CH. 11
CONSPIRACY & SOLICITATION

§11-1
Conspiracy

United States Supreme Court

Smith v. U.S., 568 U.S. 106, 133 S.Ct. 714, 184 L. Ed.2d 570 (2013) Although the prosecution has the burden to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged, the constitution does not require that the prosecution disprove all affirmative defenses raised by the defense. Instead, the burden of proof may be assigned to the defendant if the affirmative defense in question does not negate an element of the crime. Although the legislative branch may choose to assign the burden of proof concerning other affirmative defenses to the prosecution, the constitution does not require it to do so.

Where a defendant was charged with conspiracy and claimed that he had withdrawn from the conspiracy at such time that the statute of limitations expired before the prosecution was brought, the constitution did not require that the prosecution bear the burden of disproving the affirmative defense of withdrawal. A withdrawal defense does not negate an element of conspiracy, but merely determines the point at which the defendant is no longer criminally responsible for acts which his co-conspirators took in furtherance of the conspiracy. Because the defense did not negate any elements of conspiracy, the constitution was not violated because Congress followed the common law rule by assigning to the defendant the burden to prove he had withdrawn from the conspiracy.

The court also noted the “informational asymmetry” between the defense and the prosecution concerning the defense of withdrawal. “The defendant knows what steps, if any, he took to dissociate from his associates,” while it “would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened.”

Illinois Supreme Court

People v. Hopp, 209 Ill.2d 1, 805 N.E.2d 1190 (2004) Conspiracy requires proof of three elements: (1) agreement with another that an offense be committed; (2) intent that the offense be committed; and (3) an act in furtherance of the agreement. Conspiracy to commit murder requires that the conspirator intend to kill. Thus, a proper definition of "murder" in a prosecution for conspiracy to commit murder would inform the jury that the State is required to prove intent to kill.

The failure to give such an instruction did not constitute plain error, however, because there was no serious risk that the jury misunderstood the law.

People v. Laws, 155 Ill.2d 208, 613 N.E.2d 747 (1993) Without deciding whether Wharton's Rule has been abrogated in Illinois, the Supreme Court held that the rule did not apply here. Wharton's Rule does not prohibit conspiracy prosecutions whenever the substantive crime involves the participation of two or more actors. Instead, prosecution is permitted whenever the number of alleged conspirators exceeds the minimum number of participants required to commit the substantive crime. Because each of the conspiracy indictments here alleged more participants than the minimum number required for the underlying offense, Wharton's Rule was inapplicable. But see, **People v. Urban**, 196 Ill.App.3d 310, 553 N.E.2d 740 (3d Dist. 1990) (Wharton's Rule would prohibit conspiracy prosecution where essential act was purchase of cannabis from two persons; "[s]ince a cannabis purchase always requires at least two actors, we find that [the charge] was barred by Wharton's Rule.")

People v. Foster, 99 Ill.2d 48, 457 N.E.2d 405 (1983) Illinois law encompasses the bilateral, rather than unilateral, theory of conspiracy. Thus, a conspiracy conviction lies only when there is actual agreement to commit the crime by at least two participants. Where defendant agreed to commit the crime, but the second participant had no intention of doing so, the evidence failed to sustain a conspiracy conviction. See also, **People v. Breton**, 237 Ill.App.3d 355, 603 N.E.2d 1290 (2d Dist. 1992).

People v. Bailey, 60 Ill.2d 37, 322 N.E.2d 804 (1975) Where the complainant stopped his car and raced his motor in front of rival gang members, the gang members' acts of shooting at car did not establish conspiracy to murder. The shooting appeared to be an "instantaneous or knee jerk" reaction, thus there was insufficient evidence to establish an "agreement."

People v. Williams, 52 Ill.2d 455, 288 N.E.2d 406 (1972) An indictment for conspiracy need not allege all the elements of the substantive offense.

People v. Peppas, 24 Ill.2d 483, 182 N.E.2d 228 (1962) Indictment for conspiracy is adequate where it designates the intended felony sufficiently to apprise defendant of the exact charge and enable preparation of a defense. The intended felony need not be described with the same accuracy as would be required for an indictment charging the felony itself.

Illinois Appellate Court

People v. Ulloa, 2015 IL App (1st) 131632 To prove the offense of conspiracy to deliver cocaine, the State must prove that defendant himself agreed to the delivery. 720 ILCS 570/405.1. The State cannot prove conspiracy to deliver by showing that defendant was accountable for the actions of another person who agreed to the delivery. The trial court thus committed plain error under both the closely balanced evidence and serious error prongs by instructing the jury that they could find defendant guilty of conspiracy under a theory of accountability.

People v. Effler, 349 Ill.App.3d 217, 811 N.E.2d 291 (2d Dist. 2004) At the time of the offense, 720 ILCS 5/8-2(c) provided:

> "A person convicted of conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy, except that if the object is an offense prohibited by Sections 11-15, 11-16, 11-17, 11-19, 24-1(a)(1), 24-1(a)(7), 28-1, 28-3 and 28-4 of the 'Criminal Code of 1961', approved July 28, 1961, as amended, or prohibited by Sections 404 or 406(b) of the 'Illinois Controlled Substances Act', enacted by the 77th General Assembly, or an inchoate offense related to any of the aforesaid principal offenses, the person convicted may be sentenced for a Class 3 felony however, conspiracy to commit treason, first degree murder, or aggravated kidnaping shall not be sentenced in excess of a Class 2 felony, and conspiracy to commit any offense other than those specified in this subsection, and other than those set forth in

> Sections 401, 402, or 407 of the Illinois Controlled Substances Act, shall not be sentenced in excess of a Class 4 felony."

720 ILCS 5/8-2(c) (West 2000) (emphasis added).

The final clause of §8-2(c) was intended to provide a maximum punishment of a Class 3 or 4 felony sentence for felony conspiracy offenses that are not specifically enumerated in the statute, and the first clause of the statute was intended to limit the maximum punishment for conspiracy to commit a misdemeanor to the maximum provided for the underlying misdemeanor. Any other reading of the statute would create the absurd result of punishing less serious offenses with greater sentences than those available for more serious offenses.

People v. Gomez, 286 Ill.App.3d 232, 675 N.E.2d 971 (3d Dist. 1997) 720 ILCS 5/8-5 provides that "[n]o person shall be convicted of both the inchoate and the principal offense." Thus, although a defendant may be tried for both murder and the inchoate offense of conspiracy to commit murder, conviction and sentence may be entered for only one of the offenses. Since the State elected to proceed to sentencing on the conspiracy verdict, and defendant made no attempt to appeal or otherwise overturn that conviction, the conspiracy judgment is final. Thus, §8-5 precludes the State from retrying defendant for first degree murder, on which the jury was unable to reach the verdict. See also, **People v. Jackson**, 145 Ill.App.3d 626, 495 N.E.2d 1207 (1st Dist. 1986) (a defendant cannot be convicted of both conspiracy and the principal offense).

People v. Adams, 238 Ill.App.3d 733, 606 N.E.2d 579 (1st Dist. 1992) Defendant, an employee of the Secretary of State's driver's license division, was convicted of bribery, official misconduct and conspiracy after a false driver's license was sold to an undercover agent. The supervisor with whom the agent arranged the details of the purchase spoke to defendant out of the agent's hearing. Defendant then completed the paperwork without requiring the agent to show any identification and after telling him to make up the last four digits of his social security number if he could not remember them.

Although a license-for-sale operation was being conducted out of the facility, there was no evidence that defendant was involved. None of the key participants identified defendant as a participant in the conspiracy, and there was no evidence that she ever agreed to participate. Furthermore, defendant's actions complied with office practice, as supervisors had authority to order that applications be completed without identification. Finally, although defendant admitted that she had received money to fill out applications, she could not recall any precise dates, a supervisor testified that he lent her money on occasion, and there was no evidence that she was referring to the application of the undercover agent or that she received money as part of an ongoing agreement. Defendant's conspiracy conviction was reversed.

People v. Persinger, 49 Ill.App.3d 116, 363 N.E.2d 897 (5th Dist. 1977) To establish the mens rea of conspiracy, the State must show an agreement to commit an offense and intent that the offense be committed. To establish the actus reus, the State must show that a conspirator committed an act in furtherance of the unlawful agreement.

People v. McChristian, 18 Ill.App.3d 87, 309 N.E.2d 388 (1st Dist. 1974) Express agreement is not required to prove conspiracy; however, more than mere suspicion or association is necessary.

People v. Hoffman, 124 Ill.App.2d 192, 260 N.E.2d 351 (1st Dist. 1970) The crime of conspiracy occurs where defendant agrees with another to commission of an offense, with intent that the offense be committed, and defendant or a co-conspirator commits an act in furtherance of the conspiracy.

People v. Brouilette, 92 Ill.App.2d 168, 236 N.E.2d 12 (1st Dist. 1968) Defendant could properly be convicted of conspiracy to commit theft, even though the theft was accomplished. 720 ILCS 5/8-5 merely prohibits conviction of both conspiracy and the principal offense. See also, **People v. Simmons**, 21 Ill.App.3d 310, 315 N.E.2d 226 (3d Dist. 1974).

People v. DeStefano, 85 Ill.App.2d 274, 229 N.E.2d 325 (1st Dist. 1967) In indictment for conspiracy with intent that perjury be committed, it was unnecessary to allege the means by which the act or object of the conspiracy was to be accomplished.

§11-2
Solicitation

Illinois Supreme Court

People v. Shepherd, 2026 IL 131240 Defendant argued that the solicitation of murder for hire statute requires that the State prove defendant "procured another" to commit first degree murder, that is that he and the person being offered compensation to commit murder both share a genuine intent to commit the offense of murder. The State argued that it need not prove that the individual solicited had the true intent to commit the murder, but rather it is enough that the individual solicited feign agreement. The supreme court agreed with the State.

Under 720 ILCS 5/8-1.2(a), "a person commits...solicitation of murder for hire when, with the intent that the offense of first degree murder be committed, he...procures another to commit that offense pursuant to any contract, agreement, understanding, command, or request for money or anything of value." Generally, solicitation offenses require only unilateral agreements, while the offense of conspiracy requires a bilateral agreement. Looking at the solicitation of murder for hire statute in that context, the court concluded that the use of the term "procure" in the statute did not change the nature of the offense to require anything more than the traditional unilateral agreement for solicitation.

The elements of solicitation of murder for hire are focused on defendant's intent and defendant's actions. The statute does not include any specific requirement that the individual solicited actually agree and intend to commit murder. While the statute references a contract or agreement, those terms indicate the manner in which defendant may commit the act of procuring another to commit the underlying murder; their inclusion does not add an element of actual agreement and intent by the individual solicited.

Likewise, the use of the word procure in the statute rather than solicit does not require a bilateral agreement. Instead, using the term procure acknowledges the fact that compensation in some form is a requirement of this particular solicitation offense. A defendant procures another by paying or promising to pay that individual pursuant to a contract or agreement. The offense is completed at that point, even if the individual solicited does not actually intend to commit the underlying murder.

People v. Boyce, 2015 IL 117108 The offense of solicitation of murder occurs where, with the intent that first degree murder be committed, a person commands, encourages, or requests another to commit that offense. (720 ILCS 5/8-1.1) The General Assembly did not intend that uncommunicated requests constitute solicitation of murder. Thus, where a solicitation is made by letter, the intended recipient must actually receive the letter in order for the crime of solicitation of murder to occur.

In the course of its holding, the court noted that the General Assembly based the solicitation statute on the Model Penal Code but declined to enact the provision of the Code which included uncommunicated solicitations within the definition of the offense.

An attempt occurs where, with intent to commit a specific offense, a person performs any act that constitutes a substantial step toward the commission of the specific offense. (720 ILCS 5/8-4(a)) The general attempt provision applies to all offenses unless the legislature intended that a more specific crime include attempt or application of the attempt statute to a principal offense would create an inherent impossibility. Legislative intent that a more specific crime includes attempt is shown by the inclusion of explicit "attempt" language in the definition of the specific offense.

The attempt statute applies to the offense of solicitation in Illinois. Thus, a person who sends a mailed solicitation which does not reach the intended recipient may be convicted of attempt solicitation.

Illinois Appellate Court

People v. Smith, 2025 IL App (1st) 220116 Defendant was convicted of solicitation of murder for hire. The trial evidence showed that he asked an undercover police officer, who he believed to be a hitman, to murder a judge and prosecutor. Defendant argued on appeal that the State failed to prove that he "procured" another to commit the offense, because the undercover officer was not actually a hitman.

To prove solicitation of murder for hire, the State must show that defendant "with the intent that the offense of first degree murder be committed, *** procure[d] another to commit that offense pursuant to any contract, agreement, understanding, command, or request for money or anything of value." Defendant's interpretation of the meaning of "procure," which would require that the individual solicited actually intends or agrees to commit the murder, has been consistently rejected by Illinois courts. Illinois case law has established that the solicitation of murder for hire statute is based on a unilateral theory, "which only requires actual agreement by one of the parties."

Nor was counsel ineffective for failing to take action when the deliberating jury asked for a definition of "procure." Counsel acquiesced to the trial court's response, which was to refer the jury to the pattern instructions. Counsel's performance was not deficient because decisions about jury instructions are generally matters of trial strategy, the pattern instructions do not provide a definition of "procure," "procure" has a commonly understood meaning, and the definition defendant suggests above would not have been proper.

The court did remand for a **Krankel** hearing, however, because the trial court failed to conduct a preliminary inquiry into defendant's post-trial allegation that counsel was ineffective for failing to investigate exculpatory evidence.

People v. Woodard, 367 Ill.App.3d 304, 854 N.E.2d 674 (1st Dist. 2006) Generally, a defendant cannot be convicted of both murder and the inchoate offense of solicitation to commit murder. However, convictions for both offenses were permissible where defendant solicited the murders of two persons, but a third person was killed by accident. Because the two counts had separate victims, the solicitation count was not inchoate in the first degree murder count.

People v. Terrell, 339 Ill.App.3d 786, 792 N.E.2d 357 (5th Dist. 2003) To establish the offense of solicitation of murder, the State must prove that defendant: (1) intended that the offense of first degree murder be committed, and (2) commanded, encouraged or requested another person to commit the murder. Defendant did not commit solicitation of murder where he asked another person for a ride to a remote location, so that defendant could commit a murder. In light of the clear requirement that defendant command, encourage or request another to commit murder, the solicitation statute does not apply where defendant intends to commit the murder himself.

The court rejected dicta in **People v. Quiroz**, 235 Ill.App.3d 739, 625 N.E.2d 856 (2d Dist. 1993), which suggested that a conviction for solicitation to commit murder could stand where defendant intended to commit the offense himself but requested other assistance from a third party.

People v. Sims, 315 Ill.App.3d 518, 734 N.E.2d 135 (5th Dist. 2000) Where defendant unsuccessfully solicited a cellmate to murder a witness, a conviction for solicitation of murder could stand even though the witness was subsequently murdered by a second person whom defendant approached in a separate solicitation. Solicitation to commit murder is complete when defendant requests that a murder be committed, whether or not the person solicited attempts to carry out the crime.

Although 720 ILCS 5/8-5 prohibits convictions for both murder and solicitation, the prohibition applies only where the person solicited actually carries out the murder. §8-5 does not prohibit a separate conviction for a separate, unsuccessful solicitation.

People v. Breton, 237 Ill.App.3d 355, 603 N.E.2d 1290 (2d Dist. 1992) Defendant was convicted of solicitation of murder for hire under 720 ILCS 5/8-1.2(a), which provides that the offense occurs when defendant, with intent that the offense of first degree murder be committed, procures another to commit first degree murder "pursuant to any contract, agreement, understanding, command, or request for money or anything of value." Because an actual agreement to commit a murder is unnecessary, the offense is complete once defendant requests that murder be committed pursuant to an agreement, even if the second party merely feigns agreement.

People v. Schnurr, 206 Ill.App.3d 522, 564 N.E.2d 1336 (2d Dist. 1990) The offense allegedly solicited is an essential part of the offense of solicitation; defendant cannot be charged with soliciting "an offense" without specification of what that offense is.

People v. Crews, 191 Ill.App.3d 228, 547 N.E.2d 580 (4th Dist. 1989) A defendant cannot be convicted of both a choate and an inchoate offense; because defendant was convicted of first degree murder, her conviction for solicitation to commit murder must be vacated.

People v. Harvey, 95 Ill.App.3d 992, 420 N.E.2d 645 (1st Dist. 1981) The offense of solicitation occurs where, with intent that an offense be committed, defendant commands, encourages or requests another to commit that offense. Because the solicitation is complete at that point, defendant's subsequent withdrawal from the enterprise is irrelevant. Defendant's conviction for solicitation to commit murder was affirmed. See also, People v. Edwards, 243 Ill.App.3d 280, 611 N.E.2d 1196 (1st Dist. 1993).

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