

CHAPTER 6: PARTIES TO CRIME AND VICARIOUS LIABILITY

The text discusses parties to crime in terms of accessories and accomplices. Accessories are defined as accessory before the fact – those who help prepare for the crime – and accessories after the fact – those who assist offenders after the crime. Accomplices are defined as those who participate in the crime. Under the common law, accessories were typically not punished as much as accomplices or principal offenders; on the other hand, accomplices were usually punished the same as principal offenders.

Accomplices and Accessories Before the Fact

Under Ohio's statutes, accomplices and accessories before the fact are now treated similarly, while accessories after the fact are treated separately under the obstruction of justice statute discussed later. Under Ohio's complicity statute:

(A) No person acting with the kind of culpability required for an offense...shall do any of the following:

- Solicit or procure another to commit the offense;
- Aid or abet another in committing the offense;
- Conspire with another to commit the offense... ;
- Cause an innocent or irresponsible person to commit the offense.

(Ohio Revised Code, § 2923.03, 1986, available at <http://codes.ohio.gov/orc/2923.03>).

Note that parts of the complicity statute – (A)(1) and (A)(3) – mention both solicitation and conspiracy. These two crimes are discussed in Chapter 7.

The punishment for complicity is the same as for the principal offender; that is, if Offender A robs a liquor store and Offender B drives the getaway car, both offenders are subject to the same punishment, even though Offender A would be charged with robbery and Offender B would be charged with complicity (Ohio Revised Code, § 2923.03 (F), 1986, available at <http://codes.ohio.gov/orc/2923.03>).

The actus reus for the crime of complicity is found in the terms “aid” and “abet;” however, as the text states, these terms can be confusing. Is a person “aiding and abetting” if he lets a friend borrow a car, who then uses the car during the commission of a crime? What actions constitute “aiding and abetting?” In *State v. Sims* (10 Ohio App. 3d 56, 1983), the Ohio Court of Appeal for the Eighth District provided numerous definitions of “aid” and “abet.” The court stated that,

...one is not an aider or abettor unless he knowingly does something which assists or tends in some way to affect the doing of the thing which the law forbids (p. 59).

Thus as stated in the text, and in this case, “mere presence” is not enough to satisfy the actus reus requirement in Ohio.

Although the Ohio complicity statute does not mention accessories before the fact, Ohio courts hold that these individuals are covered by the statute. In *Sims*, when discussing the complicity statute the court of appeal noted that:

a person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage the criminal act, or assist or enable it to be done, or engage or

counsel, or command the principal to do it (p. 59).

The court thus used the provisions of the complicity statute when defining who is an accessory before the fact.

The mens rea required for the crime of complicity is the same as the mens rea required for the underlying offense. Proof of that mens rea can take different forms. For example, in *State v. Cartellone*, 3 Ohio App. 3d 145 (1981), the Court of Appeals for the Eighth District upheld a conviction for felonious assault against a defendant after his companion shot at a third person. The defendant had argued that to be liable for felonious assault under Ohio law, a defendant must knowingly cause someone harm. However, the defendant claimed that he had no idea that his companion even had a gun, and thus even though he was present during the shooting, he could not be liable for complicity because he did not knowingly aid in the offense. The court of appeals acknowledged that to be convicted of any offense on the basis of complicity, the state had to prove that the defendant had the mens rea required for that underlying offense. In this case, acting knowing participation. However, the court also explained that that intent can be discerned from both direct and circumstantial evidence:

...participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed...[it] may also be established by overt acts of assistance such as driving a getaway car or serving as a lookout (p. 150).

In this case, the defendant was present when his companion threatened the victim, threw a cigarette at him, and followed him for several blocks before shooting him. Moreover, the defendant had also taunted the victim. These actions were sufficient to demonstrate that the defendant acted knowingly and was thus complicit in the assault, even though he did not fire the gun.

Accessories After the Fact

As stated earlier, accessories after the fact are treated separately than accomplices and accessories before the fact. The common law definition of an accessory after the fact has been subsumed by Ohio's modern "obstruction of justice" statute. It states:

(A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime...shall do any of the following:

Harbor or conceal the other person...;

(2) Provide the other person...with money, transportation, a weapon, a disguise, or other means of avoiding discovery or apprehension;

Warn the other person...of impending discovery or apprehension;

Destroy or conceal physical evidence of the crime or act, or induce any person to withhold testimony or information or to elude legal process summoning the person to testify or supply evidence;

Communicate false information to any person;

(6) Prevent or obstruct any person, by means of force, intimidation, or deception, from performing an act to aid in the discovery, apprehension, or prosecution of the other person...

(Ohio Revised Code, § 2921.32, 2002, available at <http://codes.ohio.gov/orc/2921.32>).

The punishment for obstruction of justice depends on the offense committed by the person being assisted. If it is

a misdemeanor, the obstruction of justice charge is at the same level of the misdemeanor. Thus, if a second-degree misdemeanor is committed, then the obstruction of justice charge will also be a second-degree misdemeanor. On the other hand, if a third, fourth, or fifth-degree felony is committed, the obstruction of justice charge will be a fifth-degree felony. If aggravated murder or a first or second degree felony is committed, the obstruction of justice charge will be third-degree felony (Ohio Revised Code, § 2921.32 (C)(2)(3)(4), 2002, available at <http://codes.ohio.gov/orc/2921.32>).

As the text states, some persons may be held liable for the criminal actions of another. For example, parents may be held liable for offenses committed by their children and businesses may be held liable for offenses committed by their employees. This type of liability is not necessarily criminal liability, however. In many instances, parents, businesses, etc. are sued in civil court for damages resulting from the criminal acts of others.

The following case illustrates an interesting situation involving liability of a business owner for injuries caused when his business was robbed. The case is *Schultz v. Elm Beverage Shoppe*, 40 Ohio St. 3d 326, 1988).

Schultz v. Elm Beverage Shoppe

In this case, a beverage shop was robbed. During the robbery, a regular customer, Schultz, walked into the store. He later stated that he knew almost immediately that the store was being robbed and so he stopped just inside the store's entrance. Upon seeing Schultz, the clerk shouted, "run, call the cops;" Schultz started to run out the door when shots rang out. The clerk was killed and Schultz was shot twice.

Schultz filed a civil suit against the store's owner, claiming that the clerk's warning to call the police put his life in jeopardy. Schultz claimed that, by putting customers at risk, the clerk acted negligently, and that the clerk's employer should thus be civilly liable for Schultz's injuries.

The court stated that store owners or their agents (in this case, the clerk) must not create an unreasonable risk of harm. This applies to any sort of harm, from slippery floors to unruly customers and robbers. When determining what is unreasonable, however, the court must consider all the circumstances, including the severe stress caused by a robbery. In this case, the Ohio Supreme Court ruled that the clerk's actions were reasonable in light of the circumstances; therefore, the store owner was not held liable for Schultz's injuries.

REFERENCES

Ohio Revised Code, <http://codes.ohio.gov/orc>

State v. Cartellone, 3 Ohio App. 3d 145 (1981)

Schultz v. Elm Beverage Shoppe, 40 Ohio St. 3d 326 (1988)

State v. Sims, 10 Ohio App. 3d 56 (1983)

REVIEW QUESTIONS

1. Which of the following is true regarding punishment for "complicity"?

- a. it is punished the same as the underlying offense
 - b. it is punished one degree less than the underlying offense
 - c. it is punished one degree more than the underlying offense
 - d. the underlying offense is irrelevant for the punishment
2. What is the term for the crime of “accessory after the fact” in Ohio?
- a. aiding and abetting
 - b. complicity
 - c. obstruction of justice
 - d. accomplice

DISCUSSION QUESTION

This chapter discusses vicarious liability and how business owners and their agents can be held liable for harm that occurs when a crime is committed in their store. In *Schultz v. Elm Beverage Shoppe*, the court ruled that the business owner should not be held liable for the clerk’s actions. Do you agree with this verdict? Do you feel that the clerk’s actions made the situation more dangerous?

WEB RESOURCES

- www.onlinelawyersource.com/personal_injury/vicarious_liability/index.html - a website that gives information and the latest news on a variety of issues. This address takes you to cases involving vicarious liability