

STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT

State of Minnesota,

Court File No.: 82-CR-11-2207

Plaintiff,
vs.

**NOTICE OF MOTION TO DISMISS IN
THE INTEREST OF DUE PROCESS**

C [REDACTED] R [REDACTED],
Defendant.

TO: THE WOODBURY CITY ATTORNEY'S OFFICE; WASHINGTON COUNTY
COURT ADMINISTRATION – CRIMINAL COURT FILING.

INTRODUCTION AND FACTS

On June 8, 2011, C [REDACTED] R [REDACTED] (a.k.a., V [REDACTED]) was charged with gross misdemeanor prostitution for allegedly engaging in prostitution with an undercover police officer at Oriental Touch Massage, in violation of Minn. Stat. § 609.324, subd. 2(1). On December 2nd and 3rd of 2010, Woodbury police officers completed surveillance on Oriental Touch Massage, a massage parlor in Woodbury, Minnesota after receiving an anonymous report concerning the legality of the business. During the surveillance, the police confronted three men coming from the building; one reported he came from his job on the third floor (the officer later confirmed that the business was indeed where the man reported it to be), and the other two said they came from the massage parlor after massages without any sexual acts.

Nonetheless, the law enforcement planned and executed undercover investigations of the massage parlor. Detectives Z [REDACTED] and an undercover officer (whose name is unknown at this time) acted as new clients, scheduled and received massages at the parlor.¹ In their reports, the detectives reported sexual contact. Det. Z [REDACTED] reported that Ms. R [REDACTED] refused to perform

¹ The facts from the undercover investigations come from Woodbury Police Incident Reports provided by the State.

any sexual favors for money at his multiple requests, while the other detective reported that the Ms. R [REDACTED] offered to help him masturbate and touch her breasts for money, however answered in the negative when he asked her if she ever completely disrobed.

The undercover officer also reported that:

...during the course of the massage, V [REDACTED] touched my buttocks, testicles and perineum. After approximately 30 minutes, she instructed me to roll over. During this portion of the massage, she repeatedly massaged my penis testicles and perineum.”²

According to the officer’s reports, Ms. R [REDACTED] committed the criminal conduct (sexual contact) at the very beginning of the massage. Under *State v. Burkland*, as described below, there was no need for the investigation to continue after the initial sexual contact. If the court were to take the undercover police officer reports as true, the officer continued to enjoy the massage and sexual contact for the full 60 minutes of the entire massage. The Minnesota Court of Appeals in *Burkland* ruled that this very type of conduct is outrageous and violates the defendant’s due process rights because the officer initiated and continued the sexual conduct beyond what was necessary to complete the investigation.

NOTICE OF DUE PROCESS MOTION

PLEASE BE ADVISED that Ms. R [REDACTED], at the *contested omnibus hearing* in the above-mentioned matter, moves this Court for an ORDER dismissing all charges in the interest of due process. A defendant may prevail on a due process defense even if the defendant is shown to have been “predisposed” to commit a crime and cannot prevail with a standard entrapment defense. *State v. Grilli*, 230 N.W. 2d 445, 451-53 (1975). The due process defense may be asserted *together* with the entrapment defense: the due process defense focuses on government conduct while the entrapment defense focuses on the defendant’s predisposition to

² See attached reports.

commit the crime. *State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985); *James*, 484 N.W.2d at 801 (emphasis added). “If the defendant asserts the defense of violation of due process with the entrapment defense or separately, the [due process] defense shall be heard and determined by the court.” Minn. R. Crim. P. 9.02, Committee Cmt; *see also State v. Ford*, 276 N.W.2d 178 182–83 (Minn. 1979). If Ms. R [REDACTED] is unsuccessful with the due process defense, she elects to submit the entrapment defense to the jury. Please note that while Ms. R [REDACTED] is litigating the due process issue and the “sentencing entrapment” motion before the Court, she elects to submit the standard entrapment defense at her jury trial.

ARGUMENT

The due process clauses of the United States and Minnesota Constitutions require that a criminal defendant be treated with fundamental fairness. *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992). The concept of fundamental fairness precludes conviction of a defendant if police participation or inducement is sufficiently outrageous. *United States v. Russell*, 411 U.S. 423, 431-32 (1973); *State v. Grilli*, 230 N.W. 2d 445, 451-53 (1975). A defendant may prevail on a due process defense even if the defendant is shown to have been “predisposed” to commit a crime and cannot prevail with a standard entrapment defense. *Grilli*, 230 N.W.2d at 451–53. The due process defense may be asserted together with the entrapment defense: the due process defense focuses on government conduct while the entrapment defense focuses on the defendant’s predisposition to commit the crime. *Vaughn*, 361 N.W.2d at 57 (Minn. 1985); *James*, 484 N.W.2d at 801. “If the defendant asserts the defense of violation of due process with the entrapment defense or separately, the [due process] defense shall be heard and determined by the court.” Minn. R. Crim. P. 9.02, Committee Cmt; *see also State v. Ford*, 276 N.W.2d 178 182–83 (Minn. 1979).

The specific elements and requirements of the due process defense are not well-developed but it is clear that an inquiry into the conduct of law enforcement officers is “probably best approached on a case-by-case basis.” See *Grill*, 230 N.W.2d at 445. The current Minnesota due process inquiry originated in *State v. James*, 484 N.W.2d 799 (Minn. App. 1992) when the court adopted the New York approach taken in *People v. Issacson*, 378 N.E. 2d 78 (N. Y. 1978). The *Issacson* Court considered the following factors in its due process analysis which *James* approved: (1) whether police “manufactured” a crime that would not otherwise have occurred, or merely involved themselves in on-going activity, (2) whether the police conduct itself was illegal or “repugnant to a sense of justice,” (3) whether the defendant was reluctant to commit the crime, but persuaded by appeals to “humanitarian instincts” such as sympathy, friendship, temptation, exorbitant gain, or persistent solicitation, and (4) whether police appear to simply desire a conviction or actually desire the prevention of a future crime or the protection of the public. *Id.* at 83; *James*, 484 N.W.2d at 802. No single *Issacson* factor is dispositive but each should be viewed in combination. 378 N.E.2d at 83. When police conduct violates due process, the government is “absolutely bar[red] from involving judicial process to obtain [the defendant’s] conviction.” *Russell*, 411 U.S. at 431–32.

In *State v. Burkland*, a very similar case to the case at hand, officers conducted an undercover operation in which an officer entered the establishment posing as a customer and received a massage. 775 N.W.2d 372, 373 (Minn. Ct. App. 2009). The masseuse offered to do the massage topless if the officer would pay \$30 more, to which the officer accepted. *Id.* During the massage, the masseuse talked about illegal immigrants performing prostitution, and said “I have to have a real comfortable customer to even get comfortable and get nude with, you know?” *Id.* Later the officer asked to touch the masseuse’s breasts, and the masseuse acquiesced. *Id.* at

373–74. The masseuse massaged the officer’s penis as the officer massaged the masseuse’s bare breasts; the officer also asked whether a “release” was covered by the fee. *Id.* at 374. The officer asked for other sexual services but the masseuse declined. *Id.*

The defendant in *Burkland* was thereafter charged with misdemeanor prostitution, violating Minn. Stat. § 609.324, subd. 3, and gross misdemeanor prostitution in a public place, violating Minn. Stat. §609.324, subd. 2. *Id.* The defendant was found guilty by a jury of the misdemeanor crime and not guilty of the gross misdemeanor. *Id.* The defendant appealed the district court’s denial of her motion to dismiss the charges as the “officer’s outrageous conduct violated the right to due process.” *Id.* The Court of Appeals agreed, and held that the officer’s conduct was outrageous and violated the defendant’s due process rights because he initiated and continued the sexual conduct beyond what was necessary. *Id.* at 376. The court considered the fact that the officer went to great lengths to prove he was just a customer (thus, the initiation of sexual contact, follow-through of massaging the masseuse’s breasts, and allowing the masseuse to massage his penis was unnecessary). Further, the officer could have succeeded in getting an agreement for sexual contact for money by only asking about how much the “release” would cost without actually initiating and engaging in sexual contact. The court:

conclude[d] that when a police officer’s conduct in a prostitution investigation involves the initiation of sexual contact that is not required for the collection of evidence to establish the elements of the offense, this conduct, initiated by the investigating officer, is sufficiently outrageous to violated the ‘concept of fundamental fairness inherent’ in the guarantee of due process.

Id. (quoting *State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978)).

The *Burkland* court differentiated its case from others in which it was necessary for the officers to expose themselves at the suspects’ demands in order to prove they were not officers and to get proof of the suspects’ criminal behavior. *Id.* at 374–75; *See Morris*, 272 N.W.2d 35; *State v. Crist*, 281 N.W.2d 657 (Minn. 1979)). *Burkland*, 775 N.W.2d at 374–75.

The conduct in Ms. R [REDACTED]'s case is eerily similar to *Burkland*. During one of the undercover operations, Det. Z [REDACTED] received a full-body massage on both his back and front and reported that Ms. R [REDACTED] touched his private areas with her hands and knee and that her clothed vagina area touched his body. Det. Z [REDACTED] reported that the touching of his "pubic region" occurred 15–20 times and he continued to let it occur for an additional 30 minutes of "massage." He reported that she did not appear fazed by this touching. During this full-body massage, Det. Z [REDACTED] asked Ms. R [REDACTED] "if she'd be willing to do more for me if I gave her extra on her tip." Ms. R [REDACTED] asked what he meant by "more" and if he meant a "happy ending." Det. Z [REDACTED] reported that Ms. R [REDACTED] said "no" and giggled in response. During more small talk, Det. Z [REDACTED] "asked her two more times if she was willing to give me a happy ending." She giggled but said she did not do that. Ms. R [REDACTED] completely denied sexual contact.

Despite her denial of sexual contact, officers did not give up the investigation. In the subsequent undercover operation, the police officer reported Ms. R [REDACTED] repeatedly touched his private areas and rubbed his penis and perineum for the entire 60 minutes of the massage. Not once did the officer object to this contact or discontinue it, despite have all the evidence he would ever need to submit a case for prostitution charging. After being asked if he was enjoying himself, undercover police officer told her he had found an extra \$20 bill that he could tip her, but he did not understand Ms. R [REDACTED]'s response. Later, the undercover police officer reported that Ms. R [REDACTED] asked him to masturbate and he declined. After she said she would do it for him for \$100, the undercover police officer "asked her if she ever got naked." Ms. R [REDACTED] replied, "no." After the massage, Ms. R [REDACTED] hugged undercover police officer and then briefly put his hands on her clothed chest. The undercover police officer then left the tip

and left the room. Not once during the entire “sexual contact” massage did the undercover police officer discontinue Ms. R [REDACTED]’s supposed sexual conduct of his penis and private areas. Rather, he let that sexual contact continue for the entire 60 minutes massage. The officer’s conduct in this investigation went far beyond what is necessary and their actions are repugnant.

CONCLUSION

Ms. R [REDACTED] hereby provides notice of her request for a contested omnibus and a motion for an **ORDER** dismissing all charges in the interest of due process.

Respectfully submitted,

RYAN GARRY, ATTORNEY AT LAW, L.L.C.

Dated: _____

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