

1977 WL 37415 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

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### QUESTION I

Is a magistrate's conviction for obstruction of justice admissible against an attorney co-defendant in a prosecution for conspiracy to obstruct justice and obstruction of justice?

### DISCUSSION

Although there is no case law in this State dispositive of the above-stated issue, it may be fairly resolved by resort to basic evidentiary and criminal law principles. This discussion will test the conviction's admissibility against both theories of criminal liability charged.

It is most probable that evidence of the magistrate's conviction is inadmissible as proof of the attorney's guilt of obstructing justice. Since the attorney is indicted on the same charge as that on which the magistrate was indicted, i.e., a charge arising from the same transactions or facts, the introduction of the magistrate's conviction would have the effect of imputing the magistrate's guilt of obstructing justice to his co-defendant. The possibility of such vicarious liability is impermissible, because the defendant has 'a right to have his guilt or innocence determined by the evidence presented against him, and not by what has happened with regard to a criminal prosecution against someone else.' [U.S. v. Toner](#), 173 F.2d 140, 142 (C.A. 3, 1949).

However, the evidence of the conviction may be proper in proving the conspiracy charge against the attorney co-defendant. It must be remembered here that the above charges are separate and distinct; conspiracy to commit a crime does not merge into the commission of the completed offense. [State v. Rutledge](#), 232 S.C. 223, 101 S.E.2d 289 (1958). Therefore, as will be seen, the introduction of evidence of the magistrate's conviction may be permitted to prove an element of the conspiracy charge against the co-defendant, a separate and distinct offense, thereby removing the question from the principles of [U.S. v. Toner](#), *supra*.

Conspiracy has been defined by statute in South Carolina as follows:

[t]he crime known to the common law as 'conspiracy' is hereby defined as a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means. 16-17-410, Code of Laws of 1976.

The section has codified the common law. [State v. Jacobs](#), 238 S.C. 234, 119 S.E.2d 735 (1961).

Because of the nature of the crime, it is generally accepted that conspiracy may be proven by 'any relevant competent evidence, having a legitimate tendency to support the accusation.' [State v. Hightower](#), 221 S.C. 91, 104, 69 S.E.2d 363, 369 (1952). The offense may be proven by both direct and circumstantial evidence, and 'in the reception of circumstantial evidence, a great latitude must be allowed.' [State v. Hightower](#), *supra*. Further, proof of conspiracy may be complete without proof of overt acts; however, such acts 'may nevertheless be shown, since from them an inference may be drawn as to the existence and object of the

conspiracy. It sometimes happens that the conspiracy can be proved in no other way.’ [State v. Hightower, supra at 99; 69 S.E.2d at 367](#). Last, it is generally accepted that proof of the substantive ‘crime’ may be introduced from which the jury might infer the conspiracy. 15A. C.J.S. Conspiracy § 92, p. 898 and the cases noted therein. Here, the magistrate's conviction for substantive crime might be admitted against the attorney co-defendant as an overt act, from which the jury might infer a conspiracy to obstruct justice. [Commonwealth v. Shea, 323 Mass. 406, 82 N.E.2d 511 \(1948\)](#). Our Supreme Court has recognized much the same principle. In [State v. Flemming, 243 S.C. 265 133 S.E.2d 800 \(1963\)](#), the defendants were charged with conspiring to defraud an insurer. The state was allowed to introduce evidence of a number of insurance policies fraudulently procured. The court held that it was inferable from the unlawful acts of procuring the policies that they were procured by prior agreement or plan.

### CONCLUSION

\*2 Given this theory, the conviction may be admitted as proof of an overt act, or the substantive crime, from which a conspiracy to commit that crime may be inferred. Proper safeguards must be made to insure that evidence of the conviction not unduly prejudice the attorney's defense of the charge of obstructing justice. Since, as mentioned above, introduction of the conviction as proof of the attorney's guilty of obstructing justice is impermissible, the jury must be advised of the specific, narrow purpose for which the conviction is offered, i.e., as evidence of conspiracy only. [State v. Lagerquist, 256 S.C. 69, 180 S.E.2d 882 \(1971\)](#).

### QUESTION 2

Is a magistrate's plea of nolo contendere admissible against attorney co-defendant in a prosecution for conspiracy to obstruct justice and obstruction of justice?

### DISCUSSION

It is clear that such a plea would not be admissible in any subsequent litigation against the magistrate. A plea of nolo contendere is an admission of guilt only in the case in which it is issued. [In Re Anderson, 255 S.C. 56, 177 S.E.2d 130 \(1970\)](#). The plea is of no effect beyond the particular case in which it was entered. 22 C.J.S. Criminal Law § 425(4), p. 1206. However, some courts have gone so far as to distinguish between the plea of nolo contendere and the subsequent entry of judgment, i.e., the conviction. Therefore, it is reasoned evidence of the conviction, even though the result of a plea of nolo contendere, may be admitted in subsequent litigation. [Kravis v. Hock, 136 N.J.L. 161, 54 A.2d 778 \(1947\)](#); see cases in annotation 89 A.L.R.2d at 604. It follows that evidence of the conviction upon a plea of nolo contendere would be admissible against the attorney co-defendant for the reasons outlined in ‘I’ above. Note that a plea of nolo contendere necessarily must have proceeded to judgment before it may be admitted; otherwise no conviction will have yet resulted, and the plea might be withdrawn. [Pharr v. United States, 48 F.2d 767 \(C.A. 6, 1931\)](#); see cases in annotation 89 A.L.R.2d at p. 611.<sup>1</sup>

### CONCLUSION

Evidence of the conviction resulting from the magistrate's plea of nolo contendere may be introduced for the reasons outlined in ‘I’ above, as evidence of the overt act, or substantive crime, from which the conspiracy might be inferred.

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#### Footnotes

- 1 It might be argued in any event that the policies underlying exclusion of such pleas is personal to the accused. No prejudice would result to the defendant magistrate by introducing evidence of his plea against the attorney co-defendant to prove an overt act relating to the conspiracy. Cf. [F.R.E. 410](#) and Advisory Committee notes.

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