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Criminal Procedure - The Entrapment Defense - The Determination of Predisposition - Janski v. State

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CASE NOTES

CRIMINAL PROCEDURE—THE ENTRAPMENT DEFENSE—The Determination of Predisposition. Janski v. State, 538 P.2d 271 (Wyo. 1975).

The response to criminal activities that are not readily susceptible to traditional investigative approaches has been the increasingly widespread use of undercover agents and informers.[1] Undercover investigation is often vital to the efficient and successful prosecution of criminal offenders.[2] A countervailing need to protect the citizenry from the excesses of undercover agents and informers has often required the courts to consider the permissible limits of undercover investigation. Courts have responded by recognizing the necessity of undercover investigation in limited criminal activities but severely condemning investigative excesses.[3] Insulation of the citizen from abuses of undercover investigation has most frequently found basis in the affirmative defense of entrapment.

FACTS OF THE CASE

On January 6, 1973, Robert Laabs, an undercover agent employed by the Casper police, arrived at the residence of Gary Janski, a young man Laabs had known for one week. Laabs asked Janski if he could buy some hashish. Janski replied that it would be necessary to go out to a golf course and procure the drug from a friend. Janski left the house, presumably for the golf course, and returned in thirty minutes with two quarter ounces of hashish. Laabs bought the drug, left Janski's residence and delivered the purchase to his police supervisor for evidence.

Janski was charged with delivery of a controlled substance in violation of Sections 35-347.14(d)(10) and 35-

1. Undercover investigation has been directed largely toward the enforcement of laws which regulate or proscribe activities such as prostitution and the use of narcotics and alcoholic beverages, which are considered offensive to the general welfare. These proscriptions are included in the contemporary classification, sumptuary offenses. Note, *Criminal Law—Entrapment in the Federal Courts—Subjective Test Reaffirmed Against Lower Court Departures*, 42 FORDHAM L. REV. 454 (1973).
2. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEXAS L. REV. 203, 210 (1975).
3. La Fleur v. State, 533 P.2d 309, 312-13 (Wyo. 1975); Sorrells v. United States, 287 U.S. 435, 448 (1932); Saunders v. People, 38 Mich. 218, 221 (1878).

347.31(a)(ii) of the Wyoming Statutes.[4] An additional charge of delivery of a controlled substance was pending against Janski at the time of the trial for the charge in issue. During the State's case one witness mistakenly referred to the pending offense when he testified that the Janski-Laabs transaction took place on January 7, when in fact the sale in question took place on January 6. At the close of the State's case defendant asked for a mistrial. The trial court denied the request.

At trial a defense witness, Kevin Doing, testified as a witness to the Janski-Laabs meeting. Doing related that Laabs had pushed a gun into Janski's stomach, and told Janski to procure the hashish and "not to mess around with Haystack [Laabs]."[5] On cross-examination Doing was shown a derringer and replied that the gun used by Laabs was not the one produced at trial. Laabs, recalled on State's rebuttal, denied the alleged coercion and identified the gun shown to Doing as the weapon carried by him on duty. Laabs further testified that a week after his meeting with Janski he did carry a .38 revolver, similar to the gun described by Doing. Laabs' police supervisor then testified that Laabs had carried the revolver on only one occasion, one week after the Janski sale. At the close of State's rebuttal defendant requested an opportunity for surrebuttal, offering to prove by two witnesses that Laabs had threatened one of them with a gun similar to the weapon described by Doing. The witnesses were prepared to testify that they had seen Laabs with the

4. Relevant sections of the statutes are as follows:
WYO. STAT. § 35-347.14(d)(10) (Supp. 1975):
> Unless specifically excepted or unless listed in another schedule, any material compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically exempted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation: . . . (10) Marihuana . . . .

WYO. STAT. § 35-347.31(a)(ii) (Supp. 1975):
> Except as authorized by this act . . . it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. Any person who violates this subsection with respect to: . . . (ii) Any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than ten (10) years, fined not more than ten thousand dollars ($10,000.00), or both . . . .

5. Janski v. State, 538 P.2d 271, 273 (Wyo. 1975).

revolver on a number of occasions. The trial court denied the request for surrebuttal.

The jury returned a verdict of guilty. On appeal to the Wyoming Supreme Court the conviction was reversed, the court finding no evidence of predisposition to commit the offense that would rebut the defense of entrapment. The State applied for a rehearing which was granted.

HOLDING

Upon rehearing, the court set aside the original opinion and affirmed the conviction, holding that a showing of ready compliance on the part of the accused unrelated to a showing of an existing course of criminal conduct or a pre-formed design to commit the offense is sufficient to create a jury issue on entrapment.

THE *Janski* COURT'S REASONING

On original hearing the Wyoming Supreme Court held that the evidence in the record indicating only that Laabs went to Janski's residence and solicited the sale of hashish was not a sufficient showing of predisposition.[6] The majority rejected the contention that evidence of Janski's ready compliance was sufficient to prove predisposition and held that entrapment existed as a matter of law.

Upon rehearing, defendant assigned as error four issues that apply to the entrapment defense: (1) evidence in the record was not sufficient to overcome the defense of entrapment, rendering the verdict contrary to the evidence; (2) submission of the entrapment issue to the jury; (3) denial of defendant's motion for a mistrial after evidence concerning the alleged sale of narcotics on January 7; and (4) denial of defendant's requested surrebuttal.[7] The court rejected the assignments of error, essentially holding that the entrapment issue was properly given to the jury.

6. Janski v. State, 529 P.2d 201, 202 (Wyo. 1974).
7. The dissent in *Janski* forcefully argues that the assignments as error are, to a degree, interrelated as to the issue of entrapment and the showing of predisposition. Janski v. State, *supra* note 5, at 287, 291 (Rose, J., dissenting).

The majority accepted without reservation the proposition that entrapment can be rebutted by a showing of predisposition through a previous course of similar crimes, a preformed criminal design evidenced by performance of the first overt act before solicitation, provision of a mere opportunity to break the law where police have reasonable cause to believe the accused is engaged in a course of similar activity, or by ready compliance.[8] Reversing the position taken by the court upon original hearing, the majority accepted a showing of predisposition through ready compliance.[9]

By adopting the rule that ready compliance is per se sufficient to establish predisposition and send the issue of entrapment to the jury, the court laid the groundwork to affirm Janski's conviction. Relying on a number of "solicitation" cases,[10] the court reasoned that predisposition was sufficiently established through ready compliance to rebut the allegation of inducement. When the jury, properly receiving the issue of entrapment by virtue of the predisposition testimony, rejected Doing's testimony as to the threat by Laabs, the factual issue of entrapment was decided against Janski. The court reasoned that since entrapment as a matter of law was precluded by the ready compliance to Laabs' solicitation, the factual finding of entrapment could not be disturbed.

The court treated the assignments of error in the mistaken date testimony and denial of surrebuttal as immaterial

8. These criteria are developed by the court in its analysis of the evolution of the entrapment doctrine. Janski v. State, *supra* note 5, at 275. *See also* text accompanying note 26 *infra*.

9. In a vigorous dissent, it is argued that only an established pattern of criminal conduct or a demonstrable willingness to commit the offense will serve as the ultimate provable fact as to predisposition. In this approach, ready compliance is important as evidence going to the issue of predisposition, but it is not the ultimate provable fact. Janski v. State, *supra* note 5, at 286 (Rose, J., dissenting).

10. The "solicitation cases" generally hold that the mere provision of an opportunity for the accused to implement a preexisting design to break the law is insufficient inducement to sustain the entrapment defense. Sandoval v. United States, 285 F.2d 605, 607 (10th Cir. 1960); Wood v. United States, 317 F.2d 736, 738 (10th Cir. 1963); United States v. Freeman, 412 F.2d 1181, 1183 (10th Cir. 1969). In these cases the inquiry is usually directed toward the accused's behavior prior to solicitation (preformed design or a pattern of similar criminal activities). Ready compliance under the *Janski* rule, however, looks exclusively to post-solicitation behavior.

to the defense of entrapment.[11] The confusion as to the date of the Janski-Laabs transaction was not prejudicial since there was no indication that the jury heard any of the evidence.[12] The denial of surrebuttal was properly vested in the discretion of the trial judge.[13] Treating the entrapment arguments, the denial of surrebuttal and the date confusion as unrelated issues, the Wyoming court found no reversible error and affirmed the conviction.

THE ENTRAPMENT DEFENSE

The affirmative defense of entrapment has been characterized as a doctrine developed in the Twentieth Century which has found nearly universal acceptance in the United States.[14] There has, however, been a split of authority as to the theoretical basis for the defense.[15]

A minority of the states and a number of federal jurisdictions in the early 1970's adopted the position set forth in the concurring opinion of Mr. Justice Roberts in *Sorrells v. United States*[16] and Mr. Justice Frankfurter in *Sherman v. United States*.[17] This is known as the objective theory of entrapment, focusing on the activity of the police and its relation to probable effects upon the reasonable man. The approach is grounded on the theory that certain activities on the part of the police are so outrageous that, as a matter of law, they should be judicially prohibited.[18] Courts adopting this position have held that the state should be estopped from prosecutions made possible by these techniques.

11. This evidence, however, could potentially be important in the traditional considerations of predisposition. *See* the discussion of evidential materiality under *Janski* in the text acompanying notes 40 to 42 *infra*.
12. The dissent, however, indicates that the erroneous testimony was heard by the jury. Prejudicial implications could not, then, be ruled out. Janski v. State, *supra* note 5, at 288 (Rose, J., dissenting).
13. WYO. STAT. § 7-228 (Supp. 1973); State v. Alexander, 78 Wyo. 324, 347, 324 P.2d 831, 839 (1958), *cert. denied* 363 U.S. 850 (1960).
14. State v. Campbell, 110 N.H. 138, 265 A.2d 11, 13 (1970). Apparently all states except Tennessee have adopted the defense.
15. For an excellent overview of the entrapment defense as treated by the Supreme Court, *See* Note, *Criminal Law—Entrapment in the Federal Courts—Subjective Test Reaffirmed Against Lower Court Departures*, *supra* note 1; Dix, *supra* note 2.
16. 287 U.S. 435, 453-59 (1932) (Roberts, J., concurring).
17. 356 U.S. 369, 378-85 (1958) (Frankfurter, J., concurring).
18. *See* State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974). The Iowa court accepts the proposition that the real issue in the assertion of entrapment is whether police conduct was so reprehensible that conviction, as a matter of public policy, should not be tolerated.

The majority of the states, however, have adopted the "subjective theory" of entrapment, originally posited in the majority opinions of *Sorrells*[19] and *Sherman*.[20] This approach, recently reaffirmed in *United States v. Russell*,[21] has been accepted in a majority of the states and has been adopted by implication in Wyoming.[22] The subjective approach focuses primarily on the predisposition of the accused to commit the crime charged or similar crimes, the reprehensible activity of the state generally notwithstanding.[23] The substantive limitation on police activity is that the state is precluded from prosecuting crimes that are the result of the creative activity of the police. This limitation is the ultimate question involved in a determination of "genesis of intent,"[24] which asks where the criminal scheme originated. The courts have founded the defense upon an implied exception to the criminal statute. The rationale reasons that considerations of public policy force the conclusion that the statute was not meant to apply to an otherwise innocent defendant induced into committing a criminal act.

The subjective approach to the entrapment defense requires the trial court to consider two issues. Initially, the accused must show inducement by government officials. It is generally held that the inducement must be more than mere solicitation.[25] After the showing of inducement the inquiry shifts to the genesis of intent issue. In this consideration the court is concerned with whether, given the inducement, the accused showed any predisposition to commit the offense charged or similar offenses. Where there has been a sufficient showing of inducement that has not been rebutted by a

19. Sorrells v. United States, *supra* note 16.
20. Sherman v. United States, *supra* note 17.
21. 411 U.S. 423 (1973).
22. Higby v. State, 485 P.2d 380, 384 (Wyo. 1971); La Fleur v. State, *supra* note 3; Dycus v. State, 529 P.2d 979, 980-81 (Wyo. 1974).
23. This approach actually involves the "genesis of intent" issue predating *Sorrells* and *Sherman*. The issue was whether the accused had formed the intent before solicitation. *See* Butts v. United States, 273 F. 35 (8th Cir. 1921); Peterson v. United States, 255 F. 433 (9th Cir. 1919); Yick v. United States, 240 F. 60 (9th Cir. 1917).
24. Peters v. State, 248 Ark. 134, 450 S.W.2d 276, 278 (1970); State v. Harney, 160 Mont. 55, 499 P.2d 802, 805 (1972); Dycus v. State, *supra* note 22.
25. United States v. Test, 486 F.2d 922, 924 (10th Cir. 1973); United States v. Jobe, 487 F.2d 268, 270 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); Higby v. State, *supra* note 22, at 384.

showing of predisposition, the courts should hold entrapment as a matter of law. If the inducement has been rebutted by a showing of predisposition, a jury issue of entrapment is thereby created.

The courts, at least nominally, have accepted four indications of predisposition: (1) a previous course of similar criminal activity; (2) a preexisting design to commit the offense (generally where the accused made the first overt offer before any solicitation); (3) ready compliance with undercover solicitation; and (4) a preexisting criminal design where the state, by virtue of undercover investigation, had reasonable cause to believe that the accused was violating the law and only afforded an opportunity for commission of the offense.[26] Factually, however, the courts recognize only three indications of predisposition. The cases indicating acceptance of ready compliance as a showing of predisposition usually involve some overt offer by the accused before solicitation has taken place.[27] These cases are generally indistinguishable from the cases relying on a demonstrable preexisting criminal design. If inducement has been shown, but not rebutted by a showing of predisposition, entrapment is held as a matter of law. If inducement has been rebutted by a showing of predisposition, a jury issue on entrapment is created.

THE ENTRAPMENT DEFENSE UNDER *Janski*

The significant facet of the *Janski* decision is found in the Wyoming court's treatment of ready compliance as the

26. Janski v. State, *supra* note 5, at 275, citing Annot., 33 A.L.R.2d 886, § 3 (1954).

27. Indicative of the "ready compliance" showing of predisposition is Higby v. State, *supra* note 22. Defendant was convicted of unlawful sale of narcotics. The court held that there was no entrapment in the following situation. Two students were working with local campus police. The students were given money to buy narcotics. They went to a local restaurant to effect a prearranged meeting with Pryor for the purchase of narcotics. Pryor was not present. The two agents saw the defendant and asked where Pryor could be found, explaining that he had agreed to make the sale. Defendant replied that he did not know of Pryor's whereabouts and offered to get the agents "some stuff." One agent accompanied defendant to his home and purchased a quantity of hashish. It is vital to note that although the court spoke of predisposition shown by ready compliance, defendant made the first overt offer of sale. The issue clearly merges with predisposition shown by preformed criminal design.

ultimate provable fact in the showing of predisposition.[28] The court treated ready compliance as sufficient in itself to establish predisposition and create a jury issue of entrapment. Evidence of Janski's post-solicitation behavior was the conclusive provable fact in the court's view of the predisposition issue. The focus of the court on post-solicitation behavior goes to the central issue of the defense, the inquiry into genesis of intent.

Prior to the *Janski* decision, the Wyoming rule was that the defense of entrapment was available to the criminally accused when the criminal scheme had its origin in the mind of the police and the law enforcement officials actively induced the criminal conduct by implanting the criminal scheme in the defendant's mind.[29] The defense, viewed objectively or subjectively, looked beyond the acts of the accused in compliance with undercover solicitation in the inquiry into predisposition.[30] Generally ready compliance had been received only as evidence of some ultimate provable fact rebutting entrapment, the preexisting criminal design, or, less frequently, a pattern of similar criminal activity.[31] The showing of predisposition through a clearly demonstrable preexisting criminal design or through a pattern of similar criminal activity necessarily involved more than a mere showing of ready compliance to undercover solicitation.

The proposition that ready compliance is sufficient evidence of predisposition to take the entrapment issue to the jury severely limits the availability of this defense to a criminally accused. Accepting ready compliance as sufficient evidence of predisposition closes the issue. Further inquiry into the behavior of the accused or the undercover agent becomes, for the most part, immaterial to the issue of entrap-

28. Although ready compliance is used by the courts as indicative of predisposition, the cases generally involve a demonstrable preexisting criminal intent on the part of the accused. *E.g.*, Higby v. State, as discussed *supra* note 27.

29. Dycus v. State, *supra* note 22, at 980. This position has also been adopted in other jurisdictions. Rogers v. State, 277 So.2d 838, 839 (Fla. App. 1973).

30. The creative activity prohibition often precluded prosecutions founded upon a mere showing of solicitation and ready compliance where the criminal design was a product of police activities. *See* La Fleur v. State, *supra* note 3, at 314; Rogers v. State, *supra* note 29, at 839.

31. Janski v. State, *supra* note 5, at 285-87 (Rose, J., dissenting).

ment.[32] The impact of this view of predisposition is that the traditional genesis of intent issue is largely ignored. A showing of ready compliance can, but does not necessarily, indicate the presence of the preexisting criminal design that is central to the genesis of intent inquiry. In this context, the search for predisposition shifts from an investigation into where the intent originated to an investigation focused only on the behavior of the accused after solicitation. This inquiry into the accused's predisposition radically alters a traditional basis of the entrapment defense, which was the inquiry into where the criminal intent originated.[33]

With a shift away from an inquiry into genesis of intent the creative activity doctrine is largely emasculated. The creative activity doctrine has generally been invoked to prohibit prosecutions where the criminal design originated with the police and the criminal activity was essentially due to the creative efforts of the law enforcement officials.[34] Prohibition of "manufactured crimes" is founded on the obvious policy that justice is not served when law enforcement officials are allowed to, in effect, create crimes for the sole purpose of prosecuting them.[35] However, under the *Janski* ruling the inquiry is not one into where the criminal design itself originated, but is only directed at what occurred after the undercover solicitation.[36] The net effect of the ruling is to shift the inquiry in the entrapment defense from the question of where the creative impetus of the activity was lodged to the question of the defendant's reaction to undercover solicitation.

32. Inquiry into the coercive activities of the undercover agent would still be relevant to the issue of ready compliance. The emphasis of this evidence would be altered—it formerly went to the creative activity prohibition—but the probative value of the evidence would remain unchanged. *Cf.* State v. Bradshaw, 12 N.C. App. 510, 183 S.E.2d 787, 790 (1971).

33. Exhaustive inquiry into the genesis of intent issue has been the focus of the entrapment defense since its judicial recognition early in the Twentieth Century. *See* Butts v. United States, *supra* note 23.

34. Dupuy v. State, 141 So.2d 825, 826 (Fla. App. 1962).

35. Peters v. Brown, 55 So.2d 334, 336 (Fla. 1951); Thomas v. State, 185 So.2d 745, 747 (Fla. App. 1966).

36. Janski v. State, *supra* note 5, at 287 (Rose, J., dissenting).

MATERIAL EVIDENCE UNDER *Janski*

The *Janski* ruling, then, is a potentially radical departure from traditional foundations of the entrapment defense.[37] The inquiry remains as to what evidence is material to the issue of predisposition under the *Janski* decision. Certainly evidence as to the defendant's behavior after solicitation is critical to the showing of predisposition through ready compliance. Although frequently unavailable, evidence of the defendant's resistance to solicitation would serve to impeach the assertion of ready compliance.[38] Evidence of coercion by the undercover agent would also rebut the allegation of ready compliance, in effect justifying the defendant's post-solicitation behavior.[39]

Exemplary of evidence of coercion that might be used to rebut the allegation of predisposition by ready compliance is the evidence defendant attempted to present in surrebuttal in *Janski*.[40] Had the defendant succeeded in introducing evidence to impeach Laabs' rebuttal testimony as to the type of weapon carried while on duty, the allegation of ready compliance might have been viewed as coercion when the issue reached the jury. But the court found no reversible error in exclusion of this testimony, and decided the issue on procedural technicalities.[41] Given the narrow limits of the defense under the *Janski* holding, however, it would appear that such evidence is of vital importance to the accused and should be received almost as a matter of right.[42] The policy supporting the introduction of this type of evidence is that the defense of entrapment has been very narrowly defined by the Wyoming court. Evidence of coercion in response to a show-

37. Potentially much of the genesis of intent inquiry is left intact under *Janski*. The Court does not preclude a showing of predisposition through demonstrable preexisting criminal design or through a showing of similar criminal activities. Predisposition thus established is the very essence of the traditional approach. However, post-solicitation compliance is usually much easier for the prosecution to establish. Thus, the potential impact of the *Janski* rule is quite significant.

38. Roundtree v. State, 271 So.2d 160, 161-62 (Fla. App. 1972).

39. Bradshaw v. State, *supra* note 32, at 789. For a discussion of the impact of coercion evidence in the traditional view of the entrapment defense, *see* Annot., 62 A.L.R.3d 110, 145-48 (1975).

40. Janski v. State, *supra* note 5, at 277-79.

41. *Id.* at 279.

42. *Id.* at 292 (Rose, J., dissenting).

ing of predisposition through ready compliance is critical to the accused who is attempting to impeach the allegation of ready compliance.

Essentially, evidence relating to the showing of post-solicitation behavior by the accused is material to the issue of predisposition under the *Janski* rule. Evidence relating to genesis of intent outside the accused's ready compliance becomes collateral under *Janski*. The confusion as to the date of the Laabs-Janski transaction is indicative of the type of evidence that is traditionally determinative of the issue of predisposition but that has become collateral under *Janski*. Normally evidence of a similar course of criminal conduct, properly admitted, indicates predisposition.[43] However, such evidence can be highly prejudicial to the defendant.[44] Attempting to vitiate the prejudicial effects of such testimony the courts have generally recognized the need to control carefully the circumstances under which such evidence can be received at trial.[45] Under the *Janski* ruling, evidence of prior similar criminal conduct, although possibly admitted under circumstances very adverse to the accused[46] and highly prejudicial to a traditional showing of predisposition, is collateral to the real issue of the defendant's post-solicitation behavior.

The evidentiary impact of the *Janski* decision is a result of the court's willingness to look exclusively at post-solicitation behavior to establish predisposition. Paralleling the shift of inquiry into predisposition from genesis of intent to post-solicitation behavior, evidence not relating to defendant's behavior after solicitation is no longer necessary to a showing of predisposition. It is submitted that this forecloses the possibility of reversible error by admitting potentially pre-

43. Hansford v. United States, 303 F.2d 219, 225 (D.C. Cir. 1962).

44. Janski v. State, *supra* note 5, at 288 (Rose, J., dissenting).

45. Courts, recognizing the possibility that the defendant may have no means of impeaching such evidence, generally carefully control the impact of such testimony. Hansford v. United States, *supra* note 43, at 225-26.

46. Janski v. State, *supra* note 5, at 288 (Rose, J., dissenting).

judicial evidence unrelated to the necessary showing of predisposition through ready compliance.[47]

CONCLUSION

The doctrine announced by the Wyoming Supreme Court in *Janski v. State* represents a fundamental departure from the traditional concepts of a sufficient showing of predisposition in the entrapment defense. Although the requirement that predisposition be shown in terms of where the criminal design originated has not been completely abandoned in *Janski,* the ruling opens a new avenue by which the state can rebut the defense of entrapment and more easily create a jury issue of entrapment. Under *Janski,* ready compliance is not founded solely in the genesis of intent inquiry, the hallmark of the defense since its inception. Recognition of a showing of ready compliance to undercover solicitation as sufficient to establish predisposition and send the issue of entrapment to the jury narrowly limits the evidentiary inquiry as to the issue of predisposition. The potential effect of the *Janski* doctrine's departure from the genesis of intent inquiry is to limit radically the viability of the entrapment defense in Wyoming.

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47. *Id.* at 277. The evidence of the date of the sale would generally involve the genesis of intent issue. Evidence wrongfully admitted and highly prejudicial to a showing of predisposition through prior criminal activity would traditionally be reversible error. Where, however, the evidence is wholly unrelated to the issue of predisposition shown through ready compliance, the prejudicial impact of the testimony is circumvented.