STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CARL RODGERS,

Defendant-Appellee.

UNPUBLISHED
September 21, 2001

No. 226047
Wayne Circuit Court
LC No. 99-012587

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

The prosecutor charged defendant, as a fourth habitual offender, MCL 769.12, with two counts of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and one count of felon in possession of a firearm, MCL 750.224f. The prosecutor appeals as of right from the trial court's order granting defendant's motion to dismiss the charges based on a finding of entrapment. We reverse.

I. Standard of Review and the Entrapment Defense

We review a trial court's finding of entrapment for clear error. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991). "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." *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998).

As our Court has explained, "Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person situated similarly to the defendant and 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 Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). A defendant must prove an entrapment defense by a preponderance of the evidence and, "[i]n its decision, the trial court must make specific findings of fact on the entrapment issue." *Juillet, supra*, at 61; see also *People v Pegenau*, 447 Mich 278, 294; 523 NW2d 325 (1994). "Entrapment will not be found where the police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted." *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Indeed, it is well settled that dismissal based on a finding of entrapment is proper "[o]nly when the defendant can prove that the government agents engaged in activities that would impermissibly manufacture or instigate a crime . . . ." *Juillet, supra*, at 61.

II. Analysis

The trial court clearly erred in ruling that Bureau of Alcohol, Tobacco and Firearms (ATF) Agent Joseph Secrete entrapped defendant by approaching him to purchase narcotics.

Contrary to the trial court's assertions, a mere offer by an undercover agent to buy drugs from a narcotics suspect does not constitute entrapment per se. The very definition of entrapment articulated by our Supreme Court requires some conduct that goes beyond the offering of an opportunity to engage in criminal conduct. *Juillet, supra*, at 52; *People v Turner*, 390 Mich 7, 21; 210 NW2d 336 (1973). Indeed, the conduct must be "of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it." *Juillet, supra*, at 52, quoting *Turner, supra*, at 21. Clearly, a mere request to buy drugs is not enough to induce an otherwise law-abiding person to commit the criminal offense of delivering drugs. Moreover, if the trial court judge's opinion represented an accurate statement of the law, police could never utilize undercover officers or informants in order to uncover and eliminate criminal activity. The judge's statements not only wholly ignore the plethora of Michigan cases that require more than mere request for illegal services, the ruling would, for all practical purposes, destroy a universally-employed and highly-effective tool to pinpoint and combat crime.

In response to the prosecutor's sound argument that the court should utilize Michigan's objective test for entrapment, the trial judge rationalized her ruling as follows:

> I believe that if [Agent Secrete] went up to an individual in that section, residing in that section of the City of Detroit, the social economic section that it is, who he knew to be an ex-con, not gainfully, likely to be employed; and asked him do you want to make some quick cash by selling me some drugs that yes, that person would have assisted him in locating the drugs, to make a little money on the side. A person situated where this person was situated.
>
> Now if he had walked up on somebody who perhaps was a teacher, who he had no knowledge about having any prior contact with any type of drug traffic, who don't use or where to go buy it or anything else, I don't believe that that person would have assisted him in making the purchase.
>
> But if I'm looking at the individual, he knew this individual to be in a situation where he knew this individual was, that, yea, that individual would have acted that way . . . .
>
> ***
>
> I think another individual just like him would have too.

As the prosecutor correctly noted below, the courts of our state follow the objective test in applying the entrapment defense, "which focuses primarily on the investigative and evidence-gathering procedures used by the governmental agents." *Juillet, supra*, at 53. While the trial court may consider both subjective and objective factors in deciding whether entrapment

occurred, the ultimate inquiry is "whether the police conduct in question would induce or cause a *hypothetical person* to engage in criminal activity." *Id*. at 53-54 (emphasis in original). The trial court, therefore, could have considered defendant's circumstances, but only to determine if Agent Secrete's actions would drive "a similarly situated person, with an otherwise law-abiding disposition, to commit the charged crime." *Id*. at 55.

The trial judge's assertion that Agent Secrete, knowing defendant had a criminal record, somehow took advantage of defendant's predisposition to commit drug crimes was clearly an improper basis for finding entrapment. In so holding, the court disregarded unambiguous precedent that requires the trial court to consider how an agent's actions would effect a *law-abiding*, *hypothetical* person, not their impact on a particular defendant with demonstrated criminal proclivities.

In addition, the trial court inappropriately relied on her belief that a person approached in that "social economic section" of Detroit is more likely than an average person to commit crimes. Not only was the judge's sweeping generalization patently offensive to residents of the area and unsupported by the record, the notion that persons in that area tend to be less law-abiding was an attempt to circumvent the objective test, the purpose of which is to determine whether police pressure or inducement rose to a level that would induce the commission of a crime by one *not* ready and willing to commit it. *Juillet, supra*, at 52. We can only conclude that the trial court's assertion was an attempt to justify defendant's conduct, rather than to assess whether Agent Secrete's actions were improper. Clearly, this was a legally erroneous basis for finding entrapment and for dismissing these criminal charges.

In addition to the statements above, the trial court based its entrapment decision on erroneous findings of fact. First, Agent Secrete specifically testified that he approached defendant on Prairie Street after receiving an informant's tip that defendant was selling drugs at that location. Also, Agent Secrete had purchased drugs from defendant at the location in 1997 as part of another investigation. Accordingly, the trial court's repeated assertions that defendant had no involvement in drug activities before Agent Secrete "planted the idea" in his mind is clearly contrary to the testimony. Inexplicably, the trial court appears to have concluded that Agent Secrete randomly solicited defendant's services, though testimony clearly established that defendant was a targeted narcotics suspect. Moreover, the trial court's assertion that Agent Secrete's conduct might have been proper if he had solicited drugs from someone standing at the door of a drug house is a distinction without a difference: we cannot fathom how the trial judge can differentiate between a request for drugs from someone at a suspected drug house and a request for drugs from a suspected drug dealer.

We are further puzzled by the trial court's finding that Agent Secrete "waved" money at defendant to persuade him to sell drugs. Defendant did not present evidence that Agent Secrete offered him money before defendant procured the drugs and gun and Agent Secrete specifically testified that the amounts he paid did not exceed the value of what he received. Accordingly, no evidence supported the trial court's repeated implications that Agent Secrete pressured defendant by taking advantage of his poverty. Along the same lines, and perhaps most egregiously, the trial court based its entrapment decision on a finding that defendant is "[a]n ex-con with no place in particular to live and no job to call his own." Not only does this statement further reveal that the trial judge impermissibly based her entrapment decision solely on subjective factors, the statement is not consistent with evidence presented at the entrapment hearing: defendant

specifically testified that he lives on Burnett Street, he referred to his "home" and his "neighborhood" throughout his testimony, and no evidence established that defendant was unemployed when Agent Secrete approached him.

We further conclude that the trial court's finding that Agent Secrete established and exploited a friendship with defendant was contrary to the evidence. The trial court stated in its findings that Agent Secrete gave defendant what he purported to be his home phone number and that he established a "relationship of comfort." While "[a]n appeal by police because of friendship or sympathy rather than for personal gain is an example of police conduct that would constitute entrapment," no such relationship existed here. *People v Potra*, 191 Mich App 503, 509; 479 NW2d 707 (1991). Though evidence suggested that defendant may have recognized Agent Secrete from two drug deals in 1997, defendant did not present evidence of a personal relationship or that Agent Secrete used that relationship to pressure defendant into selling him drugs.[1] In fact, no evidence suggests that defendant and Agent Secrete spent time together socially, other than brief verbal exchanges during the transactions at issue in this case. And, although defendant testified that Agent Secrete gave him a ride home in 1997 and may or may not have bought defendant a beer, this clearly does not rise to a level of friendship that would induce an otherwise law-abiding person to commit the crimes charged.[2] Accordingly, the trial court clearly erred in relying on this evidence as an additional basis for finding entrapment.

---

[1] In his appeal brief, defendant argues that he was entrapped because Agent Secrete established a continuing relationship that lasted for two years and that he continually called defendant. For this proposition, defendant relies primarily on *People v Larcinese*, 108 Mich App 511; 310 NW2d 49 (1981), in which the agent "pressured the defendant every two weeks for a period of more than thirteen months." *Id*. at 515. Here, defendant failed to establish by a preponderance of the evidence that Agent Secrete used similar pressure to compel defendant to act illegally.

While defendant testified that Agent Secrete "kept calling" him in 1997, he also testified that, after Agent Secrete's initial page, defendant's friend sold Agent Secrete some drugs and that, a week and a half later, police arrested defendant for another drug transaction while he was walking down a street. Defendant testified that, following his conviction on the other charge, he went to jail and did not see Agent Secrete for a year. Therefore, if we accept defendant's testimony as true, any calls Agent Secrete made during that short period of time, a few days before defendant's arrest and incarceration on other charges, do not compare to the long-term, persistent contacts by the agent in *Larcinese*.

In 1999, defendant testified that, without calling, Agent Secrete drove up to him one day and defendant procured drugs for him. Following the transaction, defendant testified that he and Agent Secrete exchanged pager and phone numbers. Defendant further testified that his pager was out of service and that Agent Secrete instructed defendant to contact him if he learned about a gun for sale. This testimony again contradicts defendant's assertion that Agent Secrete made repeated calls to him to pressure him to act illegally. Accordingly, defendant's reliance on *Larcinese* is misplaced.

[2] Defendant also argues that this case is similar to *People v White*, 411 Mich 366; 308 NW2d 128 (1981). In *White*, an undercover narcotics officer approached White and gave him $70 to drive from Oscoda to Detroit to purchase drugs for him. *Id*. at 377. When White failed to arrive at the appointed time to deliver the drugs, the officer tracked him down twice and finally agreed to give White more money and to drive him to Detroit to make the drug purchase. *Id*. at 377-378, 390.
(continued…)

Clearly, the trial court erred by finding that defendant proved his claim of entrapment by a preponderance of the evidence and we must, therefore, reverse the trial court's order dismissing the charges on entrapment grounds and remand for further proceedings. Also, we must consider the prosecutor's request that this case be remanded to a different judge, an argument to which defendant failed to respond in his appeal brief. Based on our review of the record and the pervasive bias shown by the trial judge against the prosecutor and for the defendant, we order that this case be assigned to a different judge on remand.

Were we to find that the trial court merely applied the wrong legal test or misinterpreted the testimony in this case, we would not take the serious step of remanding this case to a different judge. However, the record reflects that the trial court (1) mischaracterized and ignored evidence presented at the hearing to defend and justify defendant's conduct; (2) disregarded the rule of law and longstanding precedent by using wholly subjective criteria and personal bias to find entrapment; (3) relied on facts not in evidence; and (4) made inflammatory and unsupported assertions that the ATF was escalating drug activity in the community.

We are also particularly troubled by the trial judge's conduct during defendant's testimony, during which she rephrased or reiterated defendant's statements and prompted him regarding his prior statements, a tactic which can only be characterized as an effort to help defendant bolster his own testimony. This, along with the trial court's provocative assertions regarding the tendencies of residents in defendant's community, leads us to conclude that this judge improperly viewed the evidence only from defendant's perspective and, at times, advocated defendant's position in order to reach a preferred result. For these reasons, we

(…continued)

In Detroit, the officer waited for White to buy the drugs, then drove him back up to Oscoda, dropped him off at home, and arrested him a few minutes later. *Id*. at 378. Our Supreme Court concluded that White was entrapped as a matter of law because "[t]he police officers impermissibly manufactured or instigated a crime." *Id*. at 390.

Defendant argues that Agent Secrete's conduct in this case is *more* egregious than the agent in *White* in encouraging or "manufacturing" the crimes at issue. Defendant avers that, here, Agent Secrete "established a relationship with the Defendant based on the time that the officer may have been in fact imprisoned with the Defendant." This assertion is clearly not supported by the evidence. Not only did Agent Secrete fail to testify that he made that claim to defendant, defendant himself said that he was "quite sure" he did not know Agent Secrete. Thus, it is unclear how such a tactic could have pressured defendant into selling Agent Secrete drugs.

Moreover, as discussed above, defendant's assertion that Agent Secrete established a significant relationship with him is also without support. Although Agent Secrete bought drugs twice from defendant in 1997 and his arrest on these charges occurred in 1999, defendant testified that he had no contact with Agent Secrete for a year in between and no evidence showed that Agent Secrete and defendant spent time together other than during the illegal transactions and, according to defendant, on the day of his arrest. Although Agent Secrete asked to buy drugs and a gun from defendant based on an informant's tip, he in no way manufactured a crime or acted in a way that would induce a law-abiding person to commit a crime in similar circumstances. Clearly, any effort by Agent Secrete to buy drugs and a weapon from defendant pales in comparison to the agent in *White*, who not only approached White, but tracked him down twice and drove him nearly 400 miles to Detroit and back to make the drug purchase for which he was arrested.

conclude that it is unlikely that this judge is capable of fairly and impartially proceeding with this case.

Accordingly, we reverse the trial court's order dismissing the charges against defendant on entrapment grounds, reinstate the charges against defendant, and remand for further proceedings before a different judge. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder