U.S. v. Poehlman
(9th Cir. 2000) __F.3d __

ISSUE

Did officers entrap a suspect into attempting to commit a sex crime?

FACTS

Poehlman, a resident of Florida, began trawling Internet "alternative lifestyle" discussion groups in an effort to find a woman who could accept his compulsion to cross-dress and engage in foot fetishism. Eventually, he received a response from a California woman named "Sharon," who was actually an undercover agent. "Sharon" said she was looking for someone who understood her family's "unique needs. "Poehlman wrote back that he "was looking for a long-term relationship leading to marriage, "didn't mind children," and "had unique needs too."

It appears Poehlman initially believed that "Sharon" was simply interested in marriage and did not mind his sexual compulsions. At one point he wrote to her that he has "strong family values and would treat "Sharon's" children as his own." When "Sharon" told him that she was looking for a "special man teacher" for her children, Poehlman said that he would teach the children "proper morals and give support to them where it is needed."

"Sharon" responded by making it clear she was not looking for that kind of teacher. Although she did not come right out and say so, she left no doubt that she was looking for a man to have sexual relations with her three girls (aged 7, 10, and 12) because there were "some things I'm just not equipped to teach [them]." Among other things, she said she was "looking for someone who understands us and does not let society's views stand in the way. "According to the court, "Poehlman finally got the hint and expressed his willingness to play sex instructor to "Sharon's" children. In later e-mails, Poehlman graphically detailed his ideas to Sharon, usually at her prompting. Among these ideas were oral sex, anal sex and various acts too tasteless to mention."

Finally, it was agreed that Poehlman would travel to Los Angeles and meet "Sharon" in a certain hotel. In Poehlman's hotel room, "Sharon" directed him to an adjoining room "where he was to meet the children, presumably to give them their first lesson under their mother's protective supervision." When Poehlman walked in, he was arrested by FBI agents and Los Angeles County sheriff's deputies.

Poehlman was subsequently convicted in state court of attempting to commit lewd acts with a minor. He was sentenced to one year in state prison. Two years after his release, he was arrested and convicted of federal crimes arising from the same incident. For those crimes, he was sentenced to 121 months in prison.

DISCUSSION

Poehlman appealed his federal conviction on grounds he was entrapped. Under California law, entrapment occurs if the conduct of the investigating officers or police agents would likely have induced a "normally law-abiding person" to commit the crime with which the defendant was charged.[(1)] Under

federal law, in the absence of such inducement, entrapment may nevertheless occur if the defendant was *predisposed* to commit the crime.[(2)] Because *Poehlman* is a federal case, the court applied the federal test. However, the court's analysis of police "inducement" will be helpful in understanding how the case might fare in California courts.

Under California law and-assuming the defendant was not predisposed to commit the crime-federal law, entrapment occurs if the defendant committed the crime as the result of an officer's threats or other pressure such as badgering or importuning.[(3)] It may also occur if the conduct of officers would have generated in the mind of a normally law-abiding person an incentive to commit the crime other than a desire for personal gain or other typical criminal motivation; e.g., entrapment may occur if the defendant was induced to commit the crime to help a close friend.[(4)]

As the court in *Poehlman* explained, "[T]he government induces a crime when it creates a special incentive for the defendant to commit the crime. This incentive can consist of anything that materially alters the balance of risks and rewards bearing on defendant's decision whether to commit the offense, so as to increase the likelihood that he will engage in the particular criminal conduct." For example, entrapment would likely occur if officers, in their discussions of the crime with the defendant, made the commission of the crime appear unusually attractive to a normally law-abiding person; e.g., officers represented the crime would not be detected or that it was not illegal, or officers offered the defendant an exorbitant payoff for committing the crime.[(5)]

Although "Sharon" did not overtly pressure Poehlman into having sexual relations with her children, the court ruled there was subtle pressure, "skillfully applied": ""Sharon" did not merely invite Poehlman to have a sexual relationship with her minor daughters, she made it a condition of her own continued interest in him. "Sharon," moreover, pressured Poehlman to be explicit about his plans for teaching the girls: 'Tell me more about how their first lesson will go. This will help me make my decision as to who their teacher will be.' The implication is that unless Poehlman came up with lesson plans there were sufficiently creative, 'Sharon' would discard Poehlman and select a different mentor for her daughters."

The court also ruled that "Sharon" essentially represented to Poehlman that his sexual relations with her daughters would go undetected because she was consenting to it. Said the court, "Not only did this diminish the risk of detection, it also allayed fears defendant might have had that the activities would be harmful, distasteful or inappropriate, particularly since "Sharon" claimed to have herself benefitted from such experiences [as a child].

Finally, the court noted that the government "played on Poehlman's obvious need for an adult relationship, for acceptance of his sexual proclivities and for a family, to draw him ever deeper into a sexual fantasy would involving these imaginary girls."

Having ruled that Poehlman was not predisposed to having sexual relations with children, the court ruled he was therefore entrapped, and that his conviction must be reversed. The court concluded with these words:

"There is surely enough real crime in our society that it is unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and criminality."

(1) See *People* v. *Barraza* (1979) 23 Cal.3d 675, 689-90; *People* v. *McClellan* (1980) 107 Cal.App.3d 297, 302; *People* v. *Peppars* (1983) 140 Cal.App.3d 677, 683; *People* v. *Thoi* (1989) 213 Cal.App.3d 689, 694-6; *People* v. *Grant* (1985) 165 Cal.App.3d 496, 500; *Reyes* v. *Municipal Court* (1981) 117 Cal.App.3d 771, 777; *Arellanes* v. *Civil Service Com.* (1995) 41 Cal.App.4th 1208, 1215.

(2) See *United States* v. *Russell* (1973) 411 US 423, 432-6; *People* v. *Barraza* (1979) 23 Cal.3d 675, 686; *People* v. *Thoi* (1989) 213 Cal.App.3d 689, 696; *People* v. *Towery* (1985) 174 Cal.App.3d 1114, 1133-6; *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1765. **NOTE:** Although the Court of Appeal has questioned whether California must apply the federal test as the result of Proposition 8 (*People* v. *Arthurlee* (1985) 168 Cal.App.3d 246, 252), it seems doubtful that Proposition 8 had any effect on the area of entrapment because Proposition 8 is concerned only with the suppression of evidence (See *In re Lance W.* (1985) 37 Cal.3d 873, 884), not defenses to a crime. **ALSO SEE:** *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1765.

(3) See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690; CALJIC 4.61.5; *Arellanes* v. *Civil Service Com.* (1995) 41 Cal.App.4th 1208, 1215-6.

(4) See *People* v. *Lee* (1990) 219 Cal.App.3d 829, 836-7; *People* v. *Barraza* (1979) 23 Cal.3d 675, 690

(5) See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690. COMPARE *People* v. *Watson* (2000) __ Cal.4th __ [officers "merely conveyed the idea detection was unlikely."].