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Summary of Miller v. State, 121 Nev. Adv. Op. 10 and Summary of Daniel v. State, 121 Nev. Adv. Op. 11

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Miller v. State, 121 Nev. Adv. Op. 10 (04/28/05)¹
Daniel v. State, 121 Nev. Adv. Op. 11 (04/28/05)

CRIMINAL LAW - ENTRAPMENT

Summary

Both *Miller* and *Daniel* arise out of a Las Vegas Metropolitan Police Department (LVMPD) decoy program designed to combat an increase in street-level robberies occurring in downtown Las Vegas.

In *Miller*, a detective with the LVMPD disguised himself as an intoxicated vagrant and carried exposed cash in his pocket. The detective then positioned himself across from a bus station and leaned against a chain link fence. Richard Miller, an individual walking down the street, approached the detective and asked him for money. When the detective refused, Miller pulled the detective closer to him and took the cash from the detective's pocket.

In *Daniel*, the same detective carried a wallet in his pocket that also exposed cash. Rufas Daniel approached the detective and showed him a silver charm necklace, which the detective refused to look at. Daniel then pushed the necklace into the detective's face and grabbed the wallet out of the detective's pocket.

Miller and Daniel argued that police officers entrapped them by improperly tempting them with exposed money and a helpless victim. The court held that both Miller and Daniel were not entrapped because they were predisposed to commit the crime. The court reasoned that since the entrapment defense was designed to prevent police misconduct, evidence must be demonstrated that the State presented the opportunity to commit a crime and that the defendant was not otherwise predisposed to commit the crime. In both cases, the defendants were found to be predisposed to commit the crime because they initiated contact with the detective and engaged in the robbery or larceny for profit. Further, neither defendant demonstrated reluctance which was overcome by the government's inducement. Since the defendants were predisposed to commit the crime, entrapment was not available as a defense.

Issue and Disposition

Issue

Does a police operation involving a detective disguised as an intoxicated vagrant and carrying cash exposed from his pocket constitute entrapment?

Disposition

The Nevada Supreme Court held that the entrapment defense is only available upon a showing that (1) the state presented the opportunity to commit a crime, and (2) the defendant was not otherwise predisposed to commit the crime. Predisposition is determined by examining factors such as the defendant's character, who first suggested the criminal activity, whether the

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defendant engaged in the activity for profit, whether the defendant demonstrated reluctance, and the nature of the government's inducement. The most important factor is whether the defendant demonstrated reluctance which was overcome by the government's inducement. If, considering these factors, the defendant is found to be predisposed to commit the crime, the defense of entrapment is unavailable.

Commentary

State of the Law Before *Miller* and *Daniel*

Previously, it was held that when police officers target a specific individual for an undercover operation, they must have reasonable cause that the individual is predisposed to commit the crime.² Further, the furnishing of an opportunity for criminal conduct must be presented to one with the requisite criminal intent.³ The Court in *Shrader* found that an individual was entrapped when there was no evidence that the individual was predisposed to sell marijuana before he was targeted for an undercover operation.⁴

Miller and *Daniel* overruled this notion and stated that predisposition can be established by examining factors such as (1) the defendant's character, (2) who first suggested the criminal activity, (3) whether the defendant engaged in the activity for profit, (4) whether the defendant demonstrated reluctance, and (5) the nature of the government's inducement. The most important factor is whether the defendant demonstrated reluctance which was overcome by the government's inducement. Thus, the Court in *Miller* and *Daniel* abolished the previous standard for entrapment, which required officers to have reasonable cause that the targeted individual is predisposed prior to conducting an undercover operation. The new standard establishes that the entrapment defense is not available for defendants who demonstrated a predisposition to commit the crime based on the above factors.

Other Jurisdictions

The United States Supreme Court has held that where the government has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.⁵

Among the states, there are two predominant approaches to the entrapment defense. The majority of states have taken the subjective approach, focusing on the actions of the accused and particularly, the predisposition of the accused to engage in the crime charged. The minority of states take the objective approach, focusing on the actions of law enforcement and barring over-involvement in inciting criminal activity.⁶

² *Shrader v. State*, 109 Nev. 499, 502 (1985).

³ *Id.*

⁴ *Id.*

⁵ *Jacobson v. U.S.*, 503 U.S. 540, 549 (1992).

⁶ Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1389-90 (2004).

Effect of *Miller* and *Daniel* on Current Law

Current law holds that a defendant is entrapped when the undercover decoy is apparently helpless, intoxicated, and feigns unconsciousness with cash hanging from his pocket.⁷ In *DePasquale*, the Court held that a defendant was not entrapped when he stole from a female undercover police officer who was walking along open sidewalks around a casino with money zipped into her purse. The Court found, however, that when the aforementioned factors are present, entrapment is available as a defense. *Id.*

Miller and *Daniel* seem to apply strictly the standard established in *DePasquale*. In *Miller* and *Daniel*, the Court found that the *DePasquale* standard did not apply because the detective's money was not readily accessible since only the tips of the detective's currency was exposed. The Court concluded that the entrapment defense was not available to the defendants because the factors established in *DePasquale* were not present. *Miller* and *Daniel* represent the Court's unwillingness to permit entrapment as a defense and the requirement of strict adherence to the *DePasquale* factors in order to establish a valid defense of entrapment.

Unanswered Questions

While the Court in *Miller* explicitly stated that it was overruling *Shrader*, the Court failed to specify its reasoning for overruling *Shrader*. While the *Miller* Court offers an alternative standard to determine whether one is predisposed to commit a crime, the Court fails to mention the standard established in *Shrader*, that evidence of predisposition must be present *before* the undercover operation takes place. This poses the question of whether the pre-operation knowledge of predisposition is significant and whether it must still be considered relevant to determine whether the defendant was entrapped. It seems as though the Court in *Miller* and *Daniel* stray away from the significance of pre-operation knowledge of whether a defendant is predisposed to commit the crime and lean towards the importance of the external factors such as the defendant's character to determine predisposition. However, without an express manifestation that police no longer need reasonable cause that the defendant is predisposed *before* the undercover operation takes place, it is difficult to ascertain whether future courts will follow the holdings in *Miller* and *Daniel* or revert back to the position in *Shrader*.

Conclusion

The Court in *Miller* and *Daniel* concluded that since the defendants were predisposed to commit the crime, they were not entrapped by the detective's disguise and exposed money. Evidence that defendants initiated contact with the detective, engaged in the robbery or larceny for a profit, and failed to demonstrate reluctance that was overcome by the government's inducement further supports the notion that defendants were predisposed to commit robbery or larceny and were not entrapped to commit the crimes.

⁷ *DePasquale v. State*, 104 Nev. 338, 340-41, 757 P.2d at 368-69 (1988).