



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff - Appellee,	)	Filed June 28, 1979
vs.	)	
MERLE (JOE) HAYES and	)	47
DOROTHY HAYES,	)	<u>61137 & 61158</u>
Defendants - Appellants.	)	

Appeal from Polk District Court - A. B. Crouch, Judge.

Defendants appeal from their conviction of conspiracy to receive stolen property in violation of section 719.1, The Code 1975. The appeal of Dorothy Hayes is dismissed. The conviction of Merle Hayes is reversed and the case remanded for new trial.

Raymond Rosenberg, Des Moines, for Defendants - Appellants.

Thomas J. Miller, Attorney General of Iowa, and Ann Fitzgibbons, Assistant Attorney General, and Dan L. Johnston, Polk County Attorney, for Plaintiff - Appellee.

Heard by Oxberger, C.J., and Donielson, Snell and Johnson, JJ. Carter, J., takes no part.

PER CURIAM

Defendants, Merle (Joe) Hayes and Dorothy Hayes, appeal from their conviction for conspiracy to receive stolen property in violation of section 719.1, The Code 1975. We dismiss the appeal of defendant Dorothy Hayes. We reverse the conviction of Merle Hayes and remand for a new trial.

These convictions arose from activities of defendants in selling clothes which had been shoplifted from various stores to private individuals in the Des Moines area at reduced prices. Defendants were charged with conspiracy to receive, buy and/or aid in concealing stolen property and with receiving and concealing stolen goods in violation of section 712.1, The Code 1975. A directed verdict acquitting defendants of this latter charge was delivered by the court. The jury returned a verdict of guilty on the former charge. After conviction, defendant Merle Hayes received a three year suspended sentence and was placed on probation as provided by section 789A.1, The Code. Defendant Dorothy Hayes received a deferred judgment and was also placed on probation. Both parties filed separate notices of appeal.

While the same issues have been presented on appeal by both parties, the appeals have not been consolidated. Both appeals were submitted at the same time. Because the relief we afford each party is different, we will consider the appeals separately within the confines of this one opinion.

STATE V. DOROTHY HAYES. No. 61158.

Section 793.2, The Code, provides that in a criminal case an appeal may be taken only from a final judgment. Defendant, Dorothy Hayes, was given a deferred judgment and placed on probation for three years. Such a judgment is not final within the meaning of section 793.2. State v. Anderson, 246 N.W.2d 277, 279 (Iowa 1976). If this court does not have jurisdiction over the subject matter of these proceedings, the appeal must be dismissed even though the appellee has not moved for dismissal. Recker v. Gustafson, 271 N.W.2d 738, 739 (Iowa 1978); Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 468 (Iowa 1978). We must, therefore, dismiss this appeal.

STATE V. MERLE (JOE) HAYES No. 61137.

Defendant, Merle Hayes, asserts three issues on appeal: 1) that the trial court erred in admitting evidence of activities of alleged co-conspirators after termination of the conspiracy as to defendant; 2) that requiring the defense to prove termination of the

conspiracy unconstitutionally shifts the burden of proof and denies defendant due process; and 3) that prosecutorial misconduct justifies a new trial. We reverse and remand for a new trial on the ground of improperly admitted evidence.

Defendant contends that the trial court improperly admitted testimony concerning a larceny committed by two other named conspirators and concerning the act of one named conspirator in tearing a label from an item of confiscated clothing kept in a police storage area. The alleged larceny was committed in August of 1976 and the event in the police station occurred in September of 1976. Defendant maintains that the conspiracy with which he was charged and convicted terminated on April 20, 1976 or, at the latest, on May 10, 1976. Consequently, he claims evidence of these acts was inadmissible.

Any act or declaration by one conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator, subject to the laying of proper foundation. State v. Kidd, 239 N.W.2d 860, 865 (Iowa 1976); State v. Blyth, 226 N.W.2d 250, 269 (Iowa 1975); State v. Dewey, 220 N.W.2d 629, 631 (Iowa 1974). Proper foundation consists of sufficient independent proof in the record to establish a prima facie case of conspiracy. Blyth, 226 N.W.2d at 270. Conspiracy is an agreement between two or more persons to do or accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner. Dewey, 226 N.W.2d at 263; State v. Jennings, 195 N.W.2d 351, 356 (Iowa 1972). The principal element of the offense is the agreement. Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220, 232 (Iowa 1977).

Once a conspiracy is entered into, it continues until it is terminated. State v. Wedelstedt, 263 N.W.2d 894, 899, rehearing denied 265 N.W.2d 626 (Iowa 1978), cert. denied, ___ U.S. ___, 99 S. Ct. 352, 58 L.Ed.2d 345 (1978). Termination of a conspiracy is not the same as the withdrawal of one party from a conspiracy. The mere cessation of activity is not enough to prove withdrawal. United States v. Borelli, 336 F.2d 376, 388 (2nd Cir. 1964), cert. denied, sub nom., Cinuegrano v. United States and Mogavero v. United States, 379 U.S. 960, 85 S. Ct. 647, 13 L.Ed.2d 555 (1965). Rather, withdrawal requires an affirmative act on the part of the withdrawing party, such as the making of a clean breast to the authorities or communication of an abandonment in a manner reasonably calculated to reach the other conspirators. United States v. Mardian, 546

F.2d 973, 978 N.5 (D.C. Cir. 1976); Borelli, 336 F.2d at 388. If a conspirator fails to produce affirmative evidence of withdrawal, his participation in the conspiracy is presumed to continue until the last overt act by any of the conspirators occurs. United States v. Panebianco, 543 F.2d 447, 453 (2d Cir. 1976), cert. denied 429 U.S. 1103, 97 S. Ct. 1128, 51 L.Ed.2d 553 (1977).

Defendant does not claim that he withdrew from the conspiracy but that the conspiracy with which he was charged had ended before the acts testified to at trial occurred. A conspiracy continues as long as overt acts are committed in furtherance of its purpose. Wedelstedt, 263 N.W.2d at 899. The burden of showing the conspiracy has ended is on the conspirator. Id. In this case, defendant Merle Hayes has met this burden.

To ascertain if an overt act was committed in furtherance of the purposes of the conspiracy, it is necessary to determine the scope of the conspiracy itself. Grunewald v. United States, 353 U.S. 391, 397, 77 S. Ct. 963, 970, 1 L.Ed.2d 931, 939 (1956); see also Borelli, 336 F.2d at 388-89. In this case, the conspiracy with which defendant was charged and convicted was that of receiving stolen property. The scope of defendant's conspiratorial agreement did not reach beyond that of receiving stolen property. Consequently the acts testified to, namely the larceny in August and the tearing of the clothes label in September, could not be characterized as acts performed in the furtherance of this conspiracy. Furthermore, there was no evidence presented to show that any stolen property was received after the search of defendant's home and the homes of other named conspirators on April 20. While the meeting of the Hayes' with other conspirators at Zelpha Drake's house on May 10 could be viewed as evidence that the conspiracy continued up to that point, there was no evidence presented to establish a prima facie case that the conspiracy continued beyond May 10. As a result, testimony of the acts which took place in August and September was improperly admitted.

We note further that this testimony cannot be admitted as evidence of acts relevant to prove the conspiracy. The United States Supreme Court has stated that although hearsay declarations of a co-conspirator are admissible only when made during and in furtherance of the conspiracy, acts relevant to prove the conspiracy are admissible even if they occurred after the conspiracy had ended. Lutwak v. United

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States, 344 U.S. 604, 617-18, 73 S. Ct. 481, 489, 97 L.Ed. 593, 603 (1952); see also United States v. Bennett, 409 F.2d 888, 893 (2d Cir. 1969), cert denied sub nom. Haywood v. United States, 396 U.S. 852, 90 S. Ct. 113, 24 L.Ed.2d 101, rehearing denied, 396 U.S. 949, 90 S. Ct. 376, 24 L.Ed.2d 256 (1969); State v. Orozco, 130 N.W.2d 830, 833 (Iowa 1971). But such evidence is admissible as relevant only insofar as it might reasonably have been generated by the operation of the conspiracy agreed to and understood by defendant. Bennett, 409 F.2d at 893. Neither of these acts is relevant to prove the existence of the conspiracy of receiving stolen property.

Because we reverse on this particular issue, we find it unnecessary to reach the other issues raised by defendant.

REVERSED AND REMANDED.