IN THE SUPREME COURT OF FLORIDA

LORENZO TEAGUE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

Case No. 65,315

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813) 533-1184 or 533-0931

COUNSEL FOR PETITIONER

TOPICAL INDEX TO BRIEF

	PAGE NO.
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
ARGUMENT	
THE TRIAL COURT ERRED IN DENYING LORENZO TEAGUE'S MOTION TO DISMISS THE INFORMATION BECAUSE THE MATERIAL FACTS WERE UNDISPUTED AND ESTABLISHED ENTRAPMENT AS A MATTER OF LAW.	5
CONCLUSION	14
APPENDIX	
1. Second District Court of Appeal opinion in Teague v. State, Case No. 82-1398.	A1-3
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Bell v. State 369 So.2d 932 (Fla.1979)	7
Brown v. State 376 So.2d 382 (Fla.1979)	13
Camp v. State 293 So.2d 114 (Fla.4th DCA 1974), cert. denied, 302 So.2d 413 (Fla.1974)	10
Casso v. State 182 So.2d 252 (Fla.2d DCA 1966), cert. denied, 192 So.2d 487 (Fla.1966)	10
Drumm v. State 432 So.2d 765 (Fla.2d DCA 1983), pet.for review granted, Case No. 63,948 (Fla.1983)	14
Dupuy v. State 141 So.2d 825 (Fla.3d DCA 1962), cert. denied, 147 So.2d 531 (Fla.1962)	11
Edwards v. State 213 So.2d 274 (Fla.3d DCA 1968), cert. denied, 221 So.2d 746 (Fla.1968)	9
Ellis v. State 346 So.2d 1044 (Fla.1st DCA 1977), cert. denied, 352 So.2d 175 (Fla.1977)	10
Goldstein v. State 435 So.2d 352 (Fla.2d DCA 1983), pet.for review granted, Case No. 64,168 (Fla.1984)	2,3,14
Lashley v. State 67 So.2d 648 (Fla.1953)	6
Moody v. State 359 So.2d 557 (Fla.4th DCA 1978)	11
Smith v. State 320 So.2d 420 (Fla.2d DCA 1975), cert. denied, 334 So.2d 608 (Fla.1976)	7
Smith v. State 441 So.2d 1162 (Fla.1983), pet.for review granted, Case No. 64,678 (Fla.1984)	14

	PAGE NO.
State v. Brider, 386 So.2d 818 (Fla.2d DCA 1980), pet.for review denied, 392 So.2d 1372 (Fla.1980)	6
State v. Casper, 417 So.2d 263 (Fla.1st DCA 1982), pet.for review denied, 418 So.2d 1280 (Fla.1982)	3,11,12,13
State v. Cruz, 426 So.2d 1308 (Fla.2d DCA 1983), pet.for review granted, Case No. 63,451 (Fla.1983)	2,3,7,8,9,13, 14
State v. Dickinson, 370 So.2d 762 (Fla.1979)	5,6
State v. Evans, 394 So.2d 1068 (Fla.4th DCA 1981)	9
State v. Holliday, 431 So.2d 309 (Fla.1st DCA 1983), pet.for review granted, Case No. 63,832 (Fla.1983)	11,14
State v. Hudson, 397 So.2d 426 (Fla.2d DCA 1981)	10
State v. Liptak, 277 So.2d 19 (Fla.1973)	7
State v. Perez, 438 So.2d 436 (Fla.3d DCA 1983)	7
State v. Rouse, 239 So.2d 79 (Fla.4th DCA 1970)	7
State v. Smith, 376 So.2d 261 (Fla.3d DCA 1979), cert. denied, 388 So.2d 1118 (Fla.1980)	10
State v. Snipes, 433 So.2d 653 (Fla.1st DCA 1983)	12
State v. Sokos, 426 So.2d 1044 (Fla.2d DCA 1983)	7
State v. Stenza, 453 So.2d 169 (Fla.2d DCA 1984)	7,8,10
State v. Wilkins, 473 A.2d 295 (Vt.1983)	6,11
Story v. State, 355 So.2d 1213 (Fla.4th DCA 1978), cert. denied, 364 So.2d 893 (Fla.1978)	9,10,13

PAGE NO.

United States v. Russell
411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d
366 (1973) 6

Williams v. State
239 So.2d 127 (Fla.4th DCA 1970) 9

OTHER AUTHORITIES:

§§812.012-812.037, Fla.Stat. (1981) 5
§812.014, Fla.Stat. (1981) 5
§812.028, Fla.Stat. (1981) 6

Fla.R.Crim.P. 3.190(c)(4) 7

21 Am.Jur.2d Criminal Law §202 (1981) 7
21 Am.Jur.2d Criminal Law §204 (1981) 5
22 C.J.S. Criminal Law §45 6

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 the appropriate page number(s). References to the appendix to this brief are designated by an "A" followed by the page number.

STATEMENT OF THE CASE

Petitioner, Lorenzo Teague, was charged by an information filed in Hillsborough County Circuit Court on April 13, 1982 with grand theft in the second degree. (R3-4)

Teague filed a motion to dismiss the information on May 7, 1982, alleging that he was entrapped as a matter of law. (R25-26) The State did not file a traverse. (R1-42)

A hearing on Teague's motion was held before the Honorable Harry Lee Coe, III on May 20, 1982. (R22-24) The State did not dispute the facts recited by Teague. Judge Coe denied the motion. (R23)

On June 1, 1982, Teague entered a plea of nolo contendere, specifically reserving his right to appeal the denial of his motion to dismiss. (R16-18) The plea negotiations called for him to receive straight probation. (R16) The court accepted the plea and placed Teague on three years' probation, with adjudication of guilt withheld. (R6-7,18) As special conditions of probation, Judge Coe required Teague to pay a public defender's fee (no amount was specified) and $100.00 in court costs. (R7) A separate Final Judgment Assessing Attorney's Fees (of $250.00) and Costs (of $50.00) also was entered on June 1. (R41)

Teague appealed to the Second District Court of Appeal. (R8) On March 21, 1984 that court issued an opinion affirming the order placing Teague on probation (except for the provisions requiring him to pay costs and an attorney's fee) on the authority of Goldstein v. State, 435 So.2d 352 (Fla.2d DCA 1983) and State v. Cruz, 426 So.2d 1308 (Fla.2d DCA 1983), noting that the in-

stant case is "almost a carbon copy of" Goldstein and Cruz. (A1-3) The court recognized that State v. Casper, 417 So.2d 263 (Fla.1st DCA 1982) is "contra" its decision in the case now before this Court. (A2)

Teague filed a timely motion for rehearing, which the Second District Court of Appeal denied on May 10, 1984.

Teague sought to invoke the discretionary jurisdiction of this Court on the basis of conflict between his case and Casper. On October 11, 1984 the Court accepted jurisdiction and dispensed with oral argument.

STATEMENT OF THE FACTS

On March 25, 1982 the Tampa Police Department deployed a decoy at Seventh Avenue and North Nebraska Avenue. (R25) The police decoy was dressed in old clothes and acted sick. (R25) He had $150.00 protruding from his pocket. (R25)

At approximately 8:00 p.m. Petitioner, Lorenzo Teague, was walking along Seventh Avenue when he observed a sick man at the intersection with Nebraska Avenue. (R25) Teague asked the sick man if he was all right. (R25) As Teague started to leave, he noticed money protruding from the man's pocket. (R25) He removed the money, and was immediately arrested by detectives who were nearby. (R25)

Lorenzo Teague was not a particular target of the decoy operation, nor was he a suspect prior to the March 25 incident. (R25)

ARGUMENT

THE TRIAL COURT ERRED IN DENYING LORENZO TEAGUE'S MOTION TO DISMISS THE INFORMATION BECAUSE THE MATERIAL FACTS WERE UNDISPUTED AND ESTABLISHED ENTRAPMENT AS A MATTER OF LAW.

The defense of entrapment

> originates from a spontaneous moral revulsion against using the powers of government to beguile innocent but ductile persons into lapses that they might otherwise resist....

21 Am.Jur.2d Criminal Law §204 (1981).

This case involves the question of whether Lorenzo Teague was entrapped as a matter of law when he succumbed to the temptation placed in his path by the decoy stratagem employed by the Tampa Police Department, and whether this issue is one which may appropriately be resolved by a pretrial motion to dismiss.

Section 812.028 of the Florida Statutes permits law enforcement officers to use undercover operatives in prosecutions for theft, robbery and related crimes. However, this Court made clear in State v. Dickinson, 370 So.2d 762 (Fla.1979) that this section does not eliminate the defense of entrapment in Florida; rather entrapment is codified in section 812.028(4). This section provides that it shall not constitute a defense to a prosecution for any violation of the provisions of sections 812.012 through 812.037[1/] that:

> (4) A law enforcement officer solicited a person predisposed to engage in conduct

---

[1/] Grand theft, the crime with which Teague was charged, is proscribed by section 812.014.

> 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.

This portion of the statute saves section 812.028 from being unconstitutional because it "preserves the line between the predisposed criminal and the unwary innocent...." Dickinson, 370 So.2d at 763.

The Dickinson Court recognized, as have other courts, that predisposition is the essential consideration in an entrapment defense. See also United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); State v. Brider, 386 So.2d 818 (Fla.2d DCA 1980), pet.for review denied, 392 So.2d 1372 (Fla.1980). That is, whether the defendant was already of a mind to commit the crime before law enforcement officers became involved is determinative of whether those officers entrapped the defendant.[2/]

In Lashley v. State, 67 So.2d 648, 649 (Fla.1953) this Court quoted with approval the general rule on entrapment stated in 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." (Emphasis supplied by the Court.)

[2/] Some jurisdictions outside Florida use the "objective test" for entrapment, which focuses not on the predisposition of the accused as much as on the conduct of the police. See, for example, State v. Wilkins, 473 A.2d 295 (Vt.1983).

Of similar effect is the statement concerning entrapment found in 21 American Jurisprudence, Second Edition, Criminal Law, Section 202 (1981):

> Generally...where the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him, no conviction may be had. [Footnote omitted.]

And in State v. Perez, 438 So.2d 436,437 (Fla.3d DCA 1983) the court described the entrapment defense as follows:

> Entrapment is a defense rooted in the notion that it is not the intent of the criminal laws to prosecute or punish persons where the criminal design originates with government or state officials who implant in the mind of an otherwise innocent person the disposition to commit the offense and induce its commission. [Citations omitted.]

Although the issue of entrapment ordinarily is a question for the trier of fact, entrapment can exist as a matter of law. State v. Sokos, 426 So.2d 1044 (Fla.2d DCA 1983); Smith v. State, 320 So.2d 420 (Fla.2d DCA 1975), cert.denied, 334 So.2d 608 (Fla.1976); State v. Rouse, 239 So.2d 79 (Fla.4th DCA 1970). See also Bell v. State, 369 So.2d 932 (Fla.1979) and State v. Liptak, 277 So.2d 19 (Fla.1973). The Second District Court of Appeal recognized this fact in State v. Cruz, 426 So.2d 1308 (Fla.2d DCA 1983), pet.for review granted, Case No. 63,451 (Fla. 1983), one of the cases used to support its decision in Teague, but, incongruously, held that entrapment may not be decided pursuant to a motion to dismiss under Florida Rule of Criminal Procedure 3.190(c)(4) where the defendant's intent or state of mind (i.e. predisposition) is at issue. However, in the recent case of State v. Stenza, 453 So.2d 169 (Fla.2d DCA 1984) (which

did not involve entrapment) the same court held that, in some instances, the issue of intent may by resolved by way of a motion to dismiss. Intent only becomes a jury question where there is some substantial competent evidence from which the jury may reasonably infer intent. The Stenza holding was the culmination of

> a significant shift in the court's statements over the past twenty years or so as to the susceptibility of determining intent in a criminal case on a motion to dismiss.

Id. at 172.

The problem with the court's position in Cruz that the question of entrapment, but not predisposition, may be resolved as a matter of law is that predisposition is the key issue whenever an entrapment defense is asserted.

Cruz involved facts very similar to those of the instant case. The Second District found that a question of fact arose as to whether Cruz was predisposed to commit the grand theft because there was no showing the police approached or encouraged him to commit the offense. This conclusion was not warranted. The police encouraged Cruz, just as they encouraged Lorenzo Teague, by placing a tempting decoy bearing exposed money in his path. They approached him in the sense that they positioned the decoy so that he could be seen by anyone passing by. The Court's comments go more to the nature of the lure used to ensnare Cruz (and Teague) than to whether he might have been predisposed to commit the crime.

Cruz implies that one must have been predisposed to commit the crime because he did commit it. If adopted by this

Court as the law of Florida, this reasoning would eliminate the defense of entrapment in this state.

The Cruz court appears to have equated "intent" with "predisposition." However, the two concepts are not identical, and the distinction is important in resolving this case.

"Intent" involves the state of mind of the defendant at the time he committed the criminal act. There can be little doubt that Petitioner, Lorenzo Teague, intended to deprive the police decoy of the $150.00 when Teague removed it from his pocket. But the issue is whether Teague was predisposed to commit the theft before he formed the intent to take the money.

The question of intent is not susceptible of direct proof, but must be decided on the basis of all the facts and circumstances of the case. See, for example, State v. Evans, 394 So.2d 1068 (Fla.4th DCA 1981); Williams v. State, 239 So.2d 127 (Fla.4th DCA 1970); Edwards v. State, 213 So.2d 274 (Fla.3d DCA 1968), cert.denied, 221 So.2d 746 (Fla.1968). Predisposition, on the other hand, is susceptible of direct proof. We know this because in Story v. State, 355 So.2d 1213 (Fla.4th DCA 1978), cert.denied, 364 So.2d 893 (Fla.1978), the court set forth four specific ways to prove predisposition.[3/]

Thus, because predisposition, unlike intent, may be proven directly, there is no reason why the issue of predisposition may not be resolved by way of a pretrial motion to dismiss. The State may defeat such a motion by alleging facts which would

---

3/ According to Story, the State may establish predisposition through proof of the defendant's prior record, his ready acquiescence in the criminal scheme, his reputation for engaging in certain illicit activities, or a police officer's reasonable suspicion that the defendant was engaged in such activities.

tend to prove predisposition in accordance with one of the four methods of proof listed in Story. The State did not allege any such facts in the instant case, and so the circuit court should have granted Teague's motion to dismiss.

The nature and purpose of a pretrial motion to dismiss was examined in Ellis v. State, 346 So.2d 1044 (Fla.1st DCA 1977), cert.denied, 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.denied, 302 So.2d 413 (Fla. 1974).

The trial judge determines whether the undisputed facts raise a jury question much as the 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.denied, 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. Smith and Stenza, both supra. See also Casso v. State, 182 So.2d 252 (Fla.2d DCA 1966), cert.denied, 192 So.2d 487 (Fla.1966).

When an entrapment defense is asserted, once the accused presents a valid claim, the State bears the burden of disproving entrapment beyond a reasonable doubt. State v. Casper, 417 So.2d 263 (Fla.1st DCA 1982), pet.for review denied, 418 So.2d 1280 (Fla.1982);[4/] Moody v. State, 359 So.2d 557 (Fla.4th DCA 1978); Dupuy v. State, 141 So.2d 825 (Fla.3d DCA 1962), cert. denied, 147 So.2d 531 (Fla.1962). The Dupuy court noted:

> ...[W]here the defense of entrapment is raised it is incumbent upon the State to make a showing amounting to more than mere surmise and speculation that the intent to commit crime originated in the mind of the accused and not in the minds of the officers of the government.

141 So.2d at 827. Thus the State must at some point produce evidence of the accused's predisposition to commit the crime. In the context of a motion to dismiss, however, the State would need merely to allege facts which would tend to show predisposition. This is a minimal burden. If the State cannot meet it, there is no reason why the entrapment question may not be resolved pretrial. After all, if the State remains unable to present evidence of predisposition during the trial, the case would be subject to a motion for judgment of acquittal. Thus, judicial labor and the time of all concerned may be saved by considering this issue on a motion to dismiss.[5/]

[4/] The First District Court of Appeal followed Casper in State v. Holliday, 431 So.2d 309 (Fla.1st DCA 1983), pet.for review granted, Case No. 63,832 (Fla.1983).

[5/] In the Wilkins case cited in footnote 2, the Supreme Court of Vermont noted that the trial court should determine as a matter of law whether entrapment exists if there is no dispute as to the facts; the issue should only be submitted to the jury if a factual dispute exists.

The Casper court correctly ruled that the issue of predisposition may be resolved pursuant to a motion to dismiss. Where the State cannot establish a prima facie case for predisposition under any reasonable construction of the facts, there is no issue for the trier of fact to decide. Casper.

In State v. Snipes, 433 So.2d 653 (Fla.1st DCA 1983) the State appealed a trial court order which granted the defendant's motion to dismiss a perjury charge. The appellate court rejected the State's argument that the defense of recantation which Snipes asserted was not cognizable on a motion to dismiss, but involved factual questions which should have been submitted to a jury:

> ...[T]he 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 of recantation.

433 So.2d at 655 (emphasis supplied).

Here, the only facts before the court showed a scenario established by the police to trap anyone who was not strong enough to resist the temptation raised by a seemingly incapacitated vagrant lying on the sidewalk with a large amount of money protruding from his pocket. There is no indication in the record that the police placed the decoy in order to arrest Teague or any other particular individual. Nor is there any evidence that similar crimes had occurred in the area where the decoy was positioned. Most importantly, as noted previously, the State made no allegations that Teague readily acquiesced in the crime, or had been involved in prior criminal activity, or had a repu-

tation for such activities, or that the police had a reasonable suspicion of his involvement in such activities. See Story, supra. Under these circumstances, there was no evidence from which the trier of fact could have inferred predisposition. Teague's motion to dismiss thus established entrapment as a matter of law, and should have been granted. Casper, supra.[6/]

6/ Teague suggests that if predisposition, and hence entrapment, may not be resolved by a motion to dismiss, then a defendant who pursued such a motion prior to Cruz in reliance on Casper (in which the issue was resolved by way of a motion to dismiss) might be entitled to withdraw a nolo plea he entered reserving his right to appeal the denial of his motion to dismiss. Cf. Brown v. State, 376 So.2d 382 (Fla.1979).

CONCLUSION

Petitioner, Lorenzo Teague, respectfully prays this Honorable Court to reverse the decision of the Second District Court of Appeal and remand this cause with directions to the appellate court to return this cause to the trial court for the granting of Teague's motion to dismiss and ordering him discharged.

Teague would note that Cruz v. State, Case No. 63,451, was orally argued before this Court on November 10, 1983. Cruz involved issues very similar to those involved herein, and is probably dispositive of this appeal.

Additionally, several other similar decoy-entrapment cases, some of which have been mentioned in this brief, are currently pending in this Court. They include: State v. Holliday, 431 So.2d 309 (Fla.1st DCA 1983), pet.for review granted, No. 63,832 (Fla.1983); Drumm v. State, 432 So.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.1983), pet.for review granted, Case No. 64,678 (Fla.1984).

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Robert F. Moeller
ROBERT F. MOELLER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 30th day of October, 1984.

Robert F. Moeller

ROBERT F. MOELLER
Assistant Public Defender

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813)533-1184 or 533-0931

COUNSEL FOR PETITIONER

RFM:js