CRUZ V. STATE
Supreme Court of Florida, 1985.
465 So.2d 516.

[In this case the Florida Supreme Court provides the trial courts with a two-prong threshold test of police activity to determine whether entrapment has occurred as a matter of law.]

EHRLICH, Justice.

This case is before us on appeal from a decision of the Second District Court of Appeal, *State v. Cruz,* 426 So.2d 1308 (Fla. 2d DCA 1983). The decision directly and expressly conflicts with *State v. Casper,* 417 So.2d 263 (Fla. 1st DCA), review denied, 418 So.2d 1280 (Fla. 1982). We take jurisdiction pursuant to article V. section 3(b)(3), Florida Constitution. We disapprove the district court's decision.

Tampa police undertook a decoy operation in a high-crime area. An officer posed as an inebriated indigent, smelling of alcohol and pretending to drink wine from a bottle. The officer leaned against a building near an alleyway, his face to the wall. Plainly displayed from a rear pants pocket was $150 in currency, paper-clipped together. Defendant Cruz and a woman happened upon the scene as passersby some time after 10 P.M. Cruz approached the decoy officer, may have attempted to say something to him, then continued on his way. Ten to fifteen minutes later, the defendant and his companion returned to the scene and Cruz took the money from the decoy's pocket without harming him in any way. Officers then arrested Cruz as he walked from the scene. The decoy situation did not involve the same *modus operandi* as any of the unsolved crimes which had occurred in the area. Police were not seeking a particular individual, nor were they aware of any prior criminal acts by the defendant.

Cruz was charged by information with grand theft. Pursuant to Florida Rule of Criminal Procedure 3.190(c)(4), Cruz moved to dismiss the information, arguing that the arrest constituted entrapment as a matter of law. The trial court granted the motion to dismiss on the authority of *State v. Casper.* . . . On appeal, the Second District court of appeal reversed, acknowledging its decision was in conflict with *Casper.*

The entrapment defense arises from a recognition that sometimes police activity will induce an otherwise innocent individual to commit the criminal act the police activity seeks to produce. . . .

The entrapment defense . . . normally focuses on the predisposition of the defendant. We adopted this view in *State v. Dickinson,* 370 So.2d 762 (Fla. 1979). The First District, in *State v. Casper,* . . . focused on predisposition when it found the "drunken bum" decoy at issue here to constitute entrapment as a matter of law. In *Casper,* Jacksonville police set up a decoy situation legally indistinguishable from the scenario in this case. The *Casper* court held that the state must prove the defendant was predisposed to steal from the decoy and that predisposition can be found under four circumstances: (1) the defendant has prior convictions for similar crimes; (2) the defendant has a reputation for committing similar crimes; (3) police have a reasonable suspicion the defendant was engaged in similar crimes; or (4) the defendant showed ready acquiescence to

commit the crime suggested by police. . . . The *Casper* court found no evidence of the first two elements in that case. The third element is irrelevant in the type of random expedition at issue here. The question thus boiled down to whether *Casper* "readily acquiesced" to the criminal scenario. The *Casper* court found that an otherwise unpredisposed passerby who chose to take the money did not acquiesce, but "succumbed to temptation . . . to the lure of the bait." . . . The *Casper* court therefore distinguished between "succumbing to temptation" and "readily acquiescing," and found that this is a question of law: where a trial judge finds the defendant succumbed to temptation, the matter shall not be put to a jury. The Second District, in the case now before us, rejected this position. The *Cruz* court found that such a judgment is one for the jury to make. "[W]here, as here, a defendant's intent or state of mind (i.e., predisposition) is an issue, that issue should not be decided on a motion to dismiss." . . . Petitioner would have this court hold that where the only evidence of predisposition is the commission of the crime the police scenario was designed to elicit, there is an insufficient showing of predisposition, as a matter of law. We do not agree.

We agree with the Second District that the question of predisposition will always be a question of fact for the jury. However, we also believe that the First District's concern for entrapment scenarios in which the innocent will succumb to temptation is well founded. To protect against such abuse, we turn to another aspect of entrapment.

Entrapment is a potentially dangerous tool given to police to fight crime. "Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of crime." . . . "The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when 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 that they may prosecute." . . . "Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions." . . .

To guide the trial courts, we propound the following threshold test of an entrapment defense: Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

The first prong of this test addresses the problem of police "virtue testing," that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Roberts wrote . . . , "society is at war with the criminal classes." . . . Police must fight this war, not engage in the manufacture of new hostilities.

The second prong of the threshold test addresses the problem of inappropriate techniques. Considerations in deciding whether police activity is permissible under this prong include

whether a government agent "induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited: or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." . . .

Applying this test to the case before us, we find that the drunken bum decoy operation fails. In Cruz's motion to dismiss, one of the undisputed facts was that "none of the unsolved crimes occurring near this location involved the same *modus operandi* as the simulated situation created by the officers." . . . The record thus implies police were apparently attempting to interrupt some kind of ongoing criminal activity. However, the record does not show what specific activity was targeted. This lack of focus is sufficient for the scenario to fail the first prong of the test. However, even if the police were seeking to catch persons who had been "rolling" drunks in the area, the criminal scenario here, with $150 (paper-clipped to ensure more than $100 was taken, making the offense a felony) enticingly protruding from the back pocket of a person seemingly incapable of noticing its removal, carries with it the "substantial risk that such an offense will be committed by persons other than those who are ready to commit it." . . . This sufficiently addresses the *Casper* court's proper recognition that entrapment has occurred where "the decoy simply provided the opportunity to commit a crime to anyone who succumbed to the lure of the bait." . . . This test also recognizes, as the *Cruz* court did, that the considerations inherent in our threshold test are not properly addressed in the context of the predisposition element of the second, subjective test.

For the reasons discussed, we hold that the police activity in the instant case constituted entrapment as a matter of law under the threshold test adopted here. Accordingly, we quash the district court decision.

It is so ordered. . . .

ALDERMAN, Justice, dissenting. . . .