

A man who owned a failing construction business lacked the money and supplies necessary to complete a major industrial project. In order to acquire supplies for the major project, the man planned to take supplies that another client had purchased and delivered for the construction of an apartment complex. The man shared his plan with a friend, an employee of the construction business, and asked the friend to help him retrieve the supplies from the business's storage facility. The friend knew that the supplies belonged to the other client but nevertheless agreed to help the man. Unbeknownst to the man and the friend, the apartment project had recently been canceled and the supplies had been returned to the client.

The next day, the friend went to the storage facility to get the supplies. The friend searched the facility for only a few minutes when he had a change of heart and left. However, his movement around the facility had triggered a silent alarm that turned on the surveillance cameras and alerted the police.

The friend and the man were later arrested, charged with conspiracy to commit larceny, and tried separately. The man was acquitted based on a lack of evidence, but the friend's trial is still pending.

In a jurisdiction that follows the modern-prevailing approach for conspiracy, is the friend likely guilty?

- A. No, because the friend's subsequent withdrawal from the conspiracy prevented its success.
- B. No, because the man was acquitted due to insufficient evidence.
- C. Yes, because impossibility is not a defense to conspiracy.
- D. Yes, because the friend agreed to take the supplies and committed an overt act.

## Explanation:

### Conspiracy

	Agreement	Overt act
<b>Majority view</b> (modern & MPC)	Unilateral approach – at least one person specifically intends to enter agreement	At least one conspirator must commit overt act
<b>Minority view</b> (common law)	Bilateral approach – two or more persons specifically intend to enter agreement	Not required

**MPC** = Model Penal Code.

In most jurisdictions (including this one) and under the MPC, **conspiracy** requires proof of the following:

two or more persons entered an agreement with the specific intent to accomplish an unlawful purpose (e.g., larceny) *and*

at least one conspirator committed an **overt act** in furtherance of the agreement.

And since these jurisdictions follow the **unilateral approach**, a conspiracy may be formed when **only one party actually agrees** and, for example, the other party merely feigns agreement.

Here, the friend entered an agreement to commit larceny when he agreed to help the man take another client's supplies and use them for a different project. The friend then committed an overt act in furtherance of this agreement when he went to the storage facility to retrieve the supplies. As a result, the friend is likely guilty of conspiracy to commit larceny.

**(Choice A)** Under the MPC and the minority view, subsequent **withdrawal** is a defense to conspiracy if the defendant voluntarily acts to "thwart the success" of the conspiracy. But in most jurisdictions, withdrawal is a defense only if it occurs *before* an overt act has been committed. Here, the friend committed an overt act when he went to the storage facility, so his subsequent change of heart is no defense.

**(Choice B)** The fact that the man was acquitted of conspiracy in a previous trial does not affect the friend's guilt because unilateral-approach jurisdictions require proof of only *one* guilty mind. Therefore, a jury is not precluded from finding the friend guilty of conspiracy to commit larceny in his separate trial.

**(Choices C)** *Impossibility* is a defense to conspiracy if the object of the agreement is not a crime. But it is *not* a defense when, as here, an unknown condition (e.g., return of the supplies) prevents the completion of the intended crime.

**Educational objective:**

Under the modern-prevailing view, conspiracy requires proof that (1) one party actually entered an agreement with the specific intent to accomplish an unlawful purpose and (2) at least one conspirator committed an overt act in furtherance of the agreement.

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