

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THAIR DENHA,

Defendant-Appellant.

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UNPUBLISHED  
December 7, 2001

No. 221639  
Oakland Circuit Court  
LC Nos. 99-164767-FH;  
99-164768-FH;  
99-164769-FH;  
99-164804-FH

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of delivery of 50 grams or more but less than 225 grams of cocaine in each of four separate cases, MCL 333.7401(2)(a)(iii). The trial court sentenced defendant to four consecutive terms of four to twenty years' imprisonment. Defendant appeals as of right. We affirm.

We limit our review to defendant's claim that he was entrapped<sup>1</sup> and, in particular, his claim that his convictions based on the latter two transactions should be vacated due to entrapment.

Initially, we must determine whether this issue was properly preserved. The record indicates that defendant did not seek dismissal of the latter two charges on the ground of entrapment in the trial court. Instead, defendant urged the trial court to consider the issue of entrapment only when imposing sentence, relying on principles of sentencing entrapment or sentencing manipulation developed in the federal courts.<sup>2</sup> When the trial court asked whether a decision was desired with regard to whether dismissal on the basis of entrapment was warranted, defense counsel stated:

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<sup>1</sup> Defendant withdrew his first issue on appeal.

<sup>2</sup> Sentencing entrapment occurs when a defendant, predisposed to commit a lesser crime, is entrapped to commit a greater crime subject to a greater penalty. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997), citing *United States v Garcia*, 79 F3d 74, 75 (CA 7, 1996). The remedies for sentencing entrapment, as recognized by the court in *United States v Parrilla*, 114 F3d 124 (CA 9, 1997), pertain only to penalty. Sentencing manipulation is a distinct concept that involves improper conduct having the effect of increasing a defendant's sentence. *Garcia, supra*. Not all federal circuits recognize sentencing manipulation claims. *Id.*

I leave it to you, Judge. I don't think you can find entrapment in the classic sense but I think that you will have a basis upon which at the time of sentencing you can sentence him in such a manner as to suggest that he was entrapped into escalation.

A defendant waives an issue by expressly approving of a trial court's action. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Indeed, a party may not ask the trial court to take a certain action and then argue on appeal that it constitutes error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Conversely, an issue may be subject only to forfeiture, as opposed to waiver, when a defendant fails to timely assert a right. *Carter, supra; People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). Here, we conclude that defense counsel's request to have the trial court consider his arguments only in the context of its sentencing decision constituted a waiver of any claim that dismissal of the charges was warranted based on entrapment.

In the alternative, if we treat defendant's claim as one that is subject to forfeiture on the basis that defendant merely failed to timely assert a right to have two of the charges dismissed based on entrapment, we hold that appellate relief is not warranted because the record fails to establish any plain error affecting defendant's substantial rights. *Carines, supra* at 763.

This claim by defendant involves the traditional issue of whether a prosecution is barred by entrapment, *People v Alan Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994), and not the sentencing consequences of police conduct. In order to prevail on a claim of entrapment, defendant must show that the police either engaged in impermissible conduct designed to induce a law-abiding person situated similarly to defendant to commit the crime, or reprehensible conduct that cannot be tolerated by a civilized society. *People v James Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992); see also *People v Woods*, 241 Mich App 545, 555; 616 NW2d 211 (2000).

Here, the sole witness to testify at the entrapment hearing was the undercover officer who participated in the four drug transactions of which defendant was charged. It is not plain from his testimony that a law-abiding person situated similarly to defendant would have been induced to commit any of the four offenses underlying defendant's convictions. Further, we are unpersuaded that the opportunity afforded to defendant to commit the third and four offenses contravenes basic notions of fairness required by due process. *Williams, supra* at 663. There was no evidence that the third and fourth transactions were arranged merely to enhance penalties to which defendant would be exposed. We agree with the trial court when it determined, for sentencing purposes, that the police conduct was not reprehensible. Thus, prosecution for defendant's third and fourth offenses was not barred under either test for entrapment.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Henry William Saad  
/s/ William C. Whitbeck