

A Brief and General Rundown on New York Conspiracy Law

Primer

- Conspiracy is a crime independent of any other crime; one may be charged with either the conspiracy or the underlying crime, or both.
- The New York Legislature has passed 6 degrees of conspiracy. See NY Penal Law §§105.00 - 105.17. The lowest charge, 6th degree, is conspiracy to commit a substantive crime which, in NY, is a misdemeanor or greater, and the offense is itself a B misdemeanor (up to 6 mos. jail). The severity of the offense of conspiracy ascends to 1st degree, which requires a person greater than 18 years old agree with another less than 16 years old to commit a class A felony, and the offense is itself a class A-I felony (up to life imprisonment).
- One may not be charged with conspiracy to commit a violation.

Conspiracy, Generally

“The crime of conspiracy is as ancient as the common law, yet the modern crime of conspiracy is so vague that it almost defies definition.” *People v Schwimmer* 66 A.D. 2d 91,94 (2d Dept. 1978). Practically speaking, arguing a conspiracy case is not a matter of bending case law to render the facts of the case in favor of the defendant, but rather bending facts of the case to conform to the law. The bottom line is that the foundation of conspiracy is as most people would intuit: it is an independent crime to conspire with others to commit a crime. See *People v. McGee* 49 N.Y. 2d 48, 57 (1979). Since the lowest conspiracy charge, 6th degree, requires intent to commit a crime, the underlying offense contemplated must be at least a misdemeanor, however; one may not conspire to commit a violation. See *People v. Bravman* 89 Misc. 2d 596, 603 (Sup. Ct. Suffolk Co. 1977) [statutory language prohibiting conspiracy to commit a crime refers to misdemeanors and felonies].

Case law is well settled on the issue that conspiracy requires: 1)an agreement, 2)intent to agree to enter a conspiracy to commit a substantive crime and 3)an overt act. NY Penal Law §105.00; §105.20. The agreement, however, is the heart of a conspiracy charge. See *People v. Berkowitz* 50 N.Y. 2d 333 (1980). Intent and an overt act are not independent elements so much as elements necessary to proving that there was in fact an agreement to commit an underlying crime. *McGee* 49 N.Y. 2d at 58. The intent deals with the intention to commit the crime agreed to, and different parties may be able to argue that one intention was not shared by all, but that there were conspiracies within the conspiracy. *People v. Leisner* 73 N.Y. 2d 140 (1989); also see *Ingram Et Al. v. United States* 360 U.S. 672(1959). The overt act must be an act independent of the agreement in order to prohibit prosecuting speech/thought alone, but the act can be anything in furtherance of the commission of the crime, including the crime itself or actions after its completion that tend to prevent its discovery. See *People v. Ribowsky* 77 N.Y. 2d 284 (1991). A prosecutor, however, need only prove an overt act by a single conspirator for a conspiracy charge to be prosecuted against every party involved in the agreement. *Leisner* 73 N.Y. 2d at 149. Additionally, once an agreement is entered into, renunciation of the conspiracy cannot be accomplished by merely withdrawing from the group activity, but rather renunciation requires a substantial effort to prevent the commission of the conspiratorial plan. NY Penal Law §40.10; *People v. Ozarowski* 38 N.Y. 2d 481, 492 (1976). In the case of conspiracy, renunciation may not be an affirmative defense unless the commission of an underlying crime

was in fact prevented. NY Penal Law §40.10 subd. 4.

The Elements

- **The Agreement**

An illicit agreement is the foundation of a conspiracy charge. *See Berkowitz* 50 N.Y. 2d at 343. One defendant may be convicted of conspiracy even though all the other parties to the alleged agreement had been acquitted of conspiracy. *Berkowitz* 50 N.Y. 2d at 343. In *Berkowitz*, the court held that, even though all the other parties to a drug sale had been acquitted of conspiracy, the prosecution is not estopped from pursuing a conspiracy conviction against the defendant. *Id.*

Conspiracy is illegal by virtue of the notion that people are more likely to commit a crime when others agree to participate in some manner. *Schwimmer* 66 A.D. 2d at 96. The theoretical foundation of conspiracy law, then, is aimed at defeating the commission of the substantive offense, but it is the agreement that is the offense of conspiracy itself, and, therefore, the commission of the agreement may be punished, though the substantive offense was never accomplished. *Id.* at 95. In *Schwimmer*, the defendant conspired to steal diamonds with an undercover and a police informant. The 2nd department held that the defendant can be convicted of the agreement to commit the underlying crime even though the other parties only feigned agreement.

- **Intent**

NY is a unilateral intent state, meaning that the intent of the other actors in the conspiracy are irrelevant. *See Schwimmer* 66 A.D. 2d 91. The *Schwimmer* court was one of the first to discuss the amendment of NY from a bilateral to a unilateral intent state, but the reasoning has been supported by many courts ever since. *See People v. Harist* 193 Misc. 2d 680 (Sup. Ct. Monroe 2002). In *Harist*, the defendant was charged with conspiracy to murder stemming from the purchase of a gun from 2 undercover officers. The officers tried to discourage him from committing the murder but nevertheless sold him the gun while defendant was insisting that he would go ahead with the plan (to kill a Monroe county judge because he “is angry on him” because the judge “threw his case out of court”). The court held that, because NY is a unilateral intent state, the prosecution had met their burden of proving the element of intent (the court also went on to speculate that, because defendant’s intent was so clear, the facts of the case might be enough for prosecution in even a bilateral intent state).

Parties to the same criminal design may, however, be held liable for different conspiracy charges where the intentions of the parties are sufficiently distinguishable. *See Ingram Et Al. v. United States* 360 U.S. 672. In *Ingram*, The Supremes held that the employees of an illegal gambling operation could not be held liable for conspiring to evading paying taxes on the operation, but the proprietors of the organization could be held liable. The court explained that, since the tax statute in question required that the intent required be willful, and the employees did not know of the proprietors’ liability for the federal lottery taxes, the employees could not be convicted of conspiracy even though the proprietors could be.

- **The Act**

NY courts require an overt act as an element to a conspiracy prosecution. N.Y. Penal Law §105.20. The purpose of the requirement is to guard against prosecutions of speech/thought alone, *see People v Ribowsky* 77 N.Y. 2d 284, 293 (1991), and, while the act may be the object crime, anything in furtherance of the crime will suffice, since “the act merely provides

corroboration of the existence of the agreement and indicates that the agreement has reached a point where it poses a sufficient threat to society to impose sanctions,” *McGee* 49 N.Y. 2d at 58. Additionally, any overt act of any one party may be attributed to all the others who are party to the agreement. *Id.* at 57. In *McGee*, the court of appeals held that a conviction of the substantive crime of bribery could not be predicated solely on evidence of conspiracy, but, in so holding, the court explains that, for conspiracy, on the other hand, it is not offensive to allow the act of one to be held against another, since the act is useful as evidence of the agreement. *Id.*

The Affirmative Defense of Renunciation

Renunciation is an affirmative defense available to defendants as an inducement to those who are party to a conspiracy to take steps to prevent the crime contemplated. *See Practice Commentary* NY Penal Law §40.10. For the defense to be available to a defendant, then, the defendant must be able to prove that s/he made a “substantial effort to prevent the commission of the conspiratorial plan.” *People v. Ozarowski* 38 N.Y. 2d 481, 492 (1976). A mere withdrawal from the participation in the substantive crime is not enough. *Id.* The Court of Appeals held, in *Ozarowski*, that some parties to a conspiracy to assault could not be granted the affirmative defense of renunciation by virtue of the fact that they wandered off shortly before the assault took place. *Id.*

A Quick Note on Conspiracy and Circumstantial Evidence

Since defendants rarely draw up a contract as to the parameters of their conspiracy, circumstantial evidence is used widely in conspiracies. *Ozarowski* 38 NY 2d at 492. In *Ozarowski*, the defendants took baseball bats to have a “talk” with some unruly fast food workers. Even though most of them may not have ended up actually using the bats, they were all liable after one of the group employed the bat in a conversation between it and one of the fast food workers’ head, since “the surrounding circumstances make perfectly clear that a baseball game was not what the gang had in mind.” *Id.* Additionally, after prosecution has presented a prima facie case of conspiracy, any declarations of any co-conspirator may be introduced against other co-conspirators to prove involvement in the conspiracy or in commission of the substantive crime. *People v. Salko* 47 N.Y. 2d 230 (1979). In *Salko*, one defendant, in the process of bribing a police officer, confided in that police officer that another defendant was also part of the bribery. The Court of Appeals held that the “co-conspirators’ exception to the hearsay rule” allowed for introduction of the officer’s testimony.

Helpful Research Aids:

Legislative History, Staff Notes, Case Notes, Practice Commentary: NY Consolidated Law

Service Preceding § 105.00 & § 40.10.

10-100 New York Criminal Practice § 100.4

7-62 New York Criminal Practice § 62.2