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Entrapment in Narcotic Law Violations

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answer is in the affirmative, the conclusion is that the design originated with them; if the answer is in the negative, the conclusion is that the design originated with the accused. Some courts declare that it must appear clearly that the officers have "bent the will" of the accused if entrapment is to be a good defense. United States v. Washington (1927; D. C.), 20 F. (2d) 160.

Only one case has been reported in Kentucky on this phase of the entrapment question. Cooke v. Com., 199 Ky. 111, 250 S. W. 802 (1923). This case presents no difficulty in that it lines up four square with the principal case and thus clearly follows the general rule.

The entrapment question in connection with liquor and narcotics is handled similarly to entrapment in connection with bribery cases, abortion cases, the sending of obscene mail cases, etc. However, the tendency is to allow greater freedom to the officers in connection with liquor and narcotic cases. Several recent cases have held no entrapment where the officers with no information about the accused, without any reasonable grounds for suspicion, and with quite a degree of deception have trapped the accused. United States v. Washington (1927; D. C.), 20 F. (2d) 160; State v. Seidler, Mo. App. —, 267 S. W. 424.

Although it appears that the plea that public policy demands that public officers set no traps is faulty and that a better view is expressed in the general rule as set forth in the principal case in that no one would reasonably yield to an ordinary trap unless the intention of violating the law was present, and while it appears that an objective test is the best means to determine what was such pre-existing intent, it does not follow that the slight present tendency to allow liquor and narcotic officers unusual means of enforcement is grounded in sound public policy. It appears to be a better view to hold liquor and narcotic agents to the same recognized rules followed in the investigation and enforcement of other offenses. The law enforcement will not be hampered by such procedure to an extent that it is warrantable to declare that the end justifies questionable means.

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Entrapment in Narcotic Law Violations.—The plea of entrapment as a bar to criminal prosecution has been made with ever-increasing frequency in recent years. Especially is this true as regards federal and state prosecutions under the illicit liquor laws and in prosecutions for violations of the Harrison Narcotic Act, and state laws of similar nature. These types of cases are the most usual ones, and the attention of this article will be confined to the latter. Although such limitation of the discussion seems illogical, it is planned to do so because of the somewhat apparent difference between the rule in these cases and in other types such as liquor law violations. Swallum v. U. S., 39 Fed., 2d, 230 (Feb., 1930).

When the plea of entrapment is made it becomes the duty of the court to apply the law as laid down by precedent to the facts and
circumstances of the particular case. From a comparison of the galaxy of opinions and decisions thus given with the facts of the cases, there emerge a few well-defined principles as to entrapment and its applicability as a bar to prosecution.

In narcotic law violations, where consent does not affect the criminality of the act, the general rule seems to be that if the intent originates in the mind of the accused and the prosecuting agent merely furnishes the opportunity for doing the act, this is not such entrapment as to be a bar to the prosecution. 18 A. L. R., 146, and citations. On the other hand, the rule is positively stated that there is such entrapment as to bar prosecution if the intent originates in the mind of the prosecuting agent and the accused is lured into the commission of the crime in order to prosecute him. Supra.

Between these two general rules there is room for much variation according to the interpretation of the language as used by the courts, and in the light of the myriads of material circumstantial variations in the cases arising. Some variation in application may result from the differing theories upon which the courts allow the plea. 20 Columbia Law Review, 283 and citations. The generally accepted theory now seems to be based upon the ground of public policy. Woo Wai v. U. S., 223 Fed. 414 (1915); Goldstein v. U. S., 256 Fed. 813 (1919); Voves v. U. S., 249 Fed. 191 (1919); Sam Yick v. U. S., 240 Fed. 60 (1917); Ford v. City of Denver, 10 Colo. A. 500, 51 Pac. 1015 (1898). This theory of public policy is a desirable check upon the potential injustices in criminal law, but it gives no material and measurable aid to the courts in decisions in doubtful cases.

Some insight into the admissibility of the plea of entrapment is gained from briefly looking into a few cases and the opinions there given. The courts have been careful in their instructions as to the origin of the intent. This is finally decided by the jury, but much depends upon the way in which it is submitted to them. And the courts frequently refuse to allow the question to be submitted. It seems to be conceded that mere suggestion on the part of the prosecuting witness or decoy is no indication that the intent originated in his mind. If, after this suggestion, the accused is ready and willing to do the act and does the act, the courts construe this as only giving the accused an opportunity to commit a crime that he was ready and willing to commit. This construction seems logical.

A review of the cases of Federal Narcotic violations tends to reveal a more or less general recognition of the principle that where an unsuspected party is solicited, persuaded and lured into a violation, and where no previous violations were shown as grounds of reasonable suspicion, the entrapment is against public policy and therefore illegal. This is based upon the case of Spring Drug Co. v. U. S., 12 Fed., 2d, 852 (1926). See also citations there given at page 856. The court held that the rights of the defendant company were prejudiced by the admission of testimony that the volume of sales furnished grounds for reasonable suspicion of violations, entitling the decoys to secure violation by means of fraudulent blanks in order to prosecute. The
court said at page 856: "Where the government through its agents, has reasonable cause to believe the law is being violated by the defendant, they may legally entrap the defendant by decoy letters or by pretended purchases."

The above statement of the rule is somewhat changed by the case of *U. S. v. Sigel*, 16 Fed., 2d, 134 (1926). The court there held that when the question of entrapment is raised the government may then introduce evidence to prove reasonable suspicion of prior violations and that the agents were acting in good faith. In the following recent cases the question of entrapment into violations of the narcotic laws was raised, and in each one there was evidence introduced to prove that the agents acted in good faith and upon reasonable suspicion: *Fisk v. U. S.*, 279 Fed. 12 (1922); *Lucadamo v. U. S.*, 280 Fed. 653 (1922); *U. S. v. Pappagoda*, 283 Fed. 214 (1923); *Aultman v. U. S.*, 289 Fed. 251 (1923); *Simmons v. U. S.*, 300 Fed. 321 (1924); *Rosso v. U. S.*, 1 Fed., 2d, 717 (1924); *Bethea v. U. S.*, 1 Fed., 2d, 290 (1924); *Perez v. U. S.*, 10 Fed., 2d, 353 (1926). These cases are all apparently in harmony with the rule as laid down in *Spring Drug Co. v. U. S.* (supra) and as modified by *U. S. v. Sigel* (supra).

In the case of *Di Salvo v. U. S.*, 2 Fed., 2d, 222 (1924) the question of entrapment was not raised, but the proof was that the agents were acting on reasonable suspicion. The case of *Germak v. U. S.*, 4 Fed., 2d, 99 (1925) presents a situation slightly different. The defendant was a drug clerk and, after much persuasion by the government agents' "stool pigeon," was lured into making a narcotic sale in violation of the law. There was no evidence of his having made previous sales, but evidence was to the contrary. The court stated that this was the type of entrapment which could not be countenanced by the courts since it was grossly against public policy as stated in *Woo Wai v. U. S.* (supra). But the court seems to base the holding upon the theory of origin of intent. In the cases of *Cline v. U. S.*, 9 Fed., 2d, 621 (1925), *Lawrence v. U. S.*, 28 Fed., 2d, 608 (1928), and *Sauvain v. U. S.*, 31 Fed., 2d, 732 (1929) no mention or evidence of previous suspicion on the part of the government agents is made. But they seem to be cases only of outright purchases without persuasion, inducement or persistent solicitation, and certainly not of coercion. Hence the agents merely furnished the opportunity and the defendants did the acts.

What, if anything, is added to these principles by the case of *Swallum v. U. S.*, 39 Fed., 2d, 390 (1930). The defendant in this case was a physician. A drug addict, in the employ of the government agents, asked the defendant to sell him some morphine. Defendant stated that he had none, but upon the request of the addict, sold him a prescription for a large amount of morphine without making examination. Upon a subsequent request made a short time later, the accused wrote another prescription, suggesting and using a different name to avoid attracting suspicion. The plea of entrapment was entered. Evidence was given tending to show that the accused had before been
guilty of violations, but there was no evidence that the officers had
knowledge of these previous violations, or reasonable grounds of
suspicion. The court held in this case that there was not sufficient
grounds to sustain the defendant's request that the question of entrap-
ment be submitted to the jury. The words of the court as to reasonable
suspicion are: "That an agent manufactures an offense against the
law and then incites a person against his will to commit that offense
for the purpose of prosecution is the gist of the defense of entrap-
ment."

"When any evidence of this situation appears, the question whether
such a person was approached as an innocent man, or one suspected
of violating the law, becomes important. * * * There is no evidence
here, however, that the agent manufactured the crime or induced its
commission. The lack of evidence then that the agent did not have a
belief or suspicion of a violation of the law becomes immaterial."
This statement of the rule of law as to the defense of entrapment is
a novel one.

In the great majority of similar cases it has been at least tacitly
admitted that proof of reasonable suspicion and good faith on the part
of the government agents was proper if not necessary. Grounds for
reasonable suspicion have been proven as a guide to the origin of
intent. Whether or not the agents of the government acted in good
faith upon reasonable suspicion has been used as one of the criteria
for determining the legality or illegality of the means used to entrap
the person. According to the above rule, the court looks first to the
origin of intent. They determine whether the accused was induced
to commit the acts. Finding these in favor of the defendant, the
court then allows him to raise the question of reasonable suspicion.
Otherwise it is immaterial.

The conclusion seems to be that this case is not in harmony with
the majority of cases. They support the rule that proof of reasonable
suspicion that the law is being violated is essential to rebut the plea
of entrapment where more than mere request for violation is made
by government agents. The rule of this case requires that the defend-
ant prove all other elements of entrapment before the question of
reasonable suspicion can be brought into issue. Thus, the case of the
government becomes less burdensome, and that of the accused becomes
more so.

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Evidence—Dying Declarations.—In a recent Kentucky case, the
Court of Appeals admitted as dying declarations statements made by
deceased and held that the statement "Oh, Lordy, I am going to die,
I can't live long this way," was sufficient predicate for admission of
dying declarations, in view of the nature of the wound. Cochran v.
Commonwealth, 236 Ky. 284, 33 S. W. 230 (1930).

The law in Kentucky on admission of dying declarations is well
settled and is in accord with the general weight of authority. The
court in the above case stated the law as "consciousness on the part