

STATE V. PEREZ

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STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
ELADIO PEREZ,
Defendant-Appellee.

No. 31,754

COURT OF APPEALS OF NEW MEXICO

December 12, 2013

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Reed S.
Sheppard, District Judge

COUNSEL

Gary K. King, Attorney General, James W. Grayson, Assistant Attorney General, Santa Fe, NM, for Appellant

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JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: CYNTHIA A. FRY, Judge, M. MONICA ZAMORA, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Defendant-Appellee Eladio Perez was arrested and charged with trafficking after he sold cocaine to Jeanette Gutierrez (Gutierrez). Gutierrez arranged the drug

transaction with Defendant in order to work off, i.e. prevent, her own arrest for criminal solicitation based on an incident earlier in the same day involving Gutierrez and an undercover Albuquerque police officer. The district court dismissed Defendant's trafficking charge on grounds of normative objective entrapment, finding that the officer lacked probable cause to arrest Gutierrez for criminal solicitation and that therefore, the officer's subsequent use of Gutierrez to arrange a drug transaction that resulted in Defendant's arrest constituted unconscionable police conduct and violated Defendant's right to due process. The State appeals from the dismissal, arguing that the district court erred in dismissing Defendant's indictment on the basis of entrapment. We agree with the State, and therefore reverse the dismissal of Defendant's trafficking charge and remand for further proceedings.

BACKGROUND

{2} Defendant was indicted on one count of trafficking of a controlled substance (cocaine), contrary to NMSA 1978, § 30-31-20 (2006). Defendant subsequently filed a motion to dismiss the indictment against him on the basis of entrapment. In his motion, Defendant alleged that on July 29, 2007, Officer Walter Drutok of the Albuquerque Police Department participated in a tactical plan alongside other officers to generate arrests for prostitution and drugs in an Albuquerque neighborhood. While driving an unmarked police vehicle, Officer Drutok made contact with Gutierrez, an individual he understood to be a known prostitute, who accepted his offer of a ride. Following a conversation with Gutierrez in his vehicle during which Officer Drutok propositioned Gutierrez to engage in prostitution, Officer Drutok called in an arrest team and informed Gutierrez that she would be arrested for criminal solicitation in violation of an Albuquerque city ordinance. After Gutierrez stated that she did not want to go to jail, Officer Drutok told her that she could avoid being arrested for criminal solicitation if she in turn assisted the officer in securing a felony arrest of another individual. Gutierrez agreed to do so, and using a phone provided by Officer Drutok, she proceeded to make a series of phone calls to try to arrange a drug transaction, ultimately speaking with Defendant. Officer Drutok then gave Gutierrez marked money and drove her to another location where she met with Defendant and purchased cocaine from Defendant. Defendant was subsequently arrested for trafficking based on the sale to Gutierrez.

{3} In his motion, Defendant argued that under *State v. Vallejos*, 1997-NMSC-040, 123 N.M. 739, 945 P.2d 957, the leading case in New Mexico on entrapment, he was entitled to dismissal of the trafficking charge because the police employed unconscionable methods and advanced illegitimate purposes in the events leading up to his arrest. Defendant specifically raised an objective entrapment defense, arguing that Officer Drutok essentially coerced Gutierrez into instigating the drug transaction with Defendant even though there was allegedly no lawful basis for Gutierrez's arrest for criminal solicitation. Defendant also argued that the tactical plan that Officer Drutok participated in was solely for the purpose of boosting arrest statistics and lacked any legitimate motive to prevent future crime and protect the public. In response, the State argued that Defendant lacked standing to challenge the legality of the exchange between Officer Drutok and Gutierrez. The State further contended that it was not

improper for Gutierrez to “work off” her criminal charge and that Officer Drutok did not employ unconscionable methods in relation to Defendant.

{4} The district court held a hearing on Defendant’s motion to dismiss. At the outset of the hearing, counsel informed the district court that Officer Drutok and the other field officers involved in the tactical plan were not available to testify at the hearing. Neither Defendant nor the State presented any other witness testimony at the hearing. The primary evidence introduced at the hearing was the contents of Officer Drutok’s belt tape detailing his exchange with Gutierrez, although the belt tape recording itself was never admitted at the hearing or made part of the record on appeal. Defense counsel described Officer Drutok’s exchange with Gutierrez to the court, although counsel repeatedly stated that the belt tape was of very poor quality and that it was nearly impossible to hear Gutierrez’s end of the conversation on the tape. The State stipulated to defense counsel’s summary of the exchange between Officer Drutok and Gutierrez. The parties also stipulated that the practice of allowing individuals to “work off” criminal charges was not uncommon. We will discuss statements from the belt tape recording as necessary in our analysis.

{5} The district court granted Defendant’s motion to dismiss the trafficking charge on the basis of entrapment, determining that the tactics employed by Officer Drutok “shock[ed] the conscience of th[e] court, offend[ed] traditional notions of fundamental fairness, and violated [Defendant’s] constitutional right to due process” under the standard set forth in *Vallejos*. In addition, the court found that Officer Drutok’s actions amounted to unconscionable police conduct, and that Officer Drutok knew or should have known that he did not have probable cause to arrest Gutierrez for criminal solicitation “at the time he coerced . . . Gutierrez to obtain” a felony arrest in order to prevent her own arrest. This appeal followed.

DISCUSSION

{6} The sole issue on appeal is whether the district court erroneously dismissed Defendant’s trafficking charge on the basis of entrapment. The State argues that dismissal was improperly granted because there was no unconscionable police conduct directed at Defendant. With respect to the district court’s finding that Officer Drutok lacked probable cause to arrest Gutierrez for criminal solicitation, the State argues that this finding is not supported by substantial evidence and further that Defendant lacked standing to challenge the legality of the interaction between Officer Drutok and Gutierrez.

A. New Mexico Law on Entrapment

{7} New Mexico courts recognize both the subjective and objective forms of entrapment. See *Vallejos*, 1997-NMSC-040, ¶¶ 5-6. With respect to objective entrapment, our Supreme Court articulated in *Vallejos* that there are two types of objective entrapment defenses available to defendants: one factual and the other

normative. *Id.* ¶ 10. In this case, Defendant raised a normative objective entrapment defense in the proceedings before the district court.

{8} In *Vallejos*, the Supreme Court stated that normative objective entrapment occurs when police engage in conduct that exceeds the standards of proper investigation and violates substantive due process, irrespective of whether such conduct might ensnare an ordinary person not ready and willing to commit a crime to commit one. *Id.* ¶¶ 15-16. In cases where a defendant raises a normative objective entrapment defense, the Court indicated in *Vallejos* that the district court is to “carefully scrutinize[] both the methods and purposes of police conduct to determine whether [the] police tactics [employed] offend our notions of fundamental fairness, or are so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *Id.* ¶ 16 (internal quotation marks and citations omitted). “In the normative inquiry, . . . the question [of] whether a given undercover operation is poor police strategy or a misguided waste of taxpayer money is beyond the scope of the inquiry.” *Id.* ¶ 21 (internal quotation marks and citation omitted). Rather, “[t]he evaluation of police conduct in the normative inquiry is strictly limited to determining whether due process was violated. The normative inquiry should not be used as a guise to legislate from the bench or to micro-manage police investigative procedures.” *Id.* In addition, an objective entrapment defense “should be used sparingly and reserved for only the most egregious circumstances in recognition of the need to empower police with adequate tools to ferret out crime that is difficult to detect.” *Id.* ¶ 22 (internal quotation marks and citation omitted); see also *id.* ¶ 20 (stating that the dismissal of criminal charges based on normative objective entrapment is “an extreme remedy for extreme governmental behavior”).

{9} The Court in *Vallejos* recognized two broad categories of police impropriety under the normative inquiry: unconscionable methods and illegitimate purposes. *Id.* ¶ 17; see also *id.* ¶¶ 18-19 (providing examples of unconscionable methods and illegitimate purposes). “When the [district] court finds that police have used unconscionable methods or have advanced illegitimate purposes, criminal charges should be dismissed.” *Id.* ¶ 20. In this case, Defendant argued below that Officer Drutok both employed unconscionable methods and advanced illegitimate purposes. However, as Defendant acknowledges on appeal, the district court found only that Officer Drutok engaged in unconscionable conduct.

{10} Whether the police conduct at issue in this case constituted normative objective entrapment is a matter of law that we review de novo. See *Id.* ¶ 39; see also *In re Alberto L.*, 2002-NMCA-107, ¶ 15, 133 N.M. 1, 57 P.3d 555. We turn now to consider the propriety of the district court’s ruling.

B. The Parties’ Arguments on Appeal

{11} In examining whether Officer Drutok used unconscionable methods in the course of the events that led to Defendant’s arrest, we begin by looking at the officer’s conduct that was directed at Defendant. See *Vallejos*, 1997-NMSC-040, ¶ 40 (examining the

methods used by police during an undercover operation, “at least insofar as they directly relate to [the defendant],” for indicia of unconscionability). In order to guide our inquiry, we first note that with respect to the use of unconscionable methods in police investigations, the Supreme Court provided examples in *Vallejos* of indicia of unconscionability, which include: coaxing a defendant into a circular transaction; giving defendant free heroin until he is addicted and then playing on his addiction to persuade him to purchase heroin and cocaine for an undercover police agent; an extreme plea of desperate illness; an appeal based primarily on sympathy or friendship; an offer of inordinate gain or a promise of excessive profit; persistent solicitation to overcome a defendant’s demonstrated hesitancy; the use of brutality or physical or psychological coercion to induce the commission of a crime; an offer to sell drugs to one in a drug rehabilitation program; employment of contingent fee agreements with informants; unjustified intrusion into citizens’ privacy and autonomy; the inducement of others to engage in violence or the threat of violence against innocent parties; the use of provocateurs sent into political organizations to suggest the commission of crimes; excessive involvement by the police in creating the crime; the manufacture of a crime from whole cloth; and the engineering and direction of the criminal enterprise from start to finish. *Id.* ¶ 18.

{12} After careful review of the police methods employed in this case, we conclude that Officer Drutok’s conduct, insofar as it directly related to Defendant, did not include the use of any of the foregoing unconscionable methods. Initially, there is no indication in the record that Officer Drutok or any of the other undercover officers involved in the tactical plan specifically selected Defendant as the target of the drug transaction that led to Defendant’s arrest. Rather, it was Gutierrez who reached out to Defendant. As for the drug transaction itself, the extent of Officer Drutok’s involvement was providing the phone that Gutierrez used to call Defendant, giving Gutierrez marked money for the purchase, and then driving her to the location where the drug transaction occurred. There was no evidence presented below that Officer Drutok exited his vehicle for the transaction, directly interacted with Defendant, or otherwise participated at any point in the exchange between Gutierrez and Defendant. And although Officer Drutok set the events into motion that led to Defendant’s arrest by offering Gutierrez a chance to work off her criminal charges, the officer’s conduct merely created an opportunity for Defendant to commit a crime. *See State v. Dartez*, 1998-NMCA-009, ¶ 39, 124 N.M. 455, 952 P.2d 450 (stating that there is no factual basis for a claim of entrapment “[w]here the evidence presented indicates that [the] defendant merely was given an opportunity to commit a crime and [where] no undue persuasion or enticement was utilized” by law enforcement officials to induce the defendant to commit a crime (internal quotation marks and citation omitted)). We do not think that any of the actions taken by Officer Drutok, taken alone or collectively, were egregious enough to rise to the level of unconscionability contemplated in *Vallejos*.

{13} Rather than focusing on the police conduct directed at Defendant, the district court relied extensively on the exchange between Officer Drutok and Gutierrez prior to the drug transaction in holding that the police conduct at issue included the use of unconscionable methods. The district court erred in this regard. Defendant appeared to

argue at the hearing below that Officer Drutok knowingly initiated an illegal arrest of Gutierrez with the underlying purpose of then using Gutierrez to arrange a felony arrest and that he then acted improperly by exerting pressure and coercing Gutierrez to instigate a drug transaction if she wanted to avoid jail. However, this argument regarding Officer Drutok's intent was not corroborated by the evidence introduced at the hearing. Officer Drutok did not testify at the hearing and thus, there was no direct indication of his intent. In addition, the belt tape recording indicated that Officer Drutok did not mention the option of working off criminal charges until after he had decided to arrest Gutierrez for criminal solicitation and significantly, only after Gutierrez stated that she did not want to go to jail.

{14} Moreover, there was no evidence that Gutierrez agreed to work off the criminal solicitation charge while under the type of persistent pressure that would be considered outrageous and violate notions of fundamental fairness and due process. While Gutierrez made a number of phone calls that were unsuccessful before she reached Defendant, Officer Drutok's statements to Gutierrez following those earlier phone calls—that he wanted “somebody who will deliver right now” and that he wanted her to “[g]et me somebody now. You have three seconds or you're going directly to jail”—were not unduly coercive or threatening enough to be considered outrageous police conduct. Despite these statements, Gutierrez continued to make phone calls in an attempt to work off her criminal solicitation charge, and at one point reassured the officer following an unsuccessful phone call that she would get him somebody else. We also emphasize that Defendant did not challenge the practice of “working off” criminal charges in the proceedings below. We conclude that Officer Drutok's exchange with Gutierrez while she attempted to work off her criminal charges did not rise to the level of unconscionability contemplated in *Vallejos*.

{15} As for the district court's finding that Officer Drutok “knew or should have known” that he lacked probable cause to arrest Gutierrez for criminal solicitation, the district court appeared to apply a standard of negligence to the officer's conduct. However, negligent police conduct is significantly different from the employment of *unconscionable* police methods. Furthermore, even if there was a lack of probable cause to arrest Gutierrez, this error by Officer Drutok alone was not so egregious or extreme enough that it would support a finding of objective entrapment. As the Supreme Court emphasized in *Vallejos*, an objective entrapment defense “should be used sparingly and reserved for only the most egregious circumstances in recognition of the need to empower police with adequate tools to ferret out crime that is difficult to detect.” *Vallejos*, 1997-NMSC-040, ¶ 22 (internal quotation marks and citation omitted); see also *id.* ¶ 20 (stating that the dismissal of criminal charges based on normative objective entrapment is “an extreme remedy for extreme governmental behavior”).

{16} On appeal, Defendant relies on *People v. Isaacson*, 378 N.E.2d 78 (N.Y. 1978), in arguing that the police conduct directed at Gutierrez resulted in Defendant's entrapment and violated his right to due process. Our review of *Isaacson* leads us to conclude that *Isaacson* is both legally and factually distinguishable from the present case. *Isaacson* was not decided on entrapment grounds. *Id.* at 81, 84-85 (emphasizing

that the defense of entrapment was not at issue in the case). Rather, the New York Court of Appeals dismissed the defendant's criminal charges on state constitutional due process grounds due to police misconduct. *Id.* at 81, 83-85. While our Supreme Court in *Vallejos*, 1997-NMSC-040, ¶ 18, relied on *Isaacson* as an example of unconscionable methods, the Court recognized that a defense based on state due process grounds is not the same as an objective entrapment defense. *Vallejos*, 1997-NMSC-040, ¶ 17 n.8.

{17} Defendant also argues that *Isaacson* is factually similar because the government informant in that case, like Gutierrez in the present case, agreed to arrange a drug transaction even though the criminal charges that led to the government informant's arrest were not legally sound. 378 N.E.2d at 81. In *Isaacson*, the district court entered a specific finding that the informant "would not have aided the police were it not for the fact that they deceived him by not revealing that the charges relating to [his] arrest would not stand up in court." *Id.* at 80. However, the district court in this case did not enter a similar finding with respect to Gutierrez. Also, unlike the present case, *Isaacson* involved far more egregious police conduct directed against the informant than the police conduct directed at Gutierrez in this case. In *Isaacson*, following the informant's arrest, he was subjected to extreme physical abuse, including beatings, and threats from police investigators before he decided at a later date to work as a confidential informant for the purpose of setting up drug sales for the police. *See id.* at 79-80. As the *Isaacson* court noted, the "case expose[d] the ugliness of police brutality, upon which was imposed a cunning subterfuge employed to enlist the services of an informant who, deceived into thinking he was facing a stiff prison sentence, desperately sought out any individual he could to satisfy the police thirst for a conviction." *Id.* at 84. The police conduct in *Isaacson* is clearly distinguishable from the conduct in the present case, and thus, we are not persuaded by Defendant's argument that *Isaacson* supports the district court's ruling below.

{18} Defendant also raises an argument based on illegitimate purposes as an alternative basis for affirming the district court's ruling. *See Vallejos*, 1997-NMSC-040, ¶ 19 (stating that "[p]olice also violate due process when they ensnare a defendant in an operation guided by an illegitimate purpose"). Although Defendant argued in his written motion to dismiss that Officer Drutok employed both unconscionable methods and advanced illegitimate purposes, the district court found only that Officer Drutok engaged in unconscionable conduct. We therefore construe Defendant's argument based on illegitimate purposes to be seeking affirmance of the district court's ruling under our right for any reason doctrine. An appellate court may affirm a district court's ruling on a ground that was not relied on below if reliance on the new ground would not be unfair to the appellant. *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154.

{19} Here, Defendant argues that the tactical plan utilized by the Albuquerque Police Department that resulted in his arrest had the illegitimate purpose of boosting arrest statistics and was not designed to prevent future crime or otherwise benefit the community. *See Vallejos*, 1997-NMSC-040, ¶ 19 (providing as an example of an illegitimate purpose a situation where the police ensnare a defendant "solely for the

purpose of generating criminal charges and without any motive to prevent further crime or protect the public at large” (internal quotation marks and citation omitted)). Our review of the record reveals a lack of sufficient factual development in the district court proceedings regarding the nature of and purpose behind the tactical plan. Defendant also does not refer us to any evidence in the record that supports his assertion that the police advanced an illegitimate purpose. Our Supreme Court has emphasized that “[u]nder the right for any reason doctrine, we may affirm the district court’s order on grounds not relied upon by the district court *if those grounds do not require us to look beyond the factual allegations that were raised and considered below.*” *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 (emphasis added) (internal quotation marks and citation omitted). This Court will not, however, assume the role of the district court and delve into fact-dependent inquiries. *See Meiboom*, 2000-NMSC-004, ¶ 20. Thus, given the absence of necessary factual development below regarding the tactical plan and the lack of findings by the district court, we are unable to consider Defendant’s unsupported assertion that the police advanced an illegitimate purpose in his arrest under the right for any reason doctrine.

CONCLUSION

{20} For the foregoing reasons, we conclude that the district court erred in finding that Defendant was entrapped because the police conduct at issue did not include the use of unconscionable methods. We therefore reverse the district court’s dismissal of Defendant’s trafficking charge and remand for further proceedings.

{21} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

M. MONICA ZAMORA, Judge