

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOTT WILSON,

Defendant-Appellant.

UNPUBLISHED

September 21, 2004

No. 248156

Wayne Circuit Court

LC No. 02-013768-01

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of delivery of marijuana, MCL 333.7401(2)(d)(iii), for which he was sentenced to two years' probation. We affirm.

Defendant contends that he was entrapped as a matter of law and that he was denied effective assistance of counsel because his counsel failed to raise the claim of entrapment before or during the trial. We disagree.

First, entrapment did not exist as a matter of law because Nora Miner, who worked as a private investigator at American Axle, was not an agent of the government. The private investigator's conduct could not be attributed to the police unless she was acting with official encouragement or assistance. *People v Jones*, 165 Mich App 670, 674; 419 NW2d 47 (1988). There is no bright line measure to determine what degree of "encouragement or assistance" warrants a finding of a government agency. *Id.* Still, Michigan courts have tended to reject agency under facts in which the informant, rather than the police, has sole control over his or her interaction with the accused and then simply reports the criminal transaction to police. *Id.*

In this case, the investigation of illegal activity at the factory was prompted by defendant's employer, American Axle, which hired a private company, Professional Corporate intelligence (PCI). Through PCI, Miner was employed as a private investigator at American Axle. Thus, as Sergeant James Tolbert testified, Miner was acting as an agent for American Axle, not as an agent for the Detroit Police Department, when she engaged in a transaction with defendant involving the sale of marijuana. As testified to by Sgt. Tolbert, Miner could be compared to an informant or a security guard who simply reported the criminal transaction and delivered the evidence to the police. Also, Sgt. Tolbert's involvement in this investigation was limited to receiving the bag of marijuana as evidence and sending it to the lab for analysis. These facts show that Miner, rather than the police, had sole control over her interaction with

defendant. Therefore, we conclude that Miner was not acting with official encouragement or assistance. *Jones, supra*.

Even assuming *arguendo* that Miner acted as a government agent, we still find that there was no entrapment under these facts. Whether entrapment has occurred must be determined on the facts of each case and is a question of law for the court to decide. *People v Patrick*, 178 Mich App 152, 154; 443 NW2d 499 (1989). The purpose of the entrapment defense is to deter the corruptive use of government authority to instigate or manufacture crime, and as such, a finding of entrapment justifies acquittal for the accused irrespective of his guilt or innocence. *People v Juillet*, 439 Mich 34, 52-53; 475 NW2d 786 (1991) (Brickley, J.). Michigan courts use the objective test of entrapment. *Id.* at 53; *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). The objective test focuses on the propriety of the government's conduct which resulted in the charges against the defendant rather than on the defendant's predisposition to commit the crime. *Hampton, supra*. Under this test, entrapment occurs when (1) the police engage in impermissible conduct which would induce a person similarly situated to the defendant, although otherwise law-abiding, to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002).

Defendant contends that factors such as defendant's twenty conversations with Miner, his friendship with Miner, and the continued pressure Miner placed on defendant to sell marijuana would have established entrapment. We disagree. While this Court has found entrapment under circumstances involving *by design* an appeal to friendship or continued pressure to commit a crime, *People v Jamieson*, 436 Mich 61, 89; 461 NW2d 884 (1990) (Brickley, J.) (emphasis in original), defendant's argument is inconsistent with the evidence presented at trial. Miner testified that not all of the twenty conversations she had with defendant pertained to the sale of marijuana, that she had only a casual conversation with defendant, and that defendant offered to sell her a bag of marijuana. Nothing in the record indicates that Miner appealed to friendship to induce defendant to sell marijuana to her or that defendant was reluctant to sell marijuana. Viewed objectively, the conduct of the private investigator, Miner, would not induce a normal, law-abiding person to commit a crime. *Juillet, supra* at 54. At most, Miner merely furnished defendant an opportunity to commit a crime, which is not entrapment. *Johnson, supra* at 498. Therefore, we conclude there was no entrapment under these facts.

Nevertheless, defendant contends that he was denied the effective assistance of counsel when his counsel did not raise the claim of entrapment before or during trial. However, trial counsel is not ineffective for failing to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Given our conclusion that no entrapment occurred here, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens