

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

A person does not have to complete a crime to be punished for their conduct. Trying or attempting to commit a crime is a crime just as completing the offense itself is a crime. The actus reus of attempt generally involves that the person do something that indicates that he or she is trying to commit the crime. In *State v. Woods*, 48 Ohio St. 2d 127, 1976, the Ohio Supreme Court provided a number of definitions of the actus reus of attempt:

...[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)

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

This definition mirrors the definition of the Model Penal Code. One of the issues with this definition, as is noted in the text, is what actually constitutes a "substantial step." Since it is not defined by statute, Ohio courts generally define it based on the circumstances of the offense. Courts will scrutinize the actions of the offender to determine if a "substantial step" has been made. In *State v. Brooks* 44 Ohio St. 3d 185 (1989), the Ohio Supreme Court provided a number of definitions and examples of "substantial step." Among other things, the court stated that substantial step does not necessarily mean that a person has to be close to the completion of the crime: "...[the substantial step] need not be the last proximate act prior to the consummation of the offense" (p. 191). Still, the definition is a subjective one, based on the interpretation of the offender's actions by the courts.

The following case is an example of the Ohio Supreme Court's view of 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, with death specifications of attempted rape and kidnapping. The kidnapping charge was reversed by the appellate court, so the Ohio Supreme Court was ruling on the viability of the attempted rape charge. The defendant claimed that there was insufficient evidence to support the attempted rape charge.

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 partially down from her waist. Her blouse was partially up from her waist and she was wearing no underwear or shoes. Tests indicated that a saliva stain was found on the outside of the victim's blue jeans. Due to all of this evidence, the trial court ruled that attempted rape was evident. The Ohio Supreme Court indicated that the attempted rape specification was based solely on circumstantial evidence; there was no physical

evidence that the defendant tried to rape the victim. As a result, the Ohio Supreme Court ruled that the evidence did not "...convincingly demonstrate a firm purpose to commit the crime" (p. 240), a definition taken from *State v. Woods*, discussed earlier.

The punishment for attempt is based on the underlying offense. The Ohio Revised Code makes distinctions with aggravated murder, murder, and drug abuse, but other offenses are treated equally. If a person attempts to commit aggravated murder, murder, or other offense calling for a punishment of life in prison, the attempt offense is treated as a first-degree felony. For drug abuse, if a person attempts to commit a drug abuse offense that is punished based on the number of unit doses, the attempt offense is treated the same 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, § 2323.02 (E), 2000).

The text mentions a number of issues about attempt that are worth noting here. One of the issues is impossibility. According to the text, factual impossibility means that an offender believes something is factual, when in fact it is not. The text gives the example of an offender who believes he is purchasing cocaine, when he is actually purchasing baking powder. The offender intends to purchase cocaine, even though he only purchased baking powder. As a result, factual impossibility is not a defense to attempt. Additionally, the text discusses legal impossibility; this involves an individual who believes he is acting illegally, when his conduct is not actually illegal. This is considered a defense to attempt, according to the text. However, the Ohio Revised Code indicates and the Ohio Supreme Court repeatedly state that factual AND legal impossibility are not defenses to attempt. Despite this, the vast majority of cases that Ohio courts deal with involve factual impossibility.

Conspiracy

As stated in the text, conspiracy consists of an agreement to commit a crime plus an overt act in furtherance of that agreement. These provisions are noted in Section 2923.01 of the Ohio Revised Code:

- (A) No person...shall 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

- (B) 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.

Note that the statute mentions "specified offenses;" this refers to part of subsection (A) of the statute, which states that conspiracy to commit a crime only applies to certain offenses. These 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

The statute also lists two defenses to conspiracy. The first is that one of those in agreement thwarted the success of the conspiracy. The second is that one of those in agreement abandoned the conspiracy, telling all others in the conspiracy of the intent to abandon.

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), 2004).

The text mentions conspiracy prosecutions, and the Ohio Revised Code contains a subsection about testimony of co-conspirators. Essentially, one conspirator cannot be convicted on another conspirator's testimony unless that testimony is supported by other evidence.

Solicitation

The crime of solicitation is found in multiple places in the Ohio Revised Code. 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 the offense" (Ohio Revised Code, § 2923.03 (A)(1), 1986).

There is, however, a crime called "Soliciting" that is considered a sex offense. Section 2907.24 of the Ohio Revised Code defines soliciting as,

No person shall solicit another to engage with such other person in sexual activity for hire (2004).

The punishment for soliciting is a third-degree misdemeanor.

Soliciting sexual conduct is found in other sections the Ohio Revised Code. For example, persons are prohibited from soliciting a minor to engage in prostitution (§2907.21 (A)(2) – Compelling Prostitution) and soliciting another person to use a prostitute or brothel (§ 2907.23 (A)(1) – Procuring).

REFERENCES

Ohio Revised Code, www.ohio.gov/ohio/ohiolaws.html

State v. Brooks 44 Ohio St. 3d 185 (1989)

State v. Heinisch 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 with regard to being 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. Do you agree that conspiracy should carry a penalty this severe if the underlying offense is not completed or attempted? Explain.

WEB RESOURCES

- www.ag.state.oh.us/citizen/kids/parents.asp - a website provided by the Ohio Attorney General's Office that provides information to parents about sexual solicitation of children