Buffalo Law Review

Volume 6 | Number 3 Article 20

4-1-1957

Criminal Law: Entrapment

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90 N. H. 368, 9 A. 2d 513 (1939), *Delaware Optometric Ass'n v. Sherwood,*— Del. Ch.—, 122 A. 2d 424 (1956), or on the grounds that no substantial injury has been shown. *Wollitzer v. Title Guarantee & Trust Co.,* 148 Misc. 529, 266 N. Y. Supp. 184 (1933); *aff'd without opinion* 241 App. Div. 757, 270 N. Y. Supp. 968 (2d Dep't 1934).

New York follows a substantial majority of states in permitting the Attorney General to enjoin the unlicensed practice of a profession if a public nuisance can be shown. *People ex rel. Bennett v. Laman, supra.* However, as to the right of the individual practitioner to such an injunction, the lower courts have consistently refused to recognize a sufficient property interest in the licensees upon which to base such relief, *Wollitzer v. Title Guarantee & Trust Co., supra* (attorney), *Goldsmith v. Jewish Press Pub. Co.,* 118 Misc. 789, 195 N. Y. Supp. 37 (1922) (Certified Public Accountant); and the Court of Appeals apparently has not yet been faced with the precise issue. *But cf. Smith v. Lockwood,* 13 Barb. 209 (1852).

A strictly logical approach to this problem would require a refusal to recognize a substantial property interest in a professional license. There was no right at common law to be free from competition and it is extremely doubtful that the legislature intended to create such a right by the enactment of the licensing statutes. *New Hampshire Board of Registration in Optometry v. Scott Jewelry Co., supra* at 518; RESTATEMENT, TORTS §710, comment *d* (1938). However, there are certain policy considerations which seem to justify a contrary result. Regardless of who was intended to benefit from the licensing statute, it is clear that the licensed practitioner has paid a high price, in both time and money, in return for his right to practice. Justice would seem to dictate that he be entitled to protect himself from unauthorized interference with the exercise of this right. Also, preservation of a profession's reputation and protection of the public welfare require that the profession be policed, and unlicensed practice eliminated; the individual practitioners are probably equipped to handle such a task, along with the Attorney General.

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Defendant, who had no previous record for dealing in narcotics, was successfully induced by a government agent to produce a seller and to facilitate a sale of heroin. Defendant put forth the defense of entrapment. Conceding that the defendant had been induced to commit the offense, the issue evolved around whether the prosecution had made a valid reply to the defense. Held (2-1): defendant's ready complaisance to the agent's request was sufficient to indicate

that defendant stood ready without persuasion to make arrangements for the illegal sale of narcotics whenever the opportunity afforded, and that this in itself was a valid reply to the claim of inducement so as to support a denial of a motion for acquittal and a submission of the issue of entrapment to the jury. *United States v. Masciale,* 236 F. 2d 601 (2d Cir. 1956).

The principle of entrapment is clear, but its application is anything but clear or consistent. It is generally agreed by the federal courts that entrapment exists when someone, employed for the purpose of prosecution, induced the accused to commit an offense which he would not have otherwise committed. *Sorrells v. United States,* 287 U. S. 435 (1932). The accused has the burden of showing the inducement, the prosecution the burden of replying with a valid explanation for the inducement. *United States v. Sherman,* 200 F. 2d 880 (2d Cir. 1952).

The minority in *Sorrells* felt that there could be no valid excuse for an inducement for the purpose of prosecution, and upon the submitting of evidence of such inducement the accused should be acquitted. The majority felt otherwise and held that it is a valid reply to a claim of inducement if the prosecution presents evidence that the accused was ready and willing to commit the offense charged whenever the opportunity was afforded. This raises an issue which must be tried by the jury. The federal circuit courts accept the principle of *Sorrells* as a rule of law, but are unsettled as to what actually constitutes evidence that the accused was ready and willing whenever the opportunity afforded. It has been held that allegation of this is made by evidence of an existing course of similar criminal conduct, *Nero v. United States,* 189 F. 2d 515 (6th Cir. 1951); *United States v. Brandenberg,* 162 F. 2d 980 (3d Cir. 1947), an already formed design to commit the crime or similar crimes, *Neill v. United States,* 225 F. 2d 174 (8th Cir. 1955), or willingness to do so as evinced by ready complaisance, *Kivitte & Dow v. United States,* 230 F. 2d 749 (9th Cir. 1956); *Hadley v. United States,* 18 F. 2d 507 (8th Cir. 1927).

However, the majority of cases seem to adhere to the principle that a law enforcement officer can only lawfully "induce" the commission of an offense where there is evidence of an existing course of similar criminal conduct, or evidence showing reasonable grounds for believing that the accused was engaged in such unlawful activity. *Health v. United States,* 109 F. 2d 1007 (10th Cir. 1948); *Trice v. United States,* 211 F. 2d 513 (9th Cir. 1954); *Henry v. United States,* 215 F. 2d 639 (9th Cir. 1954); *Hamilton v. United States,* 221 F. 2d 611 (5th Cir. 1933); *Swallum v. United States,* 39 F. 2d 393 (8th Cir. 1930); *United States v. Eman Mfg. Co.,* 271 Fed. 353 (C. D. Colo. 1920). A recent case required that the prosecution, to make a sufficient reply, must present evidence that the accused was ready and willing to commit the offense charged and

had committed similar past offenses. *Sullivan v. United States,* 219 F. 2d 760 (D. C. Cir. 1955). Some recent decisions hold that evidence of either an existing course of similar criminal conduct or an already formed criminal design to commit the crime or ready complaisance is a sufficient reply as long as it shows that the accused had a pre-existing purpose to commit the offense charged. *United States v. Sherman,* 200 F. 2d 880 (2d Cir. 1952); *Lufty v. United States,* 198 F. 2d 760 (9th Cir. 1952); *United States v. Perkins,* 190 F. 2d 49 (7th Cir. 1951).

Most state jurisdictions that allow the defense of entrapment adhere closely to the majority of the federal decisions. See Annot., 33 A. L. R. 2d 883 (1952), and cases cited therein. However some state jurisdictions refuse to recognize the defense of entrapment. *Goins v. State,* 192 Tenn. 32, 237 S. W. 2d 8 (1950); *Bauer v. Commonwealth,* 137 Va. 403, 115 S. E. 514 (1923); *State v. Abley,* 109 Iowa 61, 80 N. W. 225 (1899). In New York the defense exists in theory, but in practice is almost non-existent; the courts feel that although the State should not tempt its citizens into the commission of a crime for the purpose of detecting and punishing it, a guilty defendant should not be protected merely because a zealous public officer exceeded his power and held out bait. *People v. Mills,* 178 N. Y. 274, 70 N. E. 786 (1904). A recent New York case has gone so far as to declare that entrapment is not a defense in New York. *People v. Schacher,* 47 N. Y. S. 2d 371 (Sup Ct. 1944).

Although the majority of cases adhere to the principle that one can only be lawfully "induced" where there is evidence of an existing course of similar criminal conduct, these cases do not seem to so hold because it is the only evidence they will accept, but rather because it is the clearest evidence that will indicate the accused's pre-existing purpose. It does not appear that any circuit has accepted any one of the types of evidence to the exclusion of the others, but rather that they will accept any of the types as long as it tends to show evidence of the accused's pre-existing purpose to commit the act. It appears that the cases which hold that evidence of ready complaisance is a sufficient reply are few because it presents the least evidence that the accused had a pre-existing purpose. And in most such cases the evidence as ready complaisance is supported by evidence of a strong suspicion or knowledge that the accused was engaged in similar criminal conduct. *United States v. Cruez,* 144 F. Supp. 229 (E. D. Ill. 1956); *Ardembault v. United States,* 224 F. 2d 925 (10th Cir. 1955); *Hadley v. United States,* 18 F. 2d 507 (8th Cir. 1927); *Lucadano v. United States,* 280 Fed. 656 (2d Cir. 1922.)

In the instant case the prosecution only presented evidence of ready complaisance; there was no evidence of suspicion that the accused was engaged in the alleged crime or similar crimes. Under this view a law enforcement officer could tempt any person, whether under suspicion or not, to determine whether

he is prone to committing a criminal offense, and, if he falls victim to the temptations, he could be successfully prosecuted even though he was an otherwise innocent person. This would run contrary to the very definition of entrapment—"the instigation of an act by a law enforcement officer on the part of persons otherwise innocent in order to lure them to its commission and to punish them". *Sorrells v. United States,* 287 U. S. 435, 448 (1932). When the prosecution only has evidence of ready compliasance they should be required to submit evidence that they at least had a reasonably strong suspicion that the accused was engaged in the alleged crimes or similar crimes, and without such evidence the accused should be entitled to an acquittal.

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