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Cruz v. State, 465 So. 2d 516 (Fla. 1985)

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On the night of March 1, 1982, a police officer leaned against a building in downtown Tampa. His appearance, however, was far from what one would ordinarily expect from a police officer. Dressed as a typical inhabitant of skid row, the officer, doused in alcohol, pretended to drink wine from a bottle and simulated intoxication. Protruding from his rear right pants pocket was $150 in currency which had been fastened together with a paper clip. Some time after 10:00 p.m., Pedro Cruz, accompanied by a woman, approached what he assumed to be a drunken bum and then walked away. Ten to fifteen minutes later, the two returned and Cruz lifted the money from the pocket of the disguised officer. Cruz walked away and was arrested by backup officers down the block.

Although there had been some unsolved crimes in the area where the drunken wino decoy was located, none of the crimes had involved the same type of victim or the same modus operandi. The police were not aware of any prior criminal acts by Cruz, and they were not seeking to snare any particular individual.

At trial, Cruz moved to dismiss the grand theft charge under Florida Rule of Criminal Procedure 3.190(c)(4) on the ground that, as a matter of law, the undisputed facts showed he was trapped by the police. The trial court granted the motion. The Second District Court of Appeal reversed the trial court's order of dismissal. The Second District approved the state's contention that the defense of entrapment may be successfully invoked only by a defendant who is not predisposed to commit a crime. Reasoning that predisposition focuses on the defendant's intent or state of mind, the court held that this issue must be decided by a jury after all the evidence has been presented and not by a judge on a motion to dismiss. However, the court acknowledged that its decision dis-

1. State v. Cruz, 426 So. 2d 1308 (Fla. 2d DCA 1983).
2. Id.
3. Id.
4. Id. at 1310; see also State v. J.T.S., 373 So. 2d 418 (Fla. 2d DCA 1979), disapproved on other grounds, 470 So. 2d 1387, 1389 (Fla. 1985).
rectly conflicted with *State v. Casper*, in which the First District held that in some situations a question of entrapment may be decided as a matter of law by a judge.

In 1985, the Florida Supreme Court accepted jurisdiction of the *Cruz* case based upon express and direct conflict of decisions. In reversing the decision of the Second District, the supreme court not only resolved the conflict between *Cruz* and *Casper*, but also set forth a new test for the defense of entrapment. The court combined the so-called subjective test, which is based on predisposition of the defendant, with an objective test, which is based on the propriety of the police conduct. The new test calls for the trial court to make a threshold determination of whether the police activity in the particular case overreached the bounds of permissible conduct. If this question is answered in the affirmative, entrapment exists as a matter of law. However, if the validity of the police conduct is established, the question remains as to whether the defendant was predisposed to commit the alleged offense. This question, the court reasoned, is properly for the jury to decide.

This Note analyzes and contrasts the evolution of the entrapment defense in the federal system with the development of the defense in Florida. The Note outlines Florida's new dual approach to the entrapment defense and examines its implications.

I. Introduction

Before discussing the origin and development of the entrapment defense, it is necessary to identify the traditional rules which have governed the doctrine of entrapment. The apprehension of true criminals has always been a socially desirable goal of criminal justice. To this end, the police are allowed to use decoys and set traps in certain instances in order to catch a suspect in the commission of a crime or to detect his plan and prevent him from acting. These police tactics are especially important when dealing with consensual crimes that are difficult to detect and often are

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5. 426 So. 2d at 1310.
6. 417 So. 2d 263 (Fla. 1st DCA 1982).
8. The Florida Supreme Court followed the reasoning of the New Jersey Supreme Court in *State v. Molnar*, 410 A.2d 37 (N.J. 1980).
9. The term "police" is used in this Note to refer to government law enforcement agents or persons working for those agents.
committed against willing victims. However, when the criminal conduct becomes the product of the creative activity of the police, and the accused is induced by the police to commit the crime, the defendant may assert that he was entrapped.

The acceptable roles of the police and defendants depend upon the particular jurisdiction's view of entrapment. Currently, there are two views of entrapment. Courts in a majority of jurisdictions have taken a subjective approach, while a minority have taken an objective approach. The subjective view focuses on the intent or predisposition of the defendant. Thus, the subjective test is designed to determine when the intent to commit the crime originates. Once a defendant has raised the defense of entrapment, the issue is submitted to the jury to determine whether the defendant intended to commit the crime irrespective of police conduct. If the government can establish that the defendant harbored an intent to commit the illegal act prior to police involvement, the defendant will lose on the issue of entrapment no matter how improper the inducements provided by the police may be. The objective view, on the other hand, advocates a test for

11. Certain types of criminal activity are consensual and covert. Hence they are virtually undetectable without the use of a government agent or an informer. Narcotics peddlers, brokers of counterfeit currency, transporters of prostitutes across state lines, and gamblers employing interstate facilities to transmit bets all do business clandestinely. Their victims are willing, sometimes eager, accomplices. Their crimes are likely to go unchecked unless the government can itself approach a suspect to offer him the opportunity to commit a crime and thus give evidence of his guilt. Pierce v. United States, 414 F.2d 163, 165 (5th Cir.), cert. denied, 396 U.S. 960 (1969).

12. "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." Sorrells, 287 U.S. 454 (Roberts, J., concurring).


16. Because the subjective standard of entrapment centers on the defendant's intent, a factual issue, the matter generally is submitted to a jury. Sherman, 356 U.S. at 377 n.8.

17. "Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law enforcement officials." Sherman, 356 U.S. at 372 (quoting Sorrells, 287 U.S.
entrapment which focuses on the nature of the governmental inducement rather than the predisposition of the defendant.\textsuperscript{18} The objective test solely examines police activity to determine whether that activity would be likely to induce a hypothetical ordinary law-abiding citizen to commit the crime. If it would, then the entrapment defense will be successful. Proponents of the objective approach seek to deter police misconduct and to keep the criminal justice system from being soiled by improper conduct. Although still a minority view, the objective test has been the overwhelming favorite of legal commentators.\textsuperscript{19} The American Law Institute's \textit{Model Penal Code} and the Brown Commission in its proposed federal code endorse the minority view by embracing the objective approach to entrapment.\textsuperscript{20}

\begin{quote}

at 451 (emphasis added)).

18. \textit{See} Park, \textit{The Entrapment Controversy}, 60 MINN. L. REV 163, 165-166 (1976). "The 'objective' entrapment test does not compare the defendant's conduct to that of a reasonable person; it evaluates the agent's conduct by considering its probable impact upon a hypothetical law-abiding person." \textit{Id.} at 165 n.2 (emphasis in original).


(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

Section 702(2) of the \textit{Brown Commission Proposal} provides:

(2) . . . Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.\textsuperscript{21}
\end{quote}
II. HISTORY AND EVOLUTION OF THE ENTRAPMENT DEFENSE IN FEDERAL COURTS

The history of entrapment is an ancient one. In 1864, Judge Bacon of New York stated that the entrapment plea was "first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and ... has never since availed."\(^{21}\) It was not until 1915 that the first successful entrapment defense was raised in the federal courts,\(^{22}\) which set the stage for the United States Supreme Court's first major pronouncement on the theory of the defense in the landmark 1932 case of Sorrells v. United States.\(^{23}\) Sorrells involved a defendant who sold whiskey in violation of the National Prohibition Act after refusing on two prior occasions to sell liquor to a government agent.\(^{24}\) Finding that the defendant was not predisposed to commit the criminal act, Chief Justice Hughes enunciated what is now known as the subjective view of entrapment. The critical inquiry, as stated in the majority opinion, was "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."\(^{25}\) However, in a separate concurring opinion written by Justice Roberts and joined by Justices Stone and Brandeis, these Justices espoused what is now known as the objective approach to entrapment. Basing the doctrine on public policy, Justice Roberts focused on the propriety of the governmental conduct. He argued that the defense is based upon the court's power to preserve "the purity of its own temple."\(^{26}\) In short, Justice Roberts would not permit the process of the courts "to be used in aid of a scheme for the actual creation of a crime by those whose


\(^{22}\) Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). The court found that Woo Wai had been impossibly coerced by government agents over an 18 month period to bring illegal aliens into the United States. However, although the convictions were reversed, the Ninth Circuit affirmed the existing principle that entrapment by government officials was not a defense. The court, however, held that it was against public policy to sustain a conviction obtained in the manner disclosed by the evidence. \textit{Id.} at 415. \textit{Woo Wai}, in effect, was a forerunner of the "objective" approach to entrapment.

\(^{23}\) 287 U.S. 435 (1932).

\(^{24}\) \textit{Id.} at 439-440. The agent discovered that he and the defendant had served in the same division during World War I. After discussing their war experiences, the agent requested liquor for a third time and the defendant complied.

\(^{25}\) \textit{Id.} at 451.

\(^{26}\) \textit{Id.} at 457 (Roberts, J., concurring).
duty it is to deter its commission." Thus, it was the *Sorrells* decision that gave birth to the two opposing views of entrapment which would remain at the heart of the entrapment issue even fifty years later.

The *Sorrells* decision remained undisturbed by the Supreme Court for nearly a quarter of a century. In 1958, the Supreme Court again faced the issue of entrapment in *Sherman v. United States*. In *Sherman*, the defendant was convicted for an illegal sale of narcotics. Evidence at trial showed that the defendant and a government agent met each other and became friendly while both were apparently undergoing drug addiction therapy. The agent pretended he was not responding to treatment and on several occasions asked the defendant to supply him with narcotics. Eventually the defendant acquiesced and sold the agent a quantity of drugs. The Supreme Court unanimously reversed the conviction. A majority of the Court found that the defendant had been entrapped as a matter of law because he was not predisposed to commit the crime. Justice Frankfurter, however, authored a highly critical concurring opinion that argued strenuously for a "re-examination to achieve clarity of thought." Adopting the view expressed by Justice Roberts in his opinion in *Sorrells*, Justice Frankfurter stated that the court should direct its attention to the conduct of the police and the methods employed by the government to bring about the conviction, not to the character and predisposition of the defendant. Justice Frankfurter, however, was unwilling to state a uniform standard by which governmental tactics were to be evaluated. Instead, he believed, the courts should use "as objective a test as the subject matter permits," determining the propriety of police conduct on a case-by-case basis.

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27. *Id.* at 454 (Roberts, J., concurring).

28. Following the *Sorrells* decision, only two federal courts refused to adhere to the majority view that the defendant's predisposition is determinative of the defense of entrapment. See *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957); *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933).


30. Chief Justice Warren reasoned that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Id.* at 372.

31. *Id.* at 379 (Frankfurter, J., concurring).

32. In a frequently cited passage, Justice Frankfurter stated that "[t]he crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." *Id.* at 382 (Frankfurter, J., concurring).

33. *Id.* at 384 (Frankfurter, J., concurring).
More than a decade after the Sherman decision, United States v. Russell renewed an entrapment dialogue among members of the Court. A government agent suspected the defendant in Russell of manufacturing and selling an illegal drug. During an undercover investigation, the agent offered to supply the defendant with a necessary but difficult to obtain ingredient needed for the manufacture of the drug in return for a portion of the drug produced. The defendant received the ingredient from the agent, completed the manufacturing process, and was later arrested and convicted. The Ninth Circuit expanded the traditional notion of entrapment and reversed the conviction. Instead of focusing on the predisposition of the defendant, the court of appeals based its reversal on a finding that the constitutional principles of due process had been violated by "an intolerable degree of governmental participation in the criminal enterprise." However, on review, Justice Rehnquist, speaking for a five-member majority of the Supreme Court, refused to elevate the defense of entrapment in this case to constitutional status. He remained adamant that the Court should continue its adherence to the doctrine announced in Sorrells and Sherman and accordingly found that Russell's predisposition to commit the crime was fatal to his entrapment defense. In a dissenting opinion, Justice Stewart, joined by Justices Brennan and Marshall, criticized the Court's continued emphasis on predisposition as misleading. He concluded that the purpose of the defense is to "prohibit unlawful governmental activity in instigating crime." Justice Stewart recognized that the majority's emphasis on predisposition had the effect of making what was proper or improper police conduct depend upon the past record of the accused.

36. Id. at 673.
38. 411 U.S. at 436.
39. Justice Douglas, dissenting with a separate opinion, argued for the objective test espoused by Justices Roberts and Frankfurter. Id. at 436 (Douglas, J., dissenting).
40. Id. at 442 (Stewart, J., dissenting).
He argued that there is no reason to permit the police to use what would normally be considered an improper tactic solely because a person had broken the law in the past.\textsuperscript{41} Thus, the objective theory of entrapment continued to attract only a minority of the Court's members, albeit a strong minority.

In the Supreme Court's fourth and most recent attempt to end confusion surrounding the entrapment defense, the Court decided the case of \textit{Hampton v. United States}.\textsuperscript{42} Flatly rejecting any due process defense in the case, the plurality opinion of Justice Rehnquist clearly states that the only acceptable test of entrapment is the subjective test from \textit{Sorrells}, \textit{Sherman}, and \textit{Russell}.\textsuperscript{43} In a concurring opinion, Justice Powell, joined by Justice Blackmun, agreed that the defense of entrapment should focus on the predisposition of the accused. However, these Justices were unwilling to completely foreclose the Court's power to bar a conviction of a predisposed defendant when there was evidence of outrageous police behavior.\textsuperscript{44} In a dissenting opinion written by Justice Brennan and joined by Justices Stewart and Marshall, the minority again urged the adoption of an objective theory of entrapment.\textsuperscript{45} Because of the Court's split in \textit{Hampton}, entrapment law is still in a state of confusion. Although a majority of the Court embraces the subjective approach to entrapment, significant concurring and dissenting opinions are evidence that the issue has not been finally decided.

\section*{III. Analysis of the Entrapment Defense in Florida Before \textit{Cruz}}

Although the United States Supreme Court has recognized and developed the defense of entrapment for more than fifty years, the Florida judiciary is not constrained to follow the Court's decisions

\textsuperscript{41} Id. at 442-444 (Stewart, J., dissenting).
\textsuperscript{42} 425 U.S. 484 (1976). Hampton was convicted of two counts of distributing heroin in violation of federal narcotics laws. The drugs he sold, however, had all been supplied by a government informant. Hampton sought to use the due process entrapment defense that was implicitly left available by Justice Rehnquist's opinion in \textit{Russell}. \textit{See supra} note 37. Hampton argued that because the government agent supplied him with the drugs that he had been convicted of selling, the government had engaged in conduct "so outrageous that due process principles would bar [conviction]." \textit{Russell}, 411 U.S. at 431-432.
\textsuperscript{43} 425 U.S. at 489. Indeed, the Court ruled out "the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established." Id.
\textsuperscript{44} Id. at 493-94 (Powell, J., concurring).
\textsuperscript{45} Id. at 495-97 (Brennan, J., dissenting).
because the defense of entrapment arises from public policy rather than from the United States Constitution. Nevertheless, until recently, Florida courts have generally followed the direction of the United States Supreme Court in recognizing the subjective rather than the objective view of entrapment. The first case to establish the entrapment defense in Florida was Lashley v. State. The Florida Supreme Court stated the rule of entrapment as follows:

One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of "entrapment." Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent.

Nine years later, the state defined the evidentiary burdens of the defense in Dupuy v. State. In that case, the Board of Dental Examiners set out to uncover evidence of unauthorized practice of dentistry by making "routine checks" on area dental laboratories. An investigator offered to pay a dental technician to make a partial plate for him, which the defendant did. Later, a second investigator asked for and received the same services. The defendant was subsequently arrested and convicted for the unauthorized practice of dentistry. On appeal, the Third District found that the investigators' activities constituted entrapment as a matter of law because the state failed to present any evidence, other than the com-


47. A few courts, however, have refused to focus on predisposition and have based their holdings on the impropriety of the police conduct irrespective of the defendant's predisposition. See Dupuy v. State, 141 So. 2d 825 (Fla. 3d DCA), cert. denied, 147 So. 2d 531 (Fla. 1962); Spencer v. State, 263 So. 2d 282 (Fla 1st DCA), cert. denied, 267 So. 2d 835 (Fla. 1972); Thomas v. State, 185 So. 2d 745 (Fla. 3d DCA 1966).

48. 67 So. 2d 648 (Fla. 1953). The facts show that two undercover police officers entered an establishment known as Lashley's Place where they approached Mr. Lashley about hiring a prostitute. Mr. Lashley made the arrangement and was arrested and subsequently convicted of operating a brothel. At trial, Mr. Lashley claimed he was entrapped by the inducements of the undercover police officers. The supreme court, finding that the defendant had previous intent to commit the crime, rejected that argument.

49. Id. at 649 (quoting 22 C.J.S. Criminal Law § 45 (1961) (emphasis in original)).

50. 141 So. 2d 825 (Fla. 3d DCA 1962).

51. These investigations were not prompted by any evidence, complaint, or suspicion that the defendant was practicing dentistry without a license. Id. at 826.
mission of the crime, to show predisposition of the defendant. The court stated that "where the defense of entrapment is raised it is incumbent upon the state to make a showing amounting to more than mere surmise and speculation that the intent to commit crime originated in the mind of the accused and not in the minds of the officers of the government."\(^{52}\)

The objective test first emerged in Florida in *Koptyra v. State*.\(^{53}\) An undercover agent cultivated a friendship with the defendant and two other people over a period of four months. One night, while at the residence of one of the other people involved, the agent observed the defendant and his companions smoking a marijuana cigarette.\(^{54}\) The agent arrested them and the defendant was convicted of unlawfully possessing marijuana. On appeal, the Second District found no error in the trial court's denial of a jury instruction on entrapment.\(^{55}\) The court indicated that there was no evidence that the defendant was enticed to possess marijuana which he would not have otherwise possessed.\(^{56}\) The important point, however, is that the court did consider the actions of the agent, thus implicitly approving some focus on the propriety of the police conduct in addition to considering the predisposition of the defendant.\(^{57}\) After *Koptyra*, other appellate courts explicitly voiced their approval of at least some focus on police conduct. Cases from the Third and Fourth District Courts stated that "[t]he rule as to the defense of entrapment arises from decency, good faith, fairness and justice, and the conduct of state agents as well as the defendants' disposition must be considered in determining whether the defense is available."\(^{58}\) The Second District in *Thomas v. State*\(^{59}\)

\(^{52}\) Id. at 827. The law in Florida is that once a defendant shows any evidence of entrapment, it is incumbent upon the state to prove that the accused was predisposed to commit the offense charged in order to negate the defense of entrapment. In other words, the state has the burden of disproving entrapment beyond a reasonable doubt. State v. Wheeler, 468 So. 2d 978 (Fla. 1985); Story v. State, 355 So. 2d 1213 (Fla. 4th DCA 1985); see also *Florida Standard Jury Instructions in Criminal Cases* 3.04(c) (1981).

\(^{53}\) 172 So. 2d 628 (Fla. 2d DCA 1965).

\(^{54}\) Id. at 630.

\(^{55}\) Id. at 632.

\(^{56}\) Id. at 632-33.

\(^{57}\) "The inspector had no knowledge that the defendant had previously been convicted of a crime. . . . The inspector had not previously seen them with marijuana; he did not specifically request them to obtain the marijuana received in evidence. . . . He did not furnish the money to make the purchase. The defendant and his companions were using the marijuana before the inspector arrived." Id.

\(^{58}\) State v. Rouse, 239 So. 2d 79, 80 (Fla. 4th DCA 1970) (citing *Thomas v. State*, 185 So. 2d 745, 747 (Fla. 3d DCA 1966)).

\(^{59}\) 243 So. 2d 200 (Fla. 2d DCA 1971).
also moved toward embracing the objective theory of entrapment when it stated that "[t]he critical issue on entrapment would be the purpose and motive of the . . . [p]olice [d]epartment or its representatives."\textsuperscript{60} The strongest endorsement of the objective standard of entrapment, however, came from the First District in the case of \textit{Spencer v. State}.\textsuperscript{61} The facts of that case show that a female undercover agent was picked up by Spencer in a bar and later accompanied him to his apartment. At the apartment the agent drank wine and discussed marijuana. Spencer then produced some marijuana that a friend had left in a closet of the apartment. Because Spencer had no means to smoke the marijuana, the agent volunteered to go to a store to buy cigarette papers. The agent returned with the papers and they smoked some of the marijuana. Spencer was arrested and subsequently convicted of possessing marijuana. The court of appeal, stating that the agent provided more than a mere opportunity to commit a crime, found the defendant had been entrapped as a matter of law. The court reiterated that "[g]overnment detection methods must measure up to reasonably decent standards. . . . It is beneath the dignity of the State of Florida to allow female agents to appear to be of questionable virtue in order to lure men into committing the crime of smoking marijuana."\textsuperscript{62}

Although a majority of Florida's district courts of appeal approved the subjective theory of entrapment, judges in several majority and dissenting opinions continued to cling to the objective test. For instance, the court in \textit{Roundtree v. State}\textsuperscript{63} found entrapment where the criminal intent or design originated in the mind of the person seeking to entrap the accused for the sole purpose of arresting and prosecuting him. Later, in \textit{Smith v. State},\textsuperscript{64} Judge McNulty wrote a well reasoned dissent that focused on police misconduct. Although recognizing that the state may in good faith furnish a predisposed person with an opportunity to commit a crime,

\begin{itemize}
\item \textsuperscript{60} \textit{Id.} at 203.
\item \textsuperscript{61} 263 So. 2d 282 (Fla. 1st DCA 1972).
\item \textsuperscript{62} \textit{Id.} at 283. The court stated that the state should not have "its paid agents out trolling for unsuspecting males whose minds are otherwise occupied than with thoughts of committing heinous crimes." \textit{Id.} at 284.
\item \textsuperscript{63} 271 So. 2d 160 (Fla. 4th DCA 1972), \textit{cert. denied}, 276 So. 2d 170 (Fla. 1973). An undercover agent attended college with and befriended the defendant. During the summer, the defendant discussed selling the agent some marijuana. No sale occurred at that time, although the agent and defendant saw each other often. In the fall, the agent initiated two attempts to obtain marijuana from the defendant and finally succeeded on the third try.
\item \textsuperscript{64} 320 So. 2d 420 (Fla. 2d DCA 1975), \textit{cert. denied}, 334 So. 2d 608 (Fla. 1976).
\end{itemize}
Judge McNulty stated that "gross participation" by the state in the commission of an offense would negate the requisite good faith of the state in its efforts to detect and prevent crime.65 In this case, an agent induced the defendant, a junkie, to purchase heroin by giving her a portion of the buy. Although the defendant was predisposed to commit the offense, Judge McNulty felt that the agent improperly took advantage of the defendant's drug addiction.66

In 1979, in an effort to end the confusion over whether the focus of the entrapment test should be on the predisposition of the defendant (the subjective test) or on the acceptability of the police conduct (the objective test), the Florida Supreme Court decided State v. Dickinson.67 The Dickinson court affirmed the subjective test by holding that a high degree of participation by law enforcement agents in the crime did not necessarily constitute entrapment if the accused had the predisposition to commit the crime. The court held that "[t]he essential element of the defense of entrapment is the absence of a predisposition of the defendant to commit the offense."68 Accordingly, where the defense of entrapment is raised, the state must show predisposition by establishing:

(1) proof of prior similar criminal activities of the defendant; or
(2) reputation for engaging in certain illicit activities; or
(3) the officers reasonable suspicion that the defendant was engaged in illegal activities; or
(4) the defendant's ready acquiescence in the commission of the crime.69

The holding in Dickinson was later followed by the Second District

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65. Id. at 423 (McNulty, J., dissenting).
66. 320 So. 2d at 424 (McNulty, J., dissenting).
67. 370 So. 2d 762 (Fla. 1979).
68. Id. at 763.
69. Story v. State, 355 So. 2d 1213 (Fla. 4th DCA), cert. denied, 364 So. 2d 893 (Fla. 1978). The court in Story receded from its earlier decision in Roundtree. In Story, the police sought to induce the defendant to sell them some heroin for the purpose of prosecuting the defendant. However, no entrapment was found because the defendant's "ready acquiescence" to the crime demonstrated his predisposition. See also State v. Liptak, 277 So. 2d 19 (Fla. 1973) (proof of prior criminal acts); Kimmons v. State, 322 So. 2d 36 (Fla. 1st DCA 1975) (defendant's reputation for engaging in certain illicit activities); Brosi v. State, 263 So. 2d 849 (Fla. 3d DCA 1972) (officers' reasonable suspicion that the defendant was engaged in illegal activities).
in *State v. Brider*. In *Brider*, the defendant claimed entrapment as a matter of law because the state had furnished the defendant with the marijuana which he was later charged with handling. Although recognizing the minority trend of focusing the entrapment defense on police misconduct, the court of appeal emphasized that there was no entrapment as a matter of law where the evidence would support a conclusion that the defendant had a predisposition to commit the crime.

IV. The Florida Supreme Court's Decision in *Cruz v. State*

The most recent word in Florida regarding the defense of entrapment has come from the Florida Supreme Court in the case of *Cruz v. State*. This case was heard by the supreme court because of a conflict with *State v. Casper*. In *Casper*, the First District was presented with a police decoy scenario which involved a police officer disguised as a drunken wino. The decoy, complete with a set of old clothes and the aroma of alcohol, lay on a sidewalk in downtown Jacksonville. Several bills amounting to $150 were stapled together and protruded visibly from the decoy's pocket. The decoy was told to feign unconsciousness. Apparently, this decoy operation was instituted because several robberies and purse snatchings had occurred in the general area. On April 28, 1981, the defendant walked past the decoy, but then returned, reached down and removed the protruding money. The defendant was arrested down the street. The defendant had not been targeted as a suspect in any purse snatchings or robberies, nor did he have a criminal record. At trial, the defendant raised the issue of entrapment. The trial court granted the defendant's motion to dismiss and the court of appeal affirmed without opinion. On a petition for rehearing, the court outlined the reasons for its affirmance of the dismissal. The court stated that where the defense of entrapment is raised, the state must show that the defendant was predisposed to commit the crime. The court recognized that the defendant's predisposi-

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70. 386 So. 2d 818 (Fla. 2d DCA), petition for review denied, 392 So. 2d 1372 (Fla. 1980).
71. Id. at 821.
73. 417 So. 2d 263 (Fla. 1st DCA), petition for review denied, 418 So. 2d 1280 (Fla. 1982).
74. State v. Casper, 415 So. 2d 1368 (Fla. 1st DCA 1982).
75. 417 So. 2d at 265. The *Casper* court did implicitly consider the propriety of the police conduct. The court held that the decoy impermissibly lured Casper into taking the money and that the decoy did not detect or discover the type of crime the police were
tion may be shown by his prior criminal activities, his reputation for such activities, reasonable suspicion of his involvement in criminal activity, or his ready acquiescence to commit the crime.\textsuperscript{76} Finding that the state brought forth no evidence on the first three criteria, the court examined whether the defendant showed ready acquiescence to commit the crime. The court found that "[n]o ready acquiescence is shown; on the contrary, the defendant's acts, as stated in the motion, demonstrate that he only succumbed to temptation."\textsuperscript{77} Thus, in the absence of a showing by the state of any facts tending to demonstrate predisposition, the First District held that the trial court properly determined that there had been entrapment as a matter of law. The First District used this analysis to reach the same conclusion in a later case involving similar facts.\textsuperscript{78}

The Second District in \textit{State v. Cruz}\textsuperscript{79} disagreed with the analysis of the First District in \textit{Casper}.\textsuperscript{80} Although agreeing with the court in \textit{Casper} that the focus of the entrapment defense should be on the predisposition of the defendant, the Second District, faced with an identical factual situation, could not agree that those facts would constitute entrapment as a matter of law.\textsuperscript{81} The Second District found that since the focus is on the defendant's intent or state of mind, (i.e., predisposition), that issue could never be decided as a matter of law by a judge on a motion to dismiss.\textsuperscript{82} Thus, the issue of predisposition, a factual issue, should always be decided by a jury.

In 1985, the Florida Supreme Court confronted the express conflict between \textit{State v. Cruz} and \textit{State v. Casper}\textsuperscript{83} and decided the issue of whether the predisposition of the defendant is proper for the court to consider on a motion to dismiss. However, the court went beyond the immediate issue and developed a new test for entrapment in Florida—a test that attempts to reconcile the previ-

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\textsuperscript{76} Id. (citing Story v. State, 355 So. 2d 1213 (Fla. 4th DCA 1978), cert. denied, 364 So. 2d 893 (Fla. 1978)).
\textsuperscript{77} State v. Holliday, 431 So. 2d 309 (Fla. 1st DCA 1983), aff'd, 465 So. 2d 524 (Fla. 1985).
\textsuperscript{78} State v. Cruz, 426 So. 2d 1308 (Fla. 2d DCA 1983), rev'd, 465 So. 2d 516; see also State v. Sokos, 426 So. 2d 1044 (Fla. 2d DCA 1983).
\textsuperscript{79} State v. Casper, 415 So. 2d 1368 (Fla. 1st DCA 1982).
\textsuperscript{80} State v. Casper, 415 So. 2d 1368 (Fla. 1st DCA 1982).
\textsuperscript{81} 426 So. 2d at 1309.
\textsuperscript{82} Id. at 1310.
\textsuperscript{83} Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 105 S. Ct. 3527 (1985).
ously conflicting subjective and objective tests. In deciding the express conflict between *Casper* and *Cruz*, the supreme court agreed with the Second District by holding that “the question of predisposition will always be a question of fact for the jury.”84 However, the court further recognized the First District’s concern for entrapment scenarios in which an otherwise innocent citizen succumbs to the temptations offered by improper police tactics. The court found that “[e]ntrapment is a potentially dangerous tool given to police to fight crime.”85 Thus, although some entrapment practices are needed by the police, these practices need to be controlled. The court recognized that impermissible police tactics should not be condoned solely because they are directed against a past offender who is said to have a criminal disposition. “A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes.”86 The problem with adopting a purely subjective view is that it would allow the police to engage in impermissible police conduct in order to snare a person predisposed to commit the crime. The court refused to condone such action, thereby affording equal protection to those individuals with a criminal past.

The supreme court in *Cruz* reconciled the two views on entrapment by formulating a new test which combines the objective and subjective tests.87 The threshold inquiry, which incorporates the objective view, is whether the police conduct in a particular case falls below the standards established by common notions about the proper use of governmental power. This initial inquiry is directed to the state and is to be answered by the court. Thus, the state must prove to the court’s satisfaction the validity of the police activity.88 As a guideline, the court held that there would be no entrapment where the “police activity: (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.”89 Part one thus discourages police tactics which are not designed to stop ongoing criminal activity.90 Part

84. *Id.* at 519.
85. *Id.*
86. *Id.* at 520 (quoting *Sherman v. United States*, 356 U.S. 369, 382-383 (1958) (Frankfurter, J., concurring)).
88. 465 So. 2d at 521.
89. *Id.* at 522.
90. This limitation on police conduct has been discussed in decisions from several juris-
two discourages inappropriate police inducements. A court may look at factors such as whether the police encouraged another to commit an offense by either making knowingly false representations designed to induce the belief that such conduct is not prohibited, or by employing methods of persuasion which would create a substantial risk that such an offense would be committed by a person not already predisposed to commit it. After the threshold question has been addressed and the state establishes that the police conduct has not been improper, then the question remains whether the criminal design was induced by the police or originated with the accused. “This question is answered by deciding whether the defendant was predisposed, and is properly for the jury to decide.”

When the supreme court in Cruz applied the new entrapment test to the factual situation at hand, it found that the drunken wino decoy failed the initial inquiry under the objective test. The decoy operation was not designed to stop any ongoing criminal activity. Even if the trap represented an attempt to stop the ongoing criminal activity of “rolling drunks,” the entire scenario created a substantial risk that such an offense would be committed by persons other than those ready to commit it.


The Second District in Jones v. State, 11 Fla. L.W. 425 (Fla. 2d DCA Feb. 14, 1986) has developed the first prong of the Cruz test. In this case the record was clear that the police were interested in intercepting the person responsible for several strong-armed robberies at a local dog track. However, instead of using tactics likely to intercept the violent armed robber, the police set up a “drunken bum” decoy similar to the one used in Cruz. The court held that the police action was not sufficiently tailored to the particular crime and found entrapment as a matter of law.

91. 465 So.2d at 522. This prong of the Cruz test has been developed by the Second District in State v. Eichel, 11 Fla. L.W. 660 (Fla. March 12, 1988). This case involved a female police officer who was engaged in a personal relationship with a defendant who admitted using drugs. Even after she informed him that she worked for the sheriff’s office, the officer cultivated and encouraged the relationship, told the defendant to “be himself,” and assured him that she would not arrest him even though she was wired and knew that an arrest was planned. The court held that these knowingly false representations made to the defendant, coupled with the inducement of a personal, intimate relationship, clearly violated the second prong of Cruz test.

92. Id. at 521.

93. Id. at 522.
V. CONCLUSION

Prior to the supreme court's decision in Cruz v. State, Florida courts had produced conflicting rules of law on the issue of entrapment. Some courts examined the conduct of the government agents and based their decisions on the objective view of entrapment. Other courts focused on whether the accused had a prior intent or predisposition to commit the crime. Those courts based their decisions on the subjective view of entrapment. Some courts even used both these tests, depending on the factual circumstances of the case. The supreme court in Cruz combined these divergent views of entrapment to create a new analysis. The court recognized that where the police conduct is so reprehensible and improper that crime is actually created instead of detected, the public's confidence in the police force will be shaken. In response to this fear, the court developed a new test which protects against unacceptable police conduct while leaving the factual determination of predisposition to the jury. This is an improvement over the prior case law. Instead of viewing the two entrapment doctrines as mutually exclusive, the court has taken a bold step by combining the objective and subjective views into a new test which maximizes the protection of the general public. The test calls for the trial court to apply specific factors in making its initial determination of the propriety of the police conduct. If the court finds the police conduct passes the test, the question of whether the defendant had the intent to commit the crime before the police involvement is submitted to the jury.

Although the Cruz test appears to be a straightforward one, the impact of this case will depend upon its future application by Florida's courts. It is clear that decoy operations like the one in Cruz have been condemned.94 But what other police practices will be condemned in Florida? The first entrapment decision to apply the new test to a factual scenario not involving a drunken bum decoy was rendered by the Third District in Marrero v. State.95 In that case, the court determined that the defendant had been entrapped as a matter of law and reversed his conviction of attempted trafficking in cannabis. The defendant had been contacted twenty to thirty times during a six month period by a police informant who asked him whether he wanted to sell marijuana. The defendant re-

94. See Teague v. State, 472 So. 2d 461 (Fla. 1985).
95. 10 Fla. L.W. 2317 (Fla. 3d DCA Oct. 8, 1985), aff'd on rehearing, 11 Fla. L.W. 59 (Fla. 3d DCA Dec. 24, 1985).
fused each time, stating that such a sale would be illegal, and asked the informant to stop bothering him. The last time the defendant was approached by the informant he gave in to the request and agreed to sell the marijuana because of his recent "economical problems." The Third District applied the threshold test for entrapment and concluded that the police activity violated both prongs of that test. First, the police were not attempting to interrupt any specific, ongoing criminal activity; the detectives readily admitted having no information about any prior or ongoing involvement of the defendant in the sale of illegal drugs. Second, the police did not use means reasonably tailored to apprehend those involved in ongoing criminal activity; the informant's repeated inquiries over a six month period constituted an improper method of persuasion which carried with it a substantial risk that the offense would be committed by one who was not otherwise ready to commit it.

Marrero is the first post-Cruz case in which a court has considered the parameters of the propriety of police inducements in a factual scenario different from the drunken bum decoy operation reviewed in Cruz. Only one court after Cruz has held police conduct improper when the accused was already involved in the criminal activity. Other courts in Florida and other jurisdictions have identified police inducements that would constitute entrapment as a matter of law where the inducements would be sufficient to overcome otherwise innocent persons. Thus, even if the police legitimately target a defendant and attempt to catch him "in the act," their techniques may be so improper as to constitute entrapment as a matter of law. For example, entrapment as a matter of law has been found where the inducement involved sex.

96. Id. at 2318. The defendant had been unemployed for two months and had fallen behind on the mortgage payments on his family home. He decided to sell the marijuana out of desperation.

97. Id. at 2318; see supra text accompanying note 89.


100. Spencer v. State, 263 So. 2d 282 (Fla. 1st DCA 1972) (lure of sex held entrapment where female undercover agent went with the defendant to his apartment, drank wine with him, purchased cigarette rolling papers and smoked the defendant's marijuana); People v. Wisneski, 292 N.W.2d 196 (Mich. Ct. App. 1980) (female informant performing fellatio on a doctor to induce him to write her an illegal prescription held an improper inducement); Commonwealth v. Thompson, 484 A.2d 159 (Pa. Super. Ct. 1984) (court held that romantic lure was improper where female agent went on several dates with defendant, kissed him,
alty and friendship have been found improper inducements. These cases turn on the notion that the function of police in our society is not to place citizens in situations where they are likely to succumb to overwhelming temptation. Furthermore, the restrictions on police activities should be enforced uniformly, regardless of the defendant's predisposition, in order to protect the rights of all people. Although Florida courts have evinced a willingness to extend the new entrapment test beyond the bounds of the decoy scenario, post-Cruz jurisprudence must further define the circumstances under which the police activity undertaken to ensnare an individual should be condemned although he is engaged in ongoing criminal activity. Ultimately, the decisions of cases such as these will form the teeth of the future entrapment doctrine, a doctrine which could have great impact as a defense to improper police conduct and serve as a practical test for acceptable police activity.

Kelly M. Haynes

101. Butts v. United States, 273 F. 35 (8th. Cir. 1921) (informant, who was an acquaintance of the defendant, improperly induced the defendant to sell morphine by representing that he and his wife were very ill and in need of the drug); People v. Crawford, 328 N.W.2d 377 (Mich. Ct. App. 1982) (informant induced a co-worker at a hospital to supply her with Valium; co-worker knew the informant's son was in the hospital in serious condition and got the Valium for the apparently distraught informant as a result of appeals to friendship and sympathy).