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Criminal Law - Defenses - Entrapment

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claiming the privilege, refusing to allow any testimony which could possibly rebut his version.[25]

From the above cases one could conclude that the Supreme Court of North Dakota could find enough justification to imply the waiver of the physician-patient privilege at the commencement of an action in which an essential issue is the patient's physical condition.

A party should not be allowed to pick and choose what evidence shall be excluded by asserting the objection that certain testimony is privileged. This may allow him to put forth the best evidence while asserting this privilege to bar the other party from determining the truth of the claim and the nature and extent of the injury. It is the opinion of the writer that the modern extension of implying a waiver when a person places his physical condition in issue by way of complaint, counterclaim, or affirmative defense is both logical and equitable. This result does no harm to the policy basis underlying the privilege, and therefore the waiver should be recognized as effective.

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CRIMINAL LAW—DEFENSES—ENTRAPMENT—Defendant was convicted for possession of marihuana. The conviction resulted from a police undercover agent inducing the defendant, through repeated requests, to procure marihuana for the agent. The defendant introduced the agent to a willing seller who sold the agent some marihauna. Defendant facilitated the sale by passing the marihuana from the seller to the agent, but neither received a share of the drug nor profited by the exchange. The Supreme Judicial Court of Massachusetts affirmed the defendant's conviction of possession and denied him the defense of entrapment stating, "his familiarity with narcotics would hardly justify a conclusion of law that the defendant was corrupted by the officer's conduct." *Commonwealth v. Harvard*,—Mass.—, 253 N. E. 2d 346 (1969).

"Entrapment is the conception and planning of an offense by an officer, and the procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[2] Though this definition appears to be universally accepted, the difficulty of formulating a test to apply

1. Marihuana is the Mexican name for the annual herb, "cannabis sativa". The drug prepared from the stems and leaves of the "cannabis sativa" plant is commonly referred to as Marijuana, marajuana, maraguana, and mariahana. BLACK'S LAW DICTIONARY 1119 (rev. 4th ed. 1968).
2. Sorrells v. United States, 287 U.S. 435, 454 (1932) (separate opinion).

entrapment has plagued both state and federal courts since the first part of this century.[3] The court in the instant case recognized for the first time the defense of entrapment as a part of Massachusetts law.[4] In doing so the court chose to follow the so called "majority test", which is used in the federal courts and in all but two of the state courts.[5] This comment will examine the desirability of the "majority test" in application of the entrapment defense, and the possibility of implementing a test which might be preferable to the "majority test".

The majority test was first articulated in *Woo Wai v. United States*.[6] This case put forth the "origin of intent" test which in essence says that where the origin of intent is in the government agent and he *induces* the defendant to do criminal acts, public policy demands that the criminality of such acts should not be punished.[7]

The United States Supreme Court adopted the *Woo Wai* approach in *Sorrells v. United States*.[8] Chief Justice Hughes, speaking for the majority in the 5 to 4 decision, held entrapment to be a valid defense where a government agent, posing as an old army friend, had induced the defendant to procure whiskey for him.[9] The test announced by the *Sorrells* court is that in order to establish entrapment, the conduct in question must be a result of the "creative activity" of law enforcement officers.[10] This test, generally accepted today,[11] provides that where entrapment has been established, ". . . a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[12] In determining what is a trap, both the conduct of the government agent and the conduct and predisposition of the defendant as bearing on his claim of innocence may be examined.[13]

Sorrells further defined the entrapment defense by stating, "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises."[14] Apparently, then, as long as the police only take advantage of the defendant's "willingness and pre-

3. 22 C.J.S., *Criminal Law* § 45 (2), at 138 (1961). *See also* Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring opinion); Sorrells v. United States, 287 U.S. 435, 453 (1932) (separate opinion); DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U. OF S.F. L. REV. 243, 256 (1967).
4. Commonwealth v. Harvard, ——Mass.——, 253 N.E.2d 346, 350 (1969).
5. *See*, Rotenburg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 890 (1963). Tennessee has rejected the entrapment defense. *See* Goins v. State, 192 Tenn. 32, 237 S.W.2d 8, 12 (1951). New York has some authority rejecting the defense of entrapment. *See* People v. Schacher, 47 N.Y.S.2d 371, (N.Y.C. Magis, Ct. 1944).
6. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).
7. *Id.* at 415, 416.
8. Sorrells v. United States, 287 U.S. 435, 443 (1932).
9. *Id.* at 440.
10. *Id.* at 451.
11. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L. J. 1091, 1106 (1951).
12. Sherman v. United States, 356 U.S. 369, 372 (1958).
13. Sorrells v. United States, 287 U.S. 435, 451 (1932).
14. *Id.* at 441.

disposition" to engage in criminal activities, there can be no entrapment.

The question of artifice and stratagem in relation to inducement by the officer was discussed fully in *Sherman v. United States*.[15] *Sherman* involved two narcotic addicts who had become friends while undergoing treatment for their addiction. One of the addicts was a government informer and succeeded in inducing the other, through appeals to his sympathy, to obtain a quantity of heroin for the informer. The court held this to be entrapment, reasoning that it was necessary to distinguish between proper and improper inducement.[16] However, *Sherman* failed to define what it actually meant by "inducement" other than reaffirming the "artifice and stratagem" approach taken by *Sorrells*.[17]

Whatever "inducement" is, both state and federal courts have uniformly held that it requires more than a mere request or offer.[18] The basis for this view appears to be that:

> [O]ne who has committed a criminal act is not entitled to be shielded from its consequence merely because he was induced to do so by another.[19]

A few courts have gone even further, holding that where the defendant has been previously engaged in criminal activity, the inducement can be greater and more deceptive.[20]

Perhaps the most criticized element of the *Sorrells* test is that part which puts the stress on a subjective standard.[21] Under this standard, the government is allowed to show the reasonableness of its agents activities by introducing evidence tending to show the defendants predisposition to criminal conduct. Past cases have allowed such evidence as; prior federal and state convictions,[22] crimes for which the defendant was not convicted,[23] defendants reputation,[24] statements from other drug users,[25] and the mere possession of a narcotic drug.[26]

The "prior predisposition" approach, which has received greatest acceptance in the state courts,[27] would appear to restrict entrapment to cases where the crime was planned by the police and the defendant was otherwise innocent.[28] This has the effect of

15. Sherman v. United States, 356 U.S. 369 (1958).
16. *Id.* at 373.
17. *Id.* at 372.
18. Trice v. United States, 211 F.2d 513 (9th Cir. 1954); Swallum v. United States, 39 F.2d 390 (8th Cir. 1930); Note Entrapment, 73 HARV. L. REV. 1333, 1336 n 24 (1960).
19. Commonwealth v. Kutler, 173 Pa. Super. 153, 96 A.2d 160 (1953), *citing* Commonwealth v. Wasson, 42 Pa. Super. 38, 54, 57 ( ).
20. Trice v. United States, 211 F.2d 513 (9th Cir. 1954).
21. Rotenburg, *supra* note 5, at 897.
22. Demos v. United States, 205 F.2d 596 (5th Cir. 1953); Carlton v. United States, 198 F.2d 795, 797 (9th Cir. 1952); United States v. Becker, 62 F.2d 1007, 1009 (2nd Cir. 1933).
23. United States v. Johnson, 208 F.2d 404, 406 (2nd Cir. 1953); Heath v. United States, 169 F.2d 1007 (10th Cir. 1948).

making the defendant and his past activities the focal point instead of the conduct of the police in relation to the present charge. It is no wonder that a number of writers have asked whether or not the purpose for which entrapment was created is being fulfilled.[29]

The inequities that appear in the "majority test" have not gone unchallenged. In each of the major Supreme Court decisions involving entrapment,[30] a minority of four justices advocated a test that would produce a more objective result. Justice Frankfurter, concurring in *Sherman*, aptly stated the objective:

> [A] test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment.[31]

The advocates of the objective test deem it irrelevant to ask where the intent to commit the crime originates, because in all these cases of entrapment, the crime originates with the police, without whose inducement the particular crime would not have occurred.[32] Taking the view that entrapment was formulated to limit police encouragement, not enhance it, the court under the objective test would look to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime.[33] Therefore, regardless of the previous infractions of the defendant, the instigation and creation of a new crime to entrap the defendant would not be justified.[34] The *Sherman* minority put it this way:

> Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.[35]

Although none of the state or federal courts have adopted this view, at least one state has moved to incorporate its principles. The California Supreme Court in *People v. Benford*,[36] though ad-

24. United States v. Siegel, 16 F.2d 134 (D.C.D. Minn. 1926).
25. Strader v. United States, 72 F.2d 589 (10th Cir. 1934).
26. United States v. Pappagoda, 288 F. 214 (D.C.D. Conn. 1923).
27. Rotenburg, *supra* note 5, at 892 n 67.
28. Rotenburg, *supra* note 5, at 892.
29. Donnelly, *supra* note 11; Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. OF PA. L. REV. 245 (1942); Rotenburg, *supra* note 5.
30. *E.g.*, Masciale v. United States, 356 U.S. 386 (1958); Sherman v. United States, 356 US. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).
31. Sherman v. United States, 356 U.S. 369, 382 (1958) (concurring opinion).
32. *Id.*
33. *Id.* at 384.
34. *Id.* at 383.
35. *Id.* at 384.
36. People v. Benford, 53 Cal. 2d 1, 345 P.2d 928 (1959).

herring to the *Sorrells* test,[37] ruled that in cases involving entrapment:

> [E]vidence that defendant had previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities is not admissible.[38]

Admittedly, this is not complete objectivity, but *Benford* at least eliminates the "predisposition" aspect of the "majority test" and probably represents the greatest deviation from the majority view that can be found among the states.[39]

One of the most critical opponents of the "majority test", is Professor Richard Donnelly of Yale Law School.[40] He contends that if the subjective orientated "majority test" really meant what it said, a defendant could never be convicted of a police created activity.[41] Therefore the subjective approach, in denying entrapment, must overlook the notion of police created activity and concentrate solely on the defendant's intent interpreted by his predisposition.[42] In short, the "majority test" professes to examine the "creative activity of the police", yet in practice fails to do so.[43] The only means to correct this inadequacy then, would be to direct the courts inquiry solely at the propriety of the officers conduct. Thus, the determining factor would be whether the officer's conduct would tempt only the willing criminals.[44] Furthermore, the courts attention should be directed solely at the crime or activity that is before the court, and if that activity shows entrapment, the defendant should be acquitted.[45] The reasoning Donnelly used in reaching this conclusion is aptly reflected in a statement made by Justice Holmes, dissenting in *Olmstead v. United States*:

> . . . for my part, I think it a less evil that some criminals escape than that the government should play an ignoble part.[46]

The American Law Institute, reflecting the purposes of entrapment, chose to adopt the "objective test" to be included in their Model Penal Code.[47] Although the A. L. I. recommendation does

37. The *Sorrells* test was formulated by the majority in *Sorrells* and there termed the "creative activity" test, but is also known as the "origin of intent" test.
38. People v. Benford, 53 Cal. 2d 1, 345 P.2d 928, 935 (1959).
39. Note, *Criminal Law: The Entrapment Doctrine as a Defense in Wisconsin*, 52 MARQ. L. REV. 406, 408 (1969).
40. DeFeo, *supra* note 3, at 261; Rotenburg, *supra* note 5, at 893: 41 U. OF COLO. L. REV. 263 (1969).
41. Donnelly, *supra* note 11, at 1107.
42. *Id.* at 1108.
43. *Id.*
44. *Id.* at 1114.
45. *Id.*
46. Olmstead v. United States, 277 U.S. 438, 470 (1928) (dissenting opinion).

not serve to bind anyone, it is indicative of the fact that a number of legal minds are concerned about the status of the law regarding entrapment.

The instant case illustrates the type of injustice that the objective view seeks to correct. Defendant was denied the defense of entrapment solely on the grounds that his familiarity with drugs justified any type of conduct by the police. In the words of the court, borrowed from another decision: "[A]lthough the instant defendant had to be played with a bit . . . he was willing to take the bait."[48] It should be pointed out that the officer either saw or phoned the defendant daily for nearly a month before obtaining any drugs. Furthermore, the defendant only introduced the officer to a willing seller. Yet the court chose to look solely to defendant's predisposition, and to completely overlook the conduct of the police agent. Evidence as to the defendant's past actions involving drugs was considered in lieu of the actual transaction that had brought defendant before the court.

It would appear that the objective view would provide a more equitable result. A careful examination of the officer's conduct might reveal the manner in which he approached the defendant for over a month, the representations that the officer made, and the extent of the friendship that produced the ultimate result, and conclude that this activity was the moving force of the defendant's conduct. Also, under the objective view, the court could have looked solely to the activity in question, and not to the defendant's predisposition. The words of Justice Frankfurter, concurring in *Sherman*, are suited to just this type of case:

> Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.[49]

In conclusion, if the doctrine of entrapment is to maintain a place in criminal law, it is a matter of necessity that the courts adopt the objective approach. North Dakota has yet to take a stand on this question and is in an ideal position to incorporate the objective approach as North Dakota law. With the constant growth of criminal statutes, both in North Dakota and other states, and the apparent broadening of police power, entrapment stands as one of the last protections the citizen has against the practices of the government. Therefore, if entrapment is going to serve the purpose for which it was intended, it must be changed to reflect that purpose.

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47. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962).
48. Waker v. United States, 344 F.2d 795, 796 (1st Cir. 1965).
49. Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring opinion).