STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 1999
v	No. 213737 Genesee Circuit Court
FELIX ERNESTO SOSA, Defendant-Appellant.	LC No. 90-043068 FH

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Defendant pleaded guilty to conspiracy to deliver 650 grams or more of cocaine, MCL 750.157a; MSA 28.354(1), MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), and was sentenced to life imprisonment without parole. In a prior appeal, this Court affirmed defendant's conviction and sentence but remanded the case for an entrapment hearing. *People v Sosa*, unpublished opinion per curiam of the Court of Appeals, issued August 15, 1997 (Docket No. 169934). Following the hearing, the trial court found that under Michigan law, defendant had not been entrapped. Defendant appeals as of right from that decision. We affirm.

I. Background Facts

Defendant's conviction arose out of series of five cocaine sales made between March 19, 1990 and April 3, 1990. For each sale, a state trooper assigned to the drug unit of the Flint Area Narcotics Group purchased cocaine from Anthony Velez. The first sale for was for one-half ounce, the second for one ounce, the third for two ounces, the fourth for one ounce, and finally a fifth for 711 grams. Velez was supplied with the cocaine by defendant. The undercover officer who made the buys testified that when the investigation began, the police did not know what amounts they could purchase from Velez. The officer also testified that he did not bring up purchasing a large amount of cocaine until after Velez informed the officer that Velez was supplying a customer who "was dealing 20 one-ounce bags."

At the conclusion of the evidentiary hearing on defendant's claim of entrapment, the trial court made the following remarks:

On this record the Court does not find that the police officers' conduct was reprehensible. . . .

It would appear that the police did not directly encourage Mr. Sosa to be involved in drug transactions with Mr. Velez . . . .

Therefore, this Court does not find on this record that Mr. Sosa was entrapped and being involved in these drug transactions by the police.

I will say for the record that in watching Mr. Sosa, he seems to be a very respectful person to the law. He has conducted himself in a very professional manner in this courtroom, and I am very sorry that he was not given an opportunity, if one was not given, to try and resolve his case with charges that would carry less than life.

[A]lthough I don't find that there is entrapment, it does bother me that the offense would be escalated in terms of the sales to an amount that would put him in the position of having to face life in prison as opposed to some lesser offense that would at least have given him an opportunity to be released from the prison as sometime in the future.

This Court believes that in these kinds of cases that the Court also ought to be able to inquire into whether or not the Defendant would have sold the amounts that were at issue had there not been some conduct that would have brought that about outside of the Defendant's conduct itself.

[W]hile the Court agrees that Mr. Sosa was not entrapped in being involved in drug transactions, this Court does believe that Mr. Sosa would not have been dealing the amounts that he was dealing if he had not been asked to do so by Mr. Velez who, obviously, was being asked by the police to provide . . . that amount.

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[T]o bottom line it, this Court does not believe, at least under the facts of this case, that the objective test as we use it under entrapment law is really fair to a defendant who has no prior history of dealing drugs at the level that was caught in this case without the request of a friend who was probably being requested to present those amounts by a police officer.

Defendant raises two arguments attacking his conviction, and one attacking his sentence. All of the arguments focus on the fifth drug sale. We examine each of these arguments separately.

II. Conviction

A. Entrapment

In his first attack on his conviction, defendant argues that the trial court erred in concluding that defendant was not entrapped. We disagree. In Michigan, entrapment is analyzed according to a two-pronged test. "The court must consider whether (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Entrapment exists if either prong of the test is established. *Id*. Although the test's first prong does require that the court consider the circumstances of the defendant rather than some hypothetical average law-abiding person, the "tests still bars evidence of the defendant's predisposition." *People v Juillet*, 439 Mich 34, 56; 475 NW2d 786 (1991).[1]

On the basis of the record before us, we believe that the trial court correctly concluded that defendant was not entrapped. The police did nothing more than present defendant with the opportunity to supply the 711 grams of cocaine. *Ealy*, *supra* at 510. Velez was not an agent of the police and there is no evidence suggesting that the police were aware of any improper tactics that may have been employed to encourage defendant to participate in the offense. See *People v Owczarzak*, 144 Mich App 65, 68; 372 NW2d 683 (1985). Nor does the evidence show that the police had any reason to believe that either Mr. Velez or defendant was hesitant to sell large amounts of cocaine.

B. Due Process

We also reject defendant's assertion that his due process rights were violated. In *United States v Russell*, 411 US 423, 431-432; 93 S Ct 1637; 36 L Ed 2d 366 (1973), Justice Rehnquist wrote of the possibility that some day the Court could "be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." We do not believe the conduct of the police in this case can properly be characterized as "outrageous." There was nothing fundamentally unfair about the investigatory techniques employed, *id.* at 432, nor did defendant have a due process right to be arrested before he committed the more serious drug offense.

III. Sentence

Finally, defendant argues that the police engaged in sentencing entrapment. Although the doctrine of sentencing entrapment has never been adopted by a Michigan appellate court, it was discussed by this Court in *Ealy*. However, defendant's argument, which is based on the conduct of the police, does not appear to us to be a sentencing entrapment argument. Instead, defendant seems to be arguing the doctrine of "sentence manipulation." See *United States v Shephard*, 4 F3d 647, 649 (CA 8, 1993).

> Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence. This claim is distinct from a claim of sentencing entrapment which occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense. [*United States v Garcia*, 79 F3d 74, 75 (CA 7, 1996) citation omitted).]

In essence, the two sentence mitigation defenses mirror the two traditional approaches to entrapment. Because it focuses on the predisposition or mental state of the defendant, sentencing entrapment is a subjective doctrine in the same vein as the subjective entrapment defense. Conversely, sentencing manipulation is like the objective entrapment defense in that both focus on the conduct of the police.[2]

Both the sentencing entrapment and sentencing manipulation defenses are intended to justify a downward departure from sentencing guidelines. See, e.g., *United States v Staufer*, 38 F3d 1103, 1106-1107 (CA 9, 1994). In the case at hand, because the sentence is imposed by statute not through use of Michigan's sentencing guidelines, application of either doctrine is irrelevant.

In any event, we do not believe the record before us supports the conclusion that the police engaged in sentence manipulation. Defendant's assertion that the sole reason the police arranged for the fifth sale was to increase his sentence upon conviction is not supported by the evidence. Presented with evidence that Velez was willing to sell a significantly larger amount of cocaine, the police did nothing more than follow through on this opportunity. *Ealy*, *supra* at 511; *Shephard*, *supra* at 649.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

[1] The trial court's concern involving this case seems to stem from a belief that it should be able to examine a defendant's predisposition in cases such as this one.

[2] Defendant relies in great part on this Court's discussion of sentencing entrapment in *Ealy*. Without ever adopting the defense, the *Ealy* Court chose to address that defendant's claim of sentencing entrapment. *Ealy*, *supra* at 510-511. We note that if an appellate court of this state were to ever choose to adopt either sentencing mitigation defense, the same policy considerations that justified adoption of the traditional objective entrapment would most likely direct that court toward adoption of sentence manipulation and not sentencing entrapment.