

1993

Utah v. Squire : Brief of Appellant

Utah Court of Appeals

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J. Frederic Voros, Jr.; Assistant Attorney General; Attorney for Appellee.

Andrew B. Berry, Jr.; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :
 :
 Plaintiff and Appellee. :
 : Case Number 930746
 :
 MICHAEL SQUIRE, : Priority No. 2
 :
 Defendant and Appellant. :

-----oo0oo-----

BRIEF OF APPELLANT

APPEAL FROM THE CONVICTION UPON A TRIAL BY JURY
BEFORE THE SIXTH JUDICIAL DISTRICT COURT
FOR THE COUNTY OF SANPETE WITHIN THE STATE OF UTAH
THE HONORABLE DON V. TIBBS PRESIDING

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FILED

JUN 1 1994

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :
Plaintiff and Appellee, :
vs : Case Number 930746
MICHAEL SQUIRE, : Priority No. 2
Defendant and Appellant. :

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court by Utah Code Ann., § 77-1-6(g), Rule 26 of the Utah Rules of Criminal Procedure and by Rule 3(a), of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues which are presented for review are as follows:

1. Whether the Sixth Judicial District Court erred in admitting evidence before the jury of a prior misdemeanor conviction despite the objections of the Defendant, Michael Squire, and the prohibition of Utah Code Annotated, § 76-2-303(6); and

2. Whether the Sixth Judicial District Court erred in refusing to give the instructions to the jury proposed by the Defendant, Michael Squire, upon the issues raised by his defense of entrapment.

STANDARD OF REVIEW

The standard of review upon the appeal is that upon review proper deference is given to the trial court's rulings, conclusions or interpretations and findings of the jury; nevertheless, they are not to be regarded as so infallible as to be beyond the possibility of error and the appellate court is free to render it's independent interpretation and review for correctness. State v. Kourbelas, 621 P.2d 1238 (Utah 1980).

DETERMINATIVE STATUTES AND RULES

Utah Code Annotated, § 76-2-303(6):

In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

STATEMENT OF THE CASE

The State of Utah, on the 30th day of November, 1992, filed a criminal information in the Sixth Judicial District Court for Sanpete County within the State of Utah against the Defendant, Michael Squire, charging him with, "DISTRIBUTION OF A CONTROLLED SUBSTANCE, a Third Degree Felony."

On the 27th day of January, 1993, a preliminary hearing was held before the trial court and the Defendant, Michael Squire, was bound over for trial.

On the 23rd day of June, 1993, a trial by jury was held before the Sixth Judicial District Court for Sanpete County within the State of Utah. The Honorable Don V. Tibbs presided over the trial.

On the 23rd day of June, 1993, the jury returned it's verdict of guilty and the Defendant, Michael Squire, was held for sentencing.

On the 10th day of November, 1993, the trial court entered it's Judgement and Order sentencing the Defendant upon the offense of Distribution of a Controlled Substance, a Third Degree Felony.

On the 24th day of November, 1993, the Defendant, Michael Squire, filed his Notice of Appeal in the Sixth Judicial District Court for the County of Sanpete within the State of Utah.

STATEMENT OF THE FACTS

On the 29th day of April, 1992, Michael Squire entered a plea of guilty to Attempted Distribution of a Controlled Substance, a Class A Misdemeanor, and was on supervised probation with Adult Probation and Parole on the 23rd day of June, 1993. He was 18 years old at the time. (Tr. 270-271 & 279).

In February, 1992, Sanpete County Sheriff Deputy Jon Cox hired a paid confidential informant, Mr. Barson, to conduct drug busts. (Tr. 117 & 126).

Mr. Barson would take his future wife, Linda Alder, who he was dating at the time, from between 10 to 25 parties in the Manti, Utah area. (Tr. 127-133).

While attending these parties the future Mrs. Barson often met the Defendant, Michael Squire, a friend and often spoke with him at these parties. (Tr. 127 & 132).

The Defendant, Michael Squire, was dating Stacey Alder, the sister of Linda Alder, at the time. (Tr. 263).

At a party in Manti canyon, where Mr. Barson and Stacey Alder were present, Linda Alder and the Defendant, Michael Squire, went up into the trees together for some time. When Linda Alder and the Michael Squire returned to the party from the trees Mr. Barson and Stacey Alder were angry at the Defendant and Linda Alder. (Tr. 263- 264).

The next week at another party in Manti canyon Michael Squire, Linda Alder, Stacey Alder and Brian Barson were present. Brian Barson, his future wife, Linda Alder, and her sister, Stacey

Alder exhibited hostility to Michael Squire. (Tr. 264-266).

At the many parties which followed Brian Barson, the confidential informant employed by Deputy Jon Cox to make drug buys, made several prior attempts to induce the Defendant, Michael Squire, to purchase marijuana for him and the Defendant had refused. (Tr. 220-239, 241-250 & 266-268).

Deputy Jon Cox and Brian Barson prior to the transaction had several conversations about the Defendant, Michael Squire. (Tr. 200-201). Deputy Cox had been interested in "catching" the Defendant for over five years and had harbored ill feelings toward the Defendant and his family. (Tr. 203-204, 206-214 & 258-261).

On the 19th day of April, 1992, the Michael Squire agreed to purchase a small amount of marijuana for Mr. Barson. Mr. Squire did not have any marijuana and had to travel to Salt Lake City, Utah to purchase the same amount that Barson had arranged to buy. The Defendant had not transferred marijuana to any other person before nor after the transaction resulting in the charging of the present crime. (Tr. 102 & 267).

The State of Utah, on the 30th day of November, 1992, filed a criminal information in the Sixth Judicial District Court for Sanpete County within the State of Utah against the Defendant, Michael Squire, charging him with, "DISTRIBUTION OF A CONTROLLED SUBSTANCE, a Third Degree Felony."

On the 27th day of January, 1993, a preliminary hearing was held before the trial court and the Defendant, Michael Squire, was bound over for trial.

On the 23rd day of June, 1993, a trial by jury was held before the Sixth Judicial District Court for Sanpete County within the State of Utah. The Honorable Don V. Tibbs presided over the trial. (Tr. 1).

The trial court during the trial admitted evidence, over objection, of the prior conviction of the Defendant, Michael Squire, for Attempted Distribution of a Controlled Substance, a Class A Misdemeanor. (Tr. 269-280).

The trial court refused to give the Defendant's proposed instructions to the jury on the issue of entrapment and gave an instruction which was misleading to the jury. (Tr. 293-295).

On the 23rd day of June, 1993, the jury returned it's verdict of guilty and the Defendant, Michael Squire, was held for sentencing. (Tr. 318).

On the 10th day of November, 1993, the trial court entered it's Judgement and Order sentencing the Defendant upon the offense of Distribution of a Controlled Substance, a Third Degree Felony.

On the 24th day of November, 1993, the Defendant, Michael Squire, filed his Notice of Appeal in the Sixth Judicial District Court for the County of Sanpete within the State of Utah.

SUMMARY OF ARGUMENT

The trial court committed a prejudicial error when it admitted into evidence over objection testimony regarding the Defendant's prior conviction for Attempted Distribution of a Controlled Substance, a Class A Misdemeanor.

The trial court committed prejudicial error when it failed to give the Defendant's proposed entrapment instructions to the jury. The instruction on entrapment given the jury by the trial court was misleading and is an incorrect statement of the law.

ARGUMENT

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE OF A PRIOR MISDEMEANOR CONVICTION OF THE DEFENDANT, MICHAEL SQUIRE

On the 29th day of April, 1992, Michael Squire entered a plea of guilty to Attempted Distribution of a Controlled Substance, a Class A Misdemeanor, and was on supervised probation with Adult Probation and Parole on the 23rd day of June, 1993. He was 18 years old at the time. (Tr. 270-271 & 279).

The State of Utah, on the 30th day of November, 1992, filed a criminal information in the Sixth Judicial District Court for Sanpete County within the State of Utah against the Defendant, Michael Squire, charging him with, "DISTRIBUTION OF A CONTROLLED SUBSTANCE, a Third Degree Felony."

On the 23rd day of June, 1993, a trial by jury was held before the Sixth Judicial District Court for Sanpete County within the State of Utah. The Honorable Don V. Tibbs presided over the trial. (Tr. 1).

The trial court during the trial admitted evidence, over objection, of the prior conviction of the Defendant, Michael Squire, for Attempted Distribution of a Controlled Substance, a Class A Misdemeanor. (Tr. 269-280).

Utah Code Annotated, § 76-2-303(6):

In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the

defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

The Defendant, Michael Squire, was entitled to be tried and have his guilt or innocence determined on the basis of the crime charged against him without the issue being confused by engendering prejudice against him by testimony concerning prior misdeeds or misconduct. State v. Hansen, 588 P.2d 164 (Utah 1978).

Although the State argued at trial that the Defendant's testimony that he had taken urinalysis testing opened the door to the admission of the testimony and evidence of the past conviction of Attempted Distribution of a Controlled Substance, a Class A Misdemeanor, such is not the case.

The Defendant did not testify that he was on supervised probation to Adult Probation and Parole, the agency which had performed the urinalysis testing. The Defendant did not testify as to his past criminal misdemeanor conviction or the circumstances surrounding that conviction.

The reference to urinalysis testing was testified to by Michael Squire to support his contention that he did not presently use marijuana or other drugs and did not do so at the time of the transaction which resulted in the filing of the felony distribution charge by the State of Utah.

Certainly, the State was not pursuing the line of questioning regarding the past conviction to show that the urinalysis testing performed by an agency of the State, Adult Probation and Parole, while the Defendant was on supervised

probation

were not performed properly. The State's intention was not to challenge the scientific basis nor the results of the urinalysis testing it had performed upon the Defendant.

The fact that the Defendant had undergone urinalysis testing does not, necessarily, lead to the conclusion that the State should be permitted to introduce evidence of a past misdemeanor conviction which resulted in the State's own urinalysis testing.

Hansen, id., argued by the State at trial as permitting the introduction of the prior conviction does not support the State's contention here. The Supreme Court of Utah, in Hansen, stated that the statute does not preclude that State from presenting any available evidence of the Defendant's intention to commit the crime with which he is charged.

The admission of the prior misdemeanor conviction of the Defendant was evidence that was directed specifically to the issue which was before the jury, the issue of entrapment. Our legislature has determined that evidence of prior misdemeanor convictions may engender prejudice against the Defendant by the jury by virtue of his prior misdeeds and has directed, by the enactment of Utah Code Annotated, § 76-2-303(6), that such evidence should not be admitted in a subsequent prosecution against the Defendant.

The trial court was in error and the jury was prejudiced

by the admission of evidence concerning Michael Squire's prior misdemeanor conviction of Attempted Distribution of a Controlled Substance. The conviction of the Defendant, Michael Squire, should be reversed.

**THE TRIAL COURT SHOULD HAVE GIVEN THE DEFENDANT'S
PROPOSED INSTRUCTIONS REGARDING ENTRAPMENT AND REASONABLE DOUBT**

The Defendant requested the trial court give his proposed jury instructions to the jury prior to the submission of the case to the jury. The trial court refused to give the Defendant's proposed instructions and, instead, gave an entrapment instruction which tracks the entrapment defense statute. The instructions proposed by the Defendant are exhibit C, attached hereto as part of the Addendum.

The Defendant asserts, and asserted at trial, that the jury should have been instructed that if there existed a reasonable doubt as to whether the offense committed was the product of Michael Squire's initiative and desire then the jury must find the Defendant not guilty of distribution of a controlled substance. (Tr. 234). Moreover, the instructions proposed by the Defendant on the issue of entrapment properly focused the jury on the issue of whether the offense committed was the product of the defendant's initiative and desire, or was induced by the persistent requests of the police authority.

The evidence presented to support the Defendant's contention that he was entrapped supported the instructions

proposed by the Defendant. In February, 1992, Sanpete County Sheriff Deputy Jon Cox hired a paid confidential informant, Mr. Barson, to conduct drug busts. (Tr. 117 & 126).

Mr. Barson would take his future wife, Linda Alder, who he was dating at the time, from between 10 to 25 parties in the Manti, Utah area. (Tr. 127-133).

While attending these parties the future Mrs. Barson often met the Defendant, Michael Squire, a friend and often spoke with him at these parties. (Tr. 127 & 132).

The Defendant, Michael Squire, was dating Stacey Alder, the sister of Linda Alder, at the time. (Tr. 263).

At a party in Manti canyon, where Mr. Barson and Stacey Alder were present, Linda Alder and the Defendant, Michael Squire, went up into the trees together for some time. When Linda Alder and the Michael Squire returned to the party from the trees Mr. Barson and Stacey Alder were angry at the Defendant and Linda Alder. (Tr. 263- 264).

The next week at another party in Manti canyon Michael Squire, Linda Alder, Stacey Alder and Brian Barson were present. Brian Barson, his future wife, Linda Alder, and her sister, Stacey Alder exhibited hostility to Michael Squire. (Tr. 264-266).

At the many parties which followed Brian Barson, the confidential informant employed by Deputy Jon Cox to make drug buys, made several prior attempts to induce the Defendant, Michael Squire, to purchase marijuana for him and the Defendant had refused. (Tr. 220-239, 241-250 & 266-268).

Deputy Jon Cox and Brian Barson prior to the transaction had several conversations about the Defendant, Michael Squire. (Tr. 200-201). Deputy Cox had been interested in "catching" the Defendant for over five years and had harbored ill feelings toward the Defendant and his family. (Tr. 203-204, 206-214 & 258-261).

On the 19th day of April, 1992, the Michael Squire agreed to purchase a small amount of marijuana for Mr. Barson. Mr. Squire did not have any marijuana and had to travel to Salt Lake City, Utah to purchase the same amount that Barson had arranged to buy. The Defendant had not transferred marijuana to any other person before nor after the transaction resulting in the charging of the present crime. (Tr. 102 & 267).

In State v. Kourbelas, the Supreme Court of Utah stated:

But it is, of course, not a proper function of law enforcement officers, either themselves or by the use of undercover agents or decoys, to induce persons who otherwise would be law abiding into the commission of a crime....

It is our opinion that, if the rule as to the presumption of innocence is fairly and properly applied, there necessarily exists a reasonable doubt as to whether the offense committed was the product of the defendant's initiative and desire, or was induced by the persistent requests of Mr. Nelson.

The Defendant asserts that the jury should have been instructed upon the issue of reasonable doubt as to whether the crime committed was a product of the defendant's own initiative and desire or the persistent efforts of the police authority to induce him or create a substantial risk that he would commit the crime with which the state would charge him. State v. Sprague, 680 P.2d 404 (Utah 1984); State v. Taylor, 599 P.2d 496 (Utah 1979);

State v. Wright, 744 P.2d 315 (Utah App. 1987); State v. Belt, 780 P.2d 1271 (Utah App. 1989); and State v. Cripps, 692 P.2d 747 (Utah 1984). The instruction on entrapment given by the trial court did not raise the issue of reasonable doubt as to whether the police authority induced the Defendant, Michael Squire, to commit the crime which he was charged with.

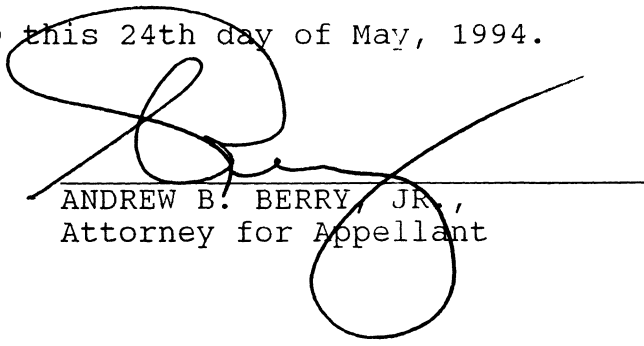
The verdict of guilty rendered upon the evidence and instructions given by the trial court should be reversed.

CONCLUSION

The trial court committed a prejudicial error when it admitted into evidence over objection testimony regarding the Defendant's prior conviction for Attempted Distribution of a Controlled Substance, a Class A Misdemeanor.

The trial court committed prejudicial error when it failed to give the Defendant's proposed entrapment instructions to the jury. The instruction on entrapment given the jury by the trial court was misleading and is an incorrect statement of the law.

RESPECTFULLY SUBMITTED this 24th day of May, 1994.



ANDREW B. BERRY, JR.,
Attorney for Appellant

CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on this ~~31st~~^{30th} day of May, 1994, I mailed, postage prepaid and by first class mail, two (2), true and correct copies of the foregoing Brief Of Appellant to J. Frederic Voros, Jr., Assistant Attorney General, Attorney for Plaintiff and Appellee, at 236 State Capitol Building, Salt Lake City, Utah 84114.

ADDENDUM

- A. Judgment and Order
- B. Utah Code Annotated, § 76-2-303(6).
- C. Defendant's Proposed Jury Instructions

FILED
SANPETE COUNTY, UTAH

NOV 10 1993

CLERK
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160 North Main
Manti, Utah 84642
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IN THE SIXTH JUDICIAL DISTRICT COURT FOR SANPETE COUNTY
STATE OF UTAH

THE STATE OF UTAH,)	
Plaintiff,)	
vs.)	JUDGEMENT AND ORDER
MICHAEL SQUIRE,)	Criminal Case No. 921600089
Defendant.)	Judge Don V. Tibbs

JUDGMENT ENTERED
JUDGMENT DOCKET

No. 8 Page 5

On the 3rd day of November, 1993, appeared Ross C. Blackham, the Attorney for the State of Utah, the Defendant appeared in person and was represented by his Attorney Andrew Berry, Jr..

IT IS ADJUDGED that the Defendant has been convicted upon a plea of:

- 1. Guilty;
- 2. No Contest;
- X 3. Not Guilty and a verdict of Guilty;
- 4. Not Guilty and a finding of Guilty;

of the offenses of: DISTRIBUTION OF A CONTROLLED SUBSTANCE, a Third Degree Felony.

- X 1. As charged in the Information;
- 2. As charged in the Amended Information;

and the Court having asked if the Defendant has anything to say why judgement should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the Defendant is guilty as charged and convicted.

IT IS ADJUDGED that the Defendant be confined and imprisoned at the Utah State Prison for a term of 0 - 5 years, as provided for by law for the offense of DISTRIBUTION OF A CONTROLLED SUBSTANCE, a Third Degree Felony and shall pay a fine of \$5,000.00 plus an 85% surcharge.

IT IS FURTHER ADJUDGED that the Defendant shall pay restitution in the amount of \$50.00.

IT IS FURTHER ADJUDGED that the Defendant is granted a stay of execution of the above jail sentence and he is now placed on probation to the Department of Adult Probation and Parole for 24 months on the following terms and conditions:

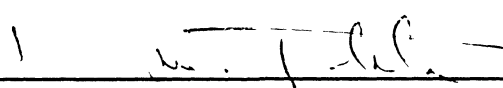
1. Defendant shall enter into and sign a probation agreement with the Department of Adult Probation and Parole and comply strictly to the terms therein.
2. That Defendant shall not have in his possession nor consume any alcoholic beverages or illegal drugs of any kind. The Defendant is further ordered to not associate with those who use alcohol or drugs.
3. The Defendant is ordered to pay a fine of \$650.00 plus an 85% surcharge of \$531.25 making a total fine and surcharge of \$1,156.25. While incarcerated Defendant earned \$256.00 which shall be credited toward Defendants fine.

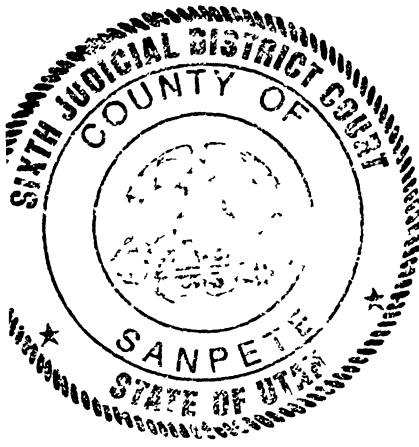
Judgement and Order
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Page 3

4. That Defendant shall be subject to search of his person, vehicle and place of residence without a warrant and shall submit himself to a request for chemical testing of body fluids without a warrant when requested to do so either by his probation officer or by any peace officer.
5. Defendant shall not violate laws of any kind, Federal, State or local.

DATED this 8th day of November, 1993.

BY:


DON V. TIBBS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I have sent a true and correct copy of the forgoing Judgement and Order to the Defendants attorney at 62 West Main, Moroni, Utah 84646, postage prepaid this 10th day of ~~October~~ ^{Nov.}, 1993.

By:


Leslie E. Jorgensen
Secretary

Utah Code Annotated, § 76-2-303(6):

In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

INSTRUCTION NUMBER _____

If you find that Michael Squire's commission of the offense of distribution of a controlled substance was induced by persistent requests of the confidential informant, Bryan Barson, and not by the initiative and desire of Michael Squire then you must find Michael Squire not guilty of such offense.

INSTRUCTION NUMBER _____

In determining whether Michael Squire was "entrapped," the test is whether a law enforcement official or an agent, in order to obtain evidence of the commission of an offense, induced Michael Squire to commit such an offense by persuasion or inducement, other than one who was merely given the opportunity to commit the offense, then you must find Michael Squire not guilty of distribution of a controlled substance.

INSTRUCTION NUMBER _____

If you find that the offense committed was induced by the persistent requests of the confidential informant, Bryan Barson, then you must find Michael Squire not guilty of the offense of distribution of a controlled substance.

INSTRUCTION NUMBER CI

If you find that there is reasonable doubt as to whether the offense committed was the product of Michael Squire's initiative and desire then you must find Michael Squire not guilty of the offense of distribution of a controlled substance.

INSTRUCTION NUMBER _____

If you find that the conduct of the police has created a substantial risk that Michael Squire would be induced to commit the offense of distribution of a controlled substance then "entrapment," has occurred and you should find Michael Squire not guilty of the offense.

INSTRUCTION NUMBER _____

If you find that the police conduct, or the conduct of the confidential informant in this case, created a substantial risk that a normal law-abiding person would be induced to commit a crime, entrapment has occurred regardless of the predisposition of Michael Squire and you must find Michael Squire not guilty of the offense of distribution of a controlled substance.

INSTRUCTION NUMBER

7

In evaluation the course of conduct between the government representative and Michael Squire, the transactions leading up to the offense, the interaction between the agent and Michael Squire, and the response to the inducements or persuasion of the police agent are all to be considered in judging what the effect of the governmental agent's conduct would be on a normal person.

INSTRUCTION NUMBER _____

In the prosecution for the sale of a controlled substance reasonable doubt necessarily exists as to whether the offense committed was the product of Michael Squire's initiative and desire, or was induced by persistent requests of the undercover narcotics agent, Bryan Barson, where the police agent first suggested the purchase of marijuana by or from Michael Squire, where the agent renewed the request several times and where there is no evidence that Michael Squire had previously dealt in drugs.

INSTRUCTION NUMBER _____

Inducing or persuading a person who otherwise would be law-abiding into the commission of a crime is not a proper function of law enforcement officers, either by themselves or by use of undercover agents or decoys.