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Criminal Law - Entrapment - Twenty-One Requests of Defendant with Quick Access to Drugs Do Not Constitute Entrapment

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principles which, in the interest of some overriding policy, is to be given 'liberal' construction."[28] In fact, very recently, a district court in Alabama interpreted the *Olberding* decision in exactly this fashion. It was stated: "There was found, moreover, no case which purports to limit the venue considerations of *Olberding* to only nonresident motorist statutes, and to attempt to do so, it is believed, would grossly ignore the rationale of that decision."[29] In short, in view of the clarity of the statutory language itself, and the interpretation given it by the highest Court, an attempt to restrict an application of the statute would seem to be erroneous.

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CRIMINAL LAW—ENTRAPMENT—TWENTY-ONE REQUESTS OF DEFENDANT WITH "QUICK ACCESS" TO DRUGS DO NOT CONSTITUTE ENTRAPMENT.

People v. Toler (Ill. 1962)

Edward Unsell, a special employee of the State Attorney's office, approached defendant about twenty times in an unsuccessful effort to obtain narcotics from him for a "sick friend who had only a year to live." Unsell then introduced defendant to a Chicago police officer who falsely represented himself to be the friend of a drug addict whose narcotics supply had dryed up and who had not long to live. The defendant agreed to obtain narcotics for the officer's "friend." The evidence showed that the defendant had quick access to substantial quantities of illegal drugs, but that the sale of the drugs in question was done without financial profit to himself. Defendant was convicted of unlawfully selling drugs. On appeal, the Supreme Court of Illinois *held* that under the facts which were presented to the lower court the defense of entrapment was not established. *People v. Toler,* 26 Ill. 2d 100, 185 N.E. 2d 874 (1962).

The elements constituting the defense of entrapment are generally well-settled and well-defined. The defense is available if law officers inspired, incited, persuaded or lured the defendant to commit a crime which he otherwise would not have perpetrated.[1] The important factor is the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it

28. *Supra* note 24 at 340, 74 S. Ct. at 85.
29. Goldberg v. Wharf Constructors, 209 F. Supp. 499, 503 (N.D. Ala. 1962).

1. People v. Outten, 13 Ill. 2d 21, 147 N.E.2d 284 (1958); People v. Clark, 7 Ill.2d 163, 130 N.E.2d 195 (1955). All jurisdictions agree that the defense is available to one who commits a crime where the intent originated with a state official and the crime is brought about through the latter's persistent preying upon the sympathy of a law-abiding person. Annot., 33 A.L.R.2d 884 (1952).

except for the trickery, persuasion, or fraud of the officer."[2] In *United States v. Washington,*[3] entrapment was defined as "any effective appeal made by the agents to the impulses of compassion, sympathy, pity, friendship, fear or hope. . . ."

The fact that defendant had a ready access to a supply of narcotics should not be overemphasized. In *Morei v. United States,*[4] the court disposed of this problem in these words:

> That he was able to procure the drug is not in itself startling. There are doubtlessly many people who live on the seamy side of the life of the great cities, innocent of association with crime and without criminal proclivities, who, nevertheless, in their lives and experience about the streets, have a pretty good idea of where narcotics could be obtained. But this is of no consequence. . . .[5]

Surely a "quick access" is in no way conclusive of the matter. On the other hand, where repeated solicitations are necessary to induce the defendant's cooperation, the courts are quite willing to find entrapment. In *Sherman v. United States,*[6] a government informer arranged to become a "patient" with the same doctor who was treating the defendant for drug addiction. After several casual meetings with the defendant, it was suggested that he supply the informer with a narcotics source for future purchases. It was only after repeated requests predicated upon the informer's alleged suffering that the defendant finally acquiesced and made several sales. Defendant was charged with illegally selling narcotics and pleaded entrapment. The Supreme Court of the United States reversed the conviction and found, upon the facts, that the defense of entrapment was established as a *matter of law.* In *Morales v. United States,*[7] which also involved repeated requests by a planted government agent, this same Court reversed the defendant's conviction and remanded the case with instructions to dismiss the indictment.[8] Similarly, in *Sorrells v. United States,*[9] entrapment was found although the defendant procured the illegal liquor sought by an "old army buddy" after only three requests to do so. In the present case, more than twenty solicitations were needed. In *Cline v. United States,*[10] the Eighth Circuit allowed the plea of entrapment when the evidence showed that the defendant had been induced to

2. Sorrells v. United States, 287 U.S. 435, 454, 53 S. Ct. 210, 217 (1932). This does not mean that when the intention originated with the defendant, police officers may not then lure him into a trap or use decoys for the purpose of apprehension. People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641 (1961); Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819 (1958); Annot., 33 A.L.R. 884 (1952).

3. 20 F.2d 160, 163 (D. Neb. 1927).

4. 127 F.2d 827 (6th Cir. 1942).

5. *Id.* at 834-35.

6. 356 U.S. 369, 78 S. Ct. 819 (1958).

7. 260 F.2d 939 (6th Cir. 1958).

8. See also Cermak v. United States, 4 F.2d 99 (6th Cir. 1925), where the government informer persistently urged his need for the drugs and the court reached a like result.

9. *Supra* note 2.

10. 20 F.2d 494 (8th Cir. 1927).

sell morphine through the informer's pleas to the defendant's sympathy and friendship, representing that he would be unable to retain his job without the drugs. In many of these cases, the requests made were far fewer than the twenty-one made in the instant case. It is unreasonable to argue, as the present court seems to have done, that because the defendant had knowledge of the "substantial supply" he was only waiting for an opportune moment to take advantage of it. Why he would wait until the twenty-first opportune moment is still unanswered. Further, it is significant that the sale, when it was finally concluded, was without profit to the defendant.

If these had been the only factors present in the instant case, it would appear that the Illinois court's decision was extremely strained, if not entirely erroneous. However, the record also showed that defendant, in addition to his ready access, procured and dispensed with the narcotics rather handily and in a somewhat professional manner. Although there was no direct evidence to this effect, the court inferred that he was an experienced dealer in illegal drugs. It has been said that the degree of permissible "inducement" can be greater where it appears that the defendant has previously engaged in unlawful activity.[11] In *Trice v. United States*,[12] the court held that an inducement was not an entrapment if the government agent had reasonable grounds to believe that the defendant was predisposed to engage in the illicit traffic.[13] Since few guides have been set forth anywhere, in order to determine whether the present court's strict interpretation of the term "entrapment" is valid,[14] one should consider the ultimate purpose of the defense. The defense was originally conceived to protect law-abiding citizens from being prosecuted for a crime they would not have committed except for the provocative, seductive or fraudulent measures of a police agent. From the definition itself, many problems arise regarding the intended scope of the defense. Was it meant to be available only to one who had never seriously broken the law before or would it be sufficient if previously he had not been engaged in the particular type of activity with which he is charged? Would the defendant's reason for initially refusing to comply with the police agent's request be relevant? When the subject is a known narcotics user should the police be given greater latitude in their methods? The decisions bearing upon these questions have provided few answers. The

11. Trice v. United States, 211 F.2d 513 (9th Cir. 1954); Henry v. United States, 215 F.2d 639 (9th Cir. 1954), where the court felt that entrapment would lie only where the defendant was not a dealer in narcotics but was lured into committing a crime he had never before committed.

12. *Supra* note 11.

13. The facts in *Trice* would not have supported the finding in the present case.

14. *Cf.* Sorrells v. United States, 287 U.S. 435, 454, 53 S. Ct. 210, 217 (1932); Butts v. United States, 273 Fed. 35 (8th Cir. 1921); Cohen, *The Entrapment Doctrine in the Federal Courts and Some State Court Comparisons*, 49 J. CRIM. L., C & P.S. 447 (1958).

better view would seem to be in the direction of limiting the number and intensity of the agent's allowable inducements.

Although the United States Supreme Court has indicated the relevancy of past conduct as bearing upon the defendant's willingness to engage in the illicit activity,[15] it should be remembered that the defendant is on trial for a particular crime and not for his past conduct. The facts surrounding the specific instance should be controlling; prior activity certainly should not be determinative of his guilt. In the present case, the accused's ready access to narcotics and his familiarity with the method of their disposal should not outweigh the fact that he agreed to obtain the drugs only after many requests and then did so, without profit, to aid a dying man.

If one concedes that different methods are available to the police depending on whether they are dealing with a hardened criminal or with a heretofore innocent party, a defendant's reason for initially refusing to commit the crime is, theoretically, quite relevant since this bears strongly upon whether he is within the class of persons regarding whom a lesser degree of solicitation is permitted. Even though the ultimate question is whether the defendant was an innocent person regarding the particular crime, his past conduct is a significant factor in making such a determination. If the defendant's prior activity is allowed to be presented, a criminal who had truly been attempting to reform would probably find the burden of proving an honest intent in his initial refusal much too onerous. On the other hand, if past conduct may not be introduced, a hardened criminal, whose only motive in refusing at first to perpetrate the suggested crime was fear of being informed upon, would have much less difficulty in showing a "pure heart."

It should be noted that in the instant case there was no evidence of prior bad conduct; the court inferred such activity and concluded that this inference was sufficient to outweigh the numerous repeated refusals by the defendant. The court's conclusion is more like an attempt to judicially legislate the defense of entrapment out of Illinois law rather than an interpretation of the defense as it exists.[16]

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15. Sherman v. United States, *supra* note 2.

16. The court cited five cases to support its interpretation of the law. All are distinguishable upon their facts. Indeed, in Sherman v. United States, *supra* note 2, which was cited for several general principles, the United States Supreme Court, on facts weaker than those in the present case, found entrapment as a matter of law. In United States v. Perkins, 190 F.2d 49 (7th Cir. 1951), both the informer and the defendant were inmates of a prison. The defendant, well acquainted with the sale of narcotics and a known user, produced drugs for the informer without question and at the first request. In People v. Outten, 13 Ill.2d 21, 147 N.E.2d 284 (1958), there was but one request and no plea for a dying son. People v. Clark, 7 Ill.2d 163, 130 N.E.2d 195, (1955) involved a similar situation with no repeated requests, refusals or impassioned pleas. In People v. McSmith, 23 Ill. 2d 87, 178 N.E.2d 641 (1961), the defendant succumbed to the third request for narcotics. The court interpreted the two refusals as natural caution that could be expected from one in the narcotics trade. Surely, the difference between the two refusals and twenty refusals is not just a matter of degree.