[Cite as *State v. Ray*, 2008-Ohio-2075.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21986
v.	:	T.C. NO. 06 CRB 13107
JESSICA J. RAY	:	(Criminal Appeal from Dayton Municipal Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 29th day of February, 2008.

. . . . . .

RAY BILOTT, Atty. Reg. No. 002220, Assistant City Prosecutor, 335 West Third Street, Room 372, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

MATTHEW RYAN ARNTZ, Atty. Reg. No. 0024084, 17 South St. Clair Street, P. O. Box 4235, Dayton, Ohio 45401
Attorney for Defendant-Appellant

. . . . . .

WOLFF, P.J.

{¶ 1} After a trial to the bench, Jessica Ray was found guilty of soliciting and loitering to engage in solicitation. Both offenses are third degree misdemeanors proscribed by R.C.

2907.24(A) and R.C. 2907.241(A)(3), respectively. The trial court imposed a fine, costs, certain community control sanctions, and supervised probation of one year.

{¶ 2} Ray advances two assignments of error on appeal:

{¶ 3} "1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE IN A MOTION FOR ACQUITTAL AND IN CLOSING ARGUMENT THAT THE STATE'S EVIDENCE CONSTITUTED ENTRAPMENT AS A MATTER OF LAW.

{¶ 4} "2. APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶ 5} The State's evidence consisted of the testimony of two Dayton police officers, Jon Zimmerman and Thomas Schloss. The two officers were working a vice detail on East Third Street on August 11, 2006 around 11:00 p.m. They were in plain clothes and driving unmarked cars. Their assignment was "to pick up suspected prostitutes."

{¶ 6} Officer Zimmerman, who was in the same car as Officer St. Claire, testified as to Ray:

{¶ 7} "We passed eastbound on Third Street, and as we were passing by, she kinda looked over her shoulder and kinda waived a little bit. So we went down, I'm not sure what street we turned around on, but we ended up coming back, and she kinda watched us again real slow as we drove past.

{¶ 8} "At that point, since there was two of us in a vehicle, a lot of times prostitutes won't get into a car where there's more than one occupant in the vehicle. We pulled over to the side, kept eye contact with her as she walked up past the U-haul station.

{¶ 9} "We informed Officer Schloss of what we had observed, the loitering, and at that point we watched him pull up to her, make contact with her, observed her get into the vehicle with him.

{¶ 10} "Q. Did you see her make any motions toward Officer Schloss?

{¶ 11} "A. Yes, she waived and then pointed. At that point he made a U-turn in the middle of the street and pulled right up to her."

{¶ 12} Officer Schloss testified as to what then occurred:

{¶ 13} "Q. As a result of your contact with other police officers, what did you see when you got to that area?

{¶ 14} "A. I then drove - - I was immediately behind Officer Zimmerman and St. Clair, and I drove past Miss Ray. As I drove past Miss Ray, she made continuous eye contact with me also.

{¶ 15} "I then circled around and parked my vehicle directly across from her in the north parking lot of 1700 East Third Street.

{¶ 16} "Q. And then what happened?

{¶ 17} "A. As soon as I put the vehicle in park, Miss Ray immediately made eye contact with me again and motioned for me to pull over beside her.

{¶ 18} "Q. By motion, what do you mean?

{¶ 19} "A. She waived me over like this.

{¶ 20} "Q. And what happened? Did you pull over?

{¶ 21} "A. Yes, I pulled over to Miss Ray. I asked her what was going on today, and at that time she said that she would give me $30 for a ride home.

{¶ 22} "I said, no, I was not - - that's not what I wanted. I was out looking for a good time. And she said that she would suck my dick for a ride home. I then repeated back to her, I said in trade for a ride home, you will suck my dick. And she said, yes.

{¶ 23} "Q. And then what happened?

{¶ 24} "A. I had Miss Ray go ahead and get into the vehicle and I drove off. After I drove off I made the predetermined take-down signal for a marked cruiser, who was Officer Mark Kinstle to make a traffic stop on us.

{¶ 25} "Q. Was that the end of your contact with her?

{¶ 26} "A. Yes.

{¶ 27} "Q. She said nothing else other than that?

{¶ 28} "A. No."

{¶ 29} On cross, Officer Zimmerman conceded that Ray walked with a pronounced limp and walks at a slower than average pace. Officer Schloss, on cross, stated it was odd that a suspected prostitute would offer money for a ride home and that was "what she was honestly trying to do, get a ride home." He also stated that he had not previously arrested Ray for prostitution, that she was not a troublemaker, that she smelled of alcohol, and that she was cooperative when the other officers stopped Officer Schloss's car.

{¶ 30} Ray testified and said that she needed to get home, which was about three blocks away, because she had urinated upon herself. She said because of her physical impairment, walking home would take 30 - 45 minutes. She said she mistook Officer Schloss for a friend of hers when she approached his car. She said she offered Officer Schloss four dollars for a ride home and got into his car. When he drove past her house, she became scared and only then

offered to perform fellatio upon him to get him to take her home.

II.

{¶ 31} The supreme court defined entrapment in *State v. Doran* (1983), 5 Ohio St.3d 187:

{¶ 32} "The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute."

{¶ 33} The court added at p. 192:

{¶ 34} "However, entrapment is not established when government officials 'merely afford opportunities or facilities for the commission of the offense' and it is shown that the accused was predisposed to commit the offense."

{¶ 35} Ray contends that her trial counsel was ineffective for not arguing that the State's evidence established the defense of entrapment as a matter of law. We disagree.

{¶ 36} The trial court credited the testimony of the officers over that of Ray where it was in conflict. Although Ray may not have acted like a typical prostitute, she did readily offer to perform fellatio on Officer Schloss after he told her he was not interested in thirty dollars to drive her home. Certainly the scenario depicted by the police officers on direct - which did not change on cross - made out the elements of solicitation and loitering to engage in solicitation and did not meet the definition of entrapment announced in *Doran*. Thus, there was no ineffectiveness in failing to argue entrapment as a matter of law in moving for acquittal after the State rested. Nor did Ray's testimony introduce the entrapment defense. She testified she offered Officer Schloss four dollars for a ride home - denying that she initially offered him sex

for a ride home after he turned down her offer of thirty dollars - and only later, out of fear, offered to perform fellatio if Officer Schloss would only take her home. Again, there was no basis upon which to argue entrapment as a matter of law and no ineffectiveness on counsel's part in not so arguing. Neither prong of the two prong test for ineffective assistance of counsel is demonstrated by this record. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 37} Nor are the guilty findings against the manifest weight of the evidence. Although Ray may well have been trying to get home, she offered to perform fellatio on Officer Schloss in return for a ride home. This certainly constitutes sexual activity for hire - R.C. 2907.24(A) - regardless of the distress Ray may have felt, being physically impaired and having just urinated on herself. The requested ride home and proposed act of fellatio were each the *quid pro quo* for the other. There being evidence establishing the essential elements of the charged offenses, which the trial court credited, and no evidence of entrapment, we cannot conclude that the trial court lost its way or that manifest injustice resulted.

{¶ 38} (Contrary to what Judge Grady states in the first sentence of his concurring opinion, I am not "suggesting" that the entrapment defense was precluded by the State's proving the elements of soliciting and loitering to engage in soliciting. As I view the evidence credited by the trial court, Ray's ready expression of willingness to perform fellatio on Officer Schloss after he rejected her offer of thirty dollars for a ride home dispelled any notion that Ray was not predisposed to engage in sexual activity for hire).

{¶ 39} The assignments of error are overrruled.

III.

{¶ 40} The judgment will be affirmed. We remind the City Prosecutor's Office that citations in its appellate briefs should conform to the directives contained in *Revisions to the Manual of Citations* promulgated May 1, 2002, by the Supreme Court of Ohio.

. . . . . .

GRADY, J., concurring:

{¶ 41} The fact that the State's evidence made out the elements of soliciting and loitering to solicit did not preclude Defendant from pleading entrapment, as Judge Wolff suggests. Entrapment is an affirmative defense which bars criminal liability that otherwise exists. *State v. Doran* (1983), 5 Ohio St.3d 187. Furthermore, on this record an entrapment defense was at least viable, because there is evidence that officers of the government induced Defendant's commission of the solicitation offense, conduct which likewise supports the loitering charge. Even so, I cannot find that Defendant's attorney was constitutionally ineffective for failing to plead entrapment.

{¶ 42} Judge Donovan points out that the State failed to offer evidence to demonstrate that Defendant was predisposed to commit these offenses. However, entrapment is an affirmative defense, and as such the burden of persuasion is on the accused. *Doran*. Therefore, the accused must instead demonstrate a lack of predisposition. *Id*.

{¶ 43} Not knowing what evidence Defendant could have offered to show a lack of her predisposition to commit these offenses, it is not possible to find that Defendant was prejudiced by her counsel's failure to plead entrapment. Absent a finding of prejudice sufficient to affect the outcome of the trial, a finding of ineffective assistance of counsel is not possible. *Strickland*

v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 44} Defendant's proper avenue of relief on her claim of ineffective assistance of counsel was a petition for post-conviction relief, R.C. 2953.21, which permits consideration of facts outside the record, and would permit Defendant to offer evidence to show that a lack of predisposition could have been found. However, the time limits for a petition appear to have passed, and it seems doubtful that Defendant could satisfy the requirements of R.C. 2953.23 which permits the court to extend the time.

. . . . . .

DONOVAN, J., dissenting:

{¶ 45} I disagree. Not only did the appellant herself adduce evidence supporting her lack of predisposition to commit these offenses, the testimony of Officer Schloss lends credibility to an entrapment defense. It was not the appellant who mentioned "looking for a good time," it was Officer Schloss. It is undisputed that appellant had no prior prostitution arrests, plus she walked with a pronounced limp which adds credibility to the suggestion she just needed a ride home. As we noted in *State v. Deliso* (Sept. 3, 1992), 2nd Dist. No. 91-CA-46, "it is difficult to find predisposition beyond a reasonable doubt from acts of the accused that occurred only after the inducements of the government or its agents commenced." I'd note also at least two of the *Doran* factors are absent from this case. First, prior involvement by appellant in criminal activity of the nature charged. Second, expert knowledge possessed by appellant in the area of criminal activity charged.

{¶ 46} A review of the entire record reveals defense counsel was most assuredly deficient. He made no opening statement, entered just one objection, and he failed to argue a

very viable entrapment defense. In fact, his own client appreciated the availability of such a defense when she asserted on direct, "because he's not taking my four dollars and he went past my house. It's entrapment." Tr. 24, line 7-8.

{¶ 47} It is important to note that completely absent from this record is any testimony regarding the area in which this activity took place. In these types of cases, the city routinely elicits testimony regarding the area's reputation for prostitution, but this was not done. Nor was it established where the arrest actually occurred, i.e., did the officer, in fact, drive appellant past her home?

{¶ 48} I would find appellant was prejudiced by the clearly deficient performance of counsel. I'd reverse, vacate the judgment of conviction, and remand for a new trial.

. . . . . .

Copies mailed to:

Ray Bilott
Matthew Ryan Arntz
Hon. Dennis J. Greaney