No. 22950 - State of West Virginia v. Chester Houston

Cleckley, Justice, concurring:

I agree entirely with the scholarly opinion of Justice Recht. I concur only to reemphasize several significant aspects of the entrapment doctrine.

In today's majority opinion, this Court eloquently adds judicial gloss to the legal test for establishing entrapment. A valid entrapment defense requires proof of two related elements: (1) that the State induce the offense, and (2) that the defendant not be predisposed to commit it. See Jacobson v. United States, 503 U.S. 540, 112 S. Ct. 1535, 118 L.Ed.2d 174 (1992); Mathews v. United

States, 485 U.S. 58, 63, 108 S. Ct. 883, 886, 99 L.Ed.2d 54, 61 (1988); State v. Jarvis, 105 W. Va. 499, 143 S.E. 235 (1928). Before the defendant may raise an entrapment defense, he or she must offer "sufficient" evidence of both state inducement and his or her own lack of predisposition. In the past, the bare terms--inducement and predisposition--have done little to disclose the encrusting precedent. Today's opinion by Justice Recht easily becomes the most useful West Virginia discussion on the subject. This decision, which is post-Jacobson, not only illuminates the entrapment concept, but it rids entrapment jurisprudence of the burdensome and confusing "due process" theory.

Appropriately, the majority opinion makes clear that despite some general strictures against the State's "manufacturing" of crimes, inducement requires something more than a State agent or informant suggesting the crime and providing the occasion for it. Rather, inducement consists of providing an opportunity plus something else--typically, excessive pressure by the police or their informant or the police taking advantage of the defendant in an improper way. There is no better means of getting a sense of what

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Examples are: Improper appeals to sympathy, Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, 2 L.Ed.2d 848 (1958); promises of extravagant rewards; or the kind of relentless and extreme trickery engaged in by the postal and custom agents in Jacobson, 503 U.S. at 543-47, 112 S. Ct. at 1537-40, 118 L.Ed.2d at 180-83; intimidation, threats, dogged insistence and arm twisting based on need, sympathy, friendship, or the like. See, e.g., Sorrells v. United States, 287 U.S. 435, 440, 53 S.Ct. 210, 212, 77 L.Ed. 413, 416 (1932) (using sentiment of "one former war buddy ...

courts have regarded as "improper" inducement than the list of cases and parentheticals set forth in the majority opinion. See also the opinion of Chief Judge (now Justice) Breyer in United States v. Gendron, 18 F.3d 955 (1st Cir.), cert. denied, __ U.S. __, 115 S. Ct. 654, 130 L.Ed.2d 558 (1994).

Although the entrapment doctrine is primarily concerned with curbing such improper pressure by the agents of the State, a competing policy has led to the second requirement, namely, that the defendant also not be predisposed to commit the crime. Of course, until some evidence of inducement has been shown, a showing of

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for another" to get liquor during prohibition).

predisposition is unnecessary. On the other hand, if the defendant is found to be predisposed to commit the crime, the entrapment defense is unavailable regardless of the inducement. The premise supporting predisposition as an element of entrapment is that a defendant predisposed to commit the crime should not get off merely because the agents of the State gave the defendant too forceful a shove along the path that the defendant would readily have taken anyway. A

The inquiry for the jury on this issue should first be to determine if there is any evidence that an agent for the state took the first step that led to a criminal act. If the jury finds that there was no such evidence, there can be no entrapment and the jury's inquiry on its defense should end.

It is quite true that under Jacobson predisposition does count if it is itself the product of improper police conduct. This point could have reasonably been said in Jacobson. There, the government through its own mailing to the defendant, purporting to come from others, encouraged the defendant to believe that procuring child pornography was a blow against censorship and in favor of the First

defendant is predisposed to commit a crime if he is ready and willing without persuasion to commit the crime charged and awaiting any propitious opportunity to do so. Predisposition may be shown by evidence of (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the defendant to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement. In essence, the term predisposition focuses on the defendant's state of mind before state agents suggest that he commits the crime. The question the trier of fact must answer is whether the

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Amendment. If there was predisposition, said the Court, the government instilled it. 503 U.S. at 552-53, 112 S. Ct. at 1542-43, 118 L.Ed.2d at 186-87.

defendant would have been likely to commit the same crime without the undue pressure actually asserted.

The majority decision also properly, and for the first time in West Virginia, labels entrapment as a burden shifting defense, i.e., once the defendant has made a threshold showing, the burden shifts to the State to prove beyond a reasonable doubt either that there was no undue State pressure or trickery or that the defendant was predisposed. By making entrapment a burden-shifting defense, it becomes the trial court's duty to instruct the jury as to the state's burden. Thus, the problem for the jury is primarily that of applying

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The Supreme Court stated in Jacobson, that where the defendant relies upon the defense of entrapment, "the prosecution must prove beyond reasonable doubt that the defendant was disposed

to commit the criminal act prior to first being approached by Government agents." 503 U.S. at 549, 112 S.Ct. at 1540, 118 L.Ed.2d at 184. Although this instruction is incomplete, I propose a simple instruction such as the following:

> The defendant is relying upon the defense of entrapment. A person is entrapped when the person has no previous intention to violate the law and is persuaded to commit a crime by state agents. On the other hand, where a person is predisposed to commit the offense when first contacted by state agents, the fact that the state afforded him the opportunity to do so does not constitute entrapment. Once the defense of entrapment is raised, the burden is on the state to prove beyond a reasonable doubt that the defendant was not entrapped.
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> There are two elements to the defense of entrapment: (1) an inducement by the state to commit the crime, and (2) the absence of predisposition on the part of the defendant.
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> The second part of the defense of

a general standard--actually two such standards--inducement and predisposition to varying patterns of facts.

To be sure, in the ordinary case, entrapment presents a question for the factfinder. Even where there are no credibility issues or tensions in the evidence, entrapment is treated as a jury question.

> entrapment concerns predisposition of the defendant at the time when he is first approached by state agents. Predisposition is a state of mind which readily responded to the opportunity furnished by the officer or his agent to commit the offense charged.
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> If the evidence in this case leaves you with a reasonable doubt whether the defendant had any intent to commit the crime except for the inducement or persuasion on the part of some state officer or agent, then it is your duty to find the defendant not guilty.

That does not mean complete freedom for the jury, see Jacobson, supra, and State v. Hinkle, 169 W. Va. 271, 286 S.E.2d 699 (1982); it does mean that where a rational jury could decide either way, its verdict will not be disturbed. In most cases, reversible error is committed by the trial court only where it fails to submit the entrapment issue to the jury. Ordinarily, the evidence will not be so

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If the accused suggests that entrapment belongs in the case, it seems not unfair to expect the defendant to point to a modicum of evidence supportive of his or her suggestion. The alternative - that the prosecution be forced to disprove entrapment in every case - seems plainly unacceptable. I believe the rule should be that the defendant is entitled to a jury instruction on entrapment if there is record evidence which fairly supports the claims of both state inducement of the crime and the defendant's lack of predisposition. To meet this burden, the record must show sufficient evidence which if believed by a rational juror, would suffice to create a reasonable doubt as to

overwhelming as to establish improper conduct by the State as a matter of law. Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, 2 L.Ed.2d 848 (1958). In this case, the police efforts, although far from pristine, were dubious rather than flagrant, or at least a factfinder could so determine. I make this point merely to suggest that to assume that we are dealing with a sharp boundary rather than a spectrum is an illusion.

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whether the state actors induced the defendant to perform a criminal act that he was not predisposed to commit. The existence or nonexistence of the required quantity of evidence in a given case is a matter of law for the court, and thus our review is plenary, reading the record evidence in the light most favorable to the defense.

We must affirm a jury's denial of an entrapment defense unless we determine, viewing the evidence in the light most favorable to the state, that no reasonable juror could have concluded beyond a reasonable doubt that an induced defendant was predisposed to commit the crime. See State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Allocating to the jury broad discretion in entrapment cases is not new to West Virginia jurisprudence. By tradition, issues associated with guilt or innocence (duress, insanity, entrapment, self-defense) are submitted to the jury. See United States v. Gaudin, __ U.S. __, __, 115 S. Ct. 2310, 2313-14, 132 L.Ed.2d 444, 449-50 (1995) (elements of a crime); State v. Koon, 190 W. Va. 632, 640, 440 S.E.2d 442, 450 (1993) (per curiam) (mental duress); State v. Daggett, 167 W. Va. 411, 280 S.E.2d 545 (1981) (insanity); State v. Kirtley, 162 W. Va. 249, 252 S.E.2d 374 (1978) (self-defense). Other issues, perhaps similar in kind but related to collateral matters, are determined, at least initially, by the court (e.g., the reasonableness of a search and seizure and, in many

jurisdictions, the voluntariness of a confession. Cf State v. Vance, 162 W. Va. 467, 250 S.E.2d 146 (1978)). In the former category of merit-related issues, the jury in close cases effectively decides not only what happened but also whether what happened deserves the legal label described in the jury instructions.

Nevertheless, the "gatekeeper" role of the trial judge should not be undermined. First, except where a jury acquits in a criminal case, judges remain as a check on juries in the extreme case--one

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Giving the jury this broad discretion is not only a good idea, it is the best idea for resolving entrapment issues. In large part, predisposition turns on making a judgment as to how a defendant of a given character, background, and behavior would have acted in somewhat different circumstances. It is here that the common sense of the jury works at its best. At least as a composite, the jury, more than the judge, knows more about how human beings behave outside

where the judge thinks that a rational jury could reach only one result. Second, the trial court plays a critical role in limiting the kind of evidence that is to be submitted to prove predisposition. The trial court is empowered to make appropriate use of Rule 404(b) of the West Virginia Rules of Evidence and especially the balancing under Rule 403. See State v. McGinnis, 193 W. Va. 147, 455 S.E.2d 516

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court.

The trial court may allow the jury to consider evidence in connection with the
defendant's motive and predisposition to commit the crime for which he is charged under Rule 404(b). I emphasize Rule 404(b) because in my judgment proper application of this rule contains the necessary safeguards to protect against undue prejudice. State v. LaRock, __ W. Va. __, 470 S.E.2d 613 (1996). Of course,
courts may admit extrinsic prior bad acts evidence for these purposes, subject to Rule 403's requirement that the danger of unfair prejudice not substantially outweigh its probative value. We will reverse a circuit court's decision to admit evidence under Rule 403 only for an abuse of discretion.

(1994). Third, the trial court must approve and deliver only meaningful instructions for the jury.

Finally, one further word is in order. What may be even more troublesome in cases of this kind is the possibility of undue encouragement to the informant, as a result of compelling State inducements (dismissal or reduction of charges or money) to overstep the bounds in the field, or in the courtroom, or both. In his or her dual role as both instigator and witness, an informant has a special capacity--as well as a strong incentive--to tilt both the event itself and his or her testimony about it. If the State is going to use its informant in a role just short of a provocateur, it would be well advised to consider devising restrictions that will at least lessen the

likelihood for abuse. Otherwise, the lesson of history in West Virginia is that this Court itself will take precautions and our adjustments are usually more rigid and far-reaching. See Matter of W. Va. State Police Crime Lab, 190 W. Va. 321, 325, 438 S.E.2d 501, 505 (1993) (Zain cases: "[t]he law forbids the State from obtaining a conviction based on false evidence").