

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JESSIE B. JOHNSON,

Defendant-Appellee.

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UNPUBLISHED

December 19, 2000

No. 219499

Oakland Circuit Court

LC No. 92-115814-FH

Before: Wilder, P.J., and Holbrook, Jr. and McDonald, JJ.

WILDER, J. (*dissenting*).

I respectfully dissent from the majority opinion affirming the trial court's finding that defendant was entrapped and dismissing the charges against him. In my view, significant facts discounted by the majority demonstrate that defendant willingly participated in the proposed criminal enterprise. Thus, I would hold that the trial court's findings concerning entrapment were clearly erroneous.

The police investigation of defendant began after Lemuel Flack advised Captain Pat McFalda of the Pontiac Police Department that defendant, a police officer with the Pontiac Police Department, assisted Flack in operating a drug house from a home owned by defendant and rented by Flack. Flack told McFalda that defendant provided protection to Flack so that he could sell cocaine from the home, in exchange for money, but that he (Flack) owed money to defendant and as a result feared for his life. Flack's allegations were presented to the Michigan State Police, which assigned Lieutenant Gregory Sykes and Detective Lieutenant Lewis Langham to investigate.

Flack introduced Sykes to defendant as a large narcotics distributor and Flack's supplier. At this meeting, defendant patted down Sykes looking for hidden microphones and told Sykes he was aware that undercover officers sometimes wore hidden transmitter wires and that he suspected Sykes might be a police officer. After this preliminary discussion, Sykes proposed that defendant might provide protection against theft of drugs delivered to Sykes, provide information about planned drug raids and protection against arrest, and provide protection for the establishment of other drug houses to be operated by Sykes. Additional meetings were agreed to by defendant, however, defendant insisted that the next of these meetings be held at the Pontiac

Police Station so defendant could see if any other Pontiac police officers recognized Sykes as a police officer.

As the majority noted, over a two-month period Sykes and defendant continued to meet and on February 7, 1992 defendant agreed to accompany Sykes to a mock drug buy to provide protection in exchange for payment in the amount of \$1,000. After the February 7, 1992 transaction, Sykes asked defendant if he still wanted to continue providing protection for Sykes' cocaine deals and told him it was okay if he didn't. Defendant told Sykes that "he was in" on further transactions. A second transaction at which defendant was to provide protection to Sykes in exchange for payment in the amount of \$1,000 was then arranged for March 4, 1992.

As the majority opinion correctly states, entrapment is analyzed under a two-part test, and is found to exist if either (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 by the court. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Entrapment will not be found, however, "where the police do nothing more than present the defendant with an opportunity to commit the crime of which he was convicted." *Id.* See *People v Butler*, 444 Mich 965, 966; 512 NW2d 583 (1994); *People v Juillet*, 439 Mich 34, 52-53; 475 NW2d 786 (1991) (Brickley, J.). The following factors are analyzed to determine whether the government activity would induce criminal conduct:

(1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. [*People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992); citing *Juillet*, *supra* at 56-57.]

Contrary to the majority, I do not agree that the evidence establishes that the government conduct in this case would induce *a law-abiding person not ready and willing to commit the crime* to engage in criminal activity. *Williams*, *supra*. Instead, I would conclude that the police did nothing more than present defendant with an opportunity to commit the crime of which he was convicted, *Ealy*, *supra* at 511, and that the trial court clearly erred by finding otherwise.

Many of the above listed factors are inapplicable in this case. There was no evidence of appeals made to defendant's sympathy as a friend of the informant, long time lapses between the investigation and the arrest, a guarantee that the alleged criminal activity was not illegal, sexual favors offered in exchange for defendant's participation, or threats of arrest if defendant failed to participate. Additionally, while the government had control over the informant used to introduce

Sykes to defendant, the informant was removed from the investigation after defendant agreed to participate.

However, there was ample evidence on the record to establish that defendant was the owner of a known drug house and had previously participated in drug-related criminal activity. Although defendant did not participate in the actual sales or supply of drugs out of his home, testimonial evidence established that he provided protection to Flack who was selling drugs out of his home, and that defendant accepted money “for looking the other way, knowing that the activity was taking place.” In this regard, the trial court’s reliance on the fact that defendant never possessed, used or sold drugs prior to the staged drug buys is misplaced. Defendant’s actions in providing protection for drug dealing would be sufficient to establish the charge of possession with intent to deliver cocaine *as an aider and abettor*, see *People v Sammons*, 191 Mich App 351, 371-372; 478 NW2d 901 (1991); *People v Lyons*, 70 Mich App 615, 617-618; 247 NW2d 314 (1976), and justify police investigation into the depth and extent of defendant’s criminal activity. See *Ealy, supra* at 511-512; *United States v Calva*, 979 F2d 119, 123 (CA 8, 1992) (police must be given some leeway to probe the depth and extent of a criminal enterprise).

In addition, it is well settled that, in Michigan, the focus of the inquiry in cases alleging entrapment is on the propriety of the government’s conduct at the time the defendant committed the charged offense, not on the defendant’s past behavior or whether he was predisposed to commit the crime. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). Lieutenant Langham, the officer in charge of the investigation, testified that he received information that defendant was operating a crack house and he arranged the sting to ensure that defendant was actually involved in the narcotics business. Thus, whether defendant previously possessed, used or sold drugs is not dispositive.

Further, defendant’s position as a police officer with the Pontiac Police Department at the time he committed the charged offense is an important fact deserving significant weight and consideration. Because he was a police officer, defendant had the authority and the duty to arrest both Flack and Sykes for the drug transactions that instead he provided protection for. In addition, because defendant was a police officer Sykes had to take great care to conceal his own identity as a law enforcement officer. Fortunately, it is the rare drug suspect who can force a meeting to discuss future drug transactions in a police station as a means of attempting to expose the identity of the undercover officer, yet defendant was able to place Sykes and the operation at great risk because of his own position as a law enforcement officer. These actions by defendant clearly distinguish him from the otherwise law-abiding citizen contemplated by *Williams*. Defendant’s investigation of Sykes to ensure that he was a “legitimate” drug dealer clearly shows that he was willing to engage in the criminal activity as long as he believed he could successfully do so without detection. Defendant’s position as a police officer also made him less susceptible to police coercion and pressure to participate in the criminal enterprise.

Although defendant was initially enlisted by Sykes to provide security (i.e., protect against arrest and theft) and information regarding potential drug raids, he did not hesitate to assume a more active role in the criminal enterprise even after being given an opportunity to decline further participation. The fact that defendant showed no hesitation in committing the crime for which he was convicted was sufficient to defeat the entrapment argument. *Ealy, supra*

at 511. See *United States v Walls*, 315 US App DC 111; 70 F3d 1323 (1995) Accordingly, the record establishes that the trial court clearly erred in finding that the government's conduct would induce a law-abiding person to commit the crime.

Turning to the second prong of the entrapment test, I disagree with the majority's conclusion that the police conduct in this case was reprehensible so as to establish entrapment. Defendant's agreement to be present at the drug transactions to provide protection, despite his sworn duty as a police officer to arrest the participants of that transaction, is significant evidence that he had no inclination to decline to participate. Significantly, between the February 7, 1992 and March 4, 1992 transactions, defendant was specifically asked whether he wanted to continue participation in the criminal enterprise and he specifically stated his desire to continue. Thus, to the extent there was any escalation of the criminal enterprise it was done so with the express knowledge and agreement of the defendant.

In *Ealy, supra* at 510, this Court rejected the defendant's argument that police conduct of selling escalated amounts of cocaine to defendant constituted entrapment, calling the conduct in that case "good and proper police work."<sup>1</sup> The same description applies to this case. It cannot be overemphasized that Captain McFalda was presented with evidence of corruption by one of the Pontiac Police Department officers. The information presented to McFalda was that one of the officers in his department was not only looking the other way when drug transactions were occurring, but in addition the officer was being paid to provide confidential law enforcement information and other protection for the drug dealer. Not only did McFalda act correctly by referring the investigation to an outside agency, the State Police also was justified in utilizing a high level of governmental involvement in the undercover operation, including offering money for protection services, even if that level of involvement might not be justified in other circumstances. See *People v Jamieson*, 436 Mich 61, 91; 461 NW2d 884 (1990) (Brickley, J.) (difference in degree of governmental involvement is insufficient to establish reprehensible conduct where there is no evidence that the conduct created a risk that otherwise reasonable, law-abiding citizens will be enticed into violating the law).

For these reasons, I would hold that the trial court clearly erred in finding that the police conduct constituted entrapment and I would reverse the trial court order suppressing the evidence and dismissing the charges.

/s/ Kurtis T. Wilder

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<sup>1</sup> Although the specific issue in *Ealy, supra* was whether the police engaged in "sentencing entrapment," the analysis employed in that case is equally applicable to the instant case where defendant alleges that the police induced him to participate in a greater criminal offense, with more severe penalties, than those activities with which he was already involved.