August 2015

Entrapment - An End? State v. Rowan

Kenneth D. Morse

CRIMINAL LAW—ENTRAPMENT—AN END?

State v. Rowan, 32 Ohio App.2d 142, 288 N.E.2d 289 (1972)

IN *State v. Rowan*,[1] James W. Rowan was indicted, tried by a jury, and found guilty of the sale of marijuana and the delivery of a dangerous drug (methedrine) in violation of the Ohio Revised Code.[2] The sales and deliveries which resulted in the conviction of the Defendant were made to one Gene Chicoine, an informant working for the offices of the Prosecutor of Summit County, Ohio. At the time of trial, Mr. Chicoine was the subject of a Grand Jury investigation as to his activities in the traffic of narcotics.

The prosecution relied heavily on the testimony of Mr. Chicoine and on one other informant to convict the Defendant. Furthermore, the trial court charged the jury as to Ohio Revised Code Section 3719.14 that this section could be construed as to allow law enforcement officers to *sell and deliver* (emphasis added) drugs as well as possess them.[3]

---

[1] State v. Rowan, 32 Ohio App.2d 142, 288 N.E.2d (1972) states with reference to the narcotics conviction:

> [T]his court held in State v. Graham, case No. 6755, Summit County [unreported], that an undercover agent engaged in the business of trying to stamp out the illicit drug traffic may smoke marijuana in order to give the appearance of validity to his conduct. We extend this reasoning to conduct involving the delivery and sale of drugs to others, when the purpose of such conduct is to ferret out the illegal drug trade, and bring to justice those engaged in it. . . .

Id. at 143-144, 288 N.E.2d at 831.

[2] OHIO REV. CODE § 3917.14 (Page 1953) provides that:

> Sections 3719.01 to 3719.22, inclusive, of the Revised Code in so far as they restrict the possession and control of narcotic drugs do not apply to . . .
> (B) Public officers or their employees in the performance of their official duties requiring possession or control of narcotic drugs;
> (C) Temporary incidental possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties. . . .

[3] Brief for Appellant at 3, State v. Rowan, 32 Ohio App.2d 142, 288 N.E.2d 829 (1972) reads in part:

> [N]ow, I give you these instructions because of evidence that there was some possession by a public officer of certain drugs. Also, with reference to amphetamines and barbituates, there is a provision that nothing in this section shall be construed to interfere with or make illegal the purchase, collection or possession of any drug or drugs by any law enforcement official when these are to purchase, or collect or possess such a drug or drugs in the performance with his official duties as a law enforcement officer. . . .

One of the grounds for Defendant's appeal[4] was that Section 3719.14 of the Ohio Revised Code does not allow police officers or their agents to sell and deliver drugs. The Court of Appeals, however, regarded this contention as without merit and held that the reasoning which allows an undercover narcotics agent to smoke marijuana in order to give the appearance of validity to his conduct, may be extended to conduct involving the delivery and sale of drugs to others, when the purpose of such conduct is to "ferret out the illegal drug trade and to bring to justice those engaged in it."[5] This court thus gives anyone acting under the authority of a law enforcement agency the right to engage in unlimited conduct in order to make arrests for narcotics violations.

The defense of entrapment in narcotics cases has taken on a new importance since the decision of the United States Supreme Court in *Sherman v. United States,* wherein Mr. Justice Brennan established a two-part test, whereby police conduct would be scrutinized so as to reveal any activity which falls below standards "for the proper use of governmental power" and secondly, whether the intention to commit the crime originated with the defendant or was the product of "creative activity" of law enforcement officials.[6]

With narcotics violation arrests seemingly increasing, courts are more often confronted with the issue of entrapment. The *Sherman* court further refined the issue as involving the unlimited power of law enforcement officials stating:

> [W]hen the criminal design originates with the officials of the government and they implant in the mind of the innocent person the disposition to commit the alleged offense . . . stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. . . .[7]

Much of the *Sherman* decision was based on the opinion of Chief

---

[4] There were three grounds for appeal from the trial court which were: (1) That the trial court erred when it refused to grant a continuance in order to allow the depositions of the state's primary witnesses to be transcribed and afford defendant-appellant an opportunity to adequately prepare a cross-examination for those witnesses, (2) That the trial court erred in failing to grant a continuance of the commencement of the trial in order to ascertain the outcome of a pending grand jury investigation directed against the state's principal witness, Gene Chicoine, and (3) That the court erred in refusing to charge the jury that Section 3917.14 of the Ohio Revised Code does not allow police officers or their agents to sell and deliver marijuana or other narcotic drugs. State v. Rowan, 32 Ohio App.2d 142, 143, 288 N.E.2d 829, 830 (1972).

[5] State v. Rowan, 32 Ohio App.2d 142, 144, 288 N.E.2d 828, 831 (1972).

[6] Sherman v. United States, 356 U.S. 369 (1958).

[7] *Id.* at 372.

Justice Hughes in *Sorrells v. United States*[8] which held that entrapment is: "[T]he conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpertrated it except for the trickery, persuasion, or fraud of the officer. . . ."[9]

Through the years, courts across the country have adhered to the principles set forth in *Sherman* and *Sorrells*, with minor variations.[10] The Ohio position on entrapment is best expressed in *State v. Forte*, where the defendant was convicted of blackmail. The court here set forth a two-part test for entrapment requiring that the entrapper instigate the offense and then that he incite the accused to commit the offense for the purpose of prosecution.[11] From the decision of the Court of Appeals in *Rowan*, the construction given to Section 3719.14 of the Ohio Revised Code comports well with the test given in *Forte*. It is quite conceivable that the defense of entrapment would succeed against any violation of Section 3719.14 as interpreted by *Rowan*.

Ohio is not the only state which faces the problem of vague narcotics statutes.[12] Many states fail to define what constitutes unlawful possession

---

[8] Sorrells v. United States, 287 U.S. 435 (1932). Here, a federal liquor law violation was in issue. The Court urged that the federal statute (NATIONAL PROHIBITION ACT 27 U.S.C.A., Repealed 1933) be construed liberally and not in such a manner so as to avoid "absurd consequences."

[9] *Id.* at 454.

[10] Brooke v. U.S. 385 F.2d 279 (U.S. App., D.C. 1967); U.S. v. Barrios, 457 F.2d 680 (9th Cir. 1972); U.S. v. Brewbaker, 454 F.2d 1360 (Ind. C.A. 1972); U.S. v. Catazaro, 407 F.2d 998 (N.J. C.A. 1969); U.S. v. Russell, 459 F.2d 671 (9th Cir. 1972); U.S. v. Silver, 457 F.2d 1217 (3rd Cir. 1972); McKay v. State, 489 P.2d 145 (Alaska 1971); State v. Chudy, 108 Ariz. 23, 492 P.2d 402 (1972); People v. Uhlemann, 105 Cal. Reptr. 21, 503 P.2d 277 (1972); People v. Hankin, ... Colo. App. ....., 498 P.2d 1116 (1972); State v. Fine, 159 Conn. 296, 268 A.2d 649 (1970); Brosi v. State, 263, So.2d 849 (Fla. Dist. Ct. App. 1972); Spencer v. State, 263 So.2d 282 (Fla. Dist. Ct. App. 1972); Hill v. State, 225 Ga. 117, 166 S.E.2d 338 (1969); People v. Caziaux, 119 Ill. App.2d 11, 254 N.E.2d 797 (1969); State v. Wheat, 205 Kan. 439, 469 P.2d 338 (1970); State v. Allen, 292 A.2d 167 (Maine 1972); Rettman v. State, 15 Md. App. 666, 292 A.2d 107 (1972); Commonwealth v. Miller, ... Mass. Rpts. ....., 282 N.E.2d 394 (1972); People v. Sinclair, 30 Mich. App. 473, 186 N.W.2d 767 (1971); State v. Bradshaw, 12 N.C. App. 510, 183 S.E.2d 787 (1971); State v. Forte, 29 Ohio App.2d 24, 277 N.E.2d 559 (1971); Bradley v. State, 485 P.2d 767 (Okla. Crim. 1971); Vera v. State, 473 S.W.2d 22 (Tex. Crim. App. 1971); State v. Kasai, 27 Utah 2d 326, 495 P.2d 1265 (1972); Ritter v. Commissioner, 210 Va. 732, 173 S.E.2d 799 (1970); State v. Waggoner, 80 Wash. 2d 7, 490 P.2d 1308 (1971).

[11] State v. Forte, 29 Ohio App.2d 24, 26, 277 N.E.2d 559, 561 (1971). The defense of entrapment failed in this case because, in the words of the court: "[I]t is beyond doubt that the scheme originated with him [the defendant] and his cohort and the police were but observers when the criminal act was committed. . . ."

[12] Some statutes similar to § 3719.14 of the OHIO REV. CODE are: ALAS. STAT. ANN. § 17.10.110 (1962); ARIZ. REV. STAT. ANN. § 36-1012 (1956); DEL. CODE ANN. Tit. 16, §§ 4706(d) (Cum. Supp., 1970); FLA. STAT. ANN. Ch. 398 § 398.13 (1960); ME. REV. STAT. ANN. tit. 22, § 2366 (1954); MONT. REV. CODES ANN. § 54-131 (Supp., 1971); MASS. GEN. LAWS ANN. Ch. 94 § 187B (1972); N.C. GEN. STAT. § 113.3 (1965).

and control of drugs by law enforcement officers. This contention is apparent from the fact that these states leave narcotic arrests vulnerable to the entrapment defense when the statutes typically read:

> The provisions . . . restricting the possessing and having control of narcotic drugs shall not apply to . . . public officers or their employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performance of their official duties.[13]

It is precisely this type of language that the court in *Rowan* attempts to interpret, so to construe the meaning of the words "possession and control"[14] to read *sell and deliver* (emphasis added).

Numerous jurisdictions[15] have been unwilling to grant law enforcement officers and undercover agents the authority to sell and deliver drugs.[16] The reasoning appears to be that such conduct would inevitably create traps for the unwary innocent. In addition, some courts have fallen back on the creative activity test as stated in *Sherman v. United States.* A Federal District Court in *United States v. Silver,* cited *Sherman*[17] when it applied the creative activity test to a situation involving a purchase of marijuana by narcotics agents.

The *Rowan* court has given the narcotics agent a free hand to ferret out alleged narcotic violators. Undoubtedly, the *Rowan* decision will expose hundreds of innocent people to the realism of jails in the State of Ohio. The *Rowan* decision clearly creates a situation whereby anyone on the street may be approached by an agent in order to obtain a narcotics conviction.

Courts have attempted to define what manner of activity is necessary to constitute entrapment. Such definitions have embraced terminology which can easily be applied to the facts in *Rowan.* Conduct which amounts to mere persuasion of the average person has been deemed to be

---

[13] ARIZ. REV. STAT. ANN. § 36-1012 (1956).

[14] OHIO REV. CODE ANN. § 3719.14 (Page 1953).

[15] *See, e.g.,* Spencer v. State, 263 So.2d 282 (Fla. Dist. Ct. App. 1972). (For further authority, see the cases cited in n. 10 *infra.*).

[16] *Id.* at 283. The court implied that there are definite limits within which a narcotics agent may act, when it said: "[O]ut of regard for its own dignity, this court can not allow agents of the state to engage in illegal acts and schemes designed to encourage rather than detect crime. . . ."

[17] United States v. Silver, 457 F.2d 1217, 1219 (3rd Cir. 1972), *accord,* People v. Hankin, ... Colo. ....., 498 P.2d 1116, 1118 (1972).

sufficient to constitute entrapment.[18] This, however, is a very liberal interpretation of the term and courts have not generally acquiesced to such standards.[19] For the most part, courts determine whether there has been entrapment on the basis of "inducement," "encouragement" and "luring."[20]

In *State v. Cowan*,[21] the defendant was convicted of selling about $500.00 worth of marijuana to a narcotics agent. Although the conviction was sustained based on the *sale* issue, the court failed to recognize that purchase by the agent of an amount worth $500.00 would necessarily create an inference that the agent was planning to sell the drug at a later date. The court does not comment upon the impropriety of such conduct, but the *Rowan* decision makes such conduct entirely within the limits of "official duties."

Whether or not the sale and delivery of drugs by a narcotics agent constitutes a proper use of governmental power as determined in *Sherman*, has not yet been decided. It is not unreasonable to construe delivery of drugs by a narcotics agent to a possible narcotics violator as that degree of intolerable participation by governmental authorities so as to color the entire arrest with the stain of trickery. This proposition was advanced in *United States v. Russell* where a narcotics agent was involved in the manufacture of methaphetamine. It was shown in the case that had it not been for the agent's delivering one of the essential ingredients of the drug to the defendant, there could have been no manufacture, delivery, or sale of the end product.[22] The construction given Section 3719.14 of the Ohio Revised Code in the *Rowan* case would undoubtedly present a similar issue. Under the *Rowan* ruling, it is possible to make narcotics arrests based on the possession of drugs by the defendant, the essential element, which would be lacking were it not for the conduct of the narcotics agent by his delivery of the drug.

---

[18] Grossman v. State, 457 P.2d 226, 229 (Alaska 1969), *cited in* McKay v. State, 489 P.2d 145, 149 (Alaska 1971) in which the court said:

> [U]nlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by persuasion or an inducement which would be effective to persuade the average person, other than one who is ready and willing, to commit such an offense....

[19] *See, e.g.*, State v. Chudy, 108 Ariz. 23, 492 P.2d 402 (1972). (For further authority, see cases cited in n. 10 *infra*.).

[20] *Id.*

[21] State v. Cowan, 26 Utah 2d 410, ..., 490 P.2d 890, 892 (1971).

[22] United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972) in which the court stated:

> [W]e need not resolve the precise issues apparently presented by the parties. For regardless of the significance of "predisposition" as an element in "entrapment," we conclude that a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise....

Good faith has been considered an important element in order to sustain a conviction produced through the efforts of an undercover narcotics agent. It is essential that the agent or officer act in good faith for the purposes of "discovering or detecting a crime."[23] The same contention was set forth in *Rettman v. State,* where one of the defendants contacted a police officer for the purchase of hashish in retain for cocaine and cash.[24]

The *Rowan* case not only unreasonably extends the limits within which police officers or narcotics agents may act in an attempt to ferret out the illegal drug traffic, but it also does not require that the officials act in good faith. In short, there is nothing in *Rowan* which, in allowing police officers or agents to sell and deliver drugs, insures that such persons will act for motives based entirely on legal concepts. It is of common knowledge that many of the agents used by the police department for the purpose of arresting narcotics violators, have police records of their own. *Rowan* was based on information received from an informer working as an agent who, at the time of trial, was under investigation by the Grand Jury for his own alleged narcotics violations. There is nothing in *Rowan* which would prevent such a person from giving information and acting based on personal feelings. At this point, the utility of the *Rowan* decision begins to dwindle.

Rowan creates a trap for the individual who is confronted by the undercover narcotics agent and who had no intention of committing the crime. That the crime is more likely to occur under *Rowan* cannot be doubted. It is of utmost significance that the narcotics agent may sell and deliver drugs. Courts cannot ignore a change of social mores which have occurred.[25] More and more people are willing to accept the existence of conduct which was previously branded as criminal behavior. It is precisely these people that the *Rowan* decision sets out to trap. This entire dilemma is illustrated by *State v. Karathanos* when the court stated: "[T]here is a controlling distinction between inducing a person to do an unlawful act and setting a trap to catch him in the execution of a criminal design of his own conception."[26]

---

[23] Brosi v. State, 263 So.2d 849, 850 (Fla. Dist. Ct. App. 1972) where the court said in affirming the conviction of the defendant for the sale of marijuana: "[T]he officers acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by defendant who had the requisite criminal intent...."

[24] Rettman v. State, 15 Md. App. 666, 292 A.2d 107 (1972).

[25] *See generally,* MARIJUANA: A SIGNAL OF MISUNDERSTANDING. THE TECHNICAL PAPERS OF THE FIRST REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, U.S. Gov't Printing Office: 1972.0-457-006 (Vol. 1).

[26] State v. Karathanos, 493 P.2d 326, 331 (Mont. 1972) where the court also provided a definition of entrapment by setting forth: "[O]nly when the criminal design originates, not within the accused, but in the minds of government officers and the accused is, by persuasion, deceitful representations, or inducement, lured into the commission of a criminal act, can a case of entrapment be made out..."

Had Ohio a statute explaining the conduct of an undercover narcotics agent with regard to entrapment, possibly, the *Rowan* decision might be seen in a less glaring stance. The State of Illinois has a statute which defines entrapment in terms of both law enforcement officers and agents.[27] Such a statute serves two purposes: First, it provides a basic and rather reasonable definition of entrapment. Second, it establishes a qualification to the rule and puts one on notice of the requisite elements of entrapment.

Rowan clearly has taken a giant step beyond all rational and logical attempts to create an environment in which the unwary and the innocent are not caught in the same net as the average criminal. Criminal intent in the mind of the accused is still a prerequisite in order to obtain a conviction. It is not difficult to imagine that an undercover narcotics agent who offers to sell a small quantity of drugs, and succeeds in doing so, has planted the seed of criminal intent in the mind of the accused. The North Carolina rule with respect to intent was stated in *State v. Bradshaw* when the court said:

> The prevailing rule in this jurisdiction is that mere initiation, instigation, invitation, or temptation by enforcement officers is not sufficient to establish the defense of entrapment. It is also necessary to show that the Defendant would not have committed the offense except for the persuasion, encouragement, inducement, and importunity of the officer or agent.[28]

Rowan's vague and general language of *sell and deliver* (emphasis added) can be easily thought to consist of some elements of inducement and encouragement. *Rowan* prescribes no standards as to how such a sale and delivery are to take place. In the absence of such standards, it can be assumed that the accused was entrapped by the conduct of the narcotics agent. There are many methods of sale and delivery of drugs by a narcotics agent who is uncontrolled in his conduct. If the agent is given a free hand in his method of operation, it is only natural that he should use his own ingenuity to carry out his instructions. Given the agent's authority to act as determined in *Rowan,* a court would have to presume that each defendant brought before it was the subject of some kind of inducement or persuasion. Massachusetts has recognized the problem in *Commonwealth v. Miller:*

---

[27] ILL. STAT. ANN. Ch. 38 § 7-12 (Smith Hurd 1962) which reads:

> [A] person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated. . . ."

[28] State v. Bradshaw, 12 N.C. App. 510, 513, 188 S.E.2d 787, 790 (1971).

> The rule is that once government inducement has been shown there are two issues. The government should establish that it was engaged in no conduct that was shocking or offensive per se, and that the defendant was not in fact, corrupted by the inducement.[29]

There are dire implications created by *Rowan*. By taking a position that is totally inconsistent with the current trend of decisions,[30] *Rowan* is attempting to put the narcotics violator in jail, at the expense of the unwary innocent victim who has been lured, encouraged, and induced into a minor narcotics violation. *Rowan* rationalizes its sweeping effect by explaining that its decision is aimed at conduct "to ferret out the illegal drug trade, and to bring to justice those engaged in it."[31] It connotes a valid meaning but it is unable to define its objectives.

The *Rowan* decision can only be viewed as an attempt to eliminate the defense of entrapment. *Rowan* has ignored important elements of the commission of a crime such as intent and willfulness. *Rowan* refuses to recognize that its quest for law and order is totalitarian in effect. Law enforcement officers and undercover narcotics agents may possess, sell and deliver drugs. They may do so in any way they deem best, so long as the ultimate objective is to suppress the illegal drug trade.

This nation has never been receptive to the idea of secret police. *Rowan* in effect, creates such a body whose one and only purpose is to bring to justice alleged narcotics violators through discriminatory enforcement. This situation is clearly set forth by the following:

> It is axiomatic, of course, that our constitutional guarantees of due process and equal protection forbid legislative enactment of criminal laws that invidiously apply to one class of persons. It is abundantly clear, however, that there are many situations in which the legislature gives the policeman the latitude to do precisely what the legislature is forbidden to do itself. This latitude is not based on an express statutory grant; on the contrary, statutes frequently purport to mandate full enforcement of all criminal laws. Nevertheless, existing side-by-side with these statutory mandates are other statutes which clearly do not contemplate full enforcement, statutes prescribing conduct which the legislature did not intend to be the subject of enforcement efforts. Such statutes permit police to define the actual limits of criminal conduct.[32]

---

[29] Commonwealth v. Miller, ... Mass. Rpts. ....., 282 N.E.2d 394, 400 (1972).

[30] *See, e.g.*, U.S. v. Haley, 452 F.2d 398 (8th Cir. 1972). (For further authority, see the cases cited at n. 10 *infra.*).

[31] State v. Rowan, 32 Ohio App.2d 142, 144, 288 N.E.2d 829, 831 (1972).

[32] Tieger, *Police Discretion and Discriminatory Enforcement*, 1931 DUKE L.J. 717, 720 (1971).

Rowan creates precisely this situation. The Court is attempting to do that which the legislature cannot do. *Rowan* is giving life to the proposition of selective enforcement.

Rowan has further exceeded its authority by rendering an interpretation of a statute which should be best left to the legislators. At a time when many state legislatures are revising their criminal codes, it is not inconceivable that some of their efforts be pointed toward the updating and clarification of their now-antiquated drug laws. *Rowan* has failed to see the necessity of a legislative determination for the problem with which it dispenses in a few short pages, supported by a single unreported case.[33]

The authorization of the conduct of "sale and delivery" which *Rowan* prescribes, is one which cannot be given lightly. *Rowan* creates a rule which is totally inconsistent with the prevailing law on the defense of entrapment in narcotic cases.[34] It is a decision by one man which should have been made, if at all, by hundreds sitting in the state legislature. *Rowan* serves only to create a class of criminals who have committed no crime.

KENNETH D. MORSE

---

[33] State v. Graham, No. 6755, Summit Cty. App. Ct. (Ohio, Jan. 19, 1972) which concerned the reliability of Gene Chicoine, the state's principal witness in State v. Rowan.

[34] *See, e.g.*, People v. Uhlemann, 105 Cal. Reptr. 21, 503 P.2d 277 (1972). (For further authority, see the cases cited in n. 10 *infra.*).

Editor's Note: On March 15, 1973, the Supreme Court of Ohio, Case No. 73-52 denied certiorari on the appeal.