IN THE SUPREME COURT OF FLORIDA

RAYMOND LEE SMITH,

Petitioner,

v. Case No. 64,678

STATE OF FLORIDA,

Respondent

RESPONDENT'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief references to the record on appeal that was before the Second District Court of Appeal will be designated by the symbol "R" followed by appropriate page number (s). All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set forth in petitioner's brief.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING RAYMOND LEE SMITH'S MOTION TO DISMISS THE INFORMATION BECAUSE THE MOTION FAILED TO ESTABLISH A PRIMA FACIE CASE OF ENTRAPMENT.

A. Jurisdiction

Where a writ has been issued upon a prima facie showing of probable jurisdiction of the Supreme Court, but thereafter the Court determines that the requisite conflict does not in fact exist, the writ may be quashed or discharged as improvidently issued. Wade v. Wainwright, 273 So.2d 377 (Fla. 1973). The facts of the instant case and State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982), cited for conflict, are distinguishable on their facts and certiorari was improvidently granted.

The essential facts to the appeal in Casper were established by a Florida Rule of Criminal Procedure 3.190(c)(4) motion which the State failed to traverse. Casper at 264. In petitioner's case, the motion to dismiss set forth the following allegations:

> THE DEFENDANT moves the Court pursuant to RCrp 3.190(b) to dismiss the information filed in this cause upon the grounds that, as a matter of law, defendant was illegally entrapped by police officers to commit the crime complained of. The factual basis of this motion is as follows:
>
> 1) On the 12th day of January, 1982, the Tampa Police Department deployed a decoy at Kennedy Boulevard and Bernard Avenue.
>
> 2) The police decoy was dressed in old clothes and acted sick and drunk with $150 protruding from his pocket.
>
> 3) The defendant was not a suspect and was not a particular target of the decoy.

4) On the 12th day of January, 1982, at approximately 9:20 p.m., the defendant was walking along Kennedy Boulevard when he observed a sick and inebriated man. Defendant approached the man to assist.

5) Defendant then noticed the money protruding from the sick man's pocket. The defendant then removed the money from the decoy's pocket and was immediately arrested by detectives who were nearby.

WHEREFORE, pursuant to State v. Casper, decided April 21, 1982, 1st DCA Case No. AG-45 which proscribes such conduct by police as entrapment as a matter of law, and State v. Hayes, 333 So.2d 51 (4th DCA 1976), which states that all Circuit Courts in Florida are equally bound by decisions of a District Court of Appeal, and moves this Honorable Court for its Order of Dismissal.

(R 6-7)

Even if we assume that Smith's pleading is simply mislabeled (reference to subsection (b)),[1/] the motion itself fails to satisfy

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1/ Subsection (b) of Rule 3.190 provides as follows:

(b) Motion to Dismiss

Grounds. All defenses available to a defendant by plea, other than not guilty, shall be made only by Motion to dismiss the indictment or information whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense.

the prerequisites of Rule 3.190 (c)(4)[2/]. Although the facts upon which the motion is based are specifically set forth in the pleading, the motion fails to allege that the material facts of the case are undisputed and that the undisputed facts establish a prima facie case of entrapment. The motion is also not sworn to by the defendant.

The purpose of Rule 3.190 (c)(4) is to permit a pretrial determination of the law of the case where the facts are not in dispute. State v. Giesy, 243 So.2d 635, 636 (4th DCA 1971). Unlike the Casper case, petitioner did not proceed under Rule 3.190 (c)(4). The two cases are thus factually distinguishable and the writ of certiorari should be discharged as improvidently granted. Wade v. Wainwright, supra.

[2/] Rule 3.190 (c)(4) provides:

> (4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

B. Merits

The issue before this Court, as stated by petitioner, is whether taking money from a police decoy who is feigning intoxication (or illness) constitutes entrapment as a matter of law, and whether this issue is one which may appropriately be resolved by a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190 (c)(4).

1. Entrapment

Entrapment was first recognized as an affirmative defense by the United States Supreme Court in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 2d 413 (1932). Testimony at trial revealed that a prohibition agent posing as a tourist visited Sorrells' in his home and in an attempt to gain the defendant's confidence told him they had served together in the same division during World War I. The agent then asked the defendant if he could buy some whiskey. Although the defendant initially replied that he did not have any, upon a third inquiry, he relented and sold the agent a half gallon of whiskey. The defendant was subsequently arrested and charged with possessing and selling liquor in violation of the National Prohibition Act. The trial judge refused to allow the issue of entrapment to go to the jury and the defendant was ultimately found guilty as charged. The Fourth Circuit Court of Appeal affirmed the conviction but the United States Supreme Court granted certiorari and reversed.

The Supreme Court held that the intent of Congress in enacting the statute was not to lure otherwise innocent persons into committing

crimes, but to punish unaided criminal activity. The Court considered the defendant's good reputation, coupled with the repeated requests of the Officer before defendant acted, and held that the defense of entrapment was available to the accused. In addition, the Court emphasized that government officials should not abuse their positions in detecting and enforcing the law.

In 1958, the Court was again confronted with the doctrine of entrapment in Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848 (1958). In that case, both a government informer, and Sherman, the defendant, were undergoing treatment by the same doctor for narcotics addiction. The informer repeatedly asked Sherman to supply him with drugs claiming he was not responding to treatment. The defendant initially refused, but finally purchased narcotics that he shared with the informer. The Bureau of Narcotics subsequently observed Sherman sell narcotics to the informer. The defendant was later indicted and convicted despite his plea of entrapment.

Reversing Sherman's conviction on the authority of Sorrells, a majority of the court found entrapment as a matter of law. The Court declined to consider the question, not raised by the parties, whether factual issues of entrapment are determinable by the judge or by the jury.

Sorrells and Sherman both focus on origin of criminal intent and stress that the criminal design must originate initially with the government officials. Subsequently, these officials must implant the disposition to commit a crime in the mind of an otherwise innocent person.

The minority in Sherman agreed with the result but disagreed with the rationale used by the majority. Instead, the minority cited police conduct as the crux of the entrapment issue.[3/] The minority felt it critical to determine whether the police exceeded their given authority.

In United States v. Russell, 411 U.S., 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973), the Supreme Court upheld a trial court's finding that the defendant's defense of entrapment was unwarranted. The defendant, suspected of manufacturing illegal drugs in his home, was approached by an undercover police officer who offered him an essential ingredient in the making of the drug in exchange for one-half of the finished product. The deal was consumated and a month later the agent returned and provided additional material to the defendant whom he later arrested. Russell's sole defense was that of entrapment; relying on the fact that the government had provided an essential ingredient in the manufacture of the drug.

Russell was convicted at trial and the Ninth Circuit Court of Appeal reversed concluding that there had been an "intolerable degree of governmental participation in the criminal enterprise." The

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3/ The majority view emphaphasizes the intent or predisposition of the defendant. The minority approach focuses upon police conduct. The latter approach was squarely rejected by the Supreme Court in Hampton v. United States, 425 U.S. 484, 488, 96 S.Ct. 1646, 48 L.Ed. 2d 113 (1976).

Supreme Court granted certiorari and reversed on the authority of Sorrells and Sherman. The court said:

> Several decisions of the United States District Courts and courts of appeals have undoubtedly gone beyond this Court's opinions in Sorrells and Sherman in order to bar prosecutions because of what they thought to be, for want of a better term, "overzealous law enforcement." But the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve.
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> 411 U.S. at 435.

The Court went on to reaffirm the principle, announced in Sorrells and Sherman, that "deceit does not defeat a prosecution" and government officials who "merely afford opportunities or facilities for the commission of the offense" are not guilty of entrapment. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play", United States v. Russell, supra, 411 U.S. at 435-436.

Crucial to the court's disposition of the case was the evidence of respondent's involvement in making the drug before and after the agent's participation. The Russell Court opined: [I]f the defendant seeks an acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." 411 U.S. at 451. Thus, it was held that the principal element of the defense of entrapment is the defendant's lack of predisposition to commit

the crime.

The Supreme Court cases we have discussed all appear to have a common thread running throughout them to the effect that if it was the defendant's intention to act as he did, then entrapment is not a defense; but if it was the officer's intention to place the idea in the mind of the defendant, and by artifices, instigated, induced or lured the defendant into the commission of a crime which he had otherwise no intention of committing, then it is the sort of entrapment that the Supreme Court disapproved in Sherman v. United States, (entrapment established as a matter of law where government informer made repeated requests of defendant to obtain narcotics, and defendant capitulated, after initial refusals, only when informer resorted to sympathy).

In Florida, the general rule as to the defense of entrapment is set forth in Lashley v. State, 67 So.2d 648, 649 (Fla. 1953), quoting from 22 C.J.S., Criminal Law, §45:

> One who is instigated, induced or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of entrapment. Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent. (Emphasis in original).

The entrapment defense has been codified in Sec. 812.028(4), Fla. Stats. (1981). State v. Dickinson, 370 So.2d 762 (Fla. 1979). This section provides that it shall not constitute a defense to a

prosecution for any violation of the provisions of Secs. 812.012 through 812.037 that:

> (4) A law enforcement officer solicited a person predisposed to engage in conduct in violation of any provision of §812.012-812.037 in order to gain evidence against that person, provided such solicitation would not induce an ordinary law abiding person to violate any provision of §812.012-812.037.

Whether entrapment is available as a defense depends upon the "origin of the criminal intent" Sorrells v. United States, supra, 287 U.S. at 451. Entrapment occurs when the criminal intent originates initially with the government official who then implants in the mind of an innocent person the disposition to commit the alleged offense and induced its commission for the purpose of prosecution. Entrapment is not available as a defense if the officer acted in good faith for the purpose of detecting crime and merely furnished an opportunity for the commission thereof by one who had the prerequisite criminal intent. Lashley v. State, supra; State v. Rouse, 239 So.2d 79, 80 (Fla. 4th DCA 1970); Koptyra v. State, 172 So.2d 628, 632 (Fla. 2d DCA 1965). Thus, as recently stated by this Court in Bell v. State, 369 So.2d 932, 934 (Fla. 1979) "...the key in entrapment is whether the defendant was merely presented with an opportunity to commit a crime to which he was predisposed; or whether the criminal design originated with agents of the government, who then induced its commission by the accused."

There is no constitutional prohibition against a law enforcement officer providing the opportunity for a person who has the willingness and readiness to break the law. State v. Dickinson, supra at 763. Thus, decoys may be used to entrap criminals or present opportunity to commit crime but they are not permissible to ensnare the innocent and law abiding into the commission of a crime. Peters v. Brown, 55 So.2d 334 (Fla. 1951); State v. Rouse, supra; Sec. 812.028(1), Fla. Stats. (1981). Furnishing the opportunity for the commission of a crime to one who already had the requisite criminal intent to violate the law does not constitute entrapment. See Blackshear v. State, 246 So.2d 173 (Fla. 1st DCA 1971).

The issue presently before this Court is whether taking money from a police decoy who is feigning intoxication (or illness) constitutes entrapment as a matter of law.

Federal and state law both recognize that entrapment can be established as a matter of law. Sherman v. United States, supra; United States v. Hermosillo-Nanez, 545 F.2d 1230, 1232 (9th cir. 1976), cert. denied, 429 U.S. 1050, 97 S.Ct. 763, 50 L.Ed. 2d 767 (1977); United States v. Test, 486 F.2d 922, 924 (10 Cir. 1973), cert. granted, on other grounds, 417 U.S. 967, 94 S.Ct. 3170, 41 L.Ed. 2d 1138 (1974); Sendejas v. United States, 428 F.2d 1040, 1044 (9th Cir. 1970); cert. denied, 400 U.S. 879, 91 S.Ct. 122, 27 L.Ed. 2d 116 (1970); Smith v. State, 320 So.2d 420 (Fla. 2d DCA 1975), cert. denied, 334 So.2d 608 (Fla. 1976); Spencer v. State, 263 So.2d 282 (Fla. 1st DCA 1972). The burden of proof under state law is

"clear and convincing" evidence. Smith v. State, supra, 320 So.2d at 422; State v. Robinson, 270 So.2d 761 (Fla. 4th DCA 1970). The federal courts have adopted a similar standard as is illustrated by the case of United States v. Test. At page 924 the court states:

> It is rudimentary that entrapment as a matter of law can only be found where it appears unmistakably clear to the trial judge that undisputed evidence establishes that the criminal design originated with the Government agents, was the product of their creative activity and was implanted in the mind of an otherwise innocent person totally lacking the requisite predisposition to commit the crime. (Citations omitted).

See also, United States v. Hermosillo-Nanez, supra; Sendejas v. United States, supra; Perez v. United States, 421 F.2d 462, 465 (9th Cir. 1970); Matysek v. United States, 321 F.2d 246, 248 (9th Cir. 1963), cert. denied, 376 U.S. 917, 84 S.Ct. 672, 11 L.Ed. 2d 613 (1964).

The defense of entrapment is not established as a matter of law by simply showing "that the particular act was committed at the instance of government officials." Maytesek, supra, at 248. As stated by the Ninth Circuit in Perez, supra at 465, "[e]ntrapment does not occur, as a matter of law, unless the government agents do move and, by means of pressure, persuasion or enticement, induce an otherwise innocent person to commit the offense."

In light of the principles of law above stated, we proceed to review the evidence before the trial court. According to Smith's motion to dismiss, the Tampa Police Department displayed a decoy at Kennedy Boulevard and Bernard Avenue in Tampa on January 12, 1982.

The police decoy was dressed in old clothes, acted sick or drunk and had $150.00 protruding from his pocket. The petitioner who was not a suspect or a target of the decoy, approached the undercover officer and removed the money from the decoy's pocket. (R 6-7) Smith was immediately arrested and charged with grand theft. (R 3) The State did not file a traverse or otherwise challenge the facts set forth in petitioner's motion.

The facts as revealed by petitioner's motion to dismiss do not establish entrapment as a matter of law. The motion does not set forth facts which tend to establish that government agents, by means of pressure, persuasion or enticement induced petitioner, an otherwise innocent person, to commit the crime of theft. The facts, at best, establish that a police decoy furnished Smith the opportunity to commit an offense he was otherwise predisposed to commit. Such facts negate the defense of entrapment and petitioner was not entitled to a finding of entrapment as a matter of law.

2. Sworn Motion to Dismiss

Although petitioner's motion to dismiss does not meet the prerequisites of Rule 3.190(c)(4), Florida Rules of Criminal Procedure, the trial court and District Court of Appeal apparently treated it as such.[4/] Assuming the pleading had been a proper (c)(4) motion to dismiss, the question now presented is whether the issue of entrapment is one which may appropriately be resolved by a sworn motion to dismiss pursuant to Fla.R.Crim.Proc. 3.190(c)(4).

Under Rule 3.190(c)(4) it is provided that the court may at any time entertain a motion to dismiss on the ground:

> There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

The purpose of the rule is to permit a pretrial determination of the law of the case where the facts are not in dispute. State v. Giesy, supra. Thus, to be sufficient, a 3.190 (c)(4) motion must allege that the material facts of the case are undisputed, set out these facts, and demonstrate that the undisputed facts fail to establish a prima facie case of guilt or that the facts affirmatively establish a valid defense. State v. Pastorius, 419 So.2d 1137, 1138 (Fla. 4th DCA 1982). If the sworn motion did not itself demonstrate that the undisputed facts fail to establish a prima facie case or

[4/] See respondent's argument on Jurisdiction, SUPRA, pp. 3-5.

if the motion does not establish a valid affirmative defense, a response by the State is not required and the motion may be summarily denied. State v. Horne, 399 So.2d 491 (Fla. 3rd DCA 1981); Lawler v. State, 384 So.2d 1290 (Fla. 5th DCA 1980); Ellis v. State, 346 So.2d 1044, 1046 (Fla. 1st DCA 1977); State v. Giesy, supra.

From the petitioner's motion to dismiss, the undisputed facts are as follows:

> 1) On the 12th day of January, 1982, the Tampa Police Department deployed a decoy at Kennedy Boulevard and Bernard Avenue.
>
> 2) The police decoy was dressed in old clothes and acted sick and drunk with $150 protruding from his pocket.
>
> 3) The defendant was not a suspect and was not a particular target of the decoy.
>
> 4) On the 12th day of January, 1982, at approximately 9:20 p.m., the defendant was walking along Kennedy Boulevard when he observed a sick and inebriated man. Defendant approached the man to assist.
>
> 5) Defendant then noticed the money protruding from the sick man's pocket. The defendant then revomed the money from the decoy's pocket and was immediately arrested by detectives who were nearby.
>
> (R 6)

There are enough facts in the motion to establish a prima facie case of theft in violation of Section 812.014(2)(b), Florida Statutes (1981). The real crux of the case is whether the facts are sufficient to establish the affirmative defense of entrapment.

Petitioner's argument that the State failed to defeat the motion by alleging facts which tend to prove predisposition puts the cart before the horse. The State's burden of showing predisposition is only triggered when the defendant meets his initial burden of going forward with facts which tend to establish government inducement.

Entrapment is an affirmative defense. Therefore the defendant has the initial burden of going forward with the evidence. United States v. Buckley, 586 F.2d 498, 501 (5th Cir. 1978), cert. denied, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed. 2d 242 (1979); United States v. Groessel, 440 F.2d 602 (5th Cir.), cert. denied, 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed. 2d 713 (1971). The defendant has the burden of production in that he must bear "the initial burden of going forward with the evidence of governmental involvement or inducement". United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979). In this regard, the defendant must produce "some evidence, but more than a scintilla, that [he was] induced to commit the offense." United States v. Groessel, supra, at 606; Wolffs, supra at 81. The defense of entrapment is not established simply by showing "that the particular act was committed at the instance of government officials." Matysek v. United States, supra, at 248, quoting Sorrells v. United States, supra 287 U.S. at 451.

Once the defense of entrapment is properly put in issue, the ultimate burden of persuasion -- the burden of proving predisposition of the defendant -- rests with the prosecution. United States v. Wolffs, supra at 80; United States v. Tate, 554 F.2d 1341, 1344

(5th Cir. 1977). The State's burden of proof, as set forth in Story v. State, 355 So.2d 1213 (Fla.4th DCA), is triggered only after the defendant has met his initial burden of showing government inducement. Unless some evidence of government inducement is presented by the defendant, thereby properly raising the defense of entrapment, the State is not obliged to produce evidence of the defendant's predisposition to commit the offense.

In this instance, the defendant has not met his initial burden of going forward with evidence of government inducement. The motion does not set forth facts which tend to establish that government agents, by means of pressure, persuasion or enticement induced an otherwise innocent person to commit a crime. The facts, at best, establish that a police decoy furnished Smith an opportunity to commit the offense he was otherwise predisposed to commit. The defense of entrapment is not established simply by showing that the government provided the opportunity for commission of the offense. Furnishing the opportunity for the commission of a crime to one who already had the requisite criminal intent to violate the law does not constitute entrapment. See Blackshear v. State, supra. Since such evidence negates the defense of entrapment, petitioner failed to meet his initial burden of proof and the motion to dismiss was properly denied.

The instant decision was decided on the basis of State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983). On virtually, identical facts, the Second District Court of Appeal held that although entrapment can exist as a matter of law, "where, as here, a defendant's intent

or state of mind (i.e., predisposition) is an issue, that issue should not be decided on a motion to dismiss under Rule 3.90(c)(4)." Id. at 1310 (citations omitted). Although cited by petitioner as conflict, State v. Casper, 417 So.2d 263, 265 (Fla. 1st DCA 1982) did not reach the merits of this particular argument.

In his brief, petitioner argues that the Cruz court incorrectly equates intent with predisposition. If there is error, and we do not concede that there is, then the Fifth Circuit Court of Appeal has specifically held that the issue of "predisposition" is a fact question for the jury. United States v. Martin, 533 F.2d 268 (5th Cir. 1976); United States v. Kirk, 528 F.2d 1057 (5th Cir. 1976). Applying the Cruz rationale, the Second District Court of Appeal correctly held that the issue of Smith's predisposition could not be decided on a motion to dismiss under Rule 3.190(c)(4).

CONCLUSION

Taking money from a police decoy who is feigning intoxication (or illness) does not constitute entrapment as a matter of law. Furnishing the opportunity for the commission of a crime to one who already has the requisite criminal intent does not constitute entrapment.

Petitioner failed to meet his initial burden of showing government inducement. Petitioner's (c)(4) motion to dismiss did not properly raise the defense of entrapment, thereby relieving the state of its burden of proving predisposition. The trial court properly denied petitioner's (c)(4) motion to dismiss and the decisions of the Second District Court of Appeal, Smith v. State and State v. Cruz should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Robert F. Moeller, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830, on this 20th day of June, 1984.

Sheila James Davis

OF COUNSEL FOR RESPONDENT