Volume 65 | Issue 3 Article 6

April 1963

Criminal Law--Entrapment

Robert William Burk Jr.
West Virginia University College of Law

Criminal Law—Entrapment

D was convicted of unlawfully selling narcotics. The purchaser, a police officer, had been introduced to *D* by a former fellow employee of *D*. The officer told *D* that he worked for a dentist who had a son who was a narcotics addict, that he might want to purchase several thousand dollars worth of narcotics, and that he would like a sample to determine the quality. After repeated requests the officer finally persuaded *D* to sell him the narcotics. *Held,* affirmed. There was no entrapment of *D* where the police officer did no more than afford *D* the opportunity to commit a criminal act of his own design, and *D* had quick access to substantial quantities of illegal narcotics. *People v. Toler,* 185 N.E.2d 874 (Ill. 1962).

The principal case represents the common view of the defense of entrapment. Where the act on the part of the public law enforcement officer or an agent merely affords the opportunity to commit a crime, the defendant may not plead entrapment as a defense. But if the officer or agent implants the criminal intent in the mind of the offender, the defense is available.

Historically speaking, entrapment as a defense is a product of modern society. It is an attempt by society to curtail the actions of law enforcement officers by offering a defense to those unfortunates who, without any prior criminal intent, were induced to commit a crime. The irony of the situation is that if the offender is induced to commit a crime by a private citizen, not a member or an agent of society's law enforcement machinery, he may not avail himself of the defense, but must suffer from his own susceptibility to inducement. Note, 73 HARV. L. REV. 1333 (1960).

The United States Supreme Court first espoused the defense of entrapment in *Sorrels v. United States,* 287 U.S. 435 (1932). While the Justices were in agreement that some form of relief should be allowed for the inducement of an innocent person to commit a crime for the purpose of instituting criminal prosecution against him, they were not in complete agreement as to the theory or composition of this relief. The majority advocated an estoppel theory. Where government officials had instigated an act on the part of persons otherwise innocent in order to lure them into committing a crime and to punish them, the government was estopped to prosecute and it was the duty of the courts to bar that prosecution. The majority refused to condone the view that, although the defendant was guilty of violating the statute, the court had authority to grant

him immuniy. The reason given for this refusal was that the court would be encroaching upon the pardoning power of the executive.

Under the majority opinion the determination of the applicability of entrapment as a defense was predicated on a major and minor test. The first and most important was whether the inducing officials had placed the intent to commit the crime in the mind of the offender or had merely afforded him the opportunity; the second was whether from his prior actions he was predisposed to commit the crime.

The concurring opinion in the *Sorrels* case treated entrapment as an affirmative defence. The concurring justices felt that entrapment should not grant immunity to a guilty defendant, but rather afford him a defense founded not on the statute, but on the court's interpretation of what the legislature meant. Under this theory, entrapment was considered to be a question of law to be determined by the court and not by a jury.

In *Sherman v. United States,* 356 U.S. 369 (1958), the Court was afforded the opportunity to review its decision in the *Sorrels* case. Once again the Court split into the two factions, much the same as before, with the majority upholding the estoppel theory. The concurring minority, speaking through Mr. Justice Frankfurter, condoned the affirmative defense theory to be determined as a question of law. The criterion for determination under this latter theory should not be based upon any prior conduct of a defendant or his predisposition to commit the offense, but rather upon the conduct of the law enforcement officers. The court by use of an objective test should determine whether the action of the police would in all likelihood entrap those ready and willing to commit a crime.

Only one case has occurred in West Virginia which deals directly with entrapment and it puts this state in line with the majority in the *Sorrels* case. The court stated that entrapment was inducing a person to commit a crime which had not been contemplated by him, for the purpose of instituting criminal prosecution. However, before the defendant may invoke the defense it must appear that the criminal intent, "the genesis of the idea," was conceived by the entrapping person and not by the accused. If some mere deception is practiced in order to detect a crime, in other words, if the defendant is merely afforded the opportunity to commit a crime, the defense is not available. *State v. Jarvis,* 105 W.Va. 499, 143 S.E. 235 (1928).

The defense and theories of entrapment are subject to several criticisms. First, the majority in the *Sorrels* case hesitated to accept entrapment as an affirmative defense for fear that, by doing so, they would encroach upon the power reserved for the executive. Is this not in reality what they are doing anyway? In an attempt to preserve "the purity of its own temple" by preventing the use of its "process to consumate a wrong," the Court in the *Sorrels* case has attempted to extend its judicial hand by a theory of estoppel to operate as an administrative controller of the law enforcement activities of the executive. Possibly an analogy could be drawn between the Court's activity here and where illegal searches and seizures are involved; however, such an analogy will be found wanting. There is justification for refusal to allow proof obtained by illegal searches and seizures based on the rules of admission of evidence. But where is the justification for a court to meddle in the activities of the executive and completely estop prosecution?

Secondly, the theories of both the majority and concurring opinions of the *Sorrels* and *Sherman* cases fall short of the mark in attempting to establish an adequate criterion for determining the availability of entrapment as a defense. The majority, as has been shown, places emphasis on the origin of intent. The defense is applicable only where the law enforcement official created the intent in the mind of the defendant. Ready compliance on the defendant's part is sufficient to show predisposition, which may result in a generally law-abiding citizens committing a crime and being deprived of the defense. On the other hand, the minority test places importance only on the act of the law enforcement official. The latter test may result in an acquittal of persons engaged in a course of criminal conduct, and the possibility of a conviction of persons that were not. The test hinging on the average susceptibility to inducement in the particular instance. Note, 73 HARV. L. REV. 1333 (1960).

Finally, it is somewhat difficult to justify the distinction drawn between private inducement and public inducement. Certainly entrapment as a defense could not be extended to the point where the planting by a private individual of a criminal intent in one not so predisposed would constitute a defense. This would provide a defense for a multitude of crimes in a multitude of situations and make the task of criminal prosecution virtually insurmountable. This may be an excuse for disallowing the defense, where inducement is by a private individual, but it provides little if any support for allowing

the defense when induced by a law enforcement officer. The query remains, why should one not be punished if he commits a crime?

The problems raised go far deeper than the time and space allotted to this comment. However, in the final analysis, the basic problem appears to be one of law enforcement rather than one of judicial interpretation. The courts may never be able to formulate an adequate criterion for determining when or how the defense should be applied. Instead, the answer to the injustice and the inequality that often result should be found in newer and better methods of detection of those crimes which are now plagued by the defense.

Robert William Burk, Jr.

Criminal Procedure—Trial of Co-defendants—Right of Silence Violated

D was convicted of receiving and facilitating transportation and concealment of narcotic drugs, and purchasing and acquiring narcotic drugs in violation of the Narcotic Drugs Import and Export Act. Before trial *D's* co-defendant moved for a severance. Motion was denied. Although *D* did not take the stand, the co-defendant did testify, and imputed all the blame to *D*. Co-defendant's counsel made repeated comments on *D's* failure to testify and engaged in extended colloquy with the court and *D's* counsel over these comments. The court overruled *D's* motion for mistrial and instructed the jury of *D's* right to decline to testify and that such failure to testify should not be considered in arriving at a verdict. *Held,* reversed. *D* had a constitutionally guaranteed right to silence free from prejudicial comments, even when they came only from co-defendant's attorney. Considering the collision between the two defendants, the imputation of guilt to *D* arising from the references to silence could not be cured by instructions to the jury to disregard the comments. *De Luna v. United States,* 308 F.2d 140 (5th Cir. 1962).

Most of the issues raised by this case are not new or unusual as applied to federal court practice. Rule 14 of the Federal Rules of Criminal Procedure states that a court may order separate trials if it appears that a defendant or the government is prejudiced by a joinder of offenses. FED. R. CRIM. P. 14. It is clear that severance rests within the sound discretion of the court, and a refusal of sev-