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Criminal Law - Nature of Elements of Crime and Defenses in General - Entrapment as a Defense to Criminal Prosecution

Bayard Lewis

CRIMINAL LAW—NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL—ENTRAPMENT AS A DEFENSE TO CRIMINAL PROSECUTION.—Defendant was convicted of receiving, concealing and selling opium. The only proof of guilt was the testimony of an informer employed by the United States Bureau of Narcotics. Defendant and the informer became acquainted while both were undergoing medical treatment to rid themselves of drug addiction. Subsequently the defendant, at the informer's repeated requests, purchased drugs which he delivered to the informer. After several sales, defendant was arrested by government officers in the execution of a prearranged plan based on information obtained by the informer. The only defense offered was that the defendant had been induced to commit the offense by the informer and was therefore entrapped. The court *held* that the charge of the trial judge, in which he told the jury that the law did not permit a government agent to trick anyone into committing a crime through artifice or fraud, was erroneous. Artifice or fraud was not a necessary element of the defense of entrapment. *United States v. Sherman*, 200 F.2d 880 (2d Cir. 1952).

"Entrapment" is the inducement of one to commit a crime not contemplated by him, for the sole purpose of instituting criminal prosecution against him.[1] Where it is proved that the defendant did not originate the idea of committing the specified offense or any similar crime and the officer, by persuasion and representation, induced the defendant's act, entrapment is a good defense.[2] The first duty of an officer of the law is to prevent, not punish, crime and a conviction for an offense induced by officers of the government which did not originate in the mind of the defendant will not be sustained.[3] There is a clear distinction between measures used to make a person a criminal in order to secure a conviction and the use of artifice by officers in gathering evidence to prosecute and convict a person suspected of being engaged in criminal practice.[4] "If the criminal intent or the willing pisposition to commit the crime originates in the mind of the accused and the criminal offense is completed, the fact that the opportunity is furnished or the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him for it constitutes no defense."[5] If the authorities have

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1. Sorrells v. United States, 287 U.S. 435 (1932); State v. Marquardt, 139 Conn. 1, 89 A.2d 219 (1952); State v. Jarvis, 105 W.Va. 499, 143 S.E. 235 (1928).

2. Capuano v. United States, 9 F.2d 41, 42 (1st Cir. 1925); Butts v. United States, 273 Fed. 35, 38 (8th Cir. 1921); State v. McCornish, 59 Utah 58, 201 Pac. 637 (1921).

3. Sorrells v. United States, 287 U.S. 435 (1932); United States *ex. rel.* Hassel v. Mathues, 22 F.2d 979 (4th Cir. 1927); Butts v. United States, 273 Fed. 35 (8th Cir. 1921).

4. United States *ex. rel.* Hassel v. Mathues, 22 F. 2d 979 (4th Cir. 1927); State v. Marquardt, 139 Conn. 1, 89 A.2d (1952); Lee v. State, 66 Okla. Cr. 399, 92 P.2d 621, 624 (1939).

5. State v. Marquardt, 139 Conn. 1, 89 A-2d 219, 221; United States v. Perkins, 190 F.2d 49 (7th Cir. 1951) (defense of entrapment not available where officers furnished former inmate of House of Correction with money to buy drugs from defendant who was also former inmate of same House); Schneider v. United States, 192 F.2d 498, 502 (9th Cir. 1951) (evidence held insufficient to show entrapment where defendant bought scrap iron from the United States Government, and an army Lieutenant, at the suggestion of an officer of the F.B.I., acceded to defendant's plan to take more salvage than was originally purchased); Hunter v. United States, 62 F.2d 217, 219 (5th Cir. 1932) "In cases where the intention to violate the law originates in the mind of the defendant, and the government agents or representatives do no more than merely to afford him an opportunity to commit a crime, in order to make out a case which can be successfully prosecuted, there is no entrapment. The government agents may even go so far as to aid in the commission of the crime without affecting the right of prosecution."; Patton v. United States, 42 F.2d 68 (8th Cir. 1930) (where defendant paid federal prohibition

reasonable grounds to suspect the accused of planning a crime and an officer joins the defendant for the purpose of detecting such crime and prosecuting the criminal, the officer's act would not prevent a conviction. One of two conditions, however, must be present to warrant a conviction. There must be either: (1) A reasonable suspicion on the part of the officers that the party is engaged in the commission of, or is about to commit a crime; or (2), the original suggestion or initiative for the perpetration of the offense must come from the suspect.[6] The defense of entrapment is, however, a positive defense with the burden of proof on the defendant to show that he was entrapped.[7] Although decoys may be used to entrap criminals, and to present an opportunity to one willing to commit a crime, the entrapment would not be permissible if decoys are used to ensnare the innocent and law abiding into commission of a crime. When the criminal design is conceived in the mind of an officer and the defendant is lured into its commission, the government is estopped by sound public policy from prosecuting,[8] it being the court's position that they will not permit their process to be used in aid of a scheme for the creation of crime by those whose duty it is to prevent its commission.[9] The vital factor in determining if there has been an illegal entrapment is whether the accused was induced by the persuasion of the government agent to participate in a crime which he would not otherwise have committed.[10] Any effective appeal made by agents to impulses of compassion, sympathy, pity, friendship, fear or hope other than the expectation of gain and profit raises the defense of entrapment.[11] In order to rebut such a defense, officers may present evidence to show that the defendant has engaged in other transactions of a like nature.[12] If the defendant has been engaged in criminal conduct similar to that with which he is charged and has already formed designs to commit similar crimes, or has proved willingness to commit the crime, such willingness being evinced by his ready compliance, the defense of entrapment may not be valid even if officers design and

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agents to protect him in his violation of the National Prohibition Act, the jury found no entrapment); Newman v. United States, 299 Fed. 128 (4th Cir. 1924) (where federal agent went to the office of the defendant, a physician, and told him that he was an addict and bought drugs, the defense of entrapment was a question for the jury).

6. Billingsley v. United States, 274 Fed. 86, 89 (6th Cir. 1921); United States v. Certain Quantities of Intoxicating Liquor, 290 Fed. 824, 826 (D. N.H. 1923).

7. Sorrells v. United States, 287 U.S. 435, 452 (1932); People v. Lee, 9 Cal. App.2d 99, 48 P.2d 1003, 1007 (1935); "The burden of persuasion cannot be shifted in such a manner as to relieve the prosecution of its duty of convincing the jury beyond a reasonable doubt, however." Wigmore, Evidence §§2512, 2514 (3d ed. 1940).

8. *See* Sorrells v. United States, 287 U.S. 435, 459 (1932) (concurring opinion) "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling prinicple of public policy."; United States v. Becker, 62 F.2d 1007 (2nd Cir. 1933); State v. Marquardt, 139 Conn. 1, 89 A.2d 219 (1952).

9. Sorrells v. United States, 287 U.S. 435 (1932); O'Brian v. United States, 51 F.2d 674 (7th Cir. 1931); State v. Marquardt, 139 Conn. 1, 89 A.2d 219, 221 (1952).

10. Cohen v. United States, 201 F.2d 386, 394 (9th Cir. 1953); State v. Marquardt, 139 Conn. 1, 89 A.2d 219, 221 (1952).

11. Wall v. United States, 65 F.2d 993 (5th Cir. 1933); Hunter v. United States, 62 F.2d 217, 219 (5th Cir. 1932) (agent registered as a guest at a hotel appealed to defendant to get him a half gallon of good whiskey to cure mother who was sick with flu); United States v. Washington, 20 F.2d 160, 163 (D. Neb. 1927).

12. Sauvain v. United States, 31 F.2d 732 (8th Cir. 1929); Nutter v. United States, 289 Fed. 484, 485 (4th Cir. 1923).

provoke the particular crime charged.[13] There is dictum to the effect that even if the defendant is in the course of committing a crime of some kind, has already formed the design to engage in it, or is suspected with good reason, it is a good defense if the officer instigated the crime.[14] The test turns upon the issue of inducement. "If the accused entertained the criminal intent before he was afforded the opportunity to violate the law, he is in no position to plead estoppel."[15] Although there has been no recent opportunity for the courts of North Dakota to decide the issue of entrapment, they have in the past laid down a rule which is in accord with the general rule here stated.[16] The instant case laid down no new or arbitrary rules concerning entrapment but was content to accept the law as determined in previous litigation before Federal courts. In the light of holdings in other recent cases, the decision of the court seems sound. An officer may use trickery or artifice to test a suspected person by offering him an opportunity to transgress, but may not put him under extraordinary temptation.[17] Such artifice or trickery is not necessary to a good defense however,[18] and the grant of a new trial because of an instruction to the jury naming such conditions as a prerequisite to acquittal is not contrary to existing law.

BAYARD LEWIS

GAMING—GAME OF CHANCE—FREE GAMES AWARDED FOR HIGH SCORE ON PINBALL MACHINE HELD PROPERTY WITHIN ANTI-GAMBLING STATUTES.—Plaintiff sought a declaratory judgment that a pinball machine installed in his restaurant was not a gambling device and an injunction prohibiting enforcement officials from arresting plaintiff, confiscating his machine, or interfering with its operation and use. The District Court entered judgment for the plaintiff. On appeal the Supreme Court of Nebraska *held* that a pinball machine which gave a free game or games upon the attainment of a certain minimum score, but in the operation of which the element of chance predominated over that of skill, was a game of chance played for money, and its use prohibited. *Baedaro v. Caldwell*, 56 N.W.2d 706 (Neb. 1953).

The constitutionality of statutes providing for the confiscation of gambling devices is almost uniformly upheld.[1] The problem of primary importance in

13. United States v. Perkins, 190 F.2d 49, 52 (7th Cir. 1951) (defendant not illegally entrapped where former inmate of House of Correction was given money by an officer for the purpose of buying drugs and he induced defendant, also a former member of same House who recognized him, to procure the drugs); United States v. Becker, 62 F.2d 1007 (2nd Cir. 1933) (where the defendant was regularly distributing obscence matter, the fact that postal inspectors induced him to ship such matter in interstate commerce for the purpose of prosecuting him, did not constitute an illegal entrapment); United States v. Certain Quantities of Intoxicating Liquors, 290 Fed. 824, 826 (D.N.H. 1923) "In the absence of special circumstances excusing it, a person who, at the suggestion or instigation of another, commits a crime not particularly affecting an individual in person or property, is just as guilty as though the design had originated with him, and this is true, though the suggestion came from an officer of the law."

14. *See* United States v. Becker, 62 F.2d 1007, 1008 (2nd Cir. 1933).

15. State v. Marquardt, 139 Conn. 1, 89 A.2d 219, 222 (1952).

16. State v. Currie, 13 N.D. 655, 102 N.W. 875 (1905).

17. United States v. Wray, 8 F.2d 429 (N.D. Ga. 1925); Sutton v. State, 59 Ga. App. 198, 200 S.E. 225 (1938); State v. Boylan, 158 Minn. 263, 197 N.W. 281 (1924).

18. Demos v. United States, 205 F.2d 596, 599 n. 3 (5th Cir. 1953).

1. League for Preservation of Civil Rights and Internal Tranquility v. City of Cincinnati, 64 Ohio App. 195, 28 N.E.2d 660 (1940); *see* People v. One Pinball Machine, 316 Ill. App. 161, 44 N.E.2d 950, 952 (1942).