IN THE SUPREME COURT OF FLORIDA

PEDRO A. CRUZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 63,451

BRIEF OF PETITIONER ON THE MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Pedro A. Cruz, Petitioner, was charged by Information with grand theft in the Hillsborough County Circuit Court on March 22, 1982 (R 2-3). Pursuant to Rule 3.190(c)(4), Florida Rules of Criminal Procedure, Petitioner moved to dismiss the Information, claiming entrapment as a matter of law (R 4-6). A hearing on this motion was held before the Honorable Fred J. Woods, Jr. on May 26, 1982 (R 11-20). On authority of State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982), cert. denied, 418 So.2d 1280 (Fla. 1982), the C-4 motion to dismiss was granted (R 15).

The State took appeal to the Second District Court of Appeal (R 7). In an opinion filed February 25, 1983, the Second District Court of Appeal reversed the order of dismissal. State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983). Express conflict with State v. Casper, supra, was acknowledged in the Second District Court of Appeal's opinion.

Notice to Invoke Discretionary Jurisdiction was timely filed on March 24, 1983. In an order dated July 12, 1983, this Court accepted jurisdiction of this case based upon express and direct conflict of decisions.

Petitioner, Pedro A. Cruz, seeks review of the Appellate decision which reversed the trial court's order dismissing the Information.

STATEMENT OF THE FACTS

As summarized from the sworn C-4 motion (R 4-6), the undisputed facts show that a Tampa police officer was deployed in a decoy operation, March 1, 1982 on West Kennedy Boulevard. Dressed as a skid-row denizen, the officer was doused in alcohol and simulated inordinate intoxication. Currency in the amount of one hundred fifty dollars protruded from his rear pants pocket.

Sometime after 10 p.m., the accused, accompanied by a woman, approached the decoy and then walked away. Ten to fifteen minutes later, the accused and the woman returned; at which time the accused lifted the money from the decoy's pocket. The accused walked away and was arrested by backup officers further down the block.

None of the unsolved crimes occurring near this location involved the same modus operandi. The decoy operation was not planned to snare any particular individual. The police had not observed any criminal activity associated with the accused. The police had no knowledge to indicate whether the accused had previously engaged in similar crimes, whether he had a criminal record, or whether he had reputation for criminal activities.

ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED PETITIONER'S MOTION TO DISMISS THE INFORMATION BECAUSE THE MATERIAL FACTS WERE UNDISPUTED AND CONSTITUTED AN AFFIRMATIVE DEFENSE OF ENTRAPMENT TO THE CHARGE.

The nature and purpose of a proceeding pursuant to Fla. R. Cr. P. 3.190(c)(4) was examined in Ellis v. State, 346 So.2d 1044 (Fla. 1st DCA 1977), cert. den., 352 So.2d 175 (Fla. 1977). The initial burden is on the defendant to demonstrate that the material facts are undisputed and fail to establish a prima facie case or that they establish a valid defense to the charge. If the allegations meet this test, the burden shifts to the State. The State must then place a material issue of fact in dispute by traverse; otherwise, the motion must be granted. Id.; Camp v. State, 293 So.2d 114 (Fla. 4th DCA 1974), cert. den. 302 So.2d 413 (Fla. 1974).

The trial judge determines whether the undisputed facts raise a jury question much as a judge evaluates a motion for judgment of acquittal made at trial. Ellis, supra; State v. Smith, 376 So.2d 261 (Fla. 3d DCA 1979), cert den., 388 So.2d 1118 (Fla. 1980) If a jury of reasonable men could find guilt, a jury question exists, and denial of the motion to dismiss is mandated. State v. Hudson, 397 So.2d 426, (Fla. 2d DCA 1981). But when no evidence legally sufficient for a jury verdict of guilty could be submitted, the motion to dismiss is properly granted. Hudson, supra.

The defense of entrapment is firmly recognized in Federal Courts. As stated by then Chief Justice Warren:

> The function of all enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.

Sherman v. United States, 356 U.S. 369 at 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958).

Because the defense of entrapment arises from public policy, rather than the United States Constitution, the State judiciary need not follow decisions of the United States Supreme Court regarding entrapment. Kimmons v. State, 322 So.2d 36 (Fla. 1st DCA 1975), cert. dism., 336 So.2d 106, cert. den., 429 U.S. 923, 97 S.Ct. 322, 50 L.Ed.2d 291 (1976). Nevertheless, Florida courts have followed the Federal direction in recognizing a subjective test (based on the accused's mental state) rather than an objective test (based on police conduct) to determine entrapment.

As formulated in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), the principal element for inquiry is the defendant's predisposition to commit the crime. This Court followed this reasoning in State v. Dickinson, 370 So.2d 762 (Fla. 1979) when it held:

> The essential element of the defense of entrapment is the absence of a predisposition of the defendant to commit the offense. Id. at 763.

In Florida, as in the Federal Courts, proof of predisposition is dispositive of an entrapment defense. State v. Brider, 386 So.2d 818 (Fla. 2d DCA 1980), pet. for rev. den. 392 So.2d 1372 (Fla. 1980).

Likewise, the federal view of the burden of proof on entrapment has been adopted in Florida courts. Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978). First, the defendant has the burden to demonstrate evidence of entrapment. Id. If this evidence is sufficient, the State must then disprove entrapment beyond a reasonable doubt. Id.

Specifically, the State must prove predisposition of the accused to commit the offense. Moody, supra; Story v. State, 355 So.2d 1213 (Fla. 4th DCA 1978), cert. den. 364 So.2d 893 (Fla. 1978). As formulated by the Story court, predisposition can be proved by 1) the accused's prior convictions or reputation for certain illicit activities; 2) a reasonable suspicion of involvement by the accused for such activities; or 3) the accused's readiness or willingness to commit the offense. Id. at 1211.

Normally, the entrapment issue is a question for the trier of fact unless "the evidence is so clear and convincing that as a matter of law entrapment has been conclusively established". Smith v. State, 320 So.2d 420 at 422 (Fla. 2d DCA 1975), cert. den. 334 So.2d 608 (Fla. 1976). See also State v. Rouse, 239 So.2d 79 (Fla. 4th DCA 1970); State v. Liptak, 277 So.2d 19 (Fla. 1973).

In the case at bar, the opinion of the Second District Court of Appeal takes the incongruous approach that entrapment as a matter of law can exist; but when predisposition is an issue, a jury question is presented. State v. Cruz, 426 So.2d 1308 at 1310 (Fla. 2d DCA 1983). As pointed out in Dickinson, supra and Story, supra, predis-

position is always an element in an entrapment case. A better view is that set forth in Dupuy v. State:

> Where the defense of entrapment is raised it is incumbent upon the state to make a showing amounting to more than mere surmise and speculation [of the accused's predisposition]. Dupuy, 141 So.2d 825 at 827 (Fla. 3d DCA 1962), cert. den. 147 So.2d 531 (Fla. 1962)

Certainly, any defendant shows predisposition to the extent that he proved capable of committing the crime. An entrapment defense could never succeed unless some additional proof beyond mere commission of the offense was required to show predisposition.

On basically identical facts to those of the case at bar, the First District Court of Appeal followed a similar line of reasoning in State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982), cert. den., 418 So.2d 1280 (Fla. 1982). The court emphasized that it did not disapprove of the police decoy procedure. Its narrow holding was that where an entrapment defense is raised on a C-4 motion to dismiss, the State must allege facts tending to show predisposition.

> Absent such a showing or allegation, as the case may be, we will have no alternative but to conclude that the accused's entrapment defense has merit and prevents the conviction for the offense. Id. at 265.

Since "no reasonable construction of the facts of record" indicated predisposition, the Casper court approved the trial court's dismissal of the information. See also State v. Holliday, 431 So.2d 309 (Fla. 1st DCA 1983), following Casper.

The Second District Court of Appeal recognized conflict with Casper when it decided petitioner's cause adversely to him. Cruz, supra. The Court found a question of fact existed with regard to predisposition despite the absence of any witness to support predisposition beyond the bare commission of the offense. The opinion cites a number of cases standing for the proposition that "intent or state of mind (i.e., predisposition)" should not be decided on a C-4 motion to dismiss.

A study of State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979) and the other cases cited by the Cruz court shows that these cases can be distinguished from the situation at bar. The general holding is summarized in State v. Rogers, 386 So.2d 278 at 280 (Fla. 2d DCA 1980); pet. for rev. den., 392 So.2d 1378 (Fla. 1980):

> Since the trier of fact has the opportunity to weigh the evidence and judge the credibility of the witnesses, it should determine intent or state of mind.

State v. J.T.S., supra. (and the other cases) presented actual or possibly conflicting witnesses or evidence regarding intent. As such, determination was inappropriate on a C-4 motion to dismiss. State v. West, 262 So.2d 457 (Fla. 4th DCA 1972).

State v. Sokos, 426 So.2d 1044 (Fla. 2d DCA 1983) is also distinguishable from the case at bar. Although it is also an entrapment case, in Sokos, some evidence was adduced regarding ready acquiescence to the proposed criminal scheme and intent to distribute contraband cigarettes. Therefore, the issue of predisposition was properly a jury question.

The case at bar, however, presents no conflicting witnesses. Credibility is not at issue. Not a scintilla of evidence tending to show predisposition was alleged by the State. In short, there was nothing for the trier of fact to try.

An analogous situation was presented in a recent case involving recantation of perjury, State v. Snipes, Case No. AO-239 (Fla. 1st DCA June 27, 1983) [8 FLW 1721]. The State appealed the granting of a C-4 motion to dismiss and contended the defense of recantation should have been submitted to a jury. The Court disagreed, stating:

> The state did not controvert the material facts relied on by appellant, so there was no issue for the jury to try. The court, not the jury should decide whether the undisputed facts establish a valid defense. (emphasis supplied).

At bar, the trial court correctly perceived its role to decide whether the undisputed facts sufficiently established the defense of entrapment. Having so concluded, and in the absense of any controversion by the State; the trial court correctly found that dismissal of the Information was mandated.

CONCLUSION

Based upon the foregoing argument, reasoning and citation of authorities, Pedro A. Cruz, Petitioner, respectfully requests this Honorable Court to quash the decision of the Second District Court of Appeal, and remand this cause with directions to reinstate the judgment of the trial court dismissing the information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, this 1st day of August, 1983.

Douglas S. Connor
Douglas S. Connor