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Case Comments: Constitutional Law

FOURTH CIRCUIT REVIEW

CONSTITUTIONAL LAW

Entrapment is a relatively new criminal defense in the long history of criminal law. Entrapment, an affirmative defense, requires the defendant in a criminal action to meet the burden of production before the court will send the issue to the jury. Courts and legislatures developed the defense within the last century both as a judicially created right and a statutory right.[1] Courts and statutes expanded the use of entrapment in response to the use of undercover or sting operations by the police.[2] The Fourth Circuit previously noted that the entrapment defense rests on the idea that the purpose of law enforcement should be to prevent crimes, not to manufacture crimes.[3] In asserting the entrapment defense the defendant must show some evidence that the government induced the defendant to commit an offense. In short, the defendant only can prevail in an entrapment claim if government deception implanted criminal intent in the defendant's mind.

The Fourth Circuit adheres to traditional rules in the entrapment area and generally allows defendants' claims of entrapment to go to the jury. To succeed in getting an entrapment defense before a jury, the defendant must show evidence "beyond a mere scintilla." Defendants asserting the entrapment defense have alleged constitutional violations of their Fifth Amendment Due Process rights. In looking to the government's conduct in the matter, the Fourth Circuit additionally has adhered to majority rules in the due process area. Specifically, for the defendant to prove a due process violation government conduct must be "outrageous" in the sense that it shocks the conscience of the court.

Against this background, in *United States v. Osborne*, 935 F.2d 32 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit considered the validity of a convicted defendant's challenge to his conviction on both due process and entrapment grounds. Osborne charged that the government had violated his due process rights in two ways: 1) that the government did not demonstrate a reasonable suspicion of criminal behavior before commencing a sting operation; and 2) that the government's conduct in sending several mailings to Osborne was outrageous.

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1. *See* United States v. Russell, 411 U.S. 423, 428-29 (1972) (holding that entrapment defense prohibits law enforcement officials from instigating criminal acts by otherwise innocent people); United States v. Osborne, 935 F.2d 32, 37 (4th Cir. 1991) (holding that entrapment defense prevents government from inventing crimes against innocent people).

2. *See generally* PAUL MARCUS, THE ENTRAPMENT DEFENSE (1989).

3. *See* United States v. DeVore, 423 F.2d 1068, 1070 (4th Cir. 1970) (holding that government is authorized to provide opportunities designed to encourage one who already is predisposed to commit crime).

The defendant also alleged that the district court erred by not allowing Osborne's defense of entrapment to go to the jury.

In *Osborne*, with the purpose of running a sting operation, the U.S. Postal Inspector in Nashville advertised pornography in a video publication and indicated that a purchaser could buy pornographic videos from catalogues. Osborne responded to the inspector with a letter expressing interest in purchasing child pornography videos. The Inspector then mailed Osborne a questionnaire and a list of available films. Osborne continued the exchange by returning the questionnaire and providing an address for UPS delivery. The Inspector then sent an order form to Osborne, who requested two videotapes.

After the receipt of Osborne's order, the Postal Inspector delivered the tapes, according to Osborne's request, to a North Carolina address. Federal officers subsequently obtained a search warrant and seized the tapes from Osborne. Pursuant to the seizure, Osborne was arrested and indicted for knowingly receiving sexually explicit videotapes depicting minors engaged in obscene conduct. The state charged Osborne with violating 18 U.S.C. section 2252(a)(2) which governs the receipt of sexually explicit materials.

Osborne moved to dismiss the indictment claiming that the alleged charges violated Osborne's due process rights. In a pretrial decision, the district court denied Osborne's motion to dismiss. The district court also found that because Osborne had shown a predisposition to commit the crime charged, Osborne could not use the defense of entrapment at his trial. Osborne was convicted of the charged violation and sentenced to twelve months in jail, a $3,000 fine and three years supervised release.

Osborne appealed to the Fourth Circuit, arguing that the district court erred in failing to dismiss the indictment on due process grounds and in failing to allow Osborne to raise the entrapment defense at trial. Prior to dealing with the defendant's two major contentions, the Fourth Circuit disposed of two less viable arguments. Osborne had argued that because the postal inspector delivered the tapes to Osborne's brother's house, Osborne did not knowingly receive the tapes. The Fourth Circuit used a common sense approach and found that because Osborne had requested that the tapes be sent to his brother's house, Osborne did knowingly receive them. Osborne also challenged the district judge's refusal to depart from the Federal Sentencing Guidelines and give Osborne a lower sentence. The Fourth Circuit found that because the district court was aware that it could give Osborne a lower sentence, and it did not do so, Osborne's challenge failed.

The Fourth Circuit next dealt with the defendant's due process claim. The Fourth Circuit found that the government need not have a suspicion of the defendant to offer the defendant an opportunity to commit a crime. Citing its own decision in *Newman v. United States*, 299 F. 128 (4th Cir. 1924), the Fourth Circuit affirmed that when the government affords one the opportunity to commit a crime, the government merely solicits and is incapable of inducing an otherwise innocent person to commit a crime.

In dealing with the outrageous conduct prong of the defendant's due process claim, the Fourth Circuit reiterated the standard constituting outrageous government conduct. The Fourth Circuit noted that government conduct must be so outrageous that the conduct shocks the conscience of the court. In so holding, the Fourth Circuit warned future defendants hoping to make a claim of entrapment that the Fourth Circuit has a high shock threshold. To emphasize the Fourth Circuit's shock threshold, the court cited its decision in *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988), finding that a sting operation aimed at child pornography did not constitute outrageous conduct.

Finally, to analyze the defendant's entrapment claim, the Fourth Circuit employed a test derived from both its own past cases and a case cited favorably by the Supreme Court.[4] The Fourth Circuit maintained that predisposition is the essential element of entrapment and rejected the "objective" view that the government action is sufficient to prove an entrapment claim. The Fourth Circuit noted that an entrapment claim will succeed if the defendant shows that the government conduct implanted criminal intent in the defendant. The defendant must show, however, some evidence that the government induced him to commit an offense that he was otherwise not predisposed to commit. Although the burden of production is small, the court required defendants to meet the burden.

Under the Fourth Circuit's standards of both entrapment and due process, the defendant's challenges failed. Because the court did not require government suspicion to justify the government's solicitation of Osborne, Osborne could not successfully argue that the government lacked reasonable suspicion. Osborne also failed to show that the sting operation was outrageous. Compared to far more egregious sting operations that the Fourth Circuit had determined were not outrageous, the one that led to Osborne's arrest, according to the Fourth Circuit, was far below the high shock threshold. Finally, in an attempt to meet the burden of production for an entrapment defense, Osborne argued that because the government solicited him, he was not predisposed to commit the crime. The Fourth Circuit found, however, that solicitation alone was insufficient to negate predisposition to commit a crime. In short, Osborne did not show the "scintilla" of evidence needed to raise the entrapment defense at trial. Finding that no error was committed by the district court, the Fourth Circuit upheld the conviction.

The Fourth Circuit's holding that the government needs no reasonable suspicion before offering a citizen the opportunity to commit a crime creates a conflict between the Fourth and Ninth Circuits. In *United States v. Luttrell*, 899 F.2d 806 (9th Cir. 1989), the Ninth Circuit held that the government violates due process when without reasonable suspicion it provides an innocent person with an opportunity to commit a crime. The

4. *See* Mathews v. United States, 485 U.S. 58, 63 (1988) (stating that principle element of entrapment is predisposition and not government behavior).

Fourth Circuit, however, is in accord with almost all the other circuits on the reasonable suspicion issue.[5]

The Fourth Circuit's approach to entrapment and due process in *Osborne* is consistent with the approach of other circuits and the Supreme Court. The Fourth Circuit opinion in *Osborne* is slightly unusual, however, because the defendant is not allowed to bring the entrapment issue to the jury. Under *Osborne* the defendant has a low burden of production, but *Osborne* stands for the principle that the defendant must meet that burden. The effect of *Osborne* will be to discourage defendants from raising groundless defenses of entrapment. Similarly, the due process analysis in *Osborne* could lead to fewer successful challenges to government sting operations.

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."[6] Courts traditionally consider the administration of blood alcohol and breathalyzer tests as constituting a search within the scope of the Fourth Amendment.[7] As such, the administering of these tests invokes the Fourth Amendment's warrant requirement, which requires that a probable cause showing be made and a warrant be issued prior to a search. However, there are at least two recognized exceptions to the warrant requirement: the search incident to lawful arrest exception and the exigent circumstances exception. The search incident to lawful arrest exception allows a police officer to search a lawfully arrested individual for weapons, instruments of escape and evidence of crime.[8] Alternatively, the exigent circumstances exception recognizes that there are emergency circumstances where the "special needs" of the state will justify waiver of the warrant requirement.[9]

Courts, in a variety of contexts, have addressed the question of whether breathalyzer or blood alcohol tests that are administered without a warrant

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5. *See* United States v. Jacobson, 916 F.2d 467, 468 (8th Cir. 1990) (holding that government does not need reasonable grounds to offer otherwise innocent defendant opportunity to commit crime), *cert. granted*, 111 S. Ct. 1618 (1991); United States v. Jenrette, 744 F.2d 817, 829 n.13 (D.C. Cir. 1984) (same), *cert. denied*, 471 U.S. 1099 (1985); United States v. Gamble, 737 F.2d 853, 860 (10th Cir. 1984) (same); United States v. Thoma, 726 F.2d 1191, 1198-99 (7th Cir.) (same), *cert. denied*, 467 U.S. 1228 (1984); United States v. Myers, 635 F.2d 932, 941 (2d Cir.) (same), *cert. denied*, 449 U.S. 956 (1980); United States v. Velasquez, 802 F.2d 104, 106 (4th Cir. 1986) (same); Newman v. United States, 299 F. 128, 132 (4th Cir. 1924) (same).

6. U.S. CONST. amend. IV.

7. *See* Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 616-17 (1989) (holding that blood tests and breathalyzer test constitutes Fourth Amendment "search"); Schmerber v. California, 384 U.S. 757, 766-72 (1966) (same); Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986) (same).

8. *See* United States v. Chadwick, 433 U.S. 1, 14-15 (1977) (discussing seizures incident to lawful arrest); Coolidge v. New Hampshire, 403 U.S. 443, 455-57 (1971) (same).

9. *See* Griffin v. Wisconsin, 483 U.S. 868, 872 (1987) (discussing exigent circumstances exception).

legitimately fall within either of these two recognized exception categories.[10] In examining whether the exigent circumstances exception applies, courts typically employ a balancing approach. Such an approach weighs the state's interests or "special needs" in specific circumstances against the individual's interest in freedom from an unreasonable search.[11] In light of these precedents, the United States Court of Appeals for the Fourth Circuit considered the question of whether the administration of a breathalyzer test without a warrant fell within either exception to the warrant requirement.

In *United States v. Reid*, 929 F.2d 990 (4th Cir. 1991), the Fourth Circuit considered the appeal of two women whose convictions of driving while intoxicated were based on the results of a warrantless breathalyzer test. Police officers arrested both Reid and Boyle after stopping them to determine the cause of their erratic driving. The officer pulled over Reid after he observed her speeding and having difficulty remaining within the lanes of the George Washington Memorial Parkway. Upon stopping her and smelling alcohol on her breath, the officer asked Reid to perform three field sobriety tests. Reid failed all three tests; the officer then arrested her and took her to the police station. At the station, the police advised Reid that 36 C.F.R. § 4.23 required her to submit to a blood alcohol test or face the criminal charge of refusal. A conviction of refusal carries a penalty of $500, imprisonment not exceeding six months, or both. Reid consented to a breathalyzer test and signed the corresponding notice and waiver. The police administered two separate breath tests that resulted in blood alcohol levels of .144 and .148, respectively. The officer then arrested Reid, charging her with driving under the influence of alcohol (D.U.I.) and driving with a breath alcohol content of .10 or more, in violation of 36 C.F.R. § 4.23.

Police stopped Boylan under similar circumstances. An officer pulled over Boylan when he observed her driving outside of the marked parkway lanes at an unusually slow speed. Detecting alcohol on Boylan's breath, the officer administered four field sobriety tests, all of which Boylan

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10. *See generally* Skinner v. Railway Labor Exec. Ass'n., 489 U.S. 602 (1989) (examining mandatory blood and breath tests for employees involved in train accidents); Schmerber v. California, 384 U.S. 757 (1966) (considering extraction of blood sample after defendant's involvement in accident and arrest); Hammer v. Gross, 932 F.2d 842 (9th Cir.) (reviewing forced extraction of blood from lawfully arrested drunk driver refusing test), *cert. denied sub nom.* Newport Beach v. Hammer, 112 S. Ct. 582 (1991); United States v. Berry, 866 F.2d 887 (6th Cir. 1988) (considering extraction of blood sample from unconscious defendant involved in accident); Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986) (analyzing state police practice of taking breath samples incident to D.W.I. arrests); Burka v. New York Transit Auth., 739 F. Supp. 814 (S.D.N.Y. 1990) (examining mandatory drug testing for applicants for "safety-sensitive" positions), *amd. denied*, 744 F. Supp. 63 (S.D.N.Y. 1991).

11. *See* Skinner v. Railway Labor Exec. Ass'n., 489 U.S. 602, 618-21 (1986) (balancing state's interest in regulating conduct of railroad employees in "safety-sensitive" positions against individual's interest in avoiding unreasonable searches).

failed. The officer then arrested Boylan and took her to the station. After being advised that if she refused a breathalyzer test she would be charged with refusal, Boylan consented to the test. She scored a .207 blood alcohol level; police charged her with impeding traffic, disobeying a road marking, and D.U.I. in violation of 36 C.F.R. §§ 4.12, 4.13(b), and 4.23, respectively.

In separate trials before the United States District Court for the Eastern District of Virginia, both Reid and Boylan moved to suppress the evidence of their breathalyzer test, arguing that the test was a warrantless search in violation of their Fourth Amendment rights. They based their arguments on two grounds. First, that the search was not proper under either the exigent circumstances or search incident to lawful arrest exceptions; and second, that their consent to the tests was coerced and invalid. The same magistrate denied both motions and convicted each woman. Both Reid and Boylan subsequently appealed to the Fourth Circuit, which consolidated their appeals into one action. The appeals alleged that the lower court judge erroneously denied their motions to suppress the evidence of their breathalyzer tests.

On appeal *de novo* the Fourth Circuit in *Reid* considered whether breathalyzer tests fell within any exception to the warrant requirement of the Fourth Amendment. In considering the scope of exceptions to the warrant requirement, the *Reid* Court relied on *Skinner v. Railway Executive Ass'n.*, 489 U.S. 602 (1989), and reasoned that the Fourth Amendment did not proscribe all searches and seizures, but only unreasonable ones. The Fourth Circuit recognized that usually a search or seizure is not reasonable unless it is accomplished pursuant to a warrant. Yet, the Fourth Circuit noted that in *Skinner* the Supreme Court recognized certain exceptions to this rule, when "special needs," beyond the normal demands faced in law enforcement, make the warrant and probable cause requirements impractical. The Fourth Circuit stated that when faced with "special needs," the Supreme Court balanced the governmental and privacy interests to assess the practicality of the warrant requirement in the particular context. Because the Supreme Court also established that subjecting a person to a breathalyzer test is a Fourth Amendment "search," the Fourth Circuit concluded that a warrant was required in *Reid* unless one of the exceptions to the warrant requirement was present.

Citing *New York v. Belton*, 453 U.S. 454 (1981), the Fourth Circuit noted that one established exception to the warrant requirement occurs where there are exigencies in a situation that make an exemption from the warrant requirement "imperative." The Fourth Circuit noted that the Supreme Court also recognized such exemptions in both *Skinner* and *Schmerber v. California*, 384 U.S. 757 (1981), where the delay in obtaining a warrant might result in the destruction of evidence of alcohol in the body. While Reid and Boylan argued that the police could obtain a warrant by telephone as allowed by Federal Rule of Criminal Procedure 42(c)(2), the Fourth Circuit held that compliance with the extensive requirements of a telephone warrant would demand too much time and would risk the

loss of invaluable evidence. In dismissing the possibility that a warrant could be efficiently obtained, the court therefore acknowledged the existence of exigent circumstances that would exempt the police from the warrant requirement.

In light of several recent Supreme Court decisions, the *Reid* Court concluded that the Supreme Court recognized a compelling state interest in protecting its citizens from drunk drivers and that the breathalyzer test is the least intrusive of Fourth Amendment searches. The Fourth Circuit found that the Supreme Court repeatedly has noted the gravity of the drunk driving problem in modern society. The Court has upheld several intrusions on an individual's Fourth Amendment rights in an attempt to alleviate the crisis posed by drunk driving. For example, in *Schmerber* the Court allowed the forcible extraction of blood over defendant's objections, and in *Michigan State Police v. Sitz*, 110 S. Ct. 2481 (1990), the Court upheld sobriety check-points that were set up on roads to catch drunk drivers. The Court also held in *Skinner* that breathalyzer tests and blood tests intrinsically do not violate the Fourth Amendment. The Fourth Circuit stated that these factors support the invocation of the exigent circumstances exception where police officers are acting lawfully to decrease the toll of drunk driving on the nation's highways. Thus, because of the exigent circumstances of the situation, the Fourth Circuit held that the warrantless searches of Reid and Boylan were reasonable under the Fourth Amendment.

The Fourth Circuit's analysis in *Reid* also noted that an additional exception to the warrant requirement existed in Reid and Boylan's cases. Police officers conducted both searches incident to lawful arrest. Relying on *United States v. Edwards*, 415 U.S. 800 (1974), the Fourth Circuit held that the fact of lawful arrest establishes the authority to search. Given the lawfulness of both women's custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment but is a reasonable search under the amendment.

The *Reid* Court refrained from addressing appellants' second argument that their consent was coerced and, therefore, invalid. Appellants based their coercion argument on the fact that the police informed the plaintiffs that if they did not consent to the breathalyzer tests, they could be charged with refusal which carried significant penalties. Because of this alleged coercion, both women claim that their consent was "tainted" and, therefore, invalid. However, given the court's finding that both searches were reasonable without the consent, the *Reid* court did not need address plaintiffs' claims.

In summary, the Fourth Circuit held that the appellants were lawfully arrested at the time they were searched. The police stopped each woman pursuant to an officer's observations that each was driving in a suspicious manner, based on an individualized determination of suspicion. After each woman failed several sobriety tests, the police lawfully arrested each woman, took each to the police station and performed a search (breathalyzer test) incident to a lawful arrest. Additionally, the *Reid* court