

1977

Conspiracy: The Requisite Proof: *State v. Dent*, 198 Neb. 110, 251 N.W.2d 734 (1977)

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Recommended Citation

Lynne Rae Fritz, *Conspiracy: The Requisite Proof: State v. Dent*, 198 Neb. 110, 251 N.W.2d 734 (1977), 56 Neb. L. Rev. 896 (1977)
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Conspiracy: The Requisite Proof

State v. Dent, 198 Neb. 110, 251 N.W.2d 734 (1977).

I. INTRODUCTION

Conspiracy has been referred to as an "elastic, sprawling and pervasive offense. . . . [It] is so vague that it almost defies definition."¹ Despite the inherent vagueness of the crime, it may be said to require an agreement between two or more persons, which constitutes the criminal act, and an intent to thereby achieve a certain unlawful act.² However, it is difficult to divide conspiracy into the elements of criminal act and criminal intent because the act of agreement, since it is volitional, also requires an intent.³ Some jurisdictions also require an overt act in furtherance of the agreement;⁴ however, if the agreement is established, virtually any overt act in furtherance of the conspiracy will suffice.⁵

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1. *Krulewitch v. United States*, 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring).
 2. W. LEFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW*, § 61, at 453 (1972). The objective of a conspiracy may also be the doing of a lawful act by unlawful means. However, that portion of the offense is not pertinent to the discussion herein. *Id.*
 3. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 632-35 (1941); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 935 (1959) [hereinafter cited as *Developments*]. The two types of intent involved in the offense of conspiracy focus on different issues, although practically they overlap. Since every conspiracy involves an agreement, it is necessary to establish that each of the parties charged had an intent to enter into an agreement. The issue here is whether the separate intentions of each party met on common ground to effect an agreement. If this is established, the subsequent issue raised is whether the purpose agreed upon involves a criminal intent. Harno, *supra* at 631.
 4. W. LEFAVE & A. SCOTT, *supra* note 2, at 476. In Nebraska, proof of an overt act is an element of the offense of conspiracy as defined in NEB. REV. STAT. § 28-301 (Reissue 1975) which provides:
If two or more persons conspire to commit any felony or to defraud the State of Nebraska in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties in such conspiracy shall be fined not more than ten thousand dollars or imprisoned in the Nebraska Penal and Correctional Complex not more than two years or both.
See Platt v. State, 143 Neb. 131, 8 N.W.2d 849 (1943).
 5. W. LEFAVE & A. SCOTT, *supra* note 2, at 476-78.

The elements of conspiracy are difficult to analyze because of the predominantly mental nature of the crime.⁶ For this reason, a great deal of uncertainty exists concerning the quantum of evidence necessary to prove the elements of conspiracy.⁷ This uncertainty is compounded by the clandestine nature of conspiracy and the difficulty of producing direct evidence.⁸ Thus courts have held that a charge of conspiracy may be sustained by proof of surrounding facts and circumstances which infers clear cooperation between the parties.⁹ However, it has been suggested that courts have occasionally been too enthusiastic in their reliance on circumstantial evidence.¹⁰

Recently in the case of *State v. Dent*¹¹ the Nebraska Supreme Court was directly confronted with issues regarding the quantum of evidence necessary to prove the elements of conspiracy. The purpose of this article is to analyze the court's opinion, focusing both upon what the court said and what it did not say, and to consider the possible implications of the court's holding.

II. FACTS PRESENTED TO THE COURT

On October 4, 1975, defendant Bradley Bodeman received a phone call at his residence in Grand Island, Nebraska, from defendant Gerald Dent, who placed the call from Lincoln, Nebraska.¹² In summary, the conversation revealed that Bodeman wanted six or seven more items from Dent and that the two would meet at the Ramada Inn in York, Nebraska.¹³ The identity of the items was not disclosed. A third person, William E. Burke, was at the Bodeman residence for the purpose of purchasing cocaine when the phone conversation occurred, although Burke apparently left the

6. Harno, *supra* note 3, at 632.

7. W. LEFAVE & A. SCOTT, *supra* note 2, at 456.

8. *Developments*, *supra* note 3, at 933.

9. *Id.* A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from the defendant's subsequent conduct. *State v. Lacy*, 195 Neb. 299, 237 N.W.2d 650 (1976); *State v. Claire*, 188 Neb. 373, 196 N.W.2d 519 (1972).

10. Cousins, *Agreement as an Element in Conspiracy*, 23 VA. L. REV. 898, 910 (1937); *Developments*, *supra* note 3, at 933-34.

11. 198 Neb. 110, 251 N.W.2d 734 (1977).

12. The phone call was intercepted and recorded by a wiretap on the phone at defendant Bodeman's residence. The order authorizing the wiretap was not an issue on appeal. *Id.*

13. The telephone conversation between Bodeman and Dent was recorded and then transcribed. Bodeman was identified as the first speaker and Dent as the second speaker. The substance of the transcription

residence without purchasing any drugs.¹⁴ Approximately two hours after the telephone conversation, a highway patrolman viewed a meeting, apparently between Dent and Bodeman, at the Ramada Inn parking lot in York, Nebraska. Dent was positively identified by the patrolman later when he stopped the Dent vehicle to issue a traffic citation. Bodeman was identified only by his ve-

follows in part:

First Speaker: . . . I wanted to get some more of them.
 Second Speaker: Yeah, when?
 First Speaker: Well, as soon as I could.
 Second Speaker: Hmmmm.
 First Speaker: We got a whole bunch of shit going on. We're going to be making a bunch of money, and I got a bunch of "LB's" coming in tomorrow and just all kind of shit's breaking loose.
 Second Speaker: Oh . . . really. . . . well, when do you want it? . . . Or do you?
 First Speaker: Well, how many you got left?
 Second Speaker: Ten.
 First Speaker: Ten?
 Second Speaker: Um huh.
 First Speaker: I'd sure like to get six or seven of them for a couple of days . . .
 Second Speaker: O.K., yeah, O.K. Right. Can I send them back with my brother, Randy (??)
 First Speaker: When's he coming back?
 Second Speaker: He's here right now. He's going to be going back either tonight or tomorrow. (unintelligible . . . background noise)
 First Speaker: Well, shit, I'm damned near tempted to run up there, but . . . [expletive deleted]!

 First Speaker: Meet in York (chuckling) . .
 Second Speaker: Meet in York? (laughter) You weren't really thinking about tonight, were you?
 First Speaker: Well, yeah.

 Second Speaker: There's a Ramada Inn there why don't we just meet in front of the Ramada Inn?

 Second Speaker: In about. . . . I'm going to take off in about ten minutes.
 First Speaker: Fine, fine, I'll meet you there.
 Second Speaker: What? How many do you want?
 First Speaker: Seven.
 Second Speaker: Seven. What price is that?
 First Speaker: Well, that's up to you.
 Second Speaker: Well, (unintelligible . . . background noise) . . . (either fifty-five or sixty-five).
 First Speaker: Fine, fine. Fine. Fine. Are you going to be in your little car?
 Second Speaker: Yeah.

Bill of Exceptions, vol. 2, at 280 (exhibit No. 5). See also Brief of Appellee at 9.

14. 198 Neb. at 111, 251 N.W.2d at 735.

hicle. The patrolman did not personally observe what transpired during the meeting.¹⁵ At approximately midnight that evening, Burke returned to the Bodeman residence and purchased four grams of white powder which he apparently understood to be cocaine, although he was later unsure that the substance actually was cocaine.

Bodeman and Dent were charged with conspiracy to distribute cocaine. The case was tried to the court and the defendants were found guilty.

III. ANALYSIS

In a per curiam opinion, a majority of the Nebraska Supreme Court held that the circumstantial evidence, as summarized above, was "substantial" and thus sufficient to sustain the conviction. The court concluded that the defendants entered into an agreement to "participate in the chain of distribution" of cocaine. According to the court, the specific object, which both defendants intended to achieve by their agreement, was the distribution of cocaine to third persons through Bodeman. The meeting at the Ramada Inn in York, Nebraska, was viewed as an overt act in furtherance of the conspiracy. The object of the conspiracy was achieved when Bodeman delivered the cocaine to Burke.¹⁶

The conclusions reached by the majority of the court were enunciated without explanation. The court's holding raises several issues regarding the quantum of evidence necessary to prove the requisite elements of conspiracy; specifically, the identity of the specific object of the agreement and the intent to accomplish that object.

A. The Specific Object of the Agreement

In a dissenting opinion, Justice McGowan addressed perhaps the more obvious question raised by the holding of the court. It is axiomatic that when a conspiracy to commit a specific offense is charged, in order to sustain a conviction, there must be sufficient evidence to prove that the object of the agreement between the conspirators was in fact the commission of that offense.¹⁷ Justice

15. These facts raise an unanswered question as to why the patrolman did not then intervene in the purported drug transaction.

16. 198 Neb. at 112-13, 251 N.W.2d at 735-36.

17. *People v. Smith*, 22 Ill. App. 3d 377, 317 N.E.2d 300 (1974) (reversing the conviction of conspiracy to commit perjury as the evidence was insufficient to prove that the object of the agreement was to commit the offense of perjury, as defined by statute); *State v. Butner*, 180

McGowan's disagreement with the majority focused on the quantum of evidence necessary to prove that the specific object of an agreement between the defendants was the commission of the offense charged.¹⁸

As Justice McGowan perceived the evidence, the State merely proved that the defendants agreed to sell and deliver something. He reasoned that since the evidence failed to identify the substance which the defendants agreed to sell and deliver, the object of the alleged conspiratorial agreement was sheer speculation. He concluded that the defendant's conviction of conspiracy to commit the specific offense of distribution of cocaine should not be sustained.¹⁹

The respective conclusions of the majority and the dissent in this case diverged not on a substantive point of law, but rather on the inferences drawn from the evidence. Although unexplained in the opinion, the majority of the court seems to have implicitly relied on a ladder of inferences which eventually led to the conclusion that the object of the agreement between the defendants was

Neb. 529, 143 N.W.2d 907 (1966) (sustaining a demurrer to the charge of conspiracy because the indictment did not state facts sufficient to show that the object of the conspiracy was to commit a felony); *People v. Friedlander*, 280 N.Y. 437, 21 N.E.2d 498 (1939) (reversing the conviction of conspiracy to violate wage and hour provisions of the labor law because the evidence was insufficient to prove that the object of the agreement between the defendants was to violate the law).

The conspiracy charge in *Dent* was based upon the provisions of NEB. REV. STAT. § 28-4,129 (Reissue 1975) which provides:

Any person who attempts or conspires to commit any offense defined in sections 28-459 and 28-4,115 to 28-4,142 shall, upon conviction thereof, be punished by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The substantive offense of delivery of a controlled substance is defined in NEB. REV. STAT. § 28-4,125 (Reissue 1975) which provides, in pertinent part: "Except as authorized by Sections 28-459 and 28-4,115 to 28-4,142, it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense or possess with intent to manufacture, distribute, deliver or dispense, a controlled substance"

18. 198 Neb. at 113-15, 251 N.W.2d at 736-37 (McCown, J., dissenting).

19. The majority opinion now holds in effect that evidence of an agreement between two persons to sell and deliver unidentified property which is possibly or even probably illicit or contraband, followed by some act, is sufficient to establish a conspiracy to distribute cocaine or any other controlled substance. The holding means also that the State may prove a conspiracy to commit a specific offense by proving an agreement to commit any act which is possibly or even probably unlawful or criminal.

Id. at 114, 251 N.W.2d at 736.

the distribution of cocaine. At the base of these inferences appear to be two facts. First, Bodeman did not sell cocaine to Burke earlier in the evening before Bodeman went to York, Nebraska. Second, Bodeman did sell Burke a substance, purportedly cocaine, later that evening after he returned from York. Implicit in the court's conclusion lies the inference that Bodeman received the cocaine from Dent in York. From this the court apparently inferred that the telephone conversation involved an agreement to sell and buy cocaine.²⁰

Justice McGowan was not persuaded that these inferences were sufficient to establish beyond a reasonable doubt that the defendants agreed to distribute cocaine.²¹ Justice McGowan's hesitancy to support the ladder of inferences relied on by the majority was well-founded.²² One need not use much imagination to interpret the facts presented in a manner consistent with the defendants' innocence.²³ Although it is true that conspiracy convictions are often based on circumstantial evidence,²⁴ this proposition does not

20. *Id.* at 112, 251 N.W.2d at 735-36.

21. "Any connection between Dent and whatever the transaction was between Bodeman and Burke rests upon a web of inferences which the evidence does not support." *Id.* at 114, 251 N.W.2d at 736 (McCown, J., dissenting).

22. The inference-on-inference rule has been rejected by most courts. However, the underlying principle which is rooted in the standard of reasonable doubt, continues to have vitality. The notion remains that an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility. See *Shutt v. State*, 233 Ind. 169, 117 N.E.2d 892 (1954); *State v. Earlywine*, 191 Neb. 533, 215 N.W.2d 895 (1974); J. WIGMORE, EVIDENCE, § 41 (and cases cited therein).

This notion is consistent with the rule regarding circumstantial evidence enunciated by Justice McGowan, that:

Where circumstantial evidence is relied upon in a criminal prosecution, the circumstances proven must relate directly to the guilty [*sic*] of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

198 Neb. at 114-15, 251 N.W.2d at 736 (quoting from *State v. Faircloth*, 181 Neb. 333, 336, 148 N.W.2d 187, 189 (1967)).

23. An equally reasonable interpretation of the facts is that Bodeman possessed the substance he sold to Burke for some time before Dent telephoned. It is just as feasible that Burke didn't have the cash to purchase the substance earlier in the evening. The court's initial inference that since Bodeman didn't sell the substance to Burke early that evening, Bodeman must not have possessed any drugs to sell at that time, is itself a mere suspicion. Thus the inferences which the majority deduced from that wobbly foundation fall far short of a standard of reasonable doubt.

24. See notes 8-9 and accompanying text *supra*.

affect the constitutional right of an accused to be convicted only if the circumstances exclude all reasonable doubt of innocence.²⁵

B. The Requisite State of Mind

The holding of the court in this case raises a second issue regarding the quantum of evidence necessary to prove the elements of conspiracy. This issue focuses on the requirement that each conspirator must enter into the agreement to commit a specific unlawful act possessing the requisite state of mind.²⁶ The court here holds that both parties "intended and expected" the object of the agreement, which was the distribution of cocaine to third persons through Bodeman, to be accomplished.²⁷ Although the language used by the court supports an adherence to the intent requirement, the facts relied on by the court to reach its holding cast some doubt on the actual nature of the mental state required for conspiracy.

One of the most difficult problems encountered in conspiracy law is that of determining when a venture of one person has been adopted by another so that it can be found to be the object of a joint agreement.²⁸ The facts of this case, accepting for the purpose of analysis the inferences on which the court apparently relied,²⁹ raise precisely such a problem. Although Bodeman may have intended to resell the alleged cocaine to third persons, it is not clear that Dent also intended the resale. The evidence could logically support a finding that Dent knew that Bodeman intended to resell the alleged cocaine.³⁰ The issue in this regard is whether mere

25. The United States Supreme Court in *in re Winship*, 397 U.S. 358 (1970), specifically held that the reasonable doubt standard is an essential requirement of any criminal proceeding if it is to fulfill the due process guarantees of the fourteenth amendment. This holding was reiterated in *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

It could be argued that the standard of review articulated and applied by the majority in *Dent* significantly weakens the reasonable doubt standard. The majority stated: "Although the evidence is in part circumstantial, a conviction may rest upon circumstantial evidence if it is substantial." 198 Neb. at 112, 251 N.W.2d at 735.

The majority's standard of reasonable doubt is in sharp contrast to that applied by the dissent and arguably with that guaranteed by the fourteenth amendment. See note 22 *supra*.

26. See notes 2-3 and accompanying text *supra*.

27. 198 Neb. at 112-13, 251 N.W.2d at 736.

28. *Developments, supra* note 3, at 930-31; see 53 COLUM. L. REV. 228 (1953).

29. See text accompanying note 20 *supra*.

30. This knowledge may be inferred from the telephone conversation during which Bodeman indicated he was going to make some money because several "LB's" were coming into town. See note 13 *supra*.

knowledge, on the part of a supplier, of another's illegal venture is sufficient to prove he intended to achieve the object of that venture.³¹ In other words, the factual problem is whether Dent's knowledge that Bodeman might resell the alleged cocaine which Dent purportedly sold him is sufficient to convict Dent of conspiring with Bodeman to distribute cocaine to third persons. Generally courts have required "something more" than mere knowledge, but they have had difficulty in establishing a rule to identify the "something more" that is required.³²

Judge Learned Hand considered the issue in *United States v. Peoni*,³³ which involved facts somewhat similar to those in *Dent*. In reversing the conspiracy conviction, even though the supplier knew that the illegal goods would be resold by the buyer, Judge Learned Hand stated that the accused must "in some sort associate himself with the venture, [so] that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed."³⁴ This test, which has been labeled the "stake in the venture test,"³⁵ has not, per se, been widely accepted,³⁶ except as it stands for the proposition that mere knowledge is not enough to convict one of conspiring to commit the object of another's illegal venture.³⁷

The issue of what must be proved before a seller can be found to have entered into a conspiratorial agreement, the purpose of which is to further the buyer's illegal venture, was considered by the United States Supreme Court in *Direct Sales Co. v. United States*.³⁸ The Court held that it is intent which is the additional

31. W. LEFAVE & A. SCOTT, *supra* note 2, at 466-68; *Developments, supra* note 3, at 931-33.

32. *Developments, supra* note 3, at 930-31.

33. 100 F.2d 401 (2d Cir. 1938). In this case the defendant sold counterfeit bills to Regno who sold the same bills to Dorsey. Peoni was charged with conspiracy with Regno. The object of the conspiracy was to transfer possession of bills to third persons like Dorsey.

34. *Id.* at 402.

35. *Developments, supra* note 3, at 931. The test was articulated slightly differently in *United States v. Falcone*, 109 F.2d 579 (2d Cir.), *aff'd on other grounds*, 311 U.S. 205 (1940), where the court stated that the defendant "must in some sense promote their venture himself, make it his own, have a stake in its outcome." *Id.* at 581.

36. *Developments, supra* note 3, at 931. See *Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *United States v. Tramaglino*, 197 F.2d 928 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952); *Johns v. United States*, 195 F.2d 77 (5th Cir. 1952). But see *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972); *United States v. Ragland*, 375 F.2d 471, 477 (2d Cir. 1967) (citing *Peoni* with apparent approval).

37. *Direct Sales Co. v. United States*, 319 U.S. 703, 709-10 (1943); *Developments, supra* note 3, at 931.

38. 319 U.S. 703 (1943).

“something” beyond mere knowledge which must be proven.³⁹ While indicating that the “stake in the venture” test may be relevant to a finding of intent, the Court determined that other factors should also be considered.⁴⁰ The primary factor which the Court considered was whether the goods supplied were in themselves illegal or restricted.⁴¹ But the Court indicated that not every instance of sale of restricted goods, in which the seller knows of the buyer’s illegal venture, would support a charge of conspiracy.⁴² In support of this proposition, the Court specifically referred to single or casual transactions in which the seller was indifferent to the illegal purpose underlying the buyer’s purchase.⁴³ These factors, along with references to the “stake in the venture test,” have provided a focus of inquiry for subsequent cases faced with the same issue raised by a multitude of various factual situations.⁴⁴

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39. “This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.” *Id.* at 711.
40. The factors articulated by the Court include quantity actually sold, frequency of the sales, and conduct stimulating the purchases. *Id.*
41. *Id.* at 710-12. Consistent with the Court’s emphasis on the illegal or legal nature of the substance, it has been suggested in other factual situations that the reasonableness or unreasonableness of a person’s action should be a factor added to the “stake in the venture test.” *Developments, supra* note 3, at 932-33.
42. 319 U.S. at 712.
43. *Id.* at 712 n.8. See 53 COLUM. L. REV. 228, 230-32 (1953).
44. *United States v. Rojas*, 537 F.2d 216 (5th Cir. 1976) (considering facts proving frequent and large sales of drugs sufficient to sustain the finding of conspiracy); *United States v. Sin Nagh Fong*, 490 F.2d 527 (9th Cir.), *cert. denied*, 417 U.S. 916 (1974) (considering the factors of multiple sales and active encouragement in sustaining the defendant’s conviction for conspiracy); *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972) (holding that a single sale of a large amount of amphetamine tablets by the defendant was insufficient evidence to sustain his conviction for conspiracy); *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965) (considering facts proving frequent and large deliveries of narcotics sufficient to establish a conspiracy); *United States v. Ford*, 324 F.2d 950 (7th Cir. 1963) (holding that the purchase of a watch known to be stolen was insufficient to sustain a finding that the purchaser was involved in a conspiracy to receive stolen goods); *United States v. Rich*, 262 F.2d 415 (2d Cir. 1959) (concluding that proof of frequent sales and purchases by the defendant of controlled substances with established members of a conspiracy was sufficient to sustain his conviction); *United States v. Reina*, 242 F.2d 302 (2d Cir. 1957) (holding that proof of a single large sale of heroin was sufficient to sustain the conviction of conspiracy); *United States v. Koch*, 113 F.2d 982 (2d Cir. 1940) (holding that facts proving a single purchase of a large amount of heroin were insufficient to support the conspiracy conviction). *But see*, *People v. Lauria*, 251

In *Dent*, the Nebraska Supreme Court did not articulate the factors it considered nor the reasoning it applied in reaching the conclusion that both defendants intended to distribute cocaine to third persons. The two cases cited by the court, *United States v. Bommarito*⁴⁵ and *United States v. Carlson*⁴⁶ sustained conspiracy convictions based on proof of several of the factors articulated in *Direct Sales* and subsequent lower court cases.⁴⁷ However, the evidence presented in *Dent* fails to substantiate the existence of any of the factors relied on by other courts to show intent.⁴⁸ Without

Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967). The court in *Lauria*, in dictum, indicated that if no legitimate use of the goods exists, a supplier may be found to have entered a conspiratorial agreement to achieve the object of another's illegal venture by mere knowledge alone.

45. 524 F.2d 140 (2d Cir. 1975).

46. 547 F.2d 1346 (8th Cir. 1976).

47. See notes 40 and 44 *supra*. In sustaining the defendant's conviction of conspiracy to distribute cocaine, the court in *Bommarito* relied on facts which proved a continuing business relationship between the conspirators. The defendant provided his co-conspirator, Ciraco, with a pound of methamphetamine which Ciraco paid for as he resold it. Further, there was proof of several transactions. The court found the defendant to have an active stake in the outcome of the purchaser's resales. *United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975).

In *Carlson*, the circumstantial evidence reasonably led to the conclusion that on at least two occasions the defendant supplied two co-conspirators with cocaine. The co-conspirators sold the cocaine to third parties and returned immediately to the defendant's empty warehouse. *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976).

Thus in both *Carlson* and *Bommarito*, the facts established that the defendants were involved in more than a single sale of cocaine. The evidence revealed a joint enterprise, or a concert of action, such that the supplier could have been found to have intended to accomplish the object of his agreement with the purchaser.

48. The only source of evidence which is relevant to the issue of *Dent*'s knowledge is the phone conversation between the defendants. Bodeman's statement that he wanted six or seven more items may imply the quantity of the sale and the existence of a prior transaction. However, neither implication is well-founded. Without proof of what was being referred to in the conversation, it is difficult to substantiate that six or seven is a large quantity. Further, the simple word "more" is rather scarce evidence of a course of dealing or that a prior transaction involved an amount for resale. The most substantial evidence tending to prove *Dent*'s knowledge was Bodeman's statement that he was going to make a lot of money. This gives rise to a direct finding that *Dent* knew Bodeman would probably resell the items he purchased.

Thus the evidence tended to prove one single sale of items in an unknown quantity which the seller knew the buyer would probably try to resell. There was no evidence of frequent transactions or a course of dealing between the defendants. There was also no evidence

clear and unequivocal evidence of knowledge of the purchaser's illegal purpose, one cannot be found to have intended by joint agreement to achieve the illegal purpose.⁴⁹

IV. IMPLICATIONS

The court's holding herein may be interpreted as facilitating an enhanced number of convictions of conspiracy to distribute controlled substances based on facts which circumstantially tend to prove a single sale between two defendants.⁵⁰ Traditionally, courts have refused to sustain charges of conspiracy based on a single sale of contraband between two defendants because of a well-established rule of criminal law, commonly referred to as Wharton's Rule.⁵¹ The rule provides that: "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission."⁵² The rule seems consistent with the purposes underlying the offense of conspiracy.⁵³ These purposes are based on the premise that group criminal activity is inherently more dangerous to society than individual crime.⁵⁴ Thus Wharton's Rule essentially provides that if the legislature defines an offense so that it requires an agreement between two persons, the joint nature of the offense is contemplated in

that the seller attempted to encourage resales or that he had any reason to care what the buyer did with the items after the purchase. *State v. Dent*, 198 Neb. 110, 110-12, 251 N.W.2d 734, 735-36 (1977).

49. *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

50. *But see State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977), in which the Nebraska Supreme Court disagreed with the trial court's determination that the evidence sufficiently established a conspiracy agreement so as to render admissible a co-conspirator's hearsay statement.

51. *United States v. Katz*, 271 U.S. 354 (1926); *People v. Clifton*, 70 Mich. App. 65, 245 N.W.2d 175 (1976).

52. 1 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 89 (1957).

53. The two primary purposes advanced to justify the distinct substantive offense of conspiracy have been labeled the "specific object" and the "general danger" rationales. The "specific object" rationale addresses the notion that once an individual has agreed with others to commit a certain criminal act, he has taken the necessary additional step beyond intent so as to justify state intervention. Thus conspiracy is called an inchoate crime; regardless of whether the specific object is committed, it is the act of agreement which is punishable. The second purpose is addressed to the potential for harm to society which continues to exist in a criminal grouping regardless of the present offense contemplated by the group. It is this purpose which some commentators find inconsistent with Wharton's Rule. *See Developments, supra* note 3, at 923-25, 954-55; *Callanan v. United States*, 364 U.S. 587, 593-94 (1961).

54. *Developments, supra* note 3, at 923.

the punishment prescribed. There is no additional danger to society beyond that inherent in the offense.⁵⁵ Applying this rule to the offense of distributing cocaine, which necessarily requires an agreement between two persons, the same logic would lead to the conclusion that a conspiracy charge could not be sustained.⁵⁶

Although Wharton's Rule presently exists as a judicial presumption in federal courts,⁵⁷ the factual interpretation of the Nebraska Supreme Court in this case creates a method of avoiding its remaining vitality. In essence, the court in *Dent*, interpreted the facts presented, which arguably may have implied a single sale of cocaine between the defendants, to be sufficient to establish a conspiracy to distribute cocaine to third parties because of some proof that the seller knew the buyer would probably further distribute the substance.⁵⁸

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55. W. LEFAVE & A. SCOTT, *supra* note 2, at 493. Wharton's Rule has been said to embody legislative intent, particularly since it has had a long judicial history which legislatures have declined to change. *Developments, supra* note 3, at 955.
56. *People v. Clifton*, 70 Mich. App. 65, 245 N.W.2d 175 (1976) (presented with facts proving a single heroin sale, the court held that Wharton's Rule prohibited sustaining the conviction of conspiracy to distribute heroin between defendant-seller and defendant-buyer).
57. *Iannelli v. United States*, 420 U.S. 770 (1975). After briefly tracing the history and rationale of Wharton's Rule, the Court held that it has current vitality as a judicial presumption which is rebutted by a showing of contrary legislative intent. *Id.* at 782. In *United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975), cited by the Nebraska Supreme Court in *Dent*, the court considered the applicability of Wharton's Rule to the facts presented. In dictum, the court seemed to indicate that the history of the drug abuse act and the specific conspiracy statute included within the act evidenced congressional intent to exclude Wharton's Rule from applying to offenses charged under the act. *Id.* at 143-44.
58. This is precisely what Judge Learned Hand refused to do in *United States v. Zeuli*, 137 F.2d 845 (2d Cir. 1943). The indictment therein charged several defendants with conspiracy to steal and receive gasoline ration books. The facts revealed that the defendant, Zeuli, purchased the gasoline ration books from another defendant, knowing they were stolen. Judge Learned Hand rejected Zeuli's contention that Wharton's Rule prohibited the conspiracy conviction because the conspiracy charged in the indictment was broader than the buyer-seller transaction. However, he also rejected the United States' contention that the evidence was sufficient to prove Zeuli agreed to participate in the comprehensive conspiracy charged solely because he knew of the stolen origin of the goods. In reversing the conviction, Judge Hand further stated:

[A]lthough he [the defendant] knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft; the venture, so far as he was concerned, began, as it ended, with the purchase. . . . His mere

The consequences of the Court's holding are magnified by the substantive characteristics of the offense of conspiracy.⁵⁹ One who enters into a conspiracy is liable for the reasonably foreseeable crimes committed by every other member of the conspiracy in furtherance of the objectives.⁶⁰ Further conspirators may be convicted and sentenced consecutively for each substantive crime and the conspiracy agreement itself.⁶¹

These independent substantive characteristics which enhance the potential for punishment render the court's reliance on a "web of inferences" unsupported by the evidence particularly disconcerting. It is absolutely essential in conspiracy cases for courts to insist that circumstantial evidence as to all elements of the offense be of such a conclusive nature as to exclude every rational hypothesis except guilt. Such a conclusion is consistent with the statement by the United States Supreme Court that "charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes."⁶²

V. CONCLUSION

Conspiracy is probably the least easily defined of all criminal offenses. It has been criticized as adding only confusion to criminal law.⁶³ Further, inherent in conspiracy is the potential for enhanced punishment. Thus it is particularly important that courts pay strict attention to the sufficiency of the evidence in conspiracy cases.

In *State v. Dent*, the Nebraska Supreme Court appeared to be

knowledge that they had been stolen, made him even less a party to their theft than his knowledge of their future disposition—had that been criminal—would have made him a party to that disposition.

Id. at 847. Further, the Nebraska Supreme Court's reliance on *United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975) seems to be misplaced. Although the court therein rejected Wharton's Rule by finding an agreement to distribute cocaine to third persons, the facts presented clearly revealed a continuing business arrangement in which the seller had a great interest in the resale activities of the buyer. See note 47 *supra*.

59. Once a conspiracy is found to exist, several procedural implications arise as well, including venue, joinder, and the admission of hearsay evidence. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1164-88 (1973).
60. *Pinkerton v. United States*, 328 U.S. 640 (1946); *Anderson v. Superior Court*, 78 Cal. App. 2d 22, 177 P.2d 315 (1947). See generally *Developments, supra* note 3, at 994-1000.
61. *Callanan v. United States*, 364 U.S. 587 (1961).
62. *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).
63. Johnson, *supra* note 59, at 1139-41.

less concerned with clarifying the legal elements of the crime of conspiracy than with sustaining convictions of defendants believed to be guilty. The court relied on a ladder of ill-founded inferences to conclude that the specific object of the conspiratorial agreement was the distribution of cocaine to third persons. Implicit in the court's reasoning is a reliance on the fact that Bodeman apparently sold cocaine to Burke after, and not before, he went to York, Nebraska. From this fact the court apparently reasoned that the defendants' meeting in York, Nebraska, involved a cocaine sale. Thus the court apparently concluded that the phone conversation between the defendants involved an agreement to distribute cocaine. Arguably at least, the court's reliance on such tenuous inferences is inconsistent with due process standards of reasonable doubt.

The court's opinion herein apparently diverges from cases rendered in other jurisdictions regarding facts which must be adduced to prove that a seller of illegal goods agreed and intended to participate in the buyer's illegal venture. Factors relied on by other courts, including quantity sold, frequency of sales, conduct stimulating sales and interest in the buyer's resale, which tend to prove a concert of action or joint enterprise, are not substantiated by the facts presented in this case. The court's holding indicates that future conspiracy convictions may be sustained based on evidence solely tending to prove that a seller knows of the buyer's illegal venture. This proposition, coupled with the court's reliance on such tenuous circumstantial evidence, places the decision rendered herein beyond the mainstream of cases in other jurisdictions. The court's conclusions raise more questions in an already confused area of law.

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