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IN THE SUPREME COURT OF FLORIDA

LORENZO TEAGUE,

Petitioner,

vs. Case No. 65,315

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The parties herein will be referred to by their proper names or as they stood before the trial court. The Record on Appeal that was before the Florida District Court of Appeal, Second District, and is contained in one volume and two supplemental volumes, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts the Statements of the Case and Facts as set forth in Teague's Brief on the Merits.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING LORENZO TEAGUE'S MOTION TO DISMISS THE INFORMATION BECAUSE THE MOTION FAILED TO ESTABLISH A PRIMA FACIA CASE OF ENTRAPMENT.

The issue presently before this Honorable Court is whether taking money from an undercover 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 filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4).[1] The State will treat each of these two sub issues separately.

A. Entrapment

Entrapment has been recognized as an affirmative defense by the United States Supreme Court since its decision in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed 413 (1932) (Entrapment established where police officer made repeated requests of defendant to supply illegal whisky and defendant eventually complied). The entrapment defense has been discussed by the United States Supreme Court in two subsequent decisions. Sherman v. United States, 356 U.S 369, 78 S.Ct. 819, 2 L.Ed 2d 848 (1958) (Entrapment established

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[1] Several cases are currently pending in this Honorable Court dealing with a similar decoy-entrapment issue, to-wit.: Cruz v. State, 426 So.1308 (Fla. 2d DCA 1983), pet. for review granted, Case No. 63,451 (Fla. 1983) (Oral Argument heard November 10, 1983); State v. Holliday, 431 So.2d 309 (Fla. 1st DCA 1983), pet. for review granted, Case No. 63,832 (Fla. 1983); Drumm v. State, 432 S.2d 765 (Fla. 2d DCA 1983), pet. for review granted, Case No. 63,948 (Fla. 1983); Goldstein v. State, 435 So.2d 352 (Fla. 2d DCA 1983), pet. for review granted, Case No. 64,168 (Fla. 1984); Smith v. State, 441 So.2d 1162 (Fla. 2d DCA 1983), pet. for review granted, Case No. 64,678 (Fla. 1984).

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); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed 2d 366 (1973) (Entrapment not available as a defense where police officer offered defendant an essential ingredient in the making of an illegal drug in exchange for one-half of the finished product - government officials who "merely afford opportunities or facilities for the commission of the offense" are not guilty of entrapment. Id. at 411 U.S. 435). The Supreme Court cases cited immediately above have as a common thread the notion that if it was the defendant's intention to act as he did then entrapment is not available as a defense. However, if it was the officer's intention to place the idea in the mind of the defendant and the defendant was induced into the commission of a crime in which he had otherwise no intention of committing, then entrapment is available as an affirmative defense.

In Florida, this Honorable Court set forth the general rule as to the defense of entrapment in Lashley v. State, 67 So.2d 648 (Fla. 1953), quoting from 22 Corpus Juris Secundum, Criminal Law, Section 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. (Text at 649; emphasis in original text)

The entrapment defense has been cotified in Section 812.028(4), Florida Statutes (1983).[2] State v. Dickinson, 370 So.2d 762 (Fla. 1979).

More recently, this Honorable Court stated in Bell v. State, 369 So.2d 932 (Fla. 1979):

> ...[T]he 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. (Texted at 934)

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 present an opportunity to commit a 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, 239 So.2d 79 (Fla. 4th DCA 1970); Section 812.028(1), Fla. Stat. (1983). 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).

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[2] Florida Statutes Section 812.028 provides:

812.028 Defenses precluded. - It shall not constitute a defense to a prosecution for any violation of the provisions of ss. 812.012 - 812.037 that:

(4) A law enforcement officer solicited a person predisposed to engage in conduct in violation of any provision of ss. 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 ss. 812.012 - 812.037.

Applying the above stated legal principals to the case at bar, it readily becomes apparent that Teague was not entrapped as a matter of law. The precise issue presented concerns whether taking money from a police decoy who is feigning illness (or intoxication) constitutes entrapment as a matter of law. Both federal and state law 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 (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 (10th 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 (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 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 court in United States v. Test, supra:

> 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; text at 924).

See also, United States v. Hermosillo-Nanez, supra; Sendejas v. United States, supra; Perez v. United States, 421 F.2d 462 (9th Cir. 1970); Matysek v. United States, 321 F.2d 246 (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." Matysek, supra at 248. In Perez, supra, the court held:

> Entrapment 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. (Text at 465)

The facts of the instant cause as presented in Teague's Motion to Dismiss are extremely clear-cut. On March 25, 1982, the Tampa Police Department deployed a decoy at 7th Ave. and No. Nebraska Ave. The police decoy was dressed in old clothes and acted sick and had $150.00 protruding from his pocket (R-25). At approximately 8 p.m., Teague was walking along 7th Ave. when he observed a sick man at the intersection of Nebraska Ave. Teague asked the sick man if he was all right. As Teague started to leave, he noticed money protruding from the sick man's pocket. Teague then removed the money from the decoy's pocket and was immediately arrested by the detectives who were nearby (R-25). Teague was not a particular target of the decoy operation nor was he a suspect prior to the incident (R -25). The state did not file a traverse or otherwise challenge the facts set forth in Teague's motion. The facts of the case sub judice as related above do not establish entrapment as a

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 Teague the opportunity to commit an offense he was otherwise predisposed to commit. Such facts negate the defense of entrapment and Teague was not entitled to a finding of entrapment as a matter of law. On nearly identical facts, the First District Court of Appeal held contrarily in State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982), pet. for rev. den., 418 So.2d 1280 (Fla. 1982). The conclusion in Casper is erroneous inasmuch as the court did not follow the standard that it recognized to be proper:

> ...The police are not precluded from acting in good faith for the purpose of detecting a crime and merely furnishing an opportunity for the commission of the crime by one who had the required criminal intent. (Text at 263)

In Casper, as in the case at bar, police did not prevail upon the accused to do that which he otherwise would not have done. The police merely provided a moneyed decoy and allowed the defendant to approach, observe whether he was an easy mark and then return to steal the available money. Any idea in Casper requiring the existence of probable cause to believe a specific person will commit a specific crime is erroneous. There is no such requirement. See U.S. v. Myers, 635 F.2d 932 (2d Cir 1980); U.S. v. Silver, 457 F.2d 1217 (3rd Cir 1972); U.S. v. Jannotti, 673 F.2d 578 (3d Cir 1982).

It is also of no moment to speculate whether the average law abiding citizen would have taken the money from the decoy under the facts presented sub judice. One who would take the money from a sick decoy is obviously not a law abiding citizen, at least at the moment when he commits grand theft by so purloining the cash. A truly law abiding citizen who is confronted with the decoy situation would simply decline the opportunity to commit a crime. Under the rationale of Casper, had the apparent vagrant not been a police officer, would the court have concluded that the defendant did not commit grand theft? Merely because a police officer is used as a decoy and had the money in his possesson does not necessitate a different result. The police officer in the instant case did no more than would have a "real vagrant". He was merely lying in the street with money exposed and simply offered the opportunity to a passerby to commit a crime. To illustrate the irrationality of the Casper decision we would offer an example which, on the surface, may appear to be far-fetched but, in actuality, is purely analogous to the decoy operation used by the police officers in the instant case. Let us suppose that there have been reports of sexual assualt on females at a particular beach. Further suppose that a female police officer volunteered to act as a decoy so that any possible sexual molesters could be apprehended. The female police officer would don the skimpiest of string-bikinies so that her feminine charms would be as freely exposed as the law allows. If a person attempted to sexually assualt the decoy-police woman, would a court of law find that entrapment is a valid defense? It is apparent that the

question posed must be answered in the negative inasmuch as it is illogical to presume that the police woman would induce an individual to commit a sexual assault upon her. Similarily, the police officer-decoy employed in the instant case did nothing to induce Teague to commit a grand theft. He merely presented the opportunity to commit a crime and the defense of entrapment will not lie.

B. Motion to Dismiss

Initially, it must be noted that Teague's Motion to Dismiss does not meet the prerequisites of Rule 3.190(c)(4), Florida Rules of Criminal Procedure. However, it is apparent that the Florida District Court of Appeal, Second District, treated the motion as a (c)(4) Motion.[3] Assuming arguendo that the Motion to Dismiss had been a proper (c)(4) Motion, the question arrises as to whether the issue of entrapment is one which may be appropriately resolved by a sworn (c)(4) Motion.

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[3] Teague's Motion to Dismiss filed with the trial court failed to allege that the material facts of the case were undisputed and that the undisputed facts establish a prima facie case of entrapment. Also, the motion is not sworn to by Teague. Thus, unlike the defendant in Casper, supra, Teague did not proceed under Rule 3.190(c)(4). Therefore, the instant case and Casper are factually distinguishable and the instant case should be dismissed where jurisdiction is improvidentally granted. Wade v. Wainwright, 273 So.2d 377 (Fla. 1973).

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 factors of the case are undisputed facts fail to establish a prima facie case of guilt or that the facts affirmatively establish a valid defense. State v. Pastorious, 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 of 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 March 25, 1982, the Tampa Police Department deployed a decoy at 7t Avenue and No. Nebraska Avenue.
>
> 2) The police decoy was dressed in old clothes and acted sick with $150.00 protruding from his pocket.

3) The Defendant was not a suspect and was not a particular target of the decoy.

4) On March 25, 1982 at approximately 8:00 p.m., the defendant was walking along 7th Avenue when he observed a sick man at the intersection of Nebraska Avenue. Defendant asked if the sick man was o.k.

5) The Defendant then started to leave, he noticed 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.

(R-25)

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 bruden 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

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 the 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 redisposition. The trial court properly denied petitioner's (c)(4) motion to dismiss and the decisions of the Second Distirct 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 and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, FL 33830, this 19th day of November, 1984.

Robert J. Krauss
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