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# Entrapment In Ohio

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**CRIMINAL LAW****ENTRAPMENT IN OHIO**

**P**OLICE COMMONLY pose as drug buyers,<sup>1</sup> conspirators in bribery schemes,<sup>2</sup> prostitutes,<sup>3</sup> burglars,<sup>4</sup> and receivers of stolen property<sup>5</sup> in order to apprehend criminals. Does police involvement in these crimes constitute entrapment? Not necessarily. Entrapment, as distinguished from mere deception, occurs when the police, in order to prosecute a crime, induce a person to commit a crime which he would not ordinarily commit.<sup>6</sup> A defendant who has been entrapped is entitled to an acquittal.<sup>7</sup> This seems simple enough, but police, defendants, prosecutors, defense attorneys and judges have discovered that fine lines separate permissible and impermissible police activity. It is not easy, therefore, to articulate a test for entrapment or to establish procedures for invoking the defense.<sup>8</sup>

When a defendant raises an entrapment defense, the court faces the threshold issue of how to evaluate the police activity and the defendant's culpability to determine if entrapment has occurred. Courts have developed two tests: the objective test<sup>9</sup> and the subjective test.<sup>10</sup> Both tests require that the police must have instigated the crime in order to apprehend the defendant,<sup>11</sup> but the focus of each test is different. The objective test centers on the police conduct and inquires into whether such conduct would induce a person "who would normally avoid crime and through self-struggle resist ordinary temptations" into committing a crime.<sup>12</sup> If the police conduct would induce an ordinary law-abiding

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<sup>1</sup>State v. Johnson, 4 Ohio App. 3d 308, 448 N.E.2d 520 (1982).

<sup>2</sup>United States v. Garrett, 716 F.2d 257, *reh'g denied*, 720 F.2d 1291 (5th Cir. 1983).

<sup>3</sup>People v. McCall, 52 Ill. App. 3d 407, 367 N.E.2d 588 (1977).

<sup>4</sup>United States v. Brown, 635 F.2d 1207 (6th Cir. (1980).

<sup>5</sup>*Id.*

<sup>6</sup>1 WHARTON'S CRIMINAL LAW 248 (C. Torcia 14th ed. 1978).

<sup>7</sup>There are two rationales for the entrapment defense: the implied exception rationale and the police deterrence rationale. Courts that adopt the first rationale read into a statute a legislative intent to exclude entrapped defendants from the statute. Since the statute does not apply to an entrapped defendant, he is not guilty of violating it. *Sorrells v. United States*, 287 U.S. 435, 448 (1932). Courts that adopt the second rationale view the defendant as guilty, but for public policy reasons he is entitled to an acquittal. The goal is deterrence of police misconduct. MODEL PENAL CODE § 2.10 comments (Tent. Draft No. 9, 1959).

<sup>8</sup>See W. LAFAVE & A. SCOTT, CRIMINAL LAW 370 (1972).

<sup>9</sup>*Id.* at 371. The objective test is a minority view.

<sup>10</sup>*Id.* The subjective test is a majority view and is accepted by the federal courts. See also *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

<sup>11</sup>*Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring in result).

<sup>12</sup>*Id.* at 384.

person into criminal activity, it "falls below standards, to which common feelings respond, for the proper use of governmental power."<sup>13</sup> A criminal conviction arising from underlying abuse of governmental authority cannot stand.<sup>14</sup> The subjective test focuses on the defendant's predisposition to commit the crime.<sup>15</sup> Under the subjective test, a defendant is entrapped when police "implant in the mind of an innocent person the disposition to commit" a crime.<sup>16</sup> Because the defendant's criminal intent arises from the police conduct and not his independent will, he is truly innocent and cannot be convicted.<sup>17</sup> If a defendant, however, is predisposed to commit a crime, his mind is not innocent and the police activity, even if it falls below a standard of acceptable governmental conduct, could not entrap him.

Although the results under the two tests are often the same,<sup>18</sup> there are evidentiary<sup>19</sup> and procedural differences.<sup>20</sup> Under the subjective test, evidence of a defendant's predisposition is freely admitted.<sup>21</sup> However, courts which adhere to a literal view of the objective test will not admit any evidence pertaining to the defendant's predisposition.<sup>22</sup> A more flexible view of the objective test admits predisposition evidence if it is necessary for a fair evaluation of the police conduct.<sup>23</sup> Allocation of the burden of proof under the two tests is different. According to the classic subjective view, the defendant carries the burden of production on the issue of inducement and the state has the burden of proving predisposition beyond a reasonable doubt.<sup>24</sup> The objective test places the burdens of both production and persuasion on the defendant "to prove by a preponderance of the evidence that his conduct occurred in response to an entrapment."<sup>25</sup>

Although lower Ohio courts had used the subjective test,<sup>26</sup> the Ohio

<sup>13</sup>*Id.* at 382.

<sup>14</sup>*Sorrells*, 287 U.S. at 459 (Roberts, J., concurring in result).

<sup>15</sup>*Russell*, 411 U.S. at 429.

<sup>16</sup>*Sorrells*, 287 U.S. at 442.

<sup>17</sup>*Id.* at 448.

<sup>18</sup>*See, e.g.*, the majority and concurring opinions in *Sorrells*. *Id.* at 435, 453.

<sup>19</sup>*Park*, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 200-16, 247-62 (1976).

<sup>20</sup>*Id.* at 262-70.

<sup>21</sup>*Id.* at 200.

<sup>22</sup>*Id.* at 202.

<sup>23</sup>*Id.* at 203.

<sup>24</sup>*Id.* at 262. Case law has modified the classic allocation of proof in two ways. First, some courts have ruled that although the defendant bears the burden of proving inducement, he does not bear the burden of persuasion. Second, several courts place an additional burden on the accused to produce evidence relevant to his lack of predisposition. *Id.* at 262-64.

<sup>25</sup>MODEL PENAL CODE § 2.13 (2) (Tent. Draft No. 9, 1959); *Park*, *supra* note 19, at 264. Some commentators suggest placing the burden of persuasion on the government because it would have better access to information going to the nature of the inducement. *Id.* at 265-66.

<sup>26</sup>*See State v. Johnson*, 4 Ohio App. 3d 308, 448 N.E.2d 520 (1982); *State v. Hsie*, 36 Ohio App. 2d 99, 303 N.E.2d 89 (1973). *Cf. State v. Metcalf*, 60 Ohio App. 2d 212, 396 N.E.2d 786 (1977) which claims to adopt the subjective test but seems to have applied an objective test analysis and rationale.

Supreme Court had not clearly defined the entrapment defense until its decision in *State v. Doran*.<sup>27</sup> Until *Doran*, Ohio had no definite test of entrapment, the nature of the defense was undefined, and proper allocation of proof was unclear.

### A. Ohio's Definition of Entrapment

William Doran was indicted on six counts of aggravated drug trafficking<sup>28</sup> and one count of permitting drug abuse.<sup>29</sup> In October of 1980, Doran picked up a hitchhiker, Nona Wilson, who was a paid informant for a multi-county drug enforcement agency.<sup>30</sup> The two struck up a friendship and over the next several weeks Wilson repeatedly told Doran of her desperate financial situation — her need for money to obtain legal counsel in a child custody suit, to buy clothing for her children, and to place a deposit on an apartment.<sup>31</sup> She confessed that if she did not have money to hire an attorney she would kidnap her children.<sup>32</sup> Finally, she told Doran that she would resort to prostitution to satisfy her gambling debts.<sup>33</sup> Wilson repeatedly suggested that Doran obtain some drugs that she could sell to make money.<sup>34</sup> Initially Doran refused and advised Wilson to get a job but eventually he agreed to locate a drug supplier.<sup>35</sup> Wilson introduced Doran to a narcotics agent.<sup>36</sup> During a three to four month period, Doran and the agent engaged in six sales — three in Wilson's presence.<sup>37</sup> Before the last sale, Wilson assured Doran that this would be the final deal and that they would soon marry.<sup>38</sup> Doran was arrested after the sixth sale.<sup>39</sup>

Doran raised an entrapment defense.<sup>40</sup> The trial judge instructed the jury that entrapment was not an affirmative defense and refused to issue an instruction explaining the burden of proof.<sup>41</sup> Twice the jury asked for clearer instructions, but the judge did not issue them.<sup>42</sup> Doran was convicted on three of the trafficking charges and the permitting drug abuse charge.<sup>43</sup> He was acquitted

<sup>27</sup>5 Ohio St. 3d 187, 449 N.E.2d 1295 (1983).

<sup>28</sup>OHIO REV. CODE ANN. §2925.03(A)(1) and (5) (Page 1982).

<sup>29</sup>*Id.* § 2925.13(A).

<sup>30</sup>*Doran*, 5 Ohio St. 3d at 188, 449 N.E.2d at 1296.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 189, 449 N.E.2d at 1297.

<sup>34</sup>*Id.* at 188, 449 N.E.2d at 1296.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 189, 449 N.E.2d at 1297.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at 189-90, 449 N.E.2d at 1297.

<sup>43</sup>*Id.* at 190, 449 N.E.2d at 1297.

of the charges arising from the deals where Wilson was present.<sup>44</sup> Affirming the convictions, the appellate court ruled that while the trial judge erred in not characterizing entrapment as an affirmative defense, the error was harmless.<sup>45</sup>

When the case came before the Ohio Supreme court three issues were presented. First, what is Ohio's definition of entrapment?<sup>46</sup> Second, is entrapment an affirmative defense within the meaning of Ohio Revised Code Section 2901.05(C)(2)?<sup>47</sup> Third, is a trial court's failure to allocate a burden of proof on the entrapment defense prejudicial error?<sup>48</sup>

Doran urged the court to adopt the objective test.<sup>49</sup> He argued that the police conduct was "compelling and outrageous" in continuing to lure him into criminal activity after he had refused to give into the inducements.<sup>50</sup> The state, on the other hand, advocated the subjective test.<sup>51</sup> According to the state, the proper focus is on the individual defendant's predisposition for crime and police should be able to use deception and pretense to apprehend criminals.<sup>52</sup> The court adopted the subjective test, citing three inherent flaws in the application of the objective test.<sup>53</sup> First, application of the objective standard may result in convictions of people who should be acquitted.<sup>54</sup> Because the objective test emphasizes the inducement and ignores the individual characteristics of an actual defendant, an otherwise innocent person who succumbs to police inducement, which does not violate permissible government conduct, has no defense.<sup>55</sup> Second, the objective test may result in acquittals of those who should be convicted.<sup>56</sup> Because predisposition to commit the crime is immaterial under the objective test, a defendant who would have committed the crime regardless of police inducement will avoid conviction if the police activity meets the objective standards.<sup>57</sup> Third, the objective test adversely affects the accuracy of the fact-finding process.<sup>58</sup> The sole issue under the objective test is what inducements were actually offered by the police.<sup>59</sup> Transactions between police and accused are often conducted in private; consequently, under the objective test the

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<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 190, 449 N.E.2d at 1298.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 191, 449 N.E.2d at 1298.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 190, 449 N.E.2d at 1298.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 191, 449 N.E.2d at 1298-99.

<sup>56</sup>*Id.* at 191, 449 N.E.2d at 1299.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

fact-finder will face "a swearing contest between an accused claiming improper inducements were used and a police officer denying the accused's exhortation."<sup>60</sup>

The court found that the subjective test poses few problems.<sup>61</sup> Since the subjective standard focuses on the defendant's culpability and not that of the law enforcement official,<sup>62</sup> the risk of improper convictions and acquittals is reduced.<sup>63</sup> Further, use of the subjective test would enhance the fact-finding process.<sup>64</sup> Instead of evaluating uncorroborated testimony regarding what inducements were and were not offered, the fact-finder would be presented with objective evidence of the defendant's predisposition to commit the crime.<sup>65</sup>

The court expressed concern, however, over the proper scope of admissible evidence under the subjective standard.<sup>66</sup> Although the court advocated free admission, it criticized the use of only reputation evidence to establish predisposition.<sup>67</sup> Other facts such as past criminal activity and the accused's willingness to participate in the crime were cited as being more conclusive.<sup>68</sup>

In summary, entrapment is a valid defense in Ohio when "the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute."<sup>69</sup> An accused is not entrapped, however, when police merely provide an opportunity for criminal activity to which he is already predisposed.<sup>70</sup> Under the *Doran* analysis, police can use "deception, informants and surveillance" to apprehend criminals.<sup>71</sup> They can go as far as suggesting the crime, and if the defendant is already predisposed to it there would be no entrapment.<sup>72</sup>

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 192, 449 N.E.2d at 1299.

<sup>62</sup>The court made it clear that a defendant who was a victim of improper police conduct could attack the charges against him on due process grounds. 5 Ohio St. 3d at 192 n.4, 449 N.E.2d at 1299 n.4. *See, e.g.,* Rochin v. California, 342 U.S. 165 (1952).

<sup>63</sup>*Id.* at 192, 449 N.E.2d at 1299.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>The court offered a non-exhaustive list of relevant evidence: (1) the defendant's past involvement in crimes of a similar nature, (2) his quick acquiescence to police inducements, (3) his expertise in the area of criminal activity charged, (4) his ready access to contraband, an (5) his willingness to participate in the crime. *Id.*

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>*State v. Fellers*, No. 15-82-2, slip op. at 3 (Ohio 2d Dist. Ct. App. March 16, 1983).

<sup>72</sup>*See State v. McDonald*, 32 Ohio App. 2d 231, 289 N.E.2d 583 (1972). *Cf. State v. Howard*, 7 Ohio Misc. 2d 45, 455 N.E.2d 29 (Hamilton County Mun. Ct. 1983) where the following conversation between a policeman and defendant constituted entrapment. Note that the conversation took place at 3:00 a.m. on a city street.

Policeman: "Are you dating?"

Defendant: "Do you have any money?"

Policeman: "Is \$15.00 enough?"

Defendant: Affirmative Response

Policeman: "What will you do?"

### B. Entrapment as an Affirmative Defense

An affirmative defense is defined in Ohio Revised Code Section 2901.05(C)(2) as "a defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."<sup>73</sup> Self-defense<sup>74</sup> and not guilty by reason of insanity<sup>75</sup> are examples of affirmative defenses. The trial court in *Doran* instructed the jury that entrapment was not an affirmative defense.<sup>76</sup> Looking to the statutory language, the Ohio Supreme Court decided that entrapment falls within the purview of the statutory definition of an affirmative defense.<sup>77</sup> First, entrapment certainly involves an "excuse or justification" as it is a classic confession and avoidance defense.<sup>78</sup> Second, entrapment is both "peculiarly within the knowledge of the accused" and of such a nature that the defendant "can fairly be required to adduce supporting evidence."<sup>79</sup> Under the subjective test, the defendant's predisposition is dispositive. Although proof of predisposition may come from objective sources, only the defendant knows of his actual predisposition and he is in the best position to offer evidence of it.<sup>80</sup>

A person who claims an affirmative defense bears the burden of going forward and the burden of proof by a preponderance of the evidence.<sup>81</sup> Thus, a defendant claiming entrapment has the burden of raising the defense and proving his lack of predisposition to commit the crime.<sup>82</sup>

### C. Failure to Allocate Burden of Proof as Prejudicial Error

Because the trial court did not clarify the proper burdens of proof, the jury could have logically concluded that the state carried the burden of disproving entrapment,<sup>83</sup> and the error would have relieved the defendant of his burden and helped his cause.<sup>84</sup> The trial court, however, gave no jury instructions on burden of proof, and so the jury was left unaware of who bore the burdens to raise the defense and to prove or disprove its validity.<sup>85</sup> The instruc-

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Defendant: "Anything."  
Policeman: "Oral sex?"

The defendant agreed and was arrested for solicitation. The court ruled that the defendant merely acquiesced to the officer's suggestion and did not ask for money in return for sexual activity. Therefore, he could not be guilty of solicitation. *Howard*, 7 Ohio Misc. 2d at 45, 455 N.E.2d at 29-30.

<sup>73</sup>OHIO REV. CODE ANN. § 2901.05(C)(2) (Page 1982).

<sup>74</sup>State v. Robbins, 58 Ohio St. 2d 74, 338 N.E.2d 755 (1979).

<sup>75</sup>State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).

<sup>76</sup>*Doran*, 5 Ohio St. 3d at 189, 449 N.E.2d at 1297.

<sup>77</sup>*Id.* at 193, 449 N.E.2d at 1300.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* Note that these two requirements are substitutional.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* at 194, 449 N.E.2d at 1301.

<sup>84</sup>*Id.* at 194, 449 N.E.2d at 1300.

<sup>85</sup>*Id.* at 194, 449 N.E.2d at 1301.

tions were therefore, "inherently misleading and confusing" to the jury.<sup>86</sup> Thus, the Ohio Supreme Court ruled that the lower court's error was prejudicial and the case was reversed and remanded.<sup>87</sup>

A lone dissent argued that while entrapment was an affirmative defense, the trial court's error was harmless.<sup>88</sup> The practical effects of failing to allocate a burden or proof placed a greater burden on the state to disprove entrapment.<sup>89</sup> Thus, according to the dissent, the trial court's error aided the defendant and did not justify reversal.<sup>90</sup>

#### *D. Conclusion*

The Supreme Court in *State v. Doran* clarified the defense of entrapment. Ohio now follows the subjective or predisposition test. This means that when police create an opportunity for crime to occur there is no entrapment if the accused was predisposed to commit the crime. Evidence relevant to predisposition will be freely admitted in court. Thus, character<sup>91</sup> and hearsay<sup>92</sup> evidence may be admitted when a defense of entrapment is raised. Further, because entrapment is an affirmative defense, the burden of going forward with the defense and the burden of disproving predisposition rest with the accused. Failure to properly allocate these burdens constitutes prejudicial error.

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<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* (Holmes, J., concurring in part, dissenting in part).

<sup>89</sup>*Id.* at 195, 449 N.E.2d at 1301.

<sup>90</sup>*Id.*

<sup>91</sup>OHIO R. EVID. 404.

<sup>92</sup>OHIO R. EVID. 801-804  
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