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ENTRAPMENT—A LEGAL LIMITATION ON POLICE TECHNIQUES

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Entrapment is a defense to a criminal act when a person is incited, induced, inveigled, or lured into the commision of a crime not contemplated by him, for the purpose of prosecuting him, by a law enforcement officer or his agent. "It is recognized as a defense only in the Federal Courts and a few states. In the other states, the instigation of the crime is immaterial; the competency of evidence showing criminal conduct depends only upon its inherent probative value rather than on other circumstances."[1]

Semantically speaking, there is slight difference in the dictionary definitions between entrapping a criminal and catching one. The terms have been used synonymously in the sense that they are nearly alike in meaning and significance. The police have the duty imposed upon them to catch criminals, and if the term entrapment is used in the ordinary dictionary sense, then this "catching" of criminals means the same thing as entrapping a criminal, but this is not so under the court decisions. Since officers of the law are bound by legal enactments and court decisions, it is suggested that officers ignore the fine lines drawn by the semanticists and abide by the considered judicial decisions as applied to police work.

One of the earliest Federal cases was *Sorrells v. United States*, 287 U.S. 435, where a Federal agent visited some war buddies and after some reminiscing, the Federal agent asked the friend (accused) to purchase some liquor in violation of the National Prohibition Act. The accused stated that he "didn't bother with the stuff." But after repeated requests by the agent, the accused left and returned with some liquor about a half hour later. After his arrest, conviction, and appeal, it was shown that the accused was of good character, a steady worker, and had no record of either possessing or selling liquor prior to this transaction. The court held that the accused was "entrapped" into the commission of the crime, and therefore, he had a valid defense. The court pointed out that this was an abuse of authority.

SETTING TRAPS

A somewhat better illustration of the difference between catching and creating criminals is contained in the case of *People v. Hanselman* (76 Cal., 460) where a constable in a small town was concerned with a number of thefts involving drunk

[1] CRIMINAL LAW, E. M. DANGEL, Professor of Law, Boston University 1951, Edan Publications, Boston, Mass., Pages 174 and 175: "The States recognizing entrapment as a defense are Arizona, California, Colorado, Georgia, Illinois, Missouri, Montana, Ohio, Oklahoma, Pennsylvania, Virginia, West Virginia, and Washington."

rollers. In order to detect the offender, the constable disguised himself, feigned drunkenness, and lay down in an alley with marked money on his person. When a suspect approached him, the constable made no effort to prevent the theft from his person, but remained passive until the suspect had removed the marked money from him, at which time the constable jumped to his feet and placed the suspect under arrest. The court said that there is no entrapment where an officer disguises himself, feigns drunkenness, and makes no objection when money is taken from his person. The court then quoted from Bishop, under the head of "Plans to Entrap," where the authorities on the subject hold: "If a man suspects that an offense is to be committed, and, instead of taking precautions against it, sets a watch and detects and arrests the offenders, he does not thereby consent to their conduct, or furnish them any excuse. And in general terms, exposing property or neglecting to watch it, or furnishing any other facilities or temptations to such or any other wrongdoer, is not a consent in law." (1 Bishop on Criminal Law, 262.)

Thus, it would seem that officers may set traps for suspects, and such traps do not constitute entrapment. At this point it should be noted that there is no requirement for officers to take steps to prevent the commission of a crime except in those cases where the general obligation of an officer to protect life and property would compel him to act, as, for example, to stop a time bomb from going off, if he knew of its existence prior to the contemplated explosion. In California, for example, there is a law which requires officers to prevent duels if they have prior information regarding it.[2] But generally speaking, if officers learn beforehand that a crime will be committed at a certain time at a particular place, they may stakeout and wait until some criminal act has been committed before making an arrest.[3]

Public Policy

On grounds of public policy, the courts have refused to participate in an indirect commission of a crime by being a party to its punishment. The judiciary will not punish a crime which was instigated, developed, and culminated by another branch of our Government. If the executive branch of Government, represented by law enforcement officers, by an over-zealous and superinducement, or over-persuasion, plants a criminal intent in an apparently innocent mind with the intent to arrest the person who was "lured into its commission," the courts permit the use of the claim of entrapment as a complete defense. More aptly put by Judge Marston in a Michigan case, "Human nature is frail enough at best and requires no encouragement in wrong doing. If we cannot assist another, and prevent him from committing crime, we should at least abstain from any active efforts in the way of leading him into temptation."[4]

[2] Penal Code Section 230: "Every judge, sheriff, or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any persons to fight a duel, and who does not exert his official authority to arrest the party and prevent the duel, is punishable by fine not exceeding one thousand dollars."

[3] The term "Stakeout" is sometimes referred to as "Observation from a fixed point," or to "Wait and watch."

[4] *Saunders v. People*, 38 Michigan 218, 221. Reported in A Treatise on the Law of Crimes, Clark & Marshall, 5th Edition, 794 pages, Callaghan & Co. Chicago 1952 at pages 219 and 220.

Test of Intent

Our problem then becomes one of interpreting what is meant by "over-zealous and super-inducement, or over-persuasion." Generally, "if the accused entertained a criminal intent before he was afforded the opportunity to violate the law, he is not improperly entrapped because he is not led into the commission of the crime by the officer.[5] In other words, the defense of entrapment presents the issue of whether intent to commit the crime was furnished by the officer or the defendant. It is a question of fact whether the criminal intent was first conceived by the law enforcement officers or whether they simply encouraged defendant's boldness. There must be factual evidence introduced that a defendant was inveigled into the commission of the crime or that the officers were the procuring cause or instigators of the criminal intent. In a narcotics case a special employee of the Federal Narcotics Bureau introduced a United States Treasury Enforcement Agent to Finn.[6] The Federal narcotics man told Finn that the "T" man had some girls who needed narcotics. To an inquiry as to whether he was still doing business, Finn answered, "Yes". Finn then asked the "T" man (who was using the assumed name of Nate) if he was "the law", and the "T" man reassured him by an evasive answer. Finn asked that he be paid, departed and returned in fifteen or twenty minutes with narcotics which he delivered to "Nate." He then asked "Nate" to drive him to another location as he had other people to take care of. No arrest was made at this time. The next day "Nate," called Finn and stated that he would like to get twelve papers of the "stuff." No arrest was made at this time. Several days later "Nate" made other buys from Finn and placed him under arrest. At the trial Finn argued that the criminal intent did not originate with him and testified that the only reason he secured narcotics for the "T" man was because of the statements that the "T" man had "girls" who were sick and that the other sales were made because the "T" man told him he was taking the girls to Reno and would need sufficient until he returned to San Francisco. The court held that there was no entrapment because "no persuasion was offered for the sale other than the ordinary conversation that would take place between a willing seller of narcotics and a willing buyer."

Use of Decoy

A closer question of fact is sometimes encountered when officers use informers or decoys in securing evidence against a criminal. It now seems to be the prevailing attitude of the courts that "it is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. When an accused has a pre-existing criminal intent the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment."[7]

An interesting application of the permissive use of decoys involved a situation where "A" decided to kill his wife and enlisted the services of "B" a friend of his, to

[5] Criminal Law, Dangel, footnote 1.

[6] *People v. Walter Finn*, (1955) 136 Cal. App. 2d 152; *People v. Fong*, 129 Cal. App. 2d 667; *People v. Lagomarsino*, 97 Cal. App. 2d, 92.

[7] *People v. Braddock*, 41 Cal. 2d 794; *People v. Schwartz*, 109 Cal. App. 2d 450, 455.

make a bomb for him. "B" agreed to do this but told the District Attorney's office about the scheme. The District Attorney's office brought two Deputy Sheriffs in who instructed "B" to go ahead and prepare a dynamite bomb and instructed "B" to let them know when "A" was going to plant the bomb. The officers were informed by "B" of "A's" intentions, and pursuant to a pre-arranged plan, to which "B" was a party, they had concealed themselves nearby where they could observe the planting of the bomb by "A" and "B". The officers watched "A" and "B" approach the place where his wife was supposed to be and as the bomb was being readied, the officers rushed in and arrested "A". "A" was convicted of attempted murder of his wife and on appeal argued that his conviction was the result of an "entrapment" as that term is understood in the criminal law. The court held that there was no entrapment and affirmed conviction. In so doing the court expounded on the principles governing the use of decoys by law enforcement officers in these words: "When officers of the law are informed that a person intends to commit a crime against the property or person of another, the law permits them to afford opportunities for its commission and to lay traps which may result in the detection of the offender. To this end a person may be engaged to act with the one who is suspected and to be present with him at the time the crime is to be committed; and if the accused, having himself orginally conceived the criminal intent, commits such of the overt acts as are necessary to complete the offense, he will not be protected from punishment by reason of the fact that when the acts were done by him the person who was present, with the acknowledgement and approval of the authorities, aided in and encouraged their perpetration. It is of course necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed shall alone be sufficient to make out a complete offense against the law; for no act done by his feigned accomplice may be imputed to him, and if, in order to constitute the offense, it is necessary that something done by the supposed confederate shall be imputed to the accused, then the prosecution will fail. Or if it appear that the intent to commit the crime did not originate with the accused but was suggested by the person present with him, and that he was not intentionally carrying out his own criminal purpose. the prosecution will likewise fail."[8]

Use of Deception

Sometimes law enforcement officers will pretend to cooperate by furnishing opportunities in order to facilitate the consummation of a crime. In one case a special investigator for the Police Department of Bakersfield was assigned the duty of frequenting pool halls and similar places to pick up information about crimes that were contemplated or that had been committed. The investigator struck up an acquaintance with two characters who confided in the investigator that they were

[8] *People v. Joseph Lanzit*, 70 Cal. App. 498, Citing as authority the following cases: *Dalton v. State* 113 Ga. 1037 (39 S.E. 468); *State v. Janse*, 22 Kan. 498; *State v. Currie*, 13 N.D. 655 (112 Am. St. Rep. 687, 69 L. R. A. 405, 102 N.W. 875); *Crowder v. State*, 50 Tex. Cr. 92 (96 S.W. 934); *People v. Conrad*, 102 App. Div. 566 (92 N.Y. Supp. 606), affirmed in 182 N.Y. 529 (74 N.E. 1122); *State v. Mantis*, 32 Idaho, 724 (187 Pac. 268); *People v. Macy*, 43 Cal. App. 482 (184 Pac. 1008); 8 R.C.L., p. 128.

going to burglarize a store and wished to borrow a truck from the investigator. The investigator loaned the truck to the two characters and then reported these facts to his superior officer which resulted in a number of police officers staking out. After observing the two suspects backing the truck to the rear of the store, breaking into the store, loading on the truck an iron safe, some tires, and various other articles, the officers then placed them under arrest. After having been convicted of burglary, the two characters then appealed the case on grounds of entrapment. The appellate court held that there was no entrapment and stated that "the loaning of the truck to these appellants, even if the officer knew from his conversation with appellants what they intended to do with it, was not such an inducement to commit the crime as will relieve the appellants from responsibility."[9]

In another case an officer was approached by "F" who wished to pay to the officer's Chief of Police some money for protection against laws that inhibit gambling and prostitution. The original offer was $750 a month for the Chief. The officer told "F" that he had made some mention of the matter to his superior but was very doubtful whether he would allow houses of prostitution and as to the crap game, he did not believe the Chief would let his reputation go for $750 a month. To this "F" replied, "Well, I can raise that ante a $1,000 with the extra bonus when I have a good month and am making money. He is to have some of it too." A few days later the officer arranged for "F" to meet his chief. At this meeting "F" offered the Chief $500 immediately to open one house of prostitution. The Chief stated that "I don't think we can talk any business; I am not interested in your $500 proposition." "F" then said, "Maybe I can put $3,000 on the line but I will have to have some time to think it over." Two days later the officer walked into "F's" pawnshop and was told "I have the money, where can I locate the Chief?" The officer took "F" to the Chief's office where "F" paid the Chief the $3,000 at which time "F" was placed under arrest for bribery. After having been convicted of bribery, "F" appealed on grounds of entrapment. The Appellate Court stated: "Appellant wholly misconceives the doctrine of entrapment. He asserts that the conduct of the officers was against public policy in that they led him on to unfold his plans and to increase the amount of his offer for protection against laws that inhibit gambling and prostitution and actually to pay the money. On the contrary, such behavior was designed to uphold the public policy of the state as expressed in its statutes and court decisions. Had the officers gone in search of a bribe giver, placed decoys to attract corruptionists and led the tempted one to commit the final act, they would thereby have lowered the standards of honorable and decent official conduct, would have violated the ethics of good citizenship and would have lost the prey they aimed to conquer. But they did no such thing. Appellant conceived the crime in his own brain, opened the negotiations without the slightest inducement, and took the initiative at every meeting. To seduce the constabulary of his adopted city was with him a passion. To effect the nullification of laws and ordinances against the most loathsome social vices was the prelude to the realization of his dream of vast riches. He set about the achievement of his purpose without hesitance or timidity. . . . . After a bribe giver has told a patrolman the

[9] *People v. Malone*, et al, 117 Cal. App. 629 Citing as authority *People v. Norcross*, 71 Cal. App. 2; *People v. Rodriguez*, 61 Cal. App. 69; *People v. Caiazza*, 61 Cal. App. 505.

amount he will pay to the head of the police department and asks for the privilege of communicating directly with the Chief it would be injurious to the public welfare for either official to "fade out," leaving the rascal at large. To meet with him and obtain indisputable evidence of his offer was a duty the Chief owed the State. That he did so is a stimulus to honesty in public service and an unforgettable lesson to lurking corruptionists. *Entrapment exists only where the official has conceived and planned the crime for one who would not have done it but for the allurement, deception, or persuasion of the officer.* If the doing of an act is a crime and the criminal intent originated in the mind of the accused and the offense is completed, the fact that an officer appeared to cooperate by furnishing opportunity or otherwise aiding the offender in order to faciliate the consummation of the act is not a defense. When police officers are informed that a person intends to offer a bribe to an official of the state they may afford opportunities for him to negotiate, to bargain and pay the money and may act with the offender, and if after originating the criminal intent, he takes such steps as are necessary to complete the offense he is nonetheless guilty of the crime because the officers had encouraged him to divulge his plans and to enlarge his offers and were present at the final scene. One who commits a crime induced thereto by an officer can escape punishment only when the criminal intent was first conceived by the minions of the law, and it is a question of fact whether they were the authors of the criminal scheme or merely encouraged his boldness."[10]

CONCLUSIONS

Many courts have taken the bold step of establishing a judicially inspired defense of entrapment as being against sound public policy to woo or lure an apparently innocent person into the commission of a crime, not contemplated by him, for the purpose of prosecuting him. At the same time, the judiciary has recognized the perfectly legitimate and proper devices, decoys, and traps for the purpose of detecting crime and securing evidence. In short, officers are paid to catch criminals and not create them.

[10] *People v. Finkelstin*, (1950) 98 Cal. App. 2d 545, reported in full page 175 to 183 in CALIFORNIA CRIMINAL LAW CASES, JOHN B. WILLIAMS, William C. Brown Co. publisher, Dubuque, Iowa, 1951.