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Criminal Law--Defenses--Entrapment

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RECENT CASE COMMENTS

Criminal Law — Defenses — Entrapment. — Sorrells v. United States1 is the first direct decision of the United States Supreme Court on the validity of the defense of entrapment.2 The defendant, after several requests by a disguised federal prohibition agent who had come to his home for the purpose, procured liquor and sold it to the agent, induced partially perhaps by the friendly conversation the two had got into meanwhile about mutual war experiences. Defendant was convicted of violation of the National Prohibition Act,3 the trial court refusing to submit the issue of entrapment to the jury, ruling as a matter of law that there was no entrapment. The circuit court of appeals affirmed the judgment, but the Supreme Court, on a writ of certiorari limited to the question whether the evidence was sufficient to go to the jury on the issue of entrapment, reversed. The Court stated that if the jury should find entrapment to have been present, defendant would not be guilty of violation of the statute, as it was not intended to apply to innocent persons who have been trapped into the commission of acts prohibited under it.4

The use of the entrapment defense has increased greatly since the enactment of narcotic and intoxicating liquor statutes.5 The earlier use of the defense was confined to cases where, as a result of inducement, the accused appears to have committed a crime which he did not intend to commit,6 or where, by reason

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1 53 S. Ct. 210 (1932).
2 The opinion states that the Court has never before spoken on the precise question. Supra n. 1, at 213. In Casey v. United States, 276 U. S. 413, 48 S. Ct. 373 (1928), the objection of entrapment was not taken either below or in the Supreme Court, and the Court said that it did not feel at liberty to raise the defense of its own motion. In the nearest analogous situation that has reached the Supreme Court, it held that the illegal method of "wire-tapping" used by the government officials to obtain evidence of prohibition violations did not render the evidence inadmissible, and that convictions obtained therewith should be affirmed. Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564 (1928).
4 The Circuit Court of Appeals decision is discussed in (1932) 17 Minn. L. Rev. 90, and Supreme Court's decision in (1933) 17 Minn. L. Rev. 331. The Circuit Court of Appeals for the second circuit, speaking through L. Hand, J., has construed the Sorrells decision not to apply to habitual offenders. United States v. Becker, 62 F. (2d) 1007 (C. C. A. 2d, 1933). Query: May a court treat as an habitual offender one who has not before been convicted of the crime?
of the consent implied in the inducement, no crime has in fact been committed. In these cases the defense is valid for there is no operative criminal intent.

The Supreme Court in the Sorrells case, however, attempts to extend the field of application of the defense much farther. The reasoning is that in any case where the enforcing officer has himself been guilty of a violation of the law which induced the violation of the accused, that the mere fact of the officer’s guilt is an exoneration for the accused. This result is based on the so-called “public policy” ground that the government must set a law-abiding example for its citizens and thus preserve the “purity of its own temple”; — the government cannot take advantage of the wrong of its agents in order to convict the criminals they have illegally detected. The government must, of course, set the example for law observance by the honest administration of justice. But does the Supreme Court’s decision, which allows both violators to go free, further that policy? Two wrongs do not make a right — neither does one crime justify another. The only way in which the government can fully vindicate itself is to punish both offenders. Assuming that the prosecutor will be reluctant to seek the conviction of a fellow officer, that obstacle does not justify the Court’s lenient position in allowing both criminals to go scot-free.

Footnotes:

7 People v. McCord, 76 Mich. 200, 42 N. W. 1106 (1889); Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341 (1892); People v. Clough, 59 Cal. 43 (1881); Williams v. State, 55 Ga. 391, 1 Am. Cr. Rep. 413 (1875).

The distinction is made as to in which mind the intent to commit the crime originated. If the intent had its origin in the officer’s mind and he lured an innocent person into committing the crime, the victim of the plot should not be prosecuted. Driskill v. United States, 24 F. (2d) 525 (C. C. A. 9th, 1928); Peterson v. United States, 255 Fed. 433 (C. C. A. 9th, 1919); Capuano v. United States, 9 F. (2d) 41 (C. C. A. 1st, 1925); Voves v. United States, supra n. 6. See also Note (1930) 43 Harv. L. Rev. 617. The theory is that the government is estopped to prosecute the violator in such a case, O’Brien v. United States, 51 F. (2d) 674 (C. C. A. 7th, 1931); discussed in (1931) 45 Harv. L. Rev. 881.
9 Supra n. 1.
10 For a strong argument in favor of public policy in this direction, see the vigorous dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in Olmstead v. United States, supra n. 2 at 469; and of Mr. Justice Brandeis in Casey v. United States, 223 Fed. 412 (C. C. A. 9th, 1915).
11 See the language of the Court in the opinion, supra n. 1, at 214.
12 The officer has, of course, in every case at least technically committed the crime also, as he had the intent to commit it although his motive in doing so may have been good. There are many cases, moreover, in which he undoubtedly cannot even plead the worthy motive, since he has deliberately instigated the
The Court emphatically declares that its holding rests on a "fundamental rule of public policy."\textsuperscript{32} One may suggest that that much overworked phrase is simply judicial rationalization. In the instant case is it not equally conceivable that the public should consider the policy of government-purity completely overshadowed by a policy of rigid law enforcement which will guarantee to prospective violators swift detection and certain punishment? Particularly in the liquor cases the courts have been reluctant to allow the defense of entrapment\textsuperscript{4} because of the great difficulty of detecting violations in this field in any other way.\textsuperscript{5} But without deciding whether a distinction should be made for this particular class of case, the general rule of the majority of state courts,\textsuperscript{6} including West Virginia,\textsuperscript{7} is contrary to that enunciated by the Supreme Court in the Sorrells case.\textsuperscript{8} The state courts' view is that "a person making an unlawful sale of liquor is not excused from criminality by the fact that the sale is induced for the express purpose of prosecuting the seller."\textsuperscript{9}

It is submitted that the Supreme Court's statement "considerations of mere convenience must yield to the essential demands of justice"\textsuperscript{10} is at least questionable. "Justice" is as indefinite a basis for decision as is "public policy". Too frequently "justice" means mere leniency toward law violators. The community has a claim for "justice" as well as the individual. This seems particularly so in the light of the prevailing opinion that in the majority of cases it is the chronic offender that is finally caught in the government traps.\textsuperscript{11} A court should exercise caution in enunciating a rule which exceeds the sanction of popular belief

\textsuperscript{32} See supra n. 11.
\textsuperscript{34} See State v. Driscoll; De Graff v. State, both supra n. 14; Bishop, loc. cit. supra n. 14.
\textsuperscript{35} See Note (1921) 18 A. L. R. 146.
\textsuperscript{36} See State v. Piscioneri, 68 W. Va. 76, 69 S. E. 375 (1910); State v. Jarvis, 105 W. Va. 499, 143 S. E. 235 (1928); State v. Hamrick, 163 S. E. 888 (W. Va., 1932), especially at 870: "Where the only inducement offered by an officer to promote a sale of liquor is willingness to buy, the doctrine of entrapment is not available to the seller."
\textsuperscript{37} supra n. 1.
\textsuperscript{38} supra n. 16, quoted in State v. Jarvis, supra n. 17, 105 W. Va. at 502; State v. Hamrick, supra n. 17, at 871.
\textsuperscript{39} Sorrells v. United States, supra n. 1, at 216.
\textsuperscript{40} See Note (1929) 2 So. Calif. L. Rev. 283, at 292 and 293.
concerning proper individual conduct. Unfortunately there are no statistics available to verify that opinion; and until there is more definite information on the practical results of entrapment methods courts should proceed slowly in changing the existing rules of law.

—Trixy M. Peters.

CRIMINAL LAW — EFFECT OF AGREEMENT TO PLEAD GUILTY IN CONSIDERATION OF PROMISE TO DROP OTHER CHARGES. — The defendant was indicted for violation of the banking laws. He plead that the charges were identical with those alleged in one of thirteen indictments previously returned against him, on which occasion the prosecuting attorney had agreed, with the court's approval, to discharge the defendant from further prosecution under these thirteen indictments if he would plead guilty to the fourteenth indictment, and assist in liquidating the bank's accounts; that the defendant had performed his part of the agreement; that the entries of nolle prosequi were made under the other indictments; and that he had served a prison sentence following conviction under the remaining indictment. A demurrer to this plea was sustained and its sufficiency certified. Held, that the plea was a bar. State v. Ward.¹

This decision is squarely in conflict with the rule adopted by most courts to the effect that such agreements create merely an "equitable right" to a pardon, which the courts will recommend but cannot effect.² The court has in effect assumed the power to pardon, which is expressly reserved to the governor alone by the West Virginia Constitution.³ A nolle prosequi in itself is no bar to a subsequent prosecution.⁴ The entry of a nolle prosequi could

¹165 S. E. 803 (W. Va., 1932).