

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JESSE T. BROOKS

09-S-319, 08-S-579, 07-S-2885

**DEFENDANT’S MOTION TO DISMISS INDICTMENT 09-S-319
CHARGING CONSPIRACY TO COMMIT MURDER**

2009 JUN 15 P 3:14
ROCKINGHAM
SUPERIOR COURT

Defendant Jesse T. Brooks hereby moves to dismiss indictment No. 09-S-319 charging him with conspiracy to commit murder. As grounds for this motion, Defendant states that the crimes of conspiracy and capital murder, under the New Hampshire Criminal Code, bear distinct and conflicting *mens rea* requirements. Consequently, there is, as a matter of law in New Hampshire, no basis for the crime with which Defendant is charged in indictment No. 09-S-319.¹

In support of this motion, Defendant states as follows:

1. On November 9, 2007, Defendant Jesse Brooks was indicted on one count of conspiracy to commit capital murder (No. 07-S-2885). On March 5, 2008, Defendant was re-indicted on one count of conspiracy to commit capital murder (No. 08-S-579). On February 4, 2009, Defendant was indicted a third time in an indictment that stated one count of conspiracy to commit murder (No. 09-S-319).

2. The third indictment, No. 09-S-319, omitted the word “capital” from the caption. Like the second indictment, however, the third indictment cited the conspiracy statute (RSA 629:3, I, IV) as well as the solicitation provision (RSA 630:1, I(c)) and kidnapping provision

¹ Mr. Brooks, by and through counsel, previously filed a motion to dismiss the second indictment (08-S-579) on the same legal grounds as those set forth herein. See Def.’s Motion to Dismiss Indictment (June 2, 2008). The Court (Lynn, C.J.) denied that motion. See Order on Def.’s Motion to Dismiss (July 9, 2008).

(RSA 630:1, I(b)) of the capital murder statute for its statutory basis. (The third indictment also expanded the timeframe of the conspiracy alleged, and added factual allegations not included in the prior two indictments.)

3. Under New Hampshire law, “[a] person is guilty of conspiracy if, *with a purpose* that a crime defined by statute be committed,” that person entered into a conspiracy to commit that crime. RSA 629:3, I (emphasis added). It must be that person’s “conscious object” to commit the underlying substantive crime. See RSA 626:2, II(a) (“person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises that element”).

4. The capital murder statute, however, bears a different and conflicting *mens rea* requirement: that the defendant “*knowingly* cause[d] the death” of another. RSA 630:1, I (emphasis added). To act “knowingly” means merely to act “with awareness either of the nature or natural tendency of one’s conduct, or of material factual circumstances.” State v. Allen, 128 N.H. 390, 393 (1986).

5. The attempt, in the indictment, to merge the purposeful *mens rea* requirement of the conspiracy statute with the knowing *mens rea* requirement of the capital murder statute thus leads to a “bizarre” result. See id. at 394. Inchoate offenses like conspiracy that require purposeful conduct cannot logically be joined with substantive offenses like capital murder that require only a knowing result: “It would be absurd to charge that a defendant acted with the conscious object of committing murder, and at the same time charge that if he had completed the crime he would have acted without a conscious object to cause the victim’s death (*i.e.*, only knowingly or recklessly with extreme indifference).” Id. at 395; see also id. at 394 (“two

simultaneous states of mind with respect to the same material element would be too bizarre for a practical legal system”).

6. In State v. Donohue, the New Hampshire Supreme Court expressly invalidated a criminal charge that combined such incompatible *mens rea* requirements as the charge in the indictment against Defendant. See 150 N.H. 180, 186 (2003). The Court addressed the defendant’s challenge to his conviction for conspiracy to commit second-degree (reckless) assault. See id. at 181. In doing do, the Court explained the distinction between the purposeful mental state required for conspiracy and the non-purposeful mental state of the substantive crime (reckless assault) that was the alleged object of the conspiracy. See id. at 183-85. The Court concluded:

A person cannot be guilty of conspiracy to commit reckless assault because an assault, like a reckless manslaughter, is controlled by the resulting harm. In other words, a person cannot agree, in advance, to commit a reckless assault, because, by definition, a reckless assault only arises once a future harm results from reckless behavior.

Id. at 186 (citations omitted). Consequently, the Court recognized, “the State cannot charge a person under RSA 629:3 for conspiracy to commit a reckless second-degree assault.” Id.; see also id. (“[S]ince there was no agreement to cause the particular harm that resulted, the defendant cannot be guilty of conspiracy to commit reckless assault.”).

7. The “knowing” *mens rea* required for capital murder is comparable to the “reckless” *mens rea* required for reckless assault or reckless manslaughter. With both—unlike with a “purposeful” mental state—a defendant “only believed that the result would be produced but did not consciously plan or desire to produce it.” See Model Penal Code § 5.03 comment 29(c)(i) at 408. “[A] knowing state of mind merely appreciates the nature and natural consequences of intended action, and a reckless state of mind does no more than consciously

disregard a substantial and unjustifiable risk of causing the forbidden result.” Allen, 128 N.H. at 395.

8. Other jurisdictions have also recognized the absurdity of attempting to combine charges of conspiracy with substantive crimes that require less than purposeful mental states. As the Donohue Court observed, “[n]umerous state courts have followed the reasoning set forth in the Model Penal Code to conclude that once cannot conspire to accomplish an unintended result.” 150 N.H. at 184 (citing Mitchell v. State, 767 A.2d 844, 847, 854-55 (Md. 2001) (conspiracy to commit a “non-premeditated” murder not a crime); People v. Hammond, 466 N.W.2d 335, 336-37 (Mich. App. 1991) (conspiracy to commit second-degree murder not a crime)).

9. In People v. Hammond, for example, the Michigan Court of Appeals vacated a defendant’s conviction for conspiracy to commit second degree murder (defined as murder committed without premeditation or a specific intent to kill), ruling that “there is no such criminal offense.” 466 N.W. at 336. The court reasoned:

“Foreknowledge and plan are compatible with the substantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation. The elements of conspiracy, conversely, are incompatible and inconsistent with second-degree murder. One does not ‘plan’ to commit an ‘unplanned’ substantive crime. It is not ‘absence’ of the elements but the ‘inconsistency’ of the elements which lead [*sic*] us to conclude that one conspires to commit first-degree murder but not second-degree murder.” Because of this logical inconsistency, we conclude as a matter of law that there is no crime of conspiracy to commit second-degree murder.

Id. at 337 (quoting People v. Hamp, 312 N.W.2d 175 (Mich. App. 1981)).

10. Similarly, in Mitchell v. State, the Maryland Court of Appeals reversed a defendant’s conviction for conspiracy to commit second degree assault (defined as murder with

intent to kill but without premeditation and deliberation), ruling that “conspiracy to commit this form of second degree murder is not a crime.” 767 A.2d at 847. The court reasoned:

[T]he kind of awareness and reflection necessary to achieve the unity of purpose and design for a conspiracy is essentially the same as that required for deliberation and premeditation. We think that the California court in Cortez and the Michigan court in Hammond were entirely correct in their analysis—that where the charge is made and the evidence shows that the defendant conspired to kill another person unlawfully and with malice aforethought, the conspiracy is necessarily one to commit murder in the first degree (even if a murder pursuant to the conspiracy never occurs or, for whatever reason, amounts to a second degree murder), as the agreement itself, for purposes of the conspiracy, would supply the necessary deliberation and premeditation.

Id. at 854; see also People v. Cortez, 960 P.2d 537 (Cal. 1998) (holding that “all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder”).

11. Defendant therefore submits that the indictment charging him with conspiracy to commit capital murder (No. 09-S-319) is invalid and should be dismissed.

12. Counsel for Defendant has not requested the assent of counsel for the State because none is required pursuant to R.57-A.

13.

WHEREFORE, Defendant Jesse T. Brooks respectfully requests this Honorable Court issue an order:

- A. Dismissing indictment No. 09-S-319; and
- B. Granting such other relief as is just and appropriate.

Respectfully submitted,
JESSE T. BROOKS,
By his attorneys,

William H. Kettlewell (*pro hac vice*)
Maria R. Durant (*pro hac vice*)
Dwyer & Collora, LLP
600 Atlantic Avenue
Boston, Massachusetts 02210
(617) 371-1000


Peter D. Anderson, NH Bar #7860
McLane, Graf, Raulerson & Middleton, PA
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105-0326
(603) 625-6464

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Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, June 11, 2009, to all counsel of record by electronic mail and U.S. mail.


Peter D. Anderson