STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2001
v	No. 231621 Oakland Circuit Court
DEAN MADISON MARTIN, Defendant-Appellant.	LC Nos. 99-165583-FH 99-165584-FH 99-165585-FH 99-165586-FH 99-165609-FH

Before: Owens, P.J., Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from trial court orders denying his motions to quash the information on the basis of legal impossibility and to dismiss the charges on the basis of entrapment. Following the above rulings, defendant pleaded guilty to four counts of distribution of child sexually abusive material, MCL 750.145c(3), one count of child sexually abusive activity, MCL 750.145c(2), and three counts of solicitation to commit first-degree criminal sexual conduct ("CSC I"), MCL 750.157b(3) and MCL 750.520b(1)(a). However, the parties agreed, with the trial court's approval, that the plea agreement would not prevent defendant from pursuing the legal issues raised in this appeal. He was sentenced to concurrent prison terms of four to seven years for each count of distribution of child sexually abusive material, five to twenty years for the child sexually abusive activity conviction, and forty to sixty months for each count of solicitation to commit CSC I. We affirm in part and reverse in part.

Defendant responded to a fictitious Internet advertisement offering sex with child prostitutes, indicating that he was interested and seeking more details. A detective had placed the advertisement in an Internet chat room devoted to child pornography. Using the Internet and telephone, defendant communicated with the detective, who posed as both "Mike," an individual purporting to facilitate child prostitution, and "Sandi," a nine-year-old prostitute. Defendant had sexually explicit communications with both "Mike" and "Sandi," and sent "them" sexually explicit photographs. He ultimately arranged to meet "Sandi" at a hotel for the purpose of having sex. However, defendant was arrested at the hotel. At the time of his arrest, defendant had in his possession an envelope containing the agreed upon price of $350, a video camera, a digital camera, a disposable camera, condoms, a black garter belt, and other miscellaneous items. The

police also seized a video from defendant's workplace, depicting him filming a six to nine-year-old neighbor girl and masturbating while watching the child play.

As noted above, defendant moved to quash the information, arguing that it was legally impossible for him to have committed the offenses because the nine-year-old girl did not exist. Defendant also moved to dismiss the charges based on entrapment. The trial court denied defendant's motions.

On appeal, defendant contends that the trial court erred in denying his motion to dismiss because the detective's conduct constituted entrapment. Generally, a trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). A trial court's factual findings concerning entrapment are reviewed under the "clearly erroneous" standard. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991); *People v Connolly*, 232 Mich App 425, 428; 591 NW2d 340 (1998). The trial court's findings are clearly erroneous if, after review of the record, this Court is left with a firm conviction that a mistake has been made. *Connolly*, *supra* at 429.

In analyzing an entrapment defense, Michigan courts apply an objective test, which focuses on the propriety of the government's conduct, rather than the defendant's predisposition to commit the offense. *Juillet*, *supra* at 53. Entrapment is analyzed according to a two-pronged test, with entrapment existing if either prong is met. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Entrapment occurs when (1) the police engage in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that it cannot be tolerated. *Juillet*, *supra* at 54; *Ealy*, *supra* at 510.

Defendant confines his appeal to the second prong of the entrapment test. Specifically, defendant contends that the police detective's conduct was so reprehensible that it should not be tolerated. Defendant notes the detective's acts of: "pretending to offer child prostitutes for hire"; creating "Sandi," a child prostitute who enthusiastically desired to engage in sexual activity, and explicitly described the acts that "she" intended to participate in with defendant; soliciting, urging, pressuring, "badgering," and begging defendant to send pornographic material to "Sandi"; and steering the conversation back to the planned liaison whenever defendant would talk about something else. Defendant further notes the "absurdly low price of $350, an amount which was grossly disproportionate to the extremely dangerous and immoral act he [the detective] was attempting to procure with [defendant]."

As it relates to the second prong, in *People v Fabiano*, 192 Mich App 523, 532; 482 NW2d 467 (1992), we explained that "there is certain conduct by government that a civilized society simply will not tolerate, and the basic fairness that due process requires precludes continuation of the prosecution where the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation." "Entrapment may also occur under the second prong of the entrapment test if the furnishing of the opportunity for a target to commit an offense 'requires the police to commit certain criminal, dangerous, or immoral acts.'" *Connolly*, *supra* at 429, quoting *People v Jamieson*, 436 Mich 61, 95-96; 461 NW2d 884 (1990) (Cavanagh, J, concurring).

In the instant matter, the detective conducted a general investigation in which he operated a fictitious child prostitution ring via the Internet. . Defendant voluntarily responded to the detective's advertisement, which he saw in an Internet chat room devoted to child pornography, indicating that he was interested and asking for more details. Thus, the detective did not specifically target defendant. Moreover, before any police solicitation requesting defendant to send pornographic materials to "Mike" or "Sandi," defendant sent pornographic pictures of young children to "prove" to "Mike" that he was not the police or engaging in any police activity. Defendant remained in contact with "Mike," shared his sexual desires concerning young children, and asked to communicate with the fictitious nine-year-old girl through e-mail and on the telephone. It is undisputed that the detective never sent any child pornography to defendant.

Defendant concedes that he suffers from "a terrible frailty . . . a deeply suppressed fantasy about having sex with young girls." We note that defendant's response to the detective's child prostitution advertisement belies his claim that the fantasy was suppressed, much less deeply suppressed. The detective's actions in following up on defendant's response, while perhaps unsavory, were necessary to establish that defendant was willing to follow through with his fantasy. Indeed, the detective's actions proved that defendant was a potential consumer of child prostitution, and that he, therefore, posed a serious threat to the young children victimized by that "industry."

It should be noted that the detective's conduct in this case cannot be separated from the criminal behavior that the police, guided by our statutory scheme, seek to prevent. It is difficult to accept defendant's contention that pretending to offer child prostitution, and following up on the ruse with a calculating attention to detail, is egregious when there is a compelling need to protect children, as evidenced by defendant's intentions. Accordingly, we do not believe that the police conduct in the instant matter was too reprehensible for our civilized society to tolerate. Consequently, the trial court did not abuse its discretion by denying defendant's motion to dismiss the charges based on entrapment.

Defendant next argues that his three convictions for solicitation with intent to commit CSC I must be reversed because of legal impossibility. We review de novo the applicability of a legal doctrine. *People v Thousand*, 465 Mich 149, 156; 618 NW2d 772 (2001)

In *Thousand*, the defendant was charged with solicitation to commit third-degree criminal sexual conduct with a minor; however, the minor was actually a police detective. *Thousand, supra* at 152-155, 166-169. The defendant contended that the absence of a child victim made it legally impossible for him to be convicted of solicitation. *Id.* at 155, 166-167. The Supreme Court rejected the defendant's legal impossibility assertion, but concluded that the solicitation charge was properly dismissed because there was no evidence that defendant solicited anyone to do a criminal act. *Id.* at 168-169. In other words, because the detective could not have engaged in criminal conduct, the defendant could not have solicited the detective to engage in criminal conduct. *Id.*

Here, the factual scenario is nearly identical. Because "Sandi" was actually a police detective, there was no evidence that CSC I could have resulted from defendant's solicitation. Therefore, defendant's three convictions of solicitation to commit CSC I must be reversed.

In sum, defendant's convictions of four counts of distribution of child sexually abusive material and one count of child sexually abusive activity are affirmed, but his convictions of three counts of solicitation to commit CSC I are reversed.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot