

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Defendant's first argument, i.e. that there can be no conspiracy to commit arson without a completed arson, does not warrant dismissal. The elements of the crime of conspiracy are (1) an agreement, expressed or implied, between two or more persons; (2) to commit an illegal act; or (3) to commit a legal act in an illegal manner. *People v Ailey*, 392 Mich 298 (1974) (overruled on other grounds by *People v Hardiman*, 466 Mich 417 [20021]; MCL 750.157a. The crime of conspiracy is typically complete on proof of an agreement. *Ailey, supra*, at 310-311. Accord *People v Seewald*, 499 Mich 111, 117 (2016).

As can be gleaned, the elements for conspiracy do not require a completion of the object of the conspiracy. *People v Chambers*, 279 Mich 73, 77 (1937). The conspiracy and the arson are separate crimes. That the coffee shop was not burned, would not prompt dismissal of the conspiracy charge for lack of proof. Defense counsels' motions on this ground should not be granted.

Defendants' second argument, i.e. that proof of conspiracy requires an overt act in addition to the agreement, is also unpersuasive under Michigan law. As stated, the crime of conspiracy is completed on proof of an agreement to commit an illegal act. The prosecution need not show acts were taken, consistent with that agreement. (For example, buying gasoline to accomplish the arson.) See *Seewald*, at 117, citing *People v Asta*, 337 Mich 590 (1953). While overt acts may help establish an agreement, their absence does not nullify proof of an agreement.

Here, as with the absence of the completed arson, the absence of overt acts does not negate the agreement. *People v Carter*, 415 Mich 558, 568 (1982); *Seewald, supra*, at 117. ("Michigan law requires no proof of an overt act taken in furtherance of the conspiracy.") The motion should be denied on this basis as well.

Defendants' third argument presents a closer question. The issue is whether Sam and Smitty's words and actions establish an agreement. Without an agreement, no conspiracy can be found.

As stated, the agreement in question may be expressed or implied. A formal agreement need not be proven. *Atley*, at 311. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact. Conspiracy may be established by circumstantial evidence and may be based on inferences. Conspiracy requires a two-fold specific intent: the intent to combine with others and the intent to accomplish the illegal objective. *People v Justice (After Remand)*, 454 Mich 334, 346-347 (1997).

The facts presented can be summarized as follows: The partners had three meetings having a central purpose, to discuss their failing business and what to do about it. The first meeting focused on legitimate solutions to the problem. The second meeting was mixed, comprising yet another legitimate solution, selling the building/business to their competitor. But it also included a directive by Sam to Smitty to bring their business insurance policy, and set another meeting. The third meeting was the first where the partners' moods were upbeat. And what prompted their lifted spirits was their fire loss coverage. This meeting ended with the joint statement, "better call Sparky," albeit said in laughter.

Conspiracies are clandestine in nature and no reasonable view of the proof of a conspiracy would require vivid, clear discussion on how to burn down one's business to collect insurance proceeds in an open setting like a bar open to the public. And neither does the law require such formality and coherence.

The true issue, therefore, is whether the partners' words or deeds prove an agreement to commit the arson, even by implication. The defense motion to dismiss because proof of an agreement is lacking is the strongest of the three arguments made for dismissal for a number of reasons.

Stringing together the inculcating facts, the parties have business troubles, legal solutions do not appear effective, an illegal solution seems effective (to end the business by arson), and a means (calling Sparky) seems plausible. But these facts stop short of being even an implied agreement. No evidence exists as to who Sparky is, what he is supposed to do, how he is supposed to do it, and the like. Moreover, the facts are silent as to who is to call Sparky and what he is to be told. While in

total the facts reflect a motivation and a discussion, they fall short of establishing an agreement. Indeed, even the most damaging fact, "better call Sparky" was said amidst joint laughter, undermining its significance.

While by no means clear, dismissal is warranted based on the third argument, if at all, for failure to establish an agreement to commit an illegal act, the gist of conspiracy.