

NOTICE

Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

FRANK MARSHALL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11036
Trial Court No. 3AN-03-12471 CR

MEMORANDUM OPINION

AND JUDGMENT

No. 5984 — November 20, 2013

Appeal from the Superior Court, Third Judicial District,
Anchorage, John Suddock, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B.
Martinez, Contract Public Defender, Anchorage, for the
Appellant. Kenneth M. Rosenstein, Assistant Attorney General,
Office of Special Prosecutions and Appeals, Anchorage, and
Michael C. Geraghty, Attorney General, Juneau, for the Appel-
lee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats,
Senior Judge.*

COATS, Senior Judge.

* Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

In *Marshall v. State*, 238 P.3d 590 (Alaska 2010), the Supreme Court remanded this case to the superior court to conduct a hearing on Marshall’s defense of entrapment. The superior court conducted a hearing, and rejected Marshall’s entrapment defense. Marshall appeals. We affirm.

General Legal Principles

Marshall contends that the superior court erred in ruling that the actions of the police and the informants in the present case did not rise to the level of entrapment. The entrapment statute is set forth in AS 11.81.450, which provides:

In any prosecution for an offense, it is an affirmative defense that, in order to obtain evidence of the commission of an offense, a public law enforcement official or a person working in cooperation with the official induced the defendant to commit the offense by persuasion or inducement as would be effective to persuade an average person, other than one who is ready and willing, to commit the offense. Inducement or persuasion which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit does not constitute entrapment.

The defendant has the burden of proving the affirmative defense of entrapment by a preponderance of the evidence.¹ In determining if entrapment has occurred, Alaska applies an objective standard, meaning that “the court considers the nature of the police activity involved, without reference to the predisposition of the defendant.”² “The question is really whether that conduct falls below an acceptable standard for the fair and

¹ AS 11.81.900(b)(2)(B).

² *State v. Yi*, 85 P.3d 469, 472 (Alaska App. 2004) (original citation omitted).

honorable administration of justice.”³ Whether the conduct constitutes entrapment is a decision for the court, not a jury.⁴

In reviewing a trial court ruling on the defense of entrapment, this court accepts the factual findings of the trial court unless those findings are clearly erroneous.⁵ The question of whether those facts constitute entrapment is a question of law, which we review *de novo*.⁶

Following the remand from the Supreme Court, the superior court conducted an evidentiary hearing on Marshall’s entrapment defense. Marshall testified at that hearing. The parties stipulated that they would rely on the record of Marshall’s trial for the testimony of the other witnesses. The superior court relied upon the trial record and Marshall’s testimony in making its findings of fact and conclusions of law.

According to the testimony presented at trial, in April 2002, Robert Clossey and Margaret Purcell were arrested for selling OxyContin. Clossey and Purcell decided to work as police informants in exchange for possible favorable treatment.

On the evening of November 25, 2003, Clossey called Detective Jason Penman of the Anchorage Police Department. Clossey stated that a man known to him as “Frank, possibly Frank Marshall,” was willing to sell a portion of his OxyContin medication. When Detective Penman asked for additional information, Clossey

³ *Pascu v. State*, 577 P.2d 1064, 1067 (Alaska 1978).

⁴ *Yates v. State*, 681 P.2d 1362, 1364 (Alaska App. 1984).

⁵ *McLaughlin v. State*, 737 P.2d 1361, 1363 (Alaska App. 1987).

⁶ *See Rausch v. Devine*, 80 P.3d 733, 737 (Alaska 2003) (“[t]he application of law to the facts of the case is reviewed *de novo*”); *Bachlet v. State*, 941 P.2d 200, 207 (Alaska App. 1997) (independently reviewing trial court’s rejection of entrapment defense).

conveyed that Marshall was an acquaintance who was in a state of transience and that it would be difficult for Clossey to find Marshall again at a later date. Detective Penman then arranged for an undercover officer to buy the pills from Marshall later that night in a parking lot off of Tudor Road in Anchorage. After all of the preparations for the controlled buy had been made, Detective Penman called Clossey and instructed him to drive Marshall to the parking lot.

When Clossey pulled into the parking lot, undercover APD Officer Steve Haas approached the passenger side of the vehicle. He confirmed the terms of the deal with Clossey, which was a sale of 20 OxyContin pills at \$30 a pill, for a total of \$600. Clossey flicked a lighter, and Marshall used its light to show the pills to Officer Haas. Officer Haas then gave the money to Marshall, and Marshall gave Officer Haas 19 pills. Marshall asked Officer Haas if all the money was there. Officer Haas asked Marshall if he wanted Officer Haas to stay while he counted the money, and Marshall declined.

As Clossey attempted to exit the parking lot where the buy had occurred, two APD officers stopped Clossey's vehicle. The officers asked Marshall to exit the vehicle, and they arrested him. The officers then searched Marshall and recovered prescription pill bottles, paperwork, and \$261.37 from his person. Upon searching the vehicle, the officers found the buy money under the passenger seat, as well as a bag with a prescription receipt.

Detective Penman interviewed Marshall at the police station following his arrest. Marshall denied handing anything to Officer Haas but stated that Officer Haas might have thrown a \$20 bill into the vehicle and then walked away.

Clossey and Purcell testified at trial. Clossey testified that, on November 24, 2003, Marshall came to his house. While they were talking, Marshall said that he had prescriptions for painkillers and wanted to sell some of his OxyContin because he needed money. Clossey called Detective Penman who arranged for Marshall to sell the

drugs. Clossey claimed that the drugs that were sold were Marshall's. Clossey said that he never touched the drugs.

Margaret Purcell testified that, to the best of her recollection, Marshall had the drugs with him when he arrived at Clossey's residence. She testified that Marshall asked Clossey and her if they knew anyone who would be interested in buying the drugs.

Marshall had not testified at trial. But he did testify at the evidentiary hearing on the entrapment defense. Marshall testified that on November 24, 2003, at approximately 9 p.m., he called Clossey from a bus station and asked for a ride to pick up some prescriptions. Clossey sent Purcell to pick up Marshall, and Purcell drove Marshall to pick up his prescriptions at Fred Meyer. Purcell then drove Marshall to Clossey's house. Marshall stayed the night at Clossey's house. The next day, Purcell drove Marshall back to Fred Meyer to pick up an OxyContin prescription. When they returned to Clossey's house, Marshall went to sleep.

Marshall testified that Clossey woke him up at approximately 8 p.m. and suggested that they go for a ride. Clossey drove them to a bingo hall on Tudor Road. As they were pulling into the parking lot, Clossey gave Marshall 20 OxyContin pills and instructed Marshall to hold them. After Clossey stopped his truck, a man approached the passenger side. Marshall testified that Clossey told him to give the OxyContin to the man. Marshall complied. (The man was Officer Haas, and Marshall was arrested.)

Marshall denied that he ever discussed selling his pills with Clossey. Marshall stated that, following his arrest, he noticed that some of his OxyContin pills were missing from his prescription. He inferred that Clossey had stolen these pills from him and then tricked him into handing these pills to the police officer.

At the evidentiary hearing, the superior court rejected Marshall's entrapment defense. In making its findings, the court stated that "[c]ertain facts are not in serious dispute: Purcell and Clossey were police informants. Margaret Purcell twice

drove Marshall to the pharmacy, and Purcell and Clossey sheltered Marshall for one night. Clossey set up the buy, including the quantity and the price. He drove Marshall to the scene of the buy and discussed terms with the purchasing undercover police officer.”

“But,” the trial judge stated, “so long as Marshall proposed the sale in the first instance and furnished the nineteen Oxycontin pills actually sold, this court perceives no impropriety in the police conduct.” The superior court concluded that it found the testimony of Clossey and Purcell was credible, that their account was consistent with the largely undisputed facts in the case, and that Marshall’s testimony at the evidentiary hearing was “evasive and cursory.” The court found that Marshall was not a credible witness. The court concluded that Marshall had not established the affirmative defense of entrapment.

This case comes down to an evaluation of the credibility of witnesses. According to the testimony of Purcell and Clossey, Marshall approached them to help him find someone to whom he could sell OxyContin. They simply assisted him in making a sale that Marshall wanted to make. Merely assisting Marshall to sell drugs in these circumstances would not constitute entrapment. Under this version of the facts, Marshall was “ready and willing ... to commit the offense.”⁷

Marshall’s testimony was entirely different. He testified that Clossey simply tricked him into handing the pills to the police officer. Under this version of the offense, Marshall had no intent to sell the drugs, and no idea that the drugs he handed to Officer Haas were actually his own drugs that had been stolen from him. Under this version of events, Marshall committed no crime at all.

⁷ AS 11.81.450.

On appeal, this court defers to the trial court on issues of credibility. The trial court is in a position to view the witnesses and is far better situated to make this determination. The court found the testimony of Purcell and Clossey to be credible; the court found that Marshall was not a credible witness. On appeal we are to accept the trial court's factual findings and findings concerning the credibility of witnesses unless those findings are clearly erroneous.⁸ The trial court's findings are supported by the record. We accordingly conclude that the superior court did not err in rejecting Marshall's entrapment defense.

The judgment of the superior court is AFFIRMED.

⁸ *Rausch*, 80 P.3d at 737.