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STATE OF NORTH DAKOTA

IN THE NORTH DAKOTA SUPREME COURT

JUNE 12, 2011

State of North Dakota, Plaintiff/Appellee, vs. Kari Ann Schmidt, Defendant/Appellant.	)	Cass County Ct. No. 10-CR-2772 Supreme Court No 20110082

APPEAL OF JUDGMENT AND CONVICTION ENTERED MARCH 7, 2011 CASS COUNTY DISTRICT COURT THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING

BRIEF OF APPELLANT

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Table of Contents

[¶ 1] Table of Authorities Page

North Dakota Century Code

Other Authority

[¶ 2] Statement of the Issues

I. Whether there was sufficient evidence to provide an affirmative defense of entrapment.

NDCC § 12.1-05-11
State v. Kummer, 481 N.W.2d 437 (N.D. 1992)
United States v. West, 511 F.2d 1083 (3rd Cir.1975)

II. Whether the crime came dangerously close to be considered a C felony rather than an A misdemeanor?

NDCC § 12.1-06-01
Gray v. State, 403 A.2d 853 (Md. App. 1979)

STATEMENT OF THE CASE

[¶ 3] On or about August 5, 2010, Defendant, Kari Ann Schmidt, was arrested by members of the DEA Task Force. (Trial Transcript, December 13, 2011, herein T. at 14.) On August 6, 2010, Defendant was charged by Information with count 1; Attempt to Possess Methamphetamine, count 2; Possession of Hydrocondone, and count 3; Possession of Alpraazolam. (A. 4, D. ID. #1). On March 7, 20011 an Amended Information was filed. (A. 6, D. ID # 36) Trial was held on December 13, 2010. Judge McCullough found Defendant guilty, T. at 80. Defendant was sentenced to 3 years with 2 years and 180 days suspended. Sentencing Transcript at 5. Judgment and Conviction was entered March 7, 2011. (A. 7 D. ID# 37) Notice of Appeal was filed on Mach 25, 2011. (A. 14, D. ID# 39)

Facts

[¶ 4] Defendant, Kerry Ann Schmidt, lives in Jamestown, North Dakota. T. at 62. She lives with one of her sons and her grandmother, who is 76. T at 62 In 2005 defendant was arrested and charged and pled guilty to possession of methamphetamine. T at 63. Subsequent to the conviction defendant attended treatment and aftercare for 18 months relative to her addiction to methamphetamine. T at 64. Defendant remained drug-free into 2009 when she relapsed. Her relapse centered around a product called Stardust, a legally obtainable drug substance which she purchased in Mandan, North Dakota in 2009.

[¶ 5] In the latter part of 2009, Defendant met Melissa Vetter also known as "Alabama". T at 65. While getting to know each other Alabama was informed of defendant's treatment and relapse. T at 65 – 66. After knowing of defendant's past drug issues and treatment Alabama shared methamphetamine with defendant. T at 65.

[¶ 6] In August, 2010 Alabama, working with the DEA task force, contacted defendant and offered to sell her methamphetamine. T at 66. On August 4, 2010, Alabama contacted defendant's phone four or five times and also sent her numerous text messages inquiring about selling defendant methamphetamine. Defendant contacted Alabama and declined telling Alabama she was not interested in buying drugs. T at 66. Alabama then provided defendant with a very low price for the amount of drugs that she was to sell defendant T at 66. Alabama offered to sell her methamphetamine for $1200 for a half ounce which is about half the price of what a person would pay on the street T at 67; 52 (a gram is worth $200 on the street; there are 28 grams to an ounce; a half ounce is 14 g a savings then of $1600).

[¶ 7] On August 5, 2010 defendant finally agreed to purchase the meth from Alabama and drove to Fargo. T at 67.

(Mr. Nelson)

Q: Ultimately did you agree to meet her?

A: Ultimately?

Q: Yeah.

A: That they or your talking like – –

Q: The next day?

A: The fifth you're talking, yes.

Q: Why?

A: Because I'm a user. She was giving me something that was such a great deal I couldn't turn it down.

Q: A great deal, $1200?

A: $1200 when what I pay off the street is $200 a gram is a great deal to me.

Q: Okay.

A: I was hooked, line, sinker.

Q: Now since that time have you maintain sobriety?

A: Yes, I have.

Q: So she – – you agreed to buy it after she made it so attractive, right?

A: Definitely.

T at 67 – 68.

[¶ 8] The Defendant traveled to Fargo purchased the drugs but was arrested after she arrived. T at 68.

[¶ 9] Officer Al Schmitt with Alabama agreed to meet with defendant in a motel parking lot in West Fargo. T at 9. At approximately 1:39 a.m. Schmidt and Alabama arrived in the parking lot and waited for defendant to arrive. T 11. Once defendant arrived, Alabama exited the vehicle and walked to the defendant's vehicle. T at 13. Alabama collected the $1200 defendant and returned to the undercover police vehicle. T at 13. Alabama handed $1200 to Officer Schmidt and they left the area. T at 13 – 14. Schmidt radioed for the rest of the team to arrest defendant. No drugs exchange hands, nor were any drugs brought to the attempted buy. T at 19. Schmidt

never intended drugs to exchange hands. T at 19. Defendant was arrested and charged with attempted to possess methamphetamine. See A. 1.

[¶ 10] Defendant's attorney raised the entrapment defense. T at 76. He also pointed out that the deal was set up in a manner that could never succeed. T at 77. Additionally, counsel argued that the state did not prove that it was not entrapment. T at 77. The state acknowledged that whether the attempt came dangerously close to the commission of the offense was a sentencing issue. T at 74.

[¶ 11] The court considered two issues. First, whether there was an attempt. T at 79. The court determined that there was an attempt, but acknowledged there may be sentencing issues. T at 79.

[¶ 12] At sentencing, the court did not consider the level of the charge or make a statement to determining whether or not the attempt came dangerously close to the commission of a crime after indicating at the trial that there may be a sentencing issue with the attempt case. See sentencing transcript at 5.

Summary of Argument

[¶ 13] The court erred in failing to find that Defendant was entrapped as a mater of law and also erred in failing to determine that sufficient evidence was produced to raise the entrapment defense. The court also erred in failing to address whether the attempted crime came "dangerously close" to completion.

[¶ 14] Law and Argument

I. Whether sufficient evidence existed to raise an affirmative defense of entrapment?

[¶ 15] In the world today we have teen drug courts that focus on rehabilitating young drug users and re-directing their path to a life without drugs. We

have adult drug courts in which we do the same thing. Addiction counselors tell their patients to get new hobbies, make new friends and stay away from places where they used or bought drugs. Addicts are to stay away from places that temp them. Indeed, one of the most effective ways to get a person to relapse is to provide the addict an opportunity to get drugs. See http://www.drug-rehabs.org/drug-relapse.htm.

[¶ 16] In this case we have an addicted person fighting that very fight until she was induced and persuaded to buy drugs by a woman working with law enforcement that knew of her past addiction problems.

[¶ 17] Section 12.1-05-11 of the North Dakota Century Code addresses the affirmative defense of entrapment.

> 1. It is an affirmative defense that the defendant was entrapped into committing the offense.
> 2. A law enforcement agent perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, the law enforcement agent induces or encourages and, as a direct result, causes another person to engage in conduct constituting such a crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.
> 3. In this section "law enforcement agent" includes personnel of federal and local law enforcement agencies as well as state agencies, and any person cooperating with such an agency.

[¶ 18] The first step in the analysis is that a law enforcement officer induced or persuaded the Defendant. Here, the Defendant was contacted by Alabama, a person working with law enforcement and thus, “law enforcement agent” under the entrapment statute. §12.1-05-11 (3); *State v. Kummer*, 481 N.W.2d 437, 441 (N.D. 1992).

[¶ 19] *State v. Kummer* is the last North Dakota Supreme Court decision to

hold that a person was entrapped as a matter of law. The facts of this case are similar to the facts in *Kummer*. The *Kummer* Court noted that "[e]ntrapment 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.'" NDCC 12.1-05-11(2).

[¶ 20] After the *Kummer* decision the entrapment law was amended to read "the law enforcement agent induces or encourages and, as a direct result, causes another person to engage in conduct constituting such a crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it." Essentially, the amendment took out the words "normally law-abiding persons" and inserted "committed by a person other than one who is ready to commit it." In either case, the statute remains firm on the actions of law enforcement.

[¶ 21] Although the words in the statute have changed, the meaning of the statute has not. In *Kummer*, the court noted the then entrapment statute was based upon the objective test, meaning the focus of the issue was "to determine whether police conduct is sufficiently unsavory to justify an entrapment defense." *Kummer* at 441. (citing *State v. Pfister,* 264 N.W.2d 694, 697 (N.D.1978) (quoting from The Working Papers of the National Commission on Reform of Federal Criminal Laws (1970), p. 320).

> Under the objective test, the focus is on the conduct of law enforcement officials and the effect it would have on the normally law-abiding citizen. *State v. Flamm,* 338 N.W.2d 826, 828 (N.D.1983); *State v. Mees,* 272 N.W.2d 284, 289 (N.D.1978).

> Predisposition of the accused to commit the crime is irrelevant. *State v. Hoffman,* 291 N.W.2d 430, 432 (N.D.1980). Thus, in order to fashion an entrapment defense under NDCC 12.1-05-11, the accused must establish two elements: that law enforcement agents induced the commission of the crime and that the method of inducement was likely to cause normally law-abiding persons to commit the offense. *State v. Weisz,* 356 N.W.2d 462, 464 (N.D.1984). In this case, the method of inducement was unlawful.

[¶ 22] The first part of the amended entrapment statute again focuses on the action of law enforcement and is essentially the same as the previous entrapment statute. The second part of the test is also similar in that the focus is on the person, or the entrapped, to determine whether the person is ready to commit the crime.

[¶ 23] Here, Alabama, a seasoned paid informant, made contact with law enforcement. Law enforcement then targeted Defendant knowing that she was an addicted person trying to stay clean. Based upon Alabama's knowledge of Defendant's past drug addiction, law enforcement sought out Defendant in an effort to get her to break the law by calling her cell phone and sending numerous text messages trying to get Defendant to purchase methamphetamine from Alabama. Defendant told Alabama by text message she was not interested in purchasing methamphetamine. Upon Defendant's declining to purchase the methamphetamine, law enforcement enticed her to purchase by making the price to good to pass up. Law enforcement was playing directly to Defendant's addiction and vulnerability. It was at that time the second element of whether Defendant was ready to commit the crime came into play.

[¶ 24] In the present case, Defendant was not ready to commit the crime. She had been through treatment and after care and she informed Alabama that she did not want to purchase the methamphetamine. Alabama preyed upon Defendant's addiction and vulnerability. A Florida appellate court addressed law enforcement's action

targeting vulnerable people to pursue a prosecution. The *Dial* court reviewed the United States Supreme Court's decision of *Jacobson v. US*, 503 U.S. 540, 553 (1992):

> Although the court's analysis in Jacobson is based on a subjective entrapment test, the decision recognizes a fundamental unfairness when law enforcement exploits an innocent person's weakness or takes advantage of a vulnerable person to pursue a prosecution. This is the same type of conduct Florida courts have found offends canons of decency and fairness embodied in the due process provision in article I, section 9 of the Florida Constitution. See *Munoz*, 629 So. 2d at 95-98 (reviewing due process entrapment cases).

Dial v. Florida, 799 So.2d 407, 410, (Fla.App. 2001). Extraordinary temptation is also a factor to consider under entrapment. *See Sheriff, Washoe County v. Hawkins*, 752 P.2nd 769, 772 (Nev. 1988) (police "created an extraordinary temptation which resulted in the entrapment of young men who were not at the time discernibly bent on committing a crime.") Despite all of the actions of law enforcement, Defendant declined numerous times to purchase the methamphetamine. Defendant held fast and tried to remain strong despite her addiction. Defendant was not a person likely to commit that crime. It was only when law enforcement offered the methamphetamine at a ridiculously low price did law enforcement "create a substantial risk that such crime will be committed by a person other than one who is ready to commit it."

[¶ 25] The enticement by law enforcement of a drug addict to purchase a drug she has been working to avoid, or to commit a crime she wants no part of, goes beyond all realm of consciousness. *See State v. Hammeren* 2003 ND 6 ¶ 8, 655 N.W.2d 707 (2003) (The focus in *Kummer* was on the outrageous police conduct used to induce the accused to commit a crime.)

[¶ 26] The "reverse sting" analysis of *Kummer* is relevant to this case in almost every aspect. In *Kummer*, law enforcement initiated contact with the Kummer to sell

Kummer cocaine. 481 N.W.2d at 438. A date and time was agreed upon. *Id*. Kummer traveled to Fargo to meet with the informant. *Id*. Kummer gave the money to the informant. *Id.* Kummer was arrested. All of these things happened to the Defendant in this case.

[¶ 27] The facts differ from the present case in the following respects: Kummer did not decline the offer to purchase drugs like Defendant here did; the officers in Kummer actually had drugs to complete the sale, whereas in the present case there was no methamphetamine to sell. The officers in Kummer did not have to "sweeten the pot" as they did in the present case. There was no evidence that Kummer was an addicted person as there is here. In Kummer the officers used unlawful means to obtain drugs to sell to Kummer where in the present case there were no drugs, but the promise of them.

[¶ 28] The Kummer court acknowledged "[t]his is the first time that this court has faced the assertion of an entrapment defense where law enforcement officers furnished the controlled substance that brought about the prosecution and conviction of the accused for possession with intent to deliver. Courts from other jurisdictions have taken a dim view of this police conduct." *Kummer*, 481 N.W.2d at 441.

[¶ 29] The present case does not deal with an actual transaction since the officer did not complete the sale, however, the Defendant was charged with attempted possession of a controlled substance-a crime nonetheless. The essence of entrapment is that the law officers manufacture a crime where there would have been none without their inducement or persuasion of the defendant.

> Frequently, it is permissible law enforcement practice for an undercover agent to obtain evidence of unlawful traffic in narcotics by purchasing heroin from a suspected drug peddler. But when the government's own agent has set the accused up in illicit activity by supplying him with

> narcotics and then introducing him to another government agent as a prospective buyer, the role of government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing.

Kummer at 442 (*quoting United States v. West,* 511 F.2d 1083, 1085 (3rd Cir.1975) (emphasis added).

[¶ 30] Perhaps most important in law enforcement's role is to detect and deter crime.

> The drafters' official commentary on the entrapment provision of the proposed Federal Criminal Code, from which our entrapment statute was drawn, states:
> The defense of entrapment was devised to counter those activities of the police which are generally regarded as improper means of law enforcement. It has been the sense of the commentators, both scholarly and judicial, that the police are meant to deter or discover, not to foster, criminality. To allow such conduct to pass unchecked would be to give silent comfort to corrupting influences within the police department and within society at large.
> I Working Papers of the National Commission on Reform of Federal Criminal Laws, Comment on Entrapment: Section 702, at p. 314 (1970).
>
> We agree with the observation of the court in *Talbot*, 364 A.2d at 13:
> Government properly may use artifice to trap unwary criminals, particularly in its efforts to stamp out drug traffic. However, the methods employed by the State must measure up to commonly accepted standards of decency of conduct to which government must adhere. The manufacture or creation of a crime by law enforcement authorities cannot be tolerated.

Kummer, at 444. (emphasis added).

[¶ 31] To determine whether a person has been entrapped, it "is almost invariably a question of fact, and a court can only 'find entrapment as a matter of law where the facts and their inferences supporting a finding of entrapment are undisputed.' " *State v. Baumgartner*, 2001 ND 202 ¶16, 637 N.W.2d 14 (N.D. 2001)

(citing *State v. Murchison,* 541 N.W.2d 435, 441 (N.D.1995) (quoting *State v. Nehring,* 509 N.W.2d 42, 45 (N.D.1993)).

[¶ 32] At the trial in this case, Defendant's counsel provided the court with enough facts where the court should have ruled that Defendant was entrapped as a matter of law. At the very least, counsel established an entrapment defense which would have shifted the burden of proof to the state that entrapment did not occur. *See State v. Boushee* 284 N.W.2d 423, (N.D. 1979). The court wholly rejected the defense's assertion of entrapment.

[¶ 33] It is unseemly, actually nauseating, that a criminal informant, likely to get herself out of a jam or to make a few dollars, would pray on those in society trying to get their life back on track after a bout with the cursed drug methamphetamine. This is unsavory conduct at the direction of law enforcement and should not be tolerated.

[¶ 34] II. Did the attempted crime come dangerously close to completion when it was improbable that law enforcement would provide the controlled substance?

[¶ 35] The court, in its closing remarks at trial, indicated that Defendant was guilty of attempted purchase of controlled substances but said there may be an issue of whether the attempt came dangerously close to the commission of a crime. This was a sentencing issue. The Judge did not address this issue at sentencing. For the purposes of the following analysis it is necessary to look at both the attempt statute and the sentencing issue.

[¶ 36] Section 12.1-06-01, N.D.C.C., governs criminal attempt and provides in part:

> A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A "substantial step" is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense, if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

[¶ 37] The lower court found Defendant guilty of attempt to purchase a controlled substance. In so finding, the court could have sentenced her to a misdemeanor sentence if the court found that she did not come "dangerously close" to completion of the crime.

[¶ 38] Section 12.1–06–01 (3) of the North Dakota Century Code provides:

> Criminal attempt is an offense of the same class as it offense attempted, except that (a) an attempt to commit a class AA felony is a class a felony and an attempt to commit a class a felony is a class B felony: and (b) whether it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a class B felony shall be a class C felony and attempt to commit a class C felony shall be a class A misdemeanor.

[¶ 39] The key question is what constitutes "dangerously close"? There are three North Dakota cases that reference, but do not define, "dangerously close." *State v. Miller*, 466 N.W.2d 128 (N.D. 1991); *State v. Huber*, 361 N.W.2d 236 (N.D. 1985); *State v. York*, 326 N.W.2d 208 (N.D. 1982). Thus, it is necessary to look to other jurisdictions to determine, if possible, what "dangerously close" means.

[¶ 40] Pursuant to §12.1-06-01 of the Century Code we know that impossibility is not a defense. Under §12.1-06-01 the focus is again on the actor and that the actor take a substantial step toward realization of the goal. *Id*. Also from the statute we must infer that a substantial step does not equate with "dangerously close" to the commission of the criminal act. To have the legislature provide a lesser degree of criminality if the attempt does not

come “dangerously close” to the completion of the criminal act, there must be something other than the attempt.

> "A 'substantial step' involves conduct which is 'strongly corroborative of the actor's criminal purpose.' The Ohio Supreme Court, in formulating the standard for identifying conduct which constitutes a substantial step, stated that 'intent to commit a crime does not of itself constitute an attempt, nor does mere preparation.' However, the court went on to explain that 'those acts which are so dangerously close to resulting in a crime that intervention and arrest by the police are justified,' are punishable as a substantial step in a criminal attempt. . . . "

Ohio v. Hardley, 2007 Ohio 3520 ¶ 41 (Ohio Ct. App. 8th Dist. 2007) (Citation omitted) (emphasis added). In another case, Justice Holmes speaks on attempt and conspiracy.

> An attempt, in the strictest sense, is an act expected to bring about a substantive wrong by the forces of nature. With it is classed the kindred offence where the act and the natural conditions present or supposed to be present are not enough to do the harm without a further act, but where it is so near to the result that if coupled with an intent to produce that result, the danger is very great.

Hyde v. United States, 225 U.S. 347, 387, 32 S.Ct. 793, 56 L.Ed. 1114 (1912)(Holmes, J., dissenting.) Put in another context “dangerously close” may mean that law enforcement officials may intervene prior to the completion of the offense. Of course this is the definition of attempt.

> More precisely, attempt law makes possible preventive action by the police before the defendant has come dangerously close to committing the intended crime; as one court put it, the police must be allowed "a reasonable margin of safety after the intent to commit the crime was sufficiently apparent to them.”

Dabney v. State of Maryland, 858 A.2d 1084, 1099 (Md.App. 2004)(Citation omitted).

[¶ 41] It is obvious that the above cases are contemplating police intervention when the police observe or monitor a potential crime-not when are not involved in the

criminal act-such as a sting operation. It does not follow that police could instigate a crime and then arrest a person for attempt prior to the commission of the crime. If so, following the logic of the above cases, once Defendant drove out of her driveway, and at anytime prior to arriving in Fargo, Defendant would have been guilty of attempt by taking a substantial step to procure the contraband. As she was guilty of attempt, she thus would be "dangerously close" to the commission of the crime if she was arrested prior to abandoning the criminal act. "An attempt crime is one 'that falls short of completion through means other than the defendant's voluntary relenting.'" *People v. Dogoda,* 9 Ill. 2d 198, 203, 137 N.E.2d 386, 389 (1956). *Hamiel v. State,* 92 Wis. 2d 656, 666, 285 N.W.2d 639, 646 (1979) (holding that even a "slight act" can be a substantial step if it is taken in furtherance of an attempted crime and renders a voluntary termination of the accused's course of action improbable).

[¶ 42] At least one jury has had difficultly with the concept of "dangerously close". *See People v. Williamson*, 699 N.Y.S. 2d 749 (SC, APP.Div. 3rd Dept. 1999)(Court noting also that it intended to clarify what it perceived to be the jury's confusion with respect to the concept of "dangerously close" in relation to an attempt to commit a crime.) The North Dakota legislature likely did not contemplate an attempt charge based upon a reverse sting operation where law enforcement initiate or are a party to the criminal act. As a result, the "dangerously close" provision of §12.1-06-01 (3) to reduce the criminal severity level does not seem to fit under these facts.

[¶ 43] III Remedy

[¶ 44] Section 1-01-06 of the Century Code provides: "Code excludes common law. In this state there is no common law in any case in which the law is declared by

code." Although section 12.1-06-01 (3) declares the existence of the "dangerously close" provision regarding attempt, the analysis seems to indicate a lack of proper application to the facts here. If the reduction in criminal severity it does not fit, despite being declared, it would seem prudent to look to common law.

[¶ 45] There are no North Dakota cases addressing common law and criminal severity regarding attempt. In fact there are very few on point in the United States. However, at least one court has addressed this issue. In *Gray v. State,* 403 A.2d 853, 855 (Md. App. 1979) the Court discussed the early development of the common law attempt.

> The notion that an attempt to commit a crime--any crime, felony or misdemeanor, statutory or common law, preexisting or of later origin--is itself a crime came relatively late into Anglo-American jurisprudence. It had its origins in the Court of Star Chamber, during Tudor and early Stuart times.[1] Its crystallization into its present form, however, is generally traced to the case of Rex v. Scofield, Cald. 397, in 1784. The court held in Rex v. Scofield, "The intent may make an act, innocent in itself, criminal; nor is the completion of an act, criminal in itself, necessary to constitute criminality." The doctrine was locked into its modern mold by 1801 with the case of Rex v. Higgins, 2 East 5. Relying on Scofield, the court in Higgins confirmed a conviction, saying, "All offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable." In the wake of Scofield and Higgins, it was clear that an attempt to commit any felony or misdemeanor, of common law origin or created by statute, was itself a misdemeanor.

(emphasis added). Thus, if the court finds that the analysis on attempt and "dangerously close" does not fit under the attempt statute under these circumstances, it must look to the common law. Doing so leads one to the conclusion that the attempt to purchase controlled substances from, and initiated by, law enforcement should be a misdemeanor.

[¶ 46] Alternatively, the lower court should have addressed the issue of what severity level to sentence Defendant to at the sentencing. The court erred in failing to do so. In this case, the DEA task force never intended to provide the methamphetamine to

Defendant. Thus, while not an impossibility-because they could have supplied the drug-it was an improbability. Thus, although Defendant had in her mind the intent or mens rea to commit the crime and had acted on her intent, because of the improbability of procuring the drugs from the Task Force she never came dangerously close to committing the crime. Therefore, the court should have sentenced her to a misdemeanor sentence.

Conclusion

[¶ 47] Wherefore, Defendant respectfully requests this Court reverse and declare as a matter of law that Defendant was entrapped by the DEA Task Force. Alternatively, should this Court conclude that Defendant was not entrapped the Court should reverse the felony sentence of the Defendant and remand for sentencing as a misdemeanor.

Dated this 8th day of June, 2011.

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