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FEB 14 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA, Appellee,	)	Filed February 14, 1977
v.	)	
CLYDE DELBERT POOLER, Appellant.	)	36/58994

Appeal from Black Hawk District Court - Carroll E. Engelkes Judge

Appeal from conviction for burglary and resulting sentence. Reversed.

Richard A. Knock, of Cedar Falls, for appellant.

Richard C. Turner, Attorney General, and David Correll, Black Hawk County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Defendant, Clyde Pooler, appeals his conviction for burglary and the resulting sentence of 20 years in the penitentiary. Pooler's only defense in the trial court was entrapment which he asserts was established as a matter of law. We agree and reverse his conviction.

We view the evidence concerning entrapment in the light most favorable to the state. See State v. Leonard, 243 N.W.2d 75, 79 (Iowa 1976). When so viewed a jury could have found that on July 1, 1975, Officer Zarafis, an undercover agent for the Cedar Falls Police Department, contacted the defendant, a user of narcotics and somewhat slow witted, and attempted to sell him a revolver. By representing himself as a fugitive from justice, Zarafis hoped Pooler would have information concerning one Jack Siemens and several unsolved armed robberies. It is noteworthy that at this time, Officer Zarafis had no information that Pooler, a parolee, was involved in any current criminal activity. See People v. Turner, 390 Mich. 7, 210 N.W.2d 336, 342-343 (1973).

Subsequently, Zarafis continued to meet the defendant on which occasions alcohol invariably was consumed. During these meetings, Zarafis learned from Pooler of a plan for an armed robbery to be perpetrated by Siemens and defendant at the Boer's Head Lounge in Cedar Falls. Pooler offered Zarafis the opportunity to participate in the robbery, but, as a conditional test required Zarafis to first aid in commiting a breaking and entering.

On July 14, Officer Zarafis met Pooler early in the day and the two drove about the Cedar Falls - Waterloo area consuming beer in the officer's car. Pooler suggested

breaking into the Luloff home in Evansdale which he knew to contain guns and money. Zarafis agreed and later that evening contacted his superiors who in turn telephoned the Black Hawk County Attorney and received permission for Zarafis' participation in the burglary.

About midnight, Pooler and Zarafis, both under the influence of alcohol, drove to the Luloff residence in the officer's car and entered the home through a basement window. The pair proceeded to ransack the house. Officer Zarafis placed many of the items in his own pocket. He also carried most of the booty out of the house and loaded it into his car. The officer drove defendant home and assisted in carrying the stolen merchandise into Pooler's apartment where they divided it. Only the next morning did Officer Zarafis arrest defendant and attempt to retrieve the loot retained by Pooler.

In Iowa the real concern of entrapment is whether the police action was so reprehensible under the circumstances that a conviction *as a matter of public policy* should not be tolerated. State v. Mullen, 216 N.W.2d 375, 381 (Iowa 1974). Usually this concern over police conduct focuses on whether the police officer instigated or otherwise incited the crime. See State v. Baumann, 236 N.W.2d 361 (Iowa 1975). Viewed as such, Pooler's entrapment defense is without substantial merit. According to Zarafis' testimony, it could not be found that he incited or manufactured this burglary. Indeed, the defendant conceded in his own testimony that the burlgary was originally his idea.

Nevertheless, entrapment can occur without such incitement, not in the traditional sense, but by virtue of the fact that the state through its officers becomes so involved in

the criminal enterprise that its acts are outrageous and contrary to public policy. This proposition is supported by the *Mullen* rationale clearly grounding the defense of entrapment in considerations of public policy, rather than on mere incitement. But also, the court in *Mullen* noted: "The defense is treated primarily as a curb upon improper law enforcement techniques. . . ." State v. Mullen, supra at 382. This position is further strengthened by the analysis in State v. Overmann, 220 N.W.2d 914, 916 (Iowa 1974) - "It is thus evident defendant does not invoke the usual entrapment defense." See also, State v. Apt, 244 N.W.2d 801 (Iowa 1975). Similarly, cases from other jurisdictions, many relied upon by *Mullen* and *Apt*, have recognized that governmental over-involvement in crime can constitute a defense. United States v. Archer, 486 F.2d 670 (2d Cir. 1973), cited with approval, State v. Apt, supra; Greene v. United States, 454 F.2d 783 (9th Cir. 1971), cited with approval, State v. Mullen, supra; Accardi v. United States, 257 F.2d 168 (5th Cir. 1958); United States v. Alberanya-Salazar, 360 F.Supp. 1221 (C.D.Cal. 1973); United States v. Mahoney, 355 F.Supp. 418 (E.D.La. 1973), cited in State v. Overmann, supra; People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973), cited with approval, State v. Mullen, supra; State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (1972), cited in State v. Overmann, supra; Saunders v. People, 38 Mich. 218 (1878); See also, United States v. Grange, 475 F.2d 1022 (9th Cir. 1973), cert. denied 412 U.S. 929 (1973); United States v. Cunningham, 349 F.Supp. 1115 (M.D.Fla. 1972); LaFleur v. State, 533 P.2d 309 (Wyo. 1975); Spencer v. State, 263 So.2d 282 (Fla.App. 1972).

Attention to the actual analyses in these cases reveals that courts have been less than clear in distinguishing between outrageous police conduct constituting entrapment and the more nebulous right of due process; see, Park R. Entrapment Controversy, 60 Minn. L.Rev. 163 (1976); but the results reached in the cases are uniform and clear. Police overinvolvement in crime will not be tolerated.

We are aware that there is no Iowa case turning on this proposition of law. We fully recognize that it is not this court's function to declare "new" law or to engage in speculation concerning this state's public policy. Nonetheless, this case is here for decision and we are convinced that our Supreme Court, if presented with the issue, would hold that governmental overinvolvement in crime can be so reprehensible as to be contrary to public policy pursuant to *Mullen* rationale.

The issue remains whether in this case Zarafis' participation in this burglary was contrary to public policy. Particularly germane, the court in United States v. Archer, supra, observed:

> [t]here is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Id. at 676-677.

Government does, after all, teach its people by example. Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928) Brandeis, J., dissenting.

We certainly recognize that in many investigations, particularly narcotics, it is necessary for police officers to engage in deceit, trickery, artifice and even outright unlawful conduct in order to detect and apprehend the criminal element. We also realize that courts must be exceedingly wary of exercising an independent supervisory role over police investigative methods. United States v. Russell, 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366, 375 (1973). We believe, however, the dissenters place too much emphasis on these cases and too little on the *Mullen* public policy approach to entrapment, particularly in light of the facts disclosed in this case. Research fails to disclose any court approving actual government participation in a crime so attendant with physical danger to innocent persons as here. See Hampton v. United States, ___ U.S. ___, 96 S.Ct. 1646, 1651, 42 L.Ed.2d 113, 120-121 (1976), Powell, J., concurring.

There is little doubt that the crime which Pooler and Officer Zarafis committed was burglary with aggravation - a crime punishable by life imprisonment. Section 708.2, The Code. Although Zarafis undoubtedly did not commit the principal crime since he had no intent, he certainly aided and abetted.

There can be little doubt that the offense was completed when Pooler pushed in the basement window at the residence, and, hence there was absolutely no need for Officer Zarafis to also enter the home and participate in the ransacking.

There is no doubt that the commission of this crime involved a high degree of danger to the public. One must surely consider the probabilities for tragic consequences had the Luloffs unexpectedly returned home or had a vigilant

neighbor investigated after observing lights in the house. The fortuitous fact that no innocent person was physically harmed in this instance should be of no significance. We are unable to agree with a dissenter's suggestion that there is no need to lock the barn door because the horse has not yet escaped.

The fact the Officer Zarafis was under the influence of alcohol during his participation in this offense further exacerbates the overall lack of control which he had over the situation.

The combination of these factors - needless, active, participation in a heinous crime, high probability of violence against innocent citizens, lack of control over the situation - are intolerable to a court charged with the duty of protecting its citizens. Essentially this case comes down to a difficult choice. We have decided that this type of police conduct must be curbed. Unlike the intimation of a dissenter, this is not due to some fastidious personal notion concerning the proper police function in our society, but rather, is based upon a real and substantial concern for the physical safety of our citizens. We have been unable to discover any method by which Pooler's conviction can be affirmed without implicitly sanctioning Zarafis' conduct and thereby declaring it to be a legitimate tool of police investigation. In the final analysis we find that we cannot in good conscience permit this court to become the silent accomplice to such an ill-considered police venture wherein our citizens lives were so directly placed in jeopardy.

As was aptly proclaimed by Judge Brown concurring in Williamson v. United States, 311 F.2d 441, 445 (5th Cir. 1962):

"...there comes a time when enough is more than enough - it is just too much." We hold that for Officer Zarafis to have actively participated in the commission of this heinous offense against the Luloffs is so outrageous and reprehensible as to be contrary to the public policy of this state under the circumstances disclosed by this record. Consequently, we hold that the undisputed participation of Officer Zarafis in this burglary established entrapment as a matter of law requiring the reversal of defendant's conviction, and, with reluctance, order the information against Pooler dismissed.

> *We have to choose*, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part. Olmstead v. United States, 277 U.S. 438, 470, 48 S.Ct. 564, 575, 72 L.Ed. 944, 953, (1928), Holmes, J., dissenting. (emphasis added)

REVERSED.

SNELL and OXBERGER, J.J., concur; DONIELSON and CARTER, J.J., each dissent.

DONIELSON, J. (dissenting)

I dissent. I view the majority's opinion as a sizable expansion of the legal principles and theory of the exclusionary rule. For that matter, it goes beyond the exclusionary rule of searches and seizures, Weeks vs. United States, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914); Mapp vs. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 A.L.R.2d 933 (1961), for those cases only exclude the evidence under an illegal search and seizure.

The confession exclusionary rule under Miranda vs. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966) only excludes the confessions. In this case, the majority opinion excludes the conviction of the defendant himself and in effect provides him some kind of immunity from prosecution if the officer erred. It goes a great deal further and elevates this "outrageous conduct doctrine" to unparalleled heights that I do not envision was anticipated by State vs. Apt, 244 N.W.2d 801, 804 (Iowa 1976); State vs. Mullen, 216 N.W.2d 375 (Iowa 1974); State vs. Baumann, 236 N.W.2d 361 (Iowa 1975); and State vs. Leonard, 243 N.W.2d 75 (Iowa 1976).

The record does not show nor does the appellant allege any deprivation of rights secured to this defendant by the United States Constitution or the Iowa Constitution which has an influencing factor on me. See Hampton vs. United States, 96 S.Ct. 1646, 46 L.Ed.2d 113, 119 (1976); particular note of State vs. Apt, supra, should be made for it is directly applicable to this view and at least to some degree adopts the current United States Supreme Court view.

I see no *"ingredient involvement"* such as supplying one of the essential items in the crime itself, i.e. narcotics supplied to a defendant by a government informant. Hampton vs. United States, supra. A government agent supplying an essential

ingredient in a methamphetamine manufacturing situation. United States vs. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366. See also United States vs. Bueno, 447 F.2d 903 (5 Cir. 1971); Greene vs. United States, 454 F.2d 783 (9 Cir. 1971); United States vs. McGrath, 468 F.2d 1027 (7 Cir. 1972), vacated in light of *Russell* and affirmed in 494 F.2d 562 (7 Cir. 1974). See also United States vs. Spivey, 508 F.2d 146 (10 Cir. 1975), *cert. denied*, 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 104.

Quite the contrary, is true in the case before this court. An investigation was under way concerning a Jack Siemens who was a suspect for armed robberies in the area. Pooler, the appellant, was thought to have some information about Siemens. Law enforcement officers further heard that defendant-Pooler was attempting to purchase a gun so the attempt was made to contact and conduct an investigation through Pooler concerning Siemens by the undercover officer by the name of Zarafis.

Zarafis called Pooler and a meeting was arranged and at the meeting in the park, Siemens showed up for a few minutes and then left.

After a second meeting in a motel where the undercover agent supplied some wine and beer with the explanation that he did not want to frequent taverns for fear of being recognized, the defendant suggested a plan for an armed robbery of the Boar's Head Tavern in the Waterloo area. After leaving the motel, they circled the tavern. The appellant suggested that Officer Zarafis go into the tavern with a shotgun, and that Siemens was to make the ultimate decision as to the participation by these parties.

Pooler told Officer Zarafis that if he would participate in a break-in in Evansdale, that that would be his test and determine whether he could be included in the prospective armed

robbery at the Boar's Head Tavern. Pooler stated that Siemens had paid for the information concerning the break-in and was to give the ultimate go-ahead.

During direct examination by appellant's counsel, it was revealed that this 28-year-old male had been convicted of a felony, that he regularly used tylenol, demerol, amobaritol, librium, valium, heroin, cocaine, morphine, LSD and did so on a regular basis. During cross-examination of Officer Zarafis by appellant's counsel, it was revealed that the appellant had indicated that he had committed several armed robberies in the area, had killed once and had wanted to kill Dave Dutton (the county attorney).

Although undercover agents and informants may indeed be unpleasant or distasteful and certainly fraught with difficulty in both factual and legal situations. They are a part of the real world, and if the public is to receive any measure of security under Article I, §1 of the Bill of Rights of Iowa Constitution and under the Fourteenth Amendment of the Federal Constitution, they would seem to be on a occasion a useful and necessary procedure.

None the less, the court should look carefully into each of these situations and reread carefully State vs. Mullen, 216 N.W.2d 375 (Iowa 1974); State vs. Baumann, 236 N.W.2d 361 (Iowa 1975); State vs. Leonard, 243 N.W.2d 75 (Iowa 1976); State vs. Apt, 244 N.W.2d 801, 804 (Iowa 1976), for a balanced and realistic view of public policy as it relates to the judicial policy within this state on entrapment. The trial court did that in this case.

The facts in this instance, indicated as they would in almost all entrapment cases, that the defendant is admittedly guilty of the crime charged. The facts are overwhelmingly confirming of that. But is this such "outrageous police conduct" as

to absolve as a matter of law and that this defendant go free. I think not.

To say that because the officer erred, if indeed he did, we now exclude the defendant from being prosecuted or give him some kind of immunity is essentially unsound, unrealistic, fails to build confidence in the law or generate respect for the law within our citizenry.

The undercover agent did consult his superior and the decision was made to go into the house with the defendant. It is quite easy now perhaps, not so then, to say that this was a mistake, but I am constrained to say that it was perhaps not the best decision as we look at it in retrospect. Bad law is made by bad cases, and the judgment to enter the house, as is mentioned in the dissent, is frought with danger. There could be officers that were not notified, relatives watching the house, neighbors or a number of undesirable situations that could result in some type of tragedy either to innocent parties or to the police undercover agent. One might well assume that the object here was to try and develop a case on Siemens, but the perils involved in this situation would appear in retrospect simply not be worth the risk.

This as the majority points out, is a case of aggrevated burglary punishable by life imprisonment, §708.2, The Code, and the defendant was ultimately convicted for burglary, §708.1, The Code. I view the entering of the house as unnecessary to accomplish the purpose of the undercover work, although the target prospective accomplice would no doubt be lost at least on a temporary basis. There is great truth in the saying that law enforcement situations with short range goals cause long range consequences of an undesirable nature. No matter how well motivated these short range goals might have been.

The record reflects a full and complete explanation of the details of the entire affair concerning Officer Zarafis's relationship with the appellant-Pooler, and the jury could well have decided adversely to the State if they were offended by this police action. The entrapment instruction was and is perhaps one of the better worded instructions for clarity in instructing the jury. We are not privileged to have the closing arguments, but in reading the course of direct examination, particularly the cross-examination, it would seem somewhat obvious that the defendant's theory must have been towards ultimate arguments to the jury that these actions were beyond the bounds of good police work and toward entrapment. I find no entrapment situation as a matter of law, no violation of due process.

Any undercover work is more than likely to, at least some degree, involve the undercover officer (or informant) in at least some technical violation of the law, i.e. conspiracy, aiding and abetting, accomplice, etc. Perhaps this is what makes this type of law enforcement distasteful, but none the less, it is a matter of the degree of involvement and since this does not rise to what I call *"ingredient involvement"*, I see no outrageous conduct requiring us to turn the felon free. I reserve the right of deciding an ingredient involvement case on another day, but would expect to be guided by *Mullen*, *Apt* and *Leonard* as well as *Russell* and *Hampton*.

I do not read State vs. Deanda, 218 N.W.2d 649 (Iowa 1974) as any kind of some new additional requirement that there be an instruction that the jury should determine whether the police actions were so reprehensible that as a matter of public policy, a conviction should not be tolerated as Section II of appellant's brief suggests. This has always been a matter for the court to

determine in entrapment cases and not the jury. That language in State vs. Deanda, 218 N.W.2d 649 (Iowa 1974), is merely dicta, and to adopt that as the new policy in entrapment allegations would command that it be used in many other law enforcement situations thusly legitimatizing in moving the course of a criminal trial from a trial of a defendant for the crime alleged to the trial of the law enforcement personnel for their conduct. If their conduct is less than the best decision under the circumstances, the instruction in effect, says that they may then ignore the other instructions that they have pledged to follow. There will have to be a great deal more clarification in State vs. Deanda, supra, before I am willing to adopt in any such overwhelming change in the criminal law as I perceive this to be.

But if there is to be no allegation of violation of the defendant's constitutional rights nor is there any evidence that would indicate that he is not guilty of the crime charged, and we are now to adopt this broaden "outrageous conduct doctrine" then the majority should spell out what the special standards for the implementation and give a definitive explanation to be used by the trial judges in making this determination.

The majority has construed *Mullen*, supra, as a cornerstone by which entrapment based upon public policy can be found as a matter of law. Yet as dictated by *Mullen*, supra, the majority failed to find inducement by law enforcement officials. I am forced to conclude that the majority has judicially created a new defense, the outrageous police conduct doctrine under an established doctrine of entrapment. No doubt evidence including expert testimony can be introduced under this new doctrine to assist the judge or jury in making this determination. The appeals court has created an absolute public policy defense which

if found within the doctrine of entrapment has at least a potential of being ultimately decided by a jury when the facts of the entrapment are in controversy, *Mullen*, supra. A new workable instruction will be needed that sets forth the proper criteria for outrageous police conduct. Unfortunately, the only criteria I see now is what was suggested by *analogy* by Justice Stewart in his concurring opinion in Jacobellis vs. Ohio, 378 U.S. 184 (1964); *"I cannot define outrageous police conduct, but I know it when I see it."* *

While I recognize and do not disagree with what it says in United States vs. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366:

> "[3] While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to [411 U.S. 432] obtain a conviction, cf. Rockin vs. California, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205, 25 A.L.R.2d 1396 (1952), the instant case is distinctly not of that breed."

I adopt the United States Supreme Court's latest view in Hampton vs. United States, 96 S.Ct. 1646, 46 L.Ed.2d 113, 119 (1976), as a general philosophy and applicable in this case.

* Jacobellis vs. Ohio, 378 U.S. 184 (1964) -- Stewart concurring: *"I shall not today attempt to further define the kinds of material I understand to be embraced within that short hand description; and I could never succeed in intelligently doing so. But I know it when I see it and the motion picture involved in this case is not that."*

It says:

> "The limitations of the Due Process Clause of the Fifth Amendment, and of those portions of the Bill of Rights which it has been held to incorporate, comes into play only when the government activity in question violates some protected right of the defendant. (emphasis added)
>
> " ... the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. See O'Shea vs. Littleton, 414 U.S. 488, 503, 38 L.Ed.2d 674, 94 S.Ct. 669 (1974); Imbler vs. Packtman, _____ U.S. _____, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). But the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive *Russell* of any rights."

I view my colleagues majority opinion as far beyond anything anticipated in the established criminal law in this area. The logical legal implications are extraordinary and unwise.

CARTER, J. (dissenting)

I dissent. The trial court properly applied the law of entrapment. The result reached by the majority is not sustainable under the law of entrapment. If such result has any validity at all it must lie in some other doctrine.

The majority seek to justify the result they reach under the holding in State v. Mullen, 216 N.W.2d 375 (Iowa 1974). Such result is not supported by *Mullen* and is in fact contrary to both *Mullen* and the more recent applications of the *Mullen* holding in State v. Leonard, 243 N.W.2d 75 (Iowa 1976) and State v. Jeffs, 246 N.W.2d 913, 917 (Iowa 1976).

In *Mullen* the court adopted the following definition of entrapment derived from the National Commissions Study Draft of a New Federal Criminal Code § 702 (1970):

> "Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."

Such definition of entrapment was to be applied by the courts of this state "in all cases subsequently tried." Judges as well as juries are now bound to apply the standard of entrapment which was adopted by the court in *Mullen*.

Two necessary elements are required to fall within the *Mullen* definition of entrapment: (1) the law enforcement agent or agents must in fact induce the commission of the offense, and (2) the means used to induce the commission of the offense must be such as are likely to cause "normally law abiding persons" to commit the offense. The majority opinion concedes that the first element of this definition

is lacking in the present case. At the very least it must be said that such element does not exist as a matter of law.

The majority incorrectly states that entrapment can occur without incitement under the *Mullen* rationale because the defense is grounded in considerations of public policy rather than incitement. I would hope that all rules of decision for all courts are grounded in public policy. But such rules nevertheless have limits. *Mullen* does in fact require incitement, inducement or manufacturing of crime by law enforcement officials as an essential element of entrapment. This is what entrapment is all about. As pointed out by Mr. Justice Stewart in his dissent in Russell v. United States, 411 U.S. 423, 439-40 (1973), the element of manufacturing or instigation of crime by law enforcement agents is the common ground upon which both those advocating objective theory and those advocating subjective theory can agree.

The second element of the *Mullen* definition, i.e., the effect of the police conduct on the normally law abiding citizen is also a question for the jury on the facts of this case if we apply the criteria stated in *Mullen* for determining whether the court or jury should make such determination. To hold otherwise it would have to appear conclusively from the record that a normally law abiding person would commit a burglary if faced with like circumstances. Few would contend that this would be the case.

If there were any doubt as to the standard of entrapment which was adopted in *Mullen* it is laid to rest by the decision in State v. Leonard, 243 N.W.2d 75, 79-80 (Iowa 1976) where

the court states:

> "Under this [Mullen] test the propensities and predisposition of the particular defendant are irrelevant. Instead, the test uses the 'reasonable person' concept -- a normally law-abiding person. In other words, the police conduct must be sufficiently provocative to induce the normally law-abiding person to commit a crime. Instigations which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit do not consitute entrapment."

The court added in *Leonard:*

> "The facts, set out earlier in this [Leonard] opinion, when assessed in light of the objective test do not establish as a matter of law that the activities of the law enforcement agents in this particular case were sufficiently provocative to induce the normally law-abiding person to commit the crime charged. . . ."
>
> "The trial court was correct in overruling defendant's motion for a directed verdict."

This is the standard by which we should judge Pooler's entrapment defense in the present case. See State v. Jeffs, supra, 246 N.W.2d 917. It is the standard which was applied by the trial court in the present case in overruling Pooler's motion for directed verdict.

I find nothing in State v. Mullen, supra, which grants to the judiciary of this state the power to bar criminal prosecutions under the guise of entrapment simply because the court does not approve of the law enforcement activities used to secure the conviction. The several references made in *Mullen* to curbing law enforcement techniques which are contrary to public policy do not identify the standard by which the defense of entrapment must be judged. Rather, such references only serve to state the underlying policy considerations for the standard which was adopted by the court. Stated somewhat differently it may be said that *Mullen* adopts a rule designed to curb only that police conduct

which constitutes entrapment as therein defined. It does not give the judiciary the type of broad "chancellor's foot" veto power over other law enforcement practices which was disapproved in United States v. Russell, supra, 411 U.S. at 435 -- particularly where, as in the present case, no rights of the defendant have been violated.

State v. Overmann, 220 N.W.2d 914 (Iowa 1974) cited by the majority does not support any substantial deviation from the *Mullen* standard in entrapment cases. This is particularly apparent in light of the more recent decisions in *Leonard* and *Jeff*. Nor do the other authorities cited by the majority support the result reached in this case. This case goes beyond any decided case to which our attention has been directed. Many of the authorities cited to achieve such an extreme result do not involve the law of entrapment. I do not agree with the majority's contention that entrapment and due process are indistinguishable. They are separate and distinguishable concepts. This is not a due process case. Pooler in his motion for directed verdict in the trial court and in his brief on appeal relies solely on the *Mullen* definition of entrapment. But his case does not fit the rule which he propounds. It is submitted however, that Pooler's claims are not sustainable under due process doctrines either. See State v. Apt, 244 N.W.2d 801 (Iowa 1976); Hampton v. United States, ___ U.S. ___, 96 S.Ct. 1646; and United States v. Russell, supra.

The entrapment issue in this case was properly submitted to the jury under the record. The instructions were adequate and the objections taken thereto were without merit. The

jury's finding of guilt was necessarily a finding that the state had carried its burden of disproving entrapment by evidence beyond a reasonable doubt. I find no error incident to this determination and would affirm the trial court.