1993

State of Utah v. Kim Beddoes : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. T NO [redacted]
v.	:	Priority No. 2
KIM BEDDOES,	:	
Defendant/Appellant,	:	

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(B)(II) (SUPP. 1993), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR JUAB COUNTY, STATE OF UTAH, THE HONORABLE GUY R. BURNINGHAM, PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930800-CA
v.	:	Priority No. 2
KIM BEDDOES,	:	
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930800-CA
v.	:	Priority No. 2
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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for possession of a controlled substance with intent to distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(b)(ii) (Supp. 1993), in the Fourth Judicial District Court in and for Juab County, State of Utah, the Honorable Guy R. Burningham, presiding. This Court has jurisdiction to hear the case pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1994).

STATEMENT OF THE ISSUES PRESENTED AND STANDARDS OF APPELLATE REVIEW

The following issues are presented on appeal:

1. Does Utah Code Ann. § 76-2-303(1) (1990), Utah's entrapment statute, require adoption of a per se rule that entrapment is established as a matter of law solely because law enforcement furnished the contraband serving as the basis for charges against a defendant during a "controlled delivery" or "reverse sting" operation, irrespective of whether the defendant has established the elements of entrapment?

This issue involves a question of statutory interpretation, which is purely a question of law. Accordingly, the trial court's implicit rejection of defendant's proposed interpretation of § 76-2-303(1) is reviewed for correctness. This Court need not afford any deference to the trial court's ruling on this issue. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

2. Does the evidence presented at trial prove as a matter of law that defendant was entrapped into distributing cocaine? A reviewing court will affirm a conviction unless the evidence, viewed in the light most favorable to the jury verdict, leaves no reasonable doubt that defendant was entrapped as a matter of law. State v. Udell, 728 P.2d 131, 133 (Utah 1986).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-2-303(1) (1990), Entrapment:

> Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

STATEMENT OF THE CASE

Defendant was charged by information with possession of a controlled substance with intent to distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(b)(ii) (Supp. 1993) (R. 8). Prior to trial, defendant moved to have the charge dismissed based on a claim of entrapment (R. 22-31). After an

evidentiary hearing, the trial court took the issue under advisement and allowed the State to submit a memorandum in response to defendant's motion (R. 153). Shortly thereafter, the court entered a signed ruling in which it denied defendant's motion (R. 130-31). (A copy of the trial court's ruling is attached hereto as addendum A.)

Defendant renewed his entrapment defense at his jury trial, but he was convicted as charged (R. 200). Defendant's conviction evidences the jury's rejection of his entrapment defense.

On appeal, defendant challenges both the trial court's denial of his motion to dismiss based on entrapment as well as the jury's rejection of his entrapment defense.

STATEMENT OF THE FACTS[1]

On November 13, 1992, Ned Shepherd was arrested by Sergeant Paul Mangelson of the Utah Highway Patrol for possession of 15 pounds of marijuana. In a search incident to Shepherd's arrest, a list of names with corresponding phone numbers was found in Shepherd's wallet. The trooper transported Shepherd to the Juab County Jail and returned to his patrol duties (R. 306-07, 406-07, 421).

Juab County Deputy Sheriff William Thompkins and other officers, including two narcotics officers from Utah County,

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[1] Unless otherwise noted, this brief recites the facts from the record in the light most favorable to the jury's verdict. State v. Verde, 770 P.2d 116, 117 (Utah 1989); see also State v. Moore, 782 P.2d 497, 501 (Utah 1989).

spoke with Shepherd. Specifically, the officers questioned Shepherd about the people on his list of names because they recognized several as people who police were investigating for suspected drug dealing in Juab and Utah counties. Among the names was "Kim", the phone number for which corresponded to defendant, Kim Beddoes. Thompkins had previously gathered "extensive intelligence information" on defendant because local authorities suspected defendant was distributing narcotics (R. 342, 443). Thompkins was primarily interested in defendant because defendant was the only person on the list who lived in Juab County (R. 326).

Shepherd readily acknowledged that the name "Kim" appearing on his list of names and numbers referred to defendant. Shepherd and defendant had been friends for over twenty years (R. 425). More importantly, Shepherd told Thompkins that he had regularly sold drugs to defendant for many years. In recent transactions, Shepherd supplied defendant with approximately four ounces of marijuana. According to Shepherd, the purchase of four ounces of marijuana could be solely for personal use, but it typically indicated that the buyer was "probably purchasing it to probably use it and sell it to be able to make his money" (R. 313). Also, although he had never personally seen defendant sell narcotics, Shepherd testified that in the past defendant indicated he sold controlled substances (R. 336, 407).

In exchange for the State's reducing the possible felony charges against him to a class B misdemeanor and foregoing

any forfeiture action, Shepherd agreed to help local law enforcement "take down some drug dealers in [Juab County and] some drug dealers in Utah County" (R. 314). Specifically, Shepherd agreed to complete his planned deliveries to individuals in both counties (R. 328-29, 407-08, 447-48). According to Shepherd, even though he had no specific arrangement with defendant to deliver any marijuana to him on November 13, 1992, he was planning to deliver some of the 15 pounds of marijuana to defendant (R. 407, 418, 428, 547). That expectation was based on the fact that the last time he had spoken to defendant, defendant had requested marijuana. Shepherd told defendant he was going to get some more in about a month, but he never provided defendant a specific date of delivery (R. 407-08, 428-29, 463-64). However, Shepherd did not even tell his wife when he left for California to get the marijuana; he just did it (R. 417).

After Shepherd agreed to complete his deliveries in return for leniency, Thompkins asked Shepherd how much marijuana would be an appropriate amount to deliver to defendant (R. 412). Shepherd replied, "a pound" (R. 321, 409, 426, 445). Shepherd also told Thompkins that his normal price for a pound of marijuana was $1,600 and that defendant owed him $450 from a prior transaction (R. 327, 411-413).

Police then had Shepherd call defendant at his house. Shepherd tried to call defendant several times, but defendant apparently did not hear the phone ringing because he was outside

chopping wood (R. 329). Eventually, defendant answered the phone. Shepherd told defendant, "Kim, this is Shep. Stay home. I'll be there in a minute" (R. 315, 425). The cursory telephone conversation was not unusual for Shepherd and defendant. Indeed, Shepherd testified that he assumed defendant would then expect a delivery of drugs because when he "was going to deliver drugs, that's all [he] would say" (R. 329-30, 407-09).

Shepherd was fitted with a "Fargo Unit" -- a listening device that allowed the police to monitor and record the conversation between defendant and Shepherd at the time of the drug sale. Thompkins retrieved a package of marijuana from the department's evidence room and weighed it. Although it weighed 23 ounces instead of the planned 16 ounces, the officers decided it would be better not to dismantle the 23 once package in order to break it down to a pound. The package was given to Shepherd, and he was instructed to take his car and complete the deliver to defendant. The officers monitored the transaction via the Fargo Unit (R. 410, 445-56, 544).

Shepherd went to defendant's house at approximately 5:07 p.m. Defendant met Shepherd outside, and Shepherd asked defendant if he had any money. Defendant said, "no," and the two entered the house together through a sliding door in the basement. Shepherd handed defendant the bag of marijuana and told that it was a pound. He also told defendant the pound would cost him $1,600 plus the $450 that he owed from their previous deal for a total of $2,050 (R. 545). Defendant never indicated

he did not want the marijuana or argue about the price (R. 413, 548-49). Defendant simply responded, "okay" (R. 331), and Shepherd turned around and left (R. 320, 410-13).

When he was questioned about why he gave defendant the marijuana even though he did not receive any money for it from defendant, Shepherd explained that he "fronted" the marijuana to defendant as he had done in the past. "Fronting" is the practice of providing marijuana to a person without requiring them to pay for it upon delivery. It is a common practice in the illegal drug industry because the high cost of narcotics makes them difficult to purchase. "Fronting" enables dealers to have a supply for resale, and the understanding is that the proceeds from those transactions will be used to pay for the marijuana that was previously delivered as well as toward the next shipment. Although Shepherd acknowledged that it was extremely unusual for him to "front" marijuana to someone without first eliminating an existing debt, Shepherd frequently "fronted" marijuana to his customers (R. 327-28, 549-50).

Shepherd was in defendant's house for about three minutes, and defendant did not question him about either the prior debt, the amount delivered, or the price. Shepherd did acknowledge that defendant may have been surprised by the amount of marijuana, but he testified that defendant did not otherwise seem surprised by the delivery (R. 320, 413, 548).

The officers obtained and executed a search warrant for defendant's house. Even though the warrant was executed on a no

knock basis, by the time the officers got to defendant he was already in the bathroom and had attempted to flush the marijuana down the toilet. Thompkins, however, was able to retrieve the marijuana before defendant could to dispose of it. During a search of the house, the officers found baggies located near a scale. In the same area, they found a silver colored tray containing marijuana and a pipe. Several firearms also were seized (R. 4-5, 449-58).

SUMMARY OF THE ARGUMENT

The trial court correctly refused to adopt defendant's proposed per se rule of entrapment for cases in which law enforcement personal furnish the contraband used in a "reversed sting" operation. Defendant's proposed rule is inconsistent with Utah Code Ann. § 76-2-303(1) (1990), because under that provision a defendant asserting a defense of entrapment must demonstrate that the methods used by police created a substantial risk that person not otherwise ready to commit the offense commit by the defendant would have been induced to do so. Whether the furnishing of contraband creates such a risk, or merely provides a defendant with an opportunity to commit a crime, should be resolved on a case-by-case basis. Under the facts presented at the hearing on defendant's motion to dismiss based on entrapment, the trial court properly determined that the issue should be submitted to the jury. Its denial of defendant's motion should therefore be affirmed.

Similarly, the evidence presented at defendant's trial, viewed in the light most favorable to the jury's verdict of guilty, does not prove as a matter of law that defendant was entrapped into purchasing marijuana from the police informant. The informant made no extreme pleas of desperate illness, appeals based on sympathy, pity, or close personal friendship, or offers of sex or inordinate sums of money in order to obtain narcotics from defendant. Although the informant and defendant had been friends for twenty years, there was no evidence that the informant traded on that friendship to induce defendant to purchase marijuana. Nor does the fact that the informant "fronted" the marijuana to defendant because defendant did not then have cash to pay for the contraband demonstrate that defendant was entrapped. Fronting is a common practice in the drug industry, and the informant had fronted narcotics to defendant in prior transactions. These issues were properly reserved for the jury's determination, and the jury's determination should be affirmed because it is not incorrect as a matter of law.

ARGUMENT

POINT I

THE MERE FACT THAT POLICE FURNISHED CONTRABAND TO DEFENDANT VIA AN INFORMANT DOES NOT ESTABLISH THAT DEFENDANT WAS ENTRAPPED UNDER EITHER UTAH CODE ANN. § 76-2-303(1) (1990) OR UTAH CASE LAW

The trial court properly denied defendant's motion to dismiss based on a defense of entrapment because defendant failed

to establish that, as a matter of law, the methods employed by law enforcement officials created a substantial risk that the offense would have been committed by a person not otherwise ready to commit it. The thrust of defendant's claim below was that whenever police provide the contraband that serve as the basis for a defendant's arrest entrapment is established as a matter of law. Likewise, defendant asks this Court adopt "the per se rule that, without more, police conduct of furnishing controlled substances to citizens in an attempt to ferret out criminals establishes entrapment as a matter of law." Br. of Appellant at 14.

This Court should reject defendant's proposed per se rule because it is contrary to Utah Code Ann. § 76-2-303(1) (1990). Section 76-2-303(1) requires a showing that the police conduct created a substantial risk that persons not otherwise prepared to do so would have been induced to commit the offense committed by the defendant. Adoption of defendant's proposed per se rule would, in many cases such as this one, eliminate the statutorily required showing of improper inducement. Accordingly, the determination of whether entrapment is established during a "controlled delivery" or in "reverse sting" operations is best made on a case-by-case basis.

Utah Code Ann. § 76-2-303(1) (1990) defines entrapment, stating in pertinent part:

> Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain

> evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(Emphasis added).

Despite the plain language of § 76-2-303(1) requiring him to demonstrate that the police methods created a substantial risk of inducement, defendant asks this Court to adopt a per se rule of entrapment that will relieve him of his burden of showing inducement. Although a few courts have adopted the per se rule advocated by defendant under an objective theory of entrapment, the majority and better reasoned position requires that the determination of whether a defendant was entrapped be made on a case-by-case basis.

Even a cursory reading of the cases defendant relies upon for adoption of a per se rule of entrapment demonstrates that they are not driven by a concern that the method necessarily creates a substantial risk of inducement. Rather, they are predicated on the notion that the "[objective] entrapment defense is treated primarily as a curb upon improper law enforcement techniques." State v. Kummer, 481 N.W.2d 437, 443 (N.D. 1992) (internal quotation marks and citations omitted). See also State v. Evans, 550 P.2d 830, 845 (Alaska 1976) ("In Alaska, it was expressly for the purpose of ensuring adequate supervision of law enforcement practices that we adopted the objective theory of entrapment.").

With the goal of supervising police conduct as their starting point, the jurisdictions that have adopted a per se rule of entrapment in reverse sting cases almost invariably engage in lengthy discussions about why, as a matter of public policy, it is inappropriate for police to supply narcotics under any circumstances. Kummer, upon which defendant relies heavily, is illustrative.

In Kummer, the police officers supplied cocaine from the department's evidence room to an informant who then sold the cocaine to the defendant, a suspected drug dealer. After the sale was completed, the police arrested the defendant for possession of a controlled substance with intent to distribute. Kummer, 481 N.W.2d at 438-38.

Kummer raised an entrapment defense, which was rejected by the trial court. On appeal, he argued that he was entrapped as matter of law because the police "had to create and commit a crime" in order to arrest him. Kummer, 481 N.W. 2d at 441. The majority stated that defendants advancing an entrapment defense "must establish two elements: that law enforcement agents induced the commission of the crime and that the method of inducement was likely to cause normally law-abiding person to commit the offense." Kummer, 481 N.W.2d at 441 (citation omitted). Its subsequent analysis, however, does not address the inducement requirement.

Without ever explaining why the police provision of the narcotics is always "likely to cause normally law-abiding

person[s] to commit the offense[,]" the North Dakota Supreme Court went to great lengths to condemn the practice of reverse stings in narcotics cases. It concluded that the provision of narcotics by police was improper because the furnishing of contraband by police lacks the element of necessity that traditionally justifies police commission of crimes in undercover operations. Under Kummer, police can never make a controlled sale or delivery of narcotics to a suspected drug dealer. They must instead complete only controlled drug buys. Id. at 443. The court reasoned that, "like the exclusionary rule in search cases, [the per se entrapment rule] can be seen as a prophylactic rule intended to protect innocent persons from police action intended for the guilty. An agent who feels free to give drugs to targets creates a danger of corrupting the innocent that an agent who merely makes decoy purchases does not." Id. (citation omitted).

The majority in Kummer also emphasized that when law enforcement officers possess and sell narcotics in reverse sting operations "there is a chance not only that the drugs will be used by the recipients, including novice users, but also that the drugs will be diverted to illegal channels." Id. (citation omitted). Accordingly, it adopted a per se rule of entrapment because it "eliminates any excuse for law enforcement officers or agents to possess controlled substances, except during that brief span between the seizure or undercover purchase and the placement

of the drugs in the police evidence locker, thereby facilitating enforcement of anticorruption measures. Id. (citation omitted).

The Kummer majority unwisely resorted to an entrapment analysis to condemn what it viewed as distasteful police conduct without articulating why the use of reverse stings in narcotics cases always creates a substantial risk that a person not otherwise ready to commit the offense will be induced to commit a crime simply because police provide the contraband underlying the prosecution. As for the court's concerns about narcotics falling into the wrong hands and possible police corruption, neither issue has any bearing on the question of entrapment. More importantly, any "prophylactic" benefit from such a per se rule is equally well served by application of traditional objective entrapment standards on a case-by-case basis. Further, a case-by-case approach avoids insulating those who were not in fact entrapped from prosecution, as appeared to be the case in Kummer. Indeed, Justice Vande Walle, who concurred only in the result reached in Kummer, emphasized that Kummer was not entrapped:

> I cannot fathom why a law enforcement officer who, undercover, offers to sell narcotics, induces the commission of an offense by persuasion or other means likely to cause normally law abiding persons to commit the offense anymore than if the defendant is offered narcotics by someone not a law enforcement officer. The defendant does not know that either seller is an undercover agent. To assume, as matter of law, that a defendant who is normally law abiding will purchase from a person who is an undercover agent but would not purchase from a seller who is not an undercover agent is disingenuous at best.

Kummer, 481 N.W.2d at 444-45 (Vande Walle, J., concurring specially).

Justice Vande Walle also took issue with the rationale for adopting a per se rule of entrapment offered by other jurisdictions:

> Nevertheless, as noted by the majority opinion, a number of jurisdictions have adopted this tortured rationale. The logic of it escapes me, particularly in those jurisdictions which have adopted an "objective" standard for entrapment similar to that of North Dakota. The only explanation I can offer is that the courts, having determined that the actions of law enforcement officers were unacceptable as a matter of public policy, believed it necessary to cast their opinions in more traditional terms and, perhaps, more tenable forms such as entrapment.

Id.

Other courts addressing the issue of whether police provision of the narcotics underlying a defendant's prosecution have refused to adopt a per se rule of entrapment for reasons similar to those identified by Justice Vande Walle. For instance, the supreme courts of both Michigan and Hawaii have recently rejected the claim that entrapment per se is established when police execute reverse stings in narcotics cases. See People v. Jamieson, 461 N.W.2d 884 (Mich. 1990); State v. Agrabante, 830 P.2d 492 (Hawaii 1992). Their opinions are typical of those courts rejecting a proposed per se rule of entrapment under the objective standard.

Hawaii, like Utah, applies the objective standard for entrapment. Agrabante, 492 P.2d at 499. Indeed, the pertinent

portion of Hawaii's entrapment statute is very similar to § 76-2-303(1):

> (1) In any prosecution, it is an affirmative defense that the defendant was engaged in the prohibited conduct or caused the prohibited result because he was induced or encouraged to do so by a law enforcement officer, or a person acting in cooperation with a law enforcement officer, who, for the purpose of obtaining evidence of the commission of an offense, either:
>
> . . .
>
> (b) Employed methods of persuasion or inducement which *created a substantial risk that the offense would be committed by persons other than those who are ready to commit it*.

Hawaii Revised Statute § 702-237 (1985) (emphasis added).

Agrabante purchased cocaine from an undercover police officer in a reverse sting operation. The agreed price for the cocaine was $1,000, but Agrabante had only $690 with him. After some discussion, the undercover agent agreed that Agrabante could pay the balance the next day, collected the $690, and gave the cocaine to Agrabante. After the undercover agent gave a signal to nearby officers, the police arrested Agrabante. Agrabante, 830 P.2d at 493.

Agrabante was convicted, and on appeal he urged the Hawaii Supreme Court to hold that reverse stings constitute entrapment per se on the grounds that "the police themselves were the ones who provided and sold the cocaine, and but for those actions, . . . the offense for which [defendant] was convicted would not have occurred." Id. at 499 (internal quotation marks omitted). The court not only refused to adopt a per se rule of

entrapment, but also affirmed the lower court's determination that Agrabante was not entrapped:

> In this case, there is no evidence that the reverse [sting] operation exhibited or displayed cocaine for sale to the general public or in any manner persuaded or induced persons other than those who were actively seeking to purchase such illegal drugs. Not only is the record devoid of any evidence that defendant was persuaded or induced by the police to purchase the cocaine, defendant did not have any contact with [the undercover agent] prior to . . . the date of the transaction.
> . . .
> In this case, the police merely provided defendant an opportunity, as opposed to an inducement, to commit the charged offense.

Agrabante, 830 P.2d at 500 (citations omitted).

By the same token, the Michigan Supreme Court in Jamieson rejected an entrapment defense stemming from a reverse sting operation. In so doing, the court explained that the entrapment statute was not a catch-all provision to enable reviewing courts to supervise the police and emphasized that defendants had to show inducement in order to establish entrapment under the objective standard:

> [T]he defense of entrapment was not intended to be the remedy for any and all misconduct or neglect by police and their agents. The defense is only a remedy for conduct likely, when objectively considered, to induce or instigate the commission of the crime by a person not ready and willing to commit it.

Jamieson, 461 N.W.2d at 892 (internal quotation marks and citation omitted) (emphasis added). The Jamieson court then held that the trial court's finding of entrapment under the objective standard was clearly erroneous because the police activity in

that case "served only to provide an opportunity for [the] defendants to engage in criminal activity." Id. at 897.

Jamieson also serves as an excellent example of why a per se rule of entrapment sweeps too broadly. In that case, the defendants were all guards at a county jail. Authorities learned from an inmate that some of the guards were accepting money from inmates in return for smuggling contraband to them. Police had the informant ask the guards to pick up some drugs from his outside source, an uncover officer posing as a friend of the inmate. Several agreed to do so, and they each charged the informant a fee to smuggle the drugs into the jail. Once the authorities verified that the drugs given to the informant were the same ones that they had provided the guards, the guards were arrested. As the Jamieson court recognized, the defendants in that case "were not unwary or vulnerable. To the contrary, they were trained in law enforcement, sworn to uphold the law, and spent their working days in a most controlled environment in which they were in charge." Jamieson, 461 N.W.2d at 897. Nor were any of the traditional touchstones of entrapment, such as repeated requests for drugs or appeals based on friendship or sympathy, evidenced in the case. Id. at 893.

Had the Jamieson court adopted a per se rule of entrapment, the guards would have been insulated from prosecution under facts that fell far short of satisfying the traditional objective entrapment standard. It is therefore difficult to see how the per se rule serves the public interest any better than

application of the objective standard on a case by case basis. On the contrary, the per se rule appears to hinder legitimate prosecutions without providing any tangible benefit.

Like Jamieson, this case is a good example of why a per se rule of entrapment sweeps too broadly. It is clear that the police here did not create a crime by providing the marijuana that defendant purchased. Defendant had previously indicated to Shepherd that he wanted some marijuana, and Shepherd was planning to deliver a pound of marijuana to defendant. Fortuitously, police arrested Shepherd in Juab County before his deal with defendant had been consummated. Juab County officials took the opportunity to record the previously planned transaction in an effort to secure a conviction against a local drug dealer. Police did not initiate the transaction; they merely allowed it to be completed. What occurred in this case was not a reverse sting of the sort that Kummer found so problematic. Rather, it was what is commonly known as a "controlled delivery" that was already scheduled to be completed before the police became involved (R. 444).

Like Hawaii and Michigan, Utah courts have never held that a defendant was entrapped merely because they found the government conduct distasteful. Those few jurisdictions that have adopted the per se rule of entrapment have failed to articulate how reverse stings necessarily result in inducement. Instead, they have taken issue with use of the practice in narcotics cases on public policy grounds. In so doing, those

courts have mistakenly permitted the separate and distinct defense of "outrageous government conduct" to masquerade as entrapment. Under State v. Richardson, 843 P.2d 517 (Utah App. 1992), the trial court properly refused to be drawn into that quagmire.

In Richardson, the defendant argued that he was entrapped into distributing narcotics as a matter of law because the conduct between the police and the informant who purchased the narcotics from the defendant was outrageous. In so doing, Richardson conceded that the conduct between himself and the informant did not constitute entrapment. Nevertheless, Richardson argued that "the government's conduct . . . was so outrageous that [his] conviction, resulting from that conduct, should not be allowed to stand." Richardson, 843 P.2d at 519. In rejecting Richardson's claim, this Court emphasized that:

> under Utah law, the propriety of [government action] is measured by its probable effect upon a hypothetical person in the setting in which the inducement took place. Under Utah law, therefore, the statutory entrapment defense is available only if there is impropriety by the government in its contacts with defendant, to the extent that an ordinary person in defendant's situation would be induced to commit a crime.

Richardson, 843 P.2d at 520 (internal quotation marks, citations and footnote omitted) (emphasis added). In sum, Richardson sought an expansion of Utah's entrapment statute to include the defense of outrageous government conduct. Id. at 520 n.5. This Court held that "the expansion sought is inconsistent with both

[State v. Taylor, 599 P.2d 496 (Utah 1979)] and [Utah's entrapment] statute and, therefore, impermissible." Id.

While the facts of this case are plainly distinguishable from those of Richardson, the legal principle at stake in both cases is constant: Under § 76-2-303(1) as interpreted in Taylor, a defendant must always demonstrate that the government's methods created as substantial risk that a person not otherwise ready to do so would have committed the offense committed by the defendant. Richardson, 843 P.2d at 519.

In contrast, the defense of outrageous government conduct is "an alternative protection for criminal defendants *where governmental conduct is at issue*" that some jurisdictions have recognized under a due process theory. Richardson, 843 P.2d at 519 n.3. See also State v. Keitz, 856 P.2d 685, 687 n.1 (Utah App. 1993) (rejecting defendant's claim that outrageous government conduct violated his due process rights under both state and federal constitutions). See generally Rivera v. State, 846 P.2d 1, 4 (Wyo. 1993) (The court provides a detailed discussion of the outrageous government conduct defense as it relates to entrapment and explains that "[a]lthough it bears some similarity to the objective theory of entrapment, this defense should not be confused with either of the traditional approaches to the entrapment defense."). But see United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994) (holding that defense known as outrageous governmental conduct, allegedly grounded in notions of

due process and fundamental fairness, does not exist and deciding to no longer entertain such claims).

In this case, defendant has never presented a due process or outrageous governmental conduct defense. This Court should therefore, as it did in Richardson, refuse to consider such a claim. See Richardson, 843 P.2d at 519 n.4 (recognizing due process cases cited by defendant to support his outrageous governmental conduct claim of entrapment but refusing to address claim under due process clause because that argument was not presented to trial court or on appeal).[2]

POINT II

THE EVIDENCE DOES NOT ESTABLISH AS A MATTER OF LAW THAT DEFENDANT WAS ENTRAPPED INTO PURCHASING MARIJUANA

The evidence presented at trial does not demonstrate that defendant was, as a matter of law, entrapped into committing the offense for which he was convicted. At trial, defendant relied solely on his entrapment defense, and the jury was

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[2] Defendant also claims that the trial court failed to enter findings of fact on the issue of entrapment before sending the issue to the jury and that a remand for the entry of findings is therefore necessary. That assertion is misplaced because no conflicting testimony was presented at the hearing on defendant's motion to dismiss based on entrapment. See State v. Ramirez, 817 P.2d 774, 787 (Utah 1991) (reviewing court may infer findings where it would be reasonable to assume trial court made such findings). The trial court's order denying defendant's motion clearly states that it was denied because "[t]he conduct of the arresting officers comported with a fair and honorable administration of justice, and did not create a substantial risk that an average person would have been induced to commit the crime Defendant Kim Beddoes committed" (R. 130-31). That ruling, in light of the uncontested testimony at defendant's entrapment hearing, satisfies the requirements of Utah Code Ann. § 76-2-303(4) (1990).

properly instructed on it. Therefore, by convicting defendant, the jury necessarily found that defendant was not entrapped into committing the offense of possessing marijuana with intent to distribute. In this circumstance, asserting entrapment on appeal is considered a challenge to the jury verdict, even where a defendant argues that he was entrapped "as a matter of law." See, e.g., State v. Moore, 782 P.2d 497, 499, 501 (Utah 1989); State v. Martin, 713 P.2d 60,61 (Utah 1986).

In reviewing the jury's rejection of defendant's entrapment defense, this Court will review the evidence and all reasonable inferences in the light most favorable to the jury's verdict. Moore, 782 P.2d at 501. Reversal is proper only if the Court determines that reasonable minds, acting fairly on the evidence, must have had a reasonable doubt that defendant was entrapped. State v. LeVasseur, 854 P.2d 1022, 1023 (Utah App. 1993); State v. Martinez, 848 P.2d 702, 706 (Utah App. 1993).

In Taylor, the Utah Supreme Court provided some guidance to determine whether or not entrapment has occurred:

> Extreme pleas of desperate illness or appeals based primarily on sympathy, pity, or close personal friendship, or offers of inordinate sums of money, are examples, depending on an evaluation of circumstances in each case, of what might constitute prohibited police conduct.

Taylor, 599 P.2d at 503.

Applying the Taylor test, Utah courts have found entrapment where an agent or confidential informant badgered or appealed to the pity or sympathy of a person. See State v.

Kaufman, 734 P.2d 465, 467-68 (Utah 1987) (agent sold herself as an attractive single mother on hard times); State v. Sprague, 680 P.2d 404, 405 (Utah 1984) (agent prodded defendant whom he had no reason to believe was involved with drugs); State v. Kourbelas, 621 P.2d 1238, 1240 (Utah 1980) (repetitive request for drugs by agent); Taylor, 599 P.2d at 498-99, 503-04 (defendant's former lover and close friend played on his sympathy and pity during her apparent withdrawal from heroin); State v. Soroushirn, 571 P.2d 1370, 1372 (Utah 1977) (agent badgered defendant).

Conversely, Utah courts have consistently refused to overturn jury verdicts in the absence of "personalized high-pressure tactics or appeals to extreme vulnerability." State v. Martin, 713 P.2d 60, 62 (Utah 1986). See, e.g., State v. Moore, 782 P.2d at 501 ("no pleas of desperation or appeals based primarily on sympathy or close personal friendship"); State v. Udell, 728 P.2d at 133 (defendant was known drug user, had previously sold drugs to agent, and refused only when he had none to sell); State v. Belt, 780 P.2d 1271, 1274 (Utah App. 1989) (agent "did not resort to pity, sympathy, or money"); State v. Wynia, 754 P.2d 667, 670 (Utah App. 1988) (no badgering, pleas, or high pressure tactics; "[a]ll the officers had to do was ask" for drugs), cert. denied, 765 P.2d 1278 (Utah 1988); State v. Wright, 744 P.2d 315, 319 (Utah App. 1987) (family relationship not exploited; "no pleas of desperation of appeals to friendship or loyalty").

The Utah Supreme Court has even upheld the use of a reverse sting operation against a claim of entrapment in a case involving attempt to receive stolen property. State v. Sommers, 569 P.2d 1110 (Utah 1977). In Sommers, police were investigating the defendant because they suspected he was "fencing" stolen property. An undercover officer borrowed a color television from a local merchant and took it the defendant's place of business. He told defendant the television was stolen and offered to sell it to the defendant. The defendant agreed, and he paid the undercover officer $40.00. The Court easily rejected the defendant's claim that he was entrapped as a matter of law and held that the police merely afforded the defendant an opportunity to commit the crime. Id. at 1112. As this case demonstrates, there is no logical basis for distinguishing police provision of supposedly stolen property to suspected "fences" from police provision of narcotics to suspected drug dealers. The entrapment analysis in both settings must always focus on the question of improper inducement.

It is undisputed that Shepherd and defendant had been friends for some twenty years. While defendant makes much of the fact, his argument ignores the key principle behind the defense of entrapment: the mere existence of a relationship, however close, does not establish entrapment. Shepherd never exploited the relationship between he and defendant in order to induce defendant to purchase the marijuana. There is no evidence that Shepherd conditioned the relationship on the defendant's purchase

of drugs or offered defendant the marijuana at an unreasonably low price under the guise of friendship. On the contrary, the evidence established that the price Shepherd quoted defendant for the pound of marijuana was in keeping with its market value. Shepherd engaged in no "[e]extreme pleas of desperate illness or appeals based primarily on sympathy, pity, or close personal friendship, or offers of inordinate sums of money." Taylor, 599 P.2d at 503. None were necessary.

This case is akin to Moore. In that case, the defendant and the confidential informant had mutual friends, met at local bars, and the informant had been to defendant's home six or seven times and had spent one night there at a drug party. Moore 782 P.2d at 501. The Utah Supreme Court affirmed the conviction for distribution of a controlled substance, stating:

> Regardless of defendant's view of their relationship, friendship alone does not constitute entrapment. Under the Taylor standard, there were no pleas of desperation or appeals based primarily on sympathy or close friendship, nor were there offers of inordinate sums of money. The conduct of the confidential informant was [a] proper use of governmental authority.

Id. This Court has likewise echoed that sentiment. See, e.g., LeVasseur, 854 P.2d at 1025; Martinez, 848 P.2d at 707.

The transaction that occurred between Shepherd and defendant was executed in the same way it would have been had Shepherd not been arrested by police before he completed his deliveries. The only difference was that police monitored the transaction via a Fargo Unit to ensure they would be able to

obtain a search warrant for defendant's house when the transaction was finished.

Defendant also contends Shepherd's decision to allow defendant to have the marijuana without first requiring him to pay for it is the equivalent of providing an inordinate sum of money under Taylor. Br. of Appellant at 13. That claim is specious. The record demonstrates that defendant was not "given" the marijuana. On the contrary, he agreed to pay Shepherd $1,600 for the purported pound of marijuana. The mere fact that Shepherd handed the marijuana to defendant even after defendant said he did not have money at the time of the delivery does not mean that Shepherd offered it to defendant free of charge as defendant implies. Instead, as defendant admits in his brief, Shepherd only "fronted" him the marijuana. Br. of App. at 11.

As Shepherd testified, "fronting" is the practice of providing contraband to dealers without requiring them to pay for it at the time of delivery. Shepherd also testified that the practice is often necessary because of the high cost of illegal narcotics and indicated that he regularly fronts drugs to his customers. Shepherd's testimony about the practice of fronting is consistent with the experience of other courts. See, e.g., State v. Rivera, 846 P.2d 1, 5 (Wyo. 1993) ("While the police did 'front' a portion of the purchase price, 'fronting' is quite prevalent in the illegal drug business, and that alone is not enough to show outrageous government conduct.").

Defendant correctly notes that he already owed Shepherd approximately $450 from a prior transaction in which Shepherd had fronted him a quantity of marijuana and that Shepherd testified his practice was not to front additional drugs to a customer until the prior debt was paid. The fact that Shepherd departed from his usual practice in this case, however, does not compel the conclusion that defendant was induced to agree to purchase the marijuana. The issue of what impact the fronting of the marijuana would have had on a person not otherwise prepared to commit the offense committed by defendant was properly reserved for the jury. Under the facts presented and in light of Shepherd's testimony about the practice of fronting, the jury could have reasonably concluded that defendant was not improperly induced into purchasing marijuana from Shepherd. Rather, they could have reasonably determined that defendant willingly incurred an additional debt of $1,600 in order to obtain the marijuana offered to him by Shepherd.

Defendant also makes much of the fact that he was not expecting a delivery from Shepherd on the day in question. That assertion, though true, is potentially misleading in light of the record as a whole. Defendant clearly was expecting delivery of marijuana from Shepherd at some time. The evidence indicated that defendant told Shepherd he wanted marijuana when the two last met in person. Shepherd testified that he intended to deliver one pound of the 15 pounds of marijuana he had in his car to defendant and the remaining 14 pounds to a distributor in Utah

County. The fact that Shepherd was arrested before he was able to complete his deliveries presented Juab County law enforcement officers an excellent opportunity to go after a local drug dealer. Accordingly, defendant's deal with Shepherd was completed as planned while police monitored and recorded the transaction. The only reason why defendant did not know when Shepherd was going to make the delivery is because Shepherd did not know when he would be able to get the marijuana to sell to defendant. From this evidence, the jury could have reasonably decided that defendant asked Shepherd to supply him with marijuana as soon as Shepherd was able to do so and that the date of delivery was inconsequential. In any event, the evidence clearly showed that defendant unhesitatingly agreed to purchase the marijuana from Shepherd.

In summary, none of the traditional touchstones of entrapment identified by the Court in Taylor are present in this case. Defendant had previously asked Shepherd to get some marijuana for him. When Shepherd offered to sell defendant a pound of marijuana at its market value, defendant accepted the offer without being subjected to any pressure or pleas. "Where there is a reasonable basis in evidence upon which jurors could believe beyond a reasonable doubt that the crime was a result of a defendant's own voluntary desire and intent to commit the crime, the fact that a police officer merely afforded him the opportunity to commit it, does not amount to entrapment." State v. Salmon, 612 P.2d 366, 369 (Utah 1980). The State presented

ample evidence at trial upon which jurors could and did conclude beyond a reasonable doubt that Shepherd's conduct at most afforded defendant an opportunity to commit the offense. This Court should therefore affirm the jury's determination that defendant was not entrapped.

CONCLUSION

Because the evidence presented at trial does not demonstrate that defendant was entrapped as a matter of law, and because the trial court properly refused to adopt defendant's proposed per se rule of entrapment, this Court should affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 22nd day of September, 1994.

JAN GRAHAM
Attorney General

Todd A. Utzinger
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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, via first class mail, to Ronald J. Yengich and Hakeem Ishola, attorneys for appellant, 175 East 400 South, Suite 400 Salt Lake City, Utah 84111, this 22nd day of September, 1994.

Todd A. Utzinger

ADDENDA

Addendum A

Trial Court's Denial of
Defendant's Motion to Dismiss
Based on Entrapment

IN THE FOURTH JUDICIAL DISTRICT COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KIM BEDDOES and ANNETTE BEDDOES, Defendants.	CASE NO. D-CR-920185 RULING

This matter comes before the Court, under Rule 4-501 on Defendants' Motions to Dismiss and Motions to Suppress Evidence. The Court has reviewed the file, considered the memoranda of counsel, having entertained oral argument, and upon being advised in the premises, now makes the following:

RULING

1. Defendants' Motion to Dismiss the charges against Defendant Annette Beddoes is granted. Plaintiff has failed to demonstrate that the arresting officers had probable cause to sustain the charges of possession of a controlled substance with intent to distribute and possession of drug paraphernalia.

2. Defendants' Motion to Dismiss on grounds of entrapment of Kim Beddoes is denied. The conduct of the arresting officers comported with a fair and honorable administration of justice, and did not create a substantial risk that an average person would have been induced to commit the crime Defendant Kim Beddoes committed.

3. Defendants' Motion to Suppress evidence of drug paraphernalia is denied. The officer who found the drug paraphernalia, Chief Bowles, was legally on the premises pursuant to a valid warrant authorizing the search for drugs and found the drug paraphernalia in plain view while searching for those drugs.

4. Defendants' Motion to Suppress on grounds of illegally concealed recording device is denied. The informant upon whom the device was concealed consented to recording the conversation with Defendant Kim Beddoes. Since at least one party to the recorded conversation consented, no eavesdropping occurred and UCA §76-9-402(1)(a) does not apply.

Dated this 27 day of May, 1993.

BY THE COURT:

GUY R. BURNINGHAM, JUDGE

cc: Donald J. Eyre, Jr.
Shelden Carter