

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002338-MR

TRAVIS W. CUNDIFF

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 01-CR-00239

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Travis Cundiff was convicted of Trafficking in a Controlled Substance, First Degree, and sentenced to nine years' imprisonment. He contends that he was entitled to an entrapment instruction and, although the issue is not preserved for review, that the lack of the instruction constitutes palpable error warranting reversal. We disagree and affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Victor Montalvo, a confidential informant for the Greater Hardin County Narcotics Task Force, met Cundiff through Montalvo's sister-in-law, Crystal Stevens. After learning that Cundiff would be willing to sell cocaine, Montalvo notified Detectives Roby and Clark and set up a drug purchase. After being searched to ensure that he had no drugs or money, Montalvo was given \$100 to purchase cocaine and a tape recording device was placed in his left jacket pocket.

Montalvo met Cundiff in Bardstown and, in Montalvo's car, went to Petey Maddox's apartment where Montalvo gave Cundiff \$100 and Cundiff left the apartment to obtain cocaine. Upon his return, Cundiff is heard on the tape telling Montalvo to be careful "because it was still wet" and that he had walked in during the cooking process. Montalvo asked if it was a "hundred dollar piece" and Cundiff replied, "Yes". Montalvo left and met with the detectives. He gave them the cocaine and in return was paid \$50 for his participation in the buy.

The sole issue raised by Cundiff is whether the trial court was required to instruct the jury as to the defense of entrapment.² RCr 9.54(2) states that:

No party may assign as error the giving or failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or

² KRS 505.010

unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Despite Cundiff's failure to preserve the issue for review, he contends that the trial court's failure to sua sponte instruct the jury on the defense of entrapment constitutes palpable error.³ In Taylor v. Commonwealth⁴ the court rejected the defendant's assertion that the court's failure to instruct the jury on every conceivable defense even when the instruction is not requested constitutes palpable error as a matter of law. "Though a trial judge may be required to instruct the jury as to an implausible defense if requested, we are unprepared to hold that an unsolicited failure to do so constitutes palpable error."⁵

This is a simple case where the police informant asked Cundiff if he would sell the drugs and Cundiff agreed. The defense of entrapment, while often raised in narcotic cases, is rarely successful. As explained in Shanks v. Commonwealth:⁶

Courts have generally found it difficult to state an all-embracing rule which will define the course of conduct or provocation

³ RCr 10.26.

⁴ 995 S.W.2d. 355 (Ky. 1999).

⁵ Id. at 362 (citation omitted).

⁶ 463 S.W.2d 312 (Ky. 1971).

by government officials constituting entrapment. Each case must usually be analyzed upon its own facts. As a general proposition it may be said that to constitute entrapment, the officer must do something that will cause the accused to violate the law when he would not otherwise have done so. His normal course of legal conduct must some way be diverted into a course of illegal conduct by the acts of the officer. If all the officer does is make a purchase from one known or suspected to be dealing in the product, this in no wise (sic) constitutes entrapment.⁷

KRS 505.010(2)(a) provides that the defense is unavailable when merely the opportunity is provided for commission of a crime.

"It has long been the rule that the fact that a police officer hides his identity and solicits the purchase of illegal goods does not constitute legal entrapment."⁸

The detectives, through Montalvo, merely set up the opportunity for Cundiff to sell drugs, an illegal activity he was predisposed to committing. Under the facts, the defense of entrapment was not available, thus, there was no manifest injustice in the trial court's failure to instruct the jury. The judgment is affirmed.

ALL CONCUR.

⁷ Id. at 314.

⁸ Id.

BRIEF FOR APPELLANT:

Astrida L. Lemkins
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky