

## CHAPTER 7: ATTEMPT, CONSPIRACY, SOLICITATION

The offenses of attempt, conspiracy, and solicitation are related to one another because they represent behaviors that are punished when one tries to commit a crime, but the crime is not completed.

### **Attempt**

As explained in the text, a person does not have to complete a crime to be punished for their conduct. Ohio's attempt statute provides, in relevant part:

No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense (see Ohio Revised Code, § 2923.02 (E), 2000, available at <http://codes.ohio.gov/orc/2923.02>).

This statute establishes that the mens rea for attempt is purpose or knowledge. Ohio courts hold that it also establishes that the actus reus of attempt involves doing something that indicates that one is trying to commit the crime. In *State v. Woods*, 48 Ohio St. 2d 127, 1976, the Ohio Supreme Court explained that one engages in such conduct if: t:

...[one] purposely does or omits to do anything which is an act of omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose (p. 130)

or

...[the conduct embodies] overt acts that convincingly demonstrate a firm purpose to commit the crime (p. 132).

This mirrors the discussion found in the Model Penal Code. But an issue with this definition, as is noted in the text, is what actually constitutes a "substantial step." To determine if a defendant took a substantial step, Ohio courts scrutinize the defendant's actions and compare them to the elements of the offense. The court explained in *Woods*, that to have taken a substantial step, a defendant need not be close to completing a crime. Indeed, "...[the substantial step] need not be the last proximate act prior to the consummation of the offense" (p. 191). Still, precisely what qualifies remains elusive, and can vary from case to case.

The following case is an example of an Ohio Supreme Court's ruling on what constitutes attempted rape. The case is *State v. Heinish*, 50 Ohio St. 3d 231 (1990).

### **State v. Heinish**

In this case, the defendant was convicted of aggravated murder of his stepdaughter, based, in part, on the aggravating circumstances of attempted rape. The victim had been beaten, strangled, set on fire, and burned from the waist up. When she was found, her jeans were partially unzipped and pulled several inches down from her waist. Her blouse was also partially pushed up and she was wearing no underwear or shoes. Tests indicated that a saliva stain was found on the outside of her blue jeans, which could have come from the defendant, but also from 32 per cent of the Caucasian population. On the basis of all of this evidence, the defendant was convicted of attempted rape in addition to a number of other counts. But

the Ohio Supreme Court indicated that the attempted rape specification was based solely on circumstantial evidence; there was no physical evidence that the defendant had taken a “substantial step” towards the act of rape. Indeed, the circumstantial evidence suggestive of rape may have been “merely residual to the underlying act of murder.” As a result, the Ohio Supreme Court ruled that the evidence did not conclusively show acts that “demonstrate[d] a firm purpose to commit the crime.” The court thus “reluctantly” reversed the attempted rape conviction.

The punishment for attempt is generally based on the underlying offense. If a person attempts to commit aggravated murder, murder, or another offense calling for a punishment of life in prison, the attempt offense is treated as a first-degree felony. If a person attempts to commit a drug abuse offense that is punishable on the basis of the number of unit doses, the attempt offense is punishable to the same degree as the drug offense. Attempts to commit any other offense are treated as the next lesser degree than the offense attempted. For example, felonious assault is considered a second-degree felony. Attempt to commit felonious assault would be considered a third-degree felony (see Ohio Revised Code, § 2923.02 (E), 2000, available at <http://codes.ohio.gov/orc/2923.02>).

The text mentions a number of issues about attempt that are given special treatment in Ohio. One is the issue of impossibility. As explained in the text, factual impossibility is when a crime is not completed because an event outside an offender’s control makes it impossible to complete. Legal impossibility refers to when an offender believes he or she is doing something illegal, but in fact, what he or she has done is not. In some jurisdictions, although factual impossibility is not a defense to attempt, legal impossibility is because courts do not wish to punish people for their “imaginary” crimes. In contrast, the Ohio attempt statute specifically states:

It is no defense ... that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.... (Ohio Revised Code, § 2923.02 (B), 2000), available at <http://codes.ohio.gov/orc/2923.02>.

On the other hand:

It is an affirmative defense ... [if] the actor abandoned the actor’s effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor’s criminal purpose.

(Ohio Revised Code, § 2923.02 (D), 2000, available at <http://codes.ohio.gov/orc/2923.02>).

## **Conspiracy**

As stated in the text, conspiracy consists of an agreement to commit a crime plus an overt act in furtherance of that agreement. Under Ohio law, a defendant can only be guilty of conspiring to commit certain specified offenses. Those offenses are:

- aggravated murder and murder
- kidnapping
- compelling prostitution
- promoting prostitution
- aggravated arson and arson
- aggravated robbery and robbery
- aggravated burglary and burglary
- engaging in a pattern of corrupt activity

- corrupting another with drugs
- a felony drug trafficking, manufacturing, processing or possession offense
- theft of drugs
- illegal processing of drug documents
- felony authorized use of a vehicle

Persons are guilty of conspiring to commit one these specified offenses if they do either of the following:

- (1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;
- (2) Agree with another persons or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses

Moreover, the conspiracy statute also provides that:

No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved...an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.

(Ohio Revised Code, §2923.01, 2007, available at <http://codes.ohio.gov/orc/2923.01>).

The statute also provides that:

- (I) The following are affirmative defenses to a charge of conspiracy:
  - (1) After conspiring to commit an offense, the actor thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.
  - (2) After conspiring to commit an offense, the actor abandoned the conspiracy prior to the commission of or attempt to commit any offense that was the object of the conspiracy, either by advising all other conspirators of the actor's abandonment, or by informing any law enforcement authority of the existence of the conspiracy and of the actor's participation in the conspiracy.

Punishment for conspiracy depends on the underlying offense. Conspiracy is treated as a first-degree felony if the object of the conspiracy is aggravated murder, murder, or an offense with a punishment of life imprisonment. If the object of the conspiracy is a first, second, third, or fourth-degree felony, the conspiracy charge is treated as a felony of the next lesser degree. If the object of the conspiracy is a fifth-degree felony, conspiracy is treated as a first-degree misdemeanor (Ohio Revised Code, § 2923.01 (J)(1)(2)(4), 2007 , available at <http://codes.ohio.gov/orc/2923.01>).

The text discusses conspiracy prosecutions. Note that the Ohio conspiracy statute provides that one conspirator cannot be convicted on another conspirator's testimony unless that testimony is supported by other evidence.

## **Solicitation**

In Ohio, there is no general crime of solicitation that applies to all offenses. Rather, solicitation is found under the complicity statute discussed in Chapter 6: "...no person...shall... solicit or procure another to commit [an] offense" (Ohio Revised Code, § 2923.03 (A)(1), 1986, available at <http://codes.ohio.gov/orc/2923.03>).

Instead, in Ohio, the term solicitation is frequently used in conjunction with sexually oriented offenses. For example, Ohio law provides that:

No person shall solicit another to engage with such other person in sexual activity for hire.

(Ohio Revised Code, § 2907.24, 2004, available at <http://codes.ohio.gov/orc/2907.24>).

The punishment for this offense is a third-degree misdemeanor.

In addition, persons are prohibited from soliciting a minor to engage in prostitution (§2907.21 – Compelling Prostitution, available at <http://codes.ohio.gov/orc/2907.21>) and soliciting another person to use a prostitute or brothel (§ 2907.23 – Procuring, available at <http://codes.ohio.gov/orc/2907.23>).

## REFERENCES

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

State v. Heinish 50 Ohio St. 3d 231 (1990)

State v. Woods 48 Ohio St. 2d 127 (1976)

## REVIEW QUESTIONS

1. How are legal and factual impossibility treated as defenses under Ohio law?
  - a. factual impossibility is a defense, but legal impossibility is not
  - b. legal impossibility is a defense, but factual impossibility is not
  - c. both are defenses under Ohio law
  - d. neither are defenses under Ohio law
2. Which of the following is considered a defense to conspiracy under Ohio law?
  - a. the offender abandoned the conspiracy and told others of his intention
  - b. the offender agrees to but does not participate in the conspiracy
  - c. the offender is not the principal offender in the conspiracy
  - d. all of the above are defenses to conspiracy under Ohio law

## DISCUSSION QUESTION

The punishment for conspiracy depends on the underlying offense; in effect, the more serious the offense, the more severe the punishment. For example, if an offender conspires with others to commit murder, the conspiracy would be considered a first-degree felony, even if the murder was not completed or attempted. What are the benefits of making conspiracy should carry a penalty this severe if the underlying offense is not completed or attempted? Explain.

## WEB RESOURCES

- <http://www.missingkids.com/missingkids/servlet/ProxySearchServlet?keys=solicitation> – a website from the National Center for Missing and Exploited Children, that provides information to parents about sexual solicitation of children