind solicited, and in proof of such a predisposition evidence has often been admitted to show the defendant's reputation, criminal activities, and prior disposition. The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged." Sherman v. United States, *supra* note 2, at 382 (concurring opinion). This same objection is the basis of the general prohibition of introducing evidence of accused's prior convictions or criminal activities. I Wigmore, Evidence § 55 (3rd Ed., 1950). However, such evidence is admissible for a variety of reasons, including proof of knowledge, intent, design, motive, or identity. II Wigmore, Evidence §§ 300-307 (3rd Ed., 1950). Ohio Rev. Code § 2945.59 (1953).

[9] The courts do not necessarily call entrapment an affirmative defense, but there

frequently available as a defense since the accused will hesitate to admit commission of the acts charged.[10]

The most striking aspect of this opinion is the court's apparent unwillingness to permit the defense of entrapment in a narcotics violation case. The facts of the case were subject to conflicting interpretation by the majority and the dissenting judges.[11] Although the majority recognized entrapment as a defense, the opinion exhibits reluctance to apply entrapment in a narcotics violation case because of the difficulty in enforcing narcotics laws.[12] Therefore the question is raised whether the necessity of enforcing narcotics laws justifies restricting the application of the defense of entrapment. To answer the question one must consider the desirability of this defense from the points of view both of the accused and the public.

The defense of entrapment permits the court to give effect to a public policy of protecting individuals from overreaching police methods. Although there is no element of criminal intent in narcotics violations, it does not seem just to subject a person to a criminal penalty who but for the police entrapment would not have committed the crime. Many feel an important aspect of the judicial function is to refuse recognition to overzealous police methods.[13]

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is substantial authority that entrapment is not available where defendant denies committing the acts charged. Rodriguez v. United States, 227 F.2d 912 (5th Cir., 1955); Eastman v. United States, 212 F.2d 320 (9th Cir., 1954); Newman v. State, 116 Fla. 98, 156 So. 237 (1934); State v. Varnon, 174 S.W.2d 146 (Mo. 1943).

[10] There is authority that entrapment is available even if defendant denies committing the acts charged. Henderson v. United States, 237 F.2d 169 (5th Cir., 1956); People v. West, 139 Cal. App. 2d Supp. 923, 293 P.2d 166 (App. Dept., Super. Ct., 1956). There is also authority for the proposition that inconsistent defenses may be permitted in a criminal case. Whittaker v. United States, 281 F.2d 631 (D.C. Cir. 1960); Love v. State, 16 Ala. App. 44, 75 So. 189 (1917); State v. Wright, 352 Mo. 66, 175 S.W.2d 866 (1943).

[11] The majority states "Evidence of entrapment . . . is completely lacking in the record of the trial in this case." The dissent, however, stated "This evidence, presented by Good with corroboration, disclosed a situation in which there was an affirmative defense of entrapment and coercion." The principal case was decided after re-argument. The first time it was argued, the two judge court split as to whether the evidence justified a defense of entrapment. State v. Good, 110 Ohio App. 397, 169 N.E.2d 468 (1959).

[12] The majority opinion quoted at length a law review article describing the difficulties of enforcement of certain types of laws such as those pertaining to sale of narcotics. The court then observes "that where the crime committed is of such harmful character and the interests of the public are so deeply endangered, the criminal act should be punishable regardless of the state of mind of the actor, and the defense of entrapment should, under such circumstances, fall of its own weight." The court then states that the cases now hold that entrapment is a defense where the criminal act is at the sole instigation of the informer.

[13] Even if the test used is phrased in terms of the origin of the criminal intent, its effect is nevertheless to allow the court to render overreaching police methods ineffective. The test which is based on the propriety of policy conduct only is designed to act as a curb on police conduct. See sources cited *supra* note 4.

Courts certainly recognize the public interest in controlling the sale and distribution of narcotics. When police merely give an individual the opportunity to commit a crime which he was otherwise disposed to commit, courts do not and should not object to use of an informer or decoy as an aid in apprehending criminals.[14] However, by either definition of entrapment, an entrapped person would not have otherwise committed the crime, and thus, the entrapped person poses no threat to society. The time and resources of law enforcement officials spent in inducement, apprehension, and prosecution of entrapped persons would be better spent in apprehension of persons who commit crimes without police encouragement. By reducing the application of entrapment, one important curb to these useless police activities is removed. Thus, the court's reluctance to permit the defense of entrapment in narcotics cases might actually reduce the effective enforcement of the narcotics laws.

One result of permitting the conviction of entrapped persons is to make it possible for law enforcement authorities to distort their record of performance by an impressive number of convictions. The number of convictions may obscure a failure of the police to apprehend those persons dealing in narcotics who operate with substantial organization and financial resources.[15] These persons, while more difficult to apprehend, pose a far greater threat to society than persons who are induced by the police to commit crimes. By making it impossible to convict entrapped persons, the courts would encourage enforcement agencies to exert greater effort in apprehending those who are actually in the business of selling narcotics. In this way the retention of the defense of entrapment would tend to improve the quality of enforcement of narcotics laws.

The court in the principal case felt the application of the defense of entrapment in narcotics cases should be restricted because of the seriousness of the crime involved. The court does this although the weight of authority regards entrapment as a permissible defense for many crimes, including violation of narcotics laws. If narcotics cases are to be singled out and regarded as so serious that entrapment cannot be used as a defense, this should be done only after careful consideration of the seriousness of violation of narcotics laws, what effect the defense of entrapment has on enforcement of narcotics laws, and the extent to which the defense of entrapment protects individuals from overreaching police methods. Determination of these matters involve legislative facts which would be better left for consideration by the legislature. Therefore, courts should apply existing law

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[14] The courts frequently point out that merely giving the accused an opportunity to commit crime will not give rise to the defense of entrapment. Sherman v. United States, *supra* note 2; Sorrells v. United States, *supra* note 2; State v. Gutilla, *supra* note 6; State v. Miller, *supra* note 6.

[15] Cantor, "The Criminal Law and the Narcotics Problem," 51 J. Crim. L., C. & P. S. 512, 520-522 (1961). This article contains a discussion of the nature of the narcotics problem in the United States.

and permit the defense of entrapment in narcotics cases where it is appropriate.[16]

[16] The court in the principal case points out that "The defense of duress has never been recognized in a case of homicide. A like result must be true in case of entrapment." This suggests that entrapment and duress should not be applied when the crime is quite serious. However, the issue is much simpler in the case of duress as a defense to homicide. If duress were permitted as a defense, this would permit the defendant to appropriate another's life to save his own. In addition, the defense of duress has nothing to do with judicial control of overreaching police methods. In contrast, whether entrapment should be applied in narcotics cases involves a consideration of the matters mentioned above.