COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP14-CR **Cir. Ct. No. 2006CT652**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS C. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed and cause remanded with directions*.

¶1 BROWN, C.J.[1] Travis C. Peterson alleges that he got drunk during a concert at Alpine Valley, decided to sleep it off in his car which was parked on Alpine Valley grounds, and was awakened by a state trooper who insisted that he drive the car off the premises because the parking lots were being

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

cleared. He claims to have protested that he was too drunk to drive, but that the trooper persisted and told him he could sleep it off at a nearby rest area, so he reluctantly acceded to the trooper's order and drove away from the grounds. Then, another state trooper arrested him for operating while intoxicated. Peterson argues that these allegations, if believed by a jury, amount to entrapment. But the trial court granted the State's motion in limine prohibiting Peterson from erecting an entrapment defense. We reject the trial court's apparent rationale that, because Peterson got himself drunk knowing he would have to drive away from the lot when the concert ended, the circumstances were wholly of his own making, thus precluding his use of the entrapment defense, which is available for the otherwise innocent only. While getting drunk is not recommended behavior, it is not illegal, standing by itself. Therefore, Peterson did nothing legally wrong until he operated his vehicle. We reverse and remand with directions.

¶2 The basic facts, as alleged by Peterson, have been stated above and do not need to be repeated except to point out that they made their way into the motion in limine record by way of an offer of proof. We also note that the offer of proof included a statement that an Alpine Valley official was prepared to testify about Alpine Valley's policy of clearing the parking lots after concerts.

¶3 Not surprisingly, the trooper who was at the Alpine Valley grounds had a completely different story. At the motion in limine, the trooper testified that on July 3, 2006, he was on a detail working the grounds after a concert, was informed by Alpine Valley personnel that there might be a deceased person in a car located in the parking lot, saw a person later identified as Peterson sleeping in the car, banged on the windows for a "good five, seven minutes," shined a flashlight in his face, and finally activated the squad's siren and lights before Peterson awoke. The trooper then testified that he talked to Peterson, asked if he

was okay, told him that he was drunk and needed to sleep it off and that he would be back later to check on him. The trooper explained that this was not out of the ordinary since there are "thousands of intoxicated … individuals at Alpine [] Valley." The trooper said that this conversation took place at about 1:00 a.m. At 2:56 a.m., he responded as back-up to another trooper who had stopped an intoxicated driver, and upon arriving, recognized the operator as the same individual he talked to at Alpine.

¶4 The trial court granted the State's motion in limine to exclude the entrapment defense. Here is what the trial court said:

> Well, I am going to deny the defense the right to use the entrapment instruction. It's a defense available to a defendant when a law enforcement officer induces the defendant to commit an offense that the defendant was not otherwise predisposed to commit. The Defendant drove there, and then parked there, and then proceeded to get drunk; and then at that point it becomes somebody else's problem to look out for him apparently because he's—the only way to drive—the only way he can drive is drive himself, and the only way he can drive is drive drunk because that's the way he's gotten himself. That's not the law enforcement's problem.

¶5 Peterson subsequently waived a jury trial, and a court trial resulted in a finding of guilt. Peterson then appealed.

¶6 Whether there are sufficient facts to allow the issuing of an instruction is a question of law which this court reviews de novo. ***State v. Peters***, 2002 WI App 243, ¶12, 258 Wis. 2d 148, 653 N.W.2d 300. Entrapment is a defense to a charge when the "evil intent" and the "criminal design" of the offense originate in the mind of the government agent, and the defendant would not have committed an offense of that character except for the urging of government. ***State v. Hilleshiem***, 172 Wis. 2d 1, 8, 492 N.W.2d 381 (Ct. App. 1992) (citation

omitted). To establish entrapment, Peterson had to show, by a preponderance of evidence, that he was induced to commit the crime of operating while intoxicated. *See* ***id***. If Peterson met that burden, then the State had to prove beyond a reasonable doubt that he was disposed to commit the crime. ***Id***. at 8-9. The defense is disfavored in the law because it tends to let a person go free who under normal circumstances would be guilty. ***Id***. at 9. So, courts do not entertain this defense lightly. ***Id***.

¶7 The State relies on the following passage from ***Hilleshiem*** to support its contention that the trial court correctly granted its motion in limine:

> The fact that a government agent furnishes the accused with an opportunity to commit the crime does not by itself constitute entrapment. Furthermore, the law permits law enforcement officers to engage in some inducement, encouragement or solicitation in order to detect criminals. WIS JI—CRIMINAL 780. Thus, entrapment will only be established if the law enforcement officer used *excessive* incitement, urging, persuasion, or temptation, and prior to the inducement, the defendant was not already disposed to commit the crime.

Id. (emphasis in original; citations and footnote omitted).

¶8 The State makes three separate arguments as to why the above passage holds the key to affirming the trial court. The State first argues that Peterson's offer of proof was wholly deficient. In its view, "Peterson never testified at any hearing. Therefore, the only evidence in the record established that [the trooper] told Peterson to stay sleeping in his vehicle until Peterson was sober enough to drive." The State therefore submits it is undisputed that there was no inducement, encouragement or solicitation by the trooper.

¶9 Feeding off this line of thought, the State brushes aside a case Peterson cited, which he argues is supportive of his claim. In ***State v. Bisson***, 491

A.2d 544, 546 (Me. 1985), Bisson, the defendant, testified at his own jury trial that he had been at a night club and drank until he became sick. ***Id***. He left, got into his car in the club parking lot and passed out. ***Id.*** About three and a half hours later, he was awakened by a police officer who ordered him to move his car from the lot. ***Id.*** Bisson protested that he was too intoxicated, but the officer insisted. ***Id.*** So, Bisson drove his vehicle off the lot and was arrested just down the road by the same officer. ***Id.*** The officer had a different version. ***Id.*** He claimed he had advised Bisson not to operate his vehicle, but Bisson did anyway. ***Id.*** The trial court refused to give an entrapment instruction. ***Id.*** Bisson was found guilty and appealed. ***Id.*** The Maine supreme court said that a valid factual dispute existed so the ultimate decision about entrapment was the jury's to make. ***Id.*** at 548. The State posits that we should not pay heed to ***Bisson*** because, there, the defendant actually testified and, here, Peterson did not.

¶10 The State's argument requires us to expound on the purpose of an "offer of proof." As explained by our supreme court in ***State v. Dodson***, 219 Wis. 2d 65, 73, 580 N.W.2d 181 (1998), an offer of proof serves two purposes: first, to provide the trial court a more adequate basis for an evidentiary ruling and second, to establish a meaningful record for review. An offer of proof may be made in question or answer form or by statement of counsel, but out of the presence of the jury. ***Id.*** Although the form of the offer of proof is at the trial court's discretion, the supreme court prefers that the question and answer format be used. ***Id.*** at 73-74.

¶11 We see from ***Dodson***, then, that the offer of proof made in this case by a statement of Peterson's counsel was a valid means by which to lay the factual dispute before the trial court. If the trial court had insisted on a question-and-answer format, the record shows that witnesses had been subpoenaed and could

have participated in that fashion. But, the trial court did not so order. We therefore reject the State's view that the trooper's question-and-answer testimony at the motion in limine hearing was "uncontroverted" on grounds that Peterson used the statement of counsel format rather than the question-and-answer format.

¶12 We now address the State's second argument as to why Peterson's offer of proof was deficient. The State asserts that there is nothing within the offer of proof demonstrating that what the trooper did was *excessive* incitement, urging, persuasion or temptation. The State underscores that the trooper estimated the time of the encounter with Peterson as occurring at about 1:00 a.m. and the stop did not take place until nearly 3:00 a.m. The State claims that this time differential is undisputed in the record and shows that there was no urgency to leave the lot, and no strict order to leave. We reject this argument as well. The law is that we view affirmative defense assertions in the most favorable light it will reasonably admit from the standpoint of the accused. *See* ***State v. Jones***, 147 Wis. 2d 806, 816, 434 N.W.2d 380 (1989). Examining Peterson's offer of proof in its most favorable light, it is evident that he claims the trooper told him to immediately operate his car out of the lot and, over objection by him, he did just that. If believed by a jury, a law enforcement directive to a knowingly drunk person that he or she operate a motor vehicle could be considered excessive. The question of excessive inducement, urging or encouragement was therefore put into dispute by the offer of proof.

¶13 The State's third argument, and the argument seized upon by the trial court for its holding, is that Peterson got drunk through no fault but his own. And, he did so knowing that he was the sole occupant and driver of his vehicle. So, the State apparently reasons, what happened as a result was of his own making and not the result of police action. The State cites two cases which, it claims,

support its rationale—***Turnham v. State***, 491 S.W.2d 898 (Tex. Crim. App. 1973), and ***Ijames v. Director of Revenue***, 699 S.W.2d 121 (Mo. Ct. App. 1985).

¶14 Neither of these two cases benefits the State. In ***Turnham***, officers responded to a disturbance at a service station managed by Turnham. ***Turnham***, 491 S.W.2d at 899-900. Turnham was intoxicated but police allowed him to drive home. ***Id.*** at 900. On the way, he was stopped by an officer who was unconnected to the events at the station. ***Id.*** The court observed that an entrapment defense requires that the crime originate in the mind of the officer. ***Id.*** The court concluded that the officer's conduct did not meet this requirement: "[t]here is no showing that the officers caused [Turnham] to drink or drive in such condition." ***Id.*** Clearly, under those facts, there was no inducement to drive shown by the officers nor was there any absence of willingness on Turnham's part. The police did not hold the proverbial gun to Turnham's head and order him to drive. True, they did not stop Turnham from driving, but they did not encourage or induce him to drive nor urge him to get behind the wheel. Turnham's actions were all of his own making.

¶15 In ***Ijames***, the defendant's wife was arrested for driving while intoxicated. ***Ijames***, 699 S.W.2d at 122. The defendant, a passenger, was intoxicated too. ***Id.*** The wife refused the offer of a tow truck and the officer then warned the defendant not to drive. ***Id.*** But he did anyway and was promptly arrested. ***Id.*** The defendant sought to raise an entrapment defense. ***Id.*** The court held that, to prove entrapment, defendant needed to show both an inducement to engage in unlawful conduct and an absence of willingness to engage in such conduct. ***Id.*** The court concluded that, while inducement was clearly shown because he was left alone in a wooded area with only his car as possible

transportation, there was no absence of willingness to drive while drunk. ***Id.*** Here, too, the police did not order the defendant to drive over objection by him.

¶16 However, in this case, if we believe Peterson, he was ordered by the trooper to drive his car from the lot and he did so only after his objections were turned aside. The two cases relied upon by the State are thus inapplicable here.

¶17 So, what we are left with is the argument by the State, and holding by the trial court, that persons who drink to excess of their own accord cannot avail themselves of an entrapment defense. Neither the State nor the trial court have explained why this is so. But, we must assume that the rationale is based on Wisconsin law which holds that, while police conduct of "inducement" is a triggering factor, it is not controlling on whether or not the defendant was "entrapped." *See* ***Hawthorne v. State***, 43 Wis. 2d 82, 91, 168 N.W.2d 85 (1969). Rather, the controlling question is "whether the defendant is a person *otherwise innocent*." ***Id.*** (emphasis added). We further assume that, given the purpose of the entrapment defense—to prevent agents of the State from entrapping a citizen by forming a criminal design, and then inducing this otherwise innocent citizen to commit it so that the government may prosecute—the rationale is that the facts here show no such thing happened. So, the State and trial court's conclusion is that Peterson did not engage in innocent behavior because he drank to the point of intoxication and therefore the "criminal design" was put in place by his conduct, not by police conduct.

¶18 We believe this to be the rationale because, frankly, we cannot think of any other logical theory and, as we said, none was provided. Given that theory, we must reject it. Peterson was, in the eyes of the law, a frequenter on the Alpine Valley grounds, not a trespasser. And there is no suggestion, that as a frequenter

on the evening in question, he was prohibited from drinking alcohol. Indeed, drinking alcohol to excess, while inadvisable and unhealthy, is not unlawful by itself. So, Peterson's being drunk was lawful conduct. What Peterson did next is also not only lawful, but commendable. Knowing he was drunk, he decided to sleep it off rather than operate his vehicle. So, up to this point at least—where he was found sleeping in his car—he had not engaged in any conduct that would be the catalyst for a criminal design.

¶19 What came next is disputed. Peterson claims that he was awakened by a trooper, ordered to drive off the grounds despite his being drunk, objected on grounds that he was too drunk to drive and had his objection cast aside by the trooper. If this is true, then a jury could find that the trooper put the criminal design in place by ordering an intoxicated person to drive on the public highway despite the person's protestations. And, as we alluded to earlier, a jury could also find the trooper's order to be excessive, even abhorrent. A jury might well conclude that the better action, even assuming that Alpine Valley wanted Peterson off the grounds, would have been to offer him a ride, call someone for him, or something similar. Of course, if Peterson's account is not true because the jury so finds, then Peterson's entrapment defense goes down in flames. But, it will have been the jury that shoots the defense down, not the court in response to the State's motion in limine. We therefore remand for further proceedings not inconsistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published in the official reports. *See* WIS. STAT RULE 809.23(1)(b)4.