

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-0601 (Marshall County 10-F-10)

**Matthew M. McIlvain,
Defendant Below, Petitioner**

FILED

November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Matthew M. McIlvain appeals his convictions for three counts of felony Delivery of a Controlled Substance in violation of West Virginia Code § 60A-4-401(a)(I). The State has filed a timely summary response.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on May 31, 2011. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner argues that the circuit court should have granted his motion for judgment of acquittal on the ground that he was entrapped. The law on the defense of entrapment was addressed by this Court in *State v. Houston*, 197 W.Va. 215, 475 S.E.2d 307 (1996):

2. The exclusive entrapment defense to criminal prosecution in West Virginia is the subjective standard, which occurs where the design or inspiration for the offense originates with law enforcement officers who procure its commission by an accused who would not have otherwise perpetrated it except for the instigation or inducement by the law enforcement officers. . . .

Syl. Pt. 2, in part, *Id.*

4. When the defendant invokes entrapment as a defense to the commission of a crime, the defendant has the burden of offering some competent evidence that the government induced the defendant into committing that crime. Once the defendant has met this burden of offering some competent evidence of inducement, the burden of proof then shifts to the prosecution to prove beyond a reasonable doubt that the defendant was otherwise predisposed to commit the offense.

5. While the issue of the defendant's predisposition to commit the crime is usually reserved for the jury, a trial court may enter a judgment of acquittal if the State fails to rebut the defendant's evidence of inducement, or fails to prove the defendant's predisposition to commit the offense charged beyond a reasonable doubt. Syllabus, *State v. Hinkle*, 169 W.Va. 271, 286 S.E.2d 699 (1982).

6. Upon review of a trial court's refusal to enter a judgment of acquittal based on the defense of entrapment, we will examine the evidence in the light most favorable to the prosecution, and will reverse only if no rational trier of fact could have found predisposition to exist beyond a reasonable doubt.

Syl. Pts. 4, 5 and 6, *Id.*

At petitioner's trial, the State presented evidence that two police confidential informants purchased morphine pills from petitioner on three separate occasions: two pills on August 25, 2009, for \$70 cash; three pills on August 26, 2009, for \$105 cash; and two pills on August 28, 2009, for \$70 cash. Each purchase was recorded by police-provided audio and video recording equipment, and the recordings were played for the jury at trial. Petitioner testified on his own behalf stating that he had obtained the pills legally, and that he only provided the pills because he did not want his long-time friend [one of the informants] to suffer pain from medical and dental issues. Petitioner denied that the cash he received was in exchange for the pills, but he testified that he could not remember for what purpose he received the money. Petitioner asserted that the informants made multiple telephone calls to him seeking the pills, but the calls were not recorded. However, the State's witnesses disputed that there were numerous telephone calls. The jury was instructed on the law of entrapment, but found petitioner guilty. Petitioner has not asserted any instructional error.

Examining the evidence in the light most favorable to the prosecution, we find that petitioner did not meet his burden of offering competent evidence of inducement. The State's witness denied making multiple telephone calls requesting the pills. By denying that

the cash he received was for the pills, petitioner undoubtedly harmed his own credibility with the jury. Moreover, even assuming *arguendo* that petitioner offered competent evidence of inducement, we conclude that a reasonable jury could have found predisposition beyond a reasonable doubt. The recordings show that petitioner exhibited no reluctance in selling the controlled substance.

When denying the post-trial motion for judgment of acquittal, the circuit court found that during one of the transactions, when petitioner was asked about selling additional morphine, he responded “You know me. I’ll come through with the stuff.” Petitioner denies making this statement and asserts that the judge misheard the audio on the recording. At places, the audio is difficult to understand. Accordingly, when rendering this decision, we have disregarded the circuit court’s finding that petitioner made this statement. Even without this alleged statement, there is more than enough evidence to reject the entrapment argument and affirm the conviction.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh