

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 06-1796
Appellee/Cross-Appellant,	:	
	:	
vs.	:	On Appeal from the
	:	Champaign County Court
DANNY C. ADRIAN,	:	of Appeals, Second
	:	Appellate District
Appellant/Cross-Appellee.	:	

**CROSS-APPELLEE DANNY C. ADRIAN'S MEMORANDUM IN RESPONSE
TO CROSS-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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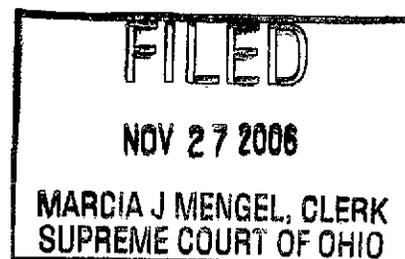


TABLE OF CONTENTS

STATEMENT OF APPELLEE/CROSS APPELLANT'S POSITION AS TO
WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST 3

ARGUMENT 5

CONCLUSION 7

CERTIFICATE OF SERVICE 7

**STATEMENT OF APPELLEE/CROSS-APPELLANT'S POSITION AS TO
WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST**

The cross-appeal in the case *sub judice* does not involve issues of public or great general interest. Instead, the Second Appellate District applied well-settled rules of statutory construction when it determined, as a matter of law, that Appellant could not have committed the offense of attempted complicity to commit kidnapping. Accordingly, this Court should decline to exercise jurisdiction over this matter with respect to the State's cross-appeal.¹

As will be discussed below, both the plain language of R.C. 2923.03(C) and applicable rules of statutory construction support the Court of Appeals' decision that "attempted complicity" is not an offense that is equivalent to "complicity in an attempt to commit an offense." The latter charge, which is permitted by R.C. 2923.03(C), sets forth the singular scenario under Ohio law where a defendant can be convicted of the interlocking offenses of attempt and complicity.

The statute permits imposition of criminal liability only where a defendant satisfies the elements of complicity under R.C. 2923.03(A) and where there has been an actual attempt to commit an offense. "Attempted complicity", on the other hand (and as charged in the instant case) criminalizes the attempt to commit the inchoate offense of complicity in the absence of any actual or perceived underlying offense. Pursuant to the rule of lenity set forth in R.C. 2901.04(A), it would be improper to interpret R.C. 2923.03(C) so broadly in favor of the State that "attempted complicity" is equivalent to "complicity in an attempt to commit an offense."

Importantly, the exclusion of the offense of "attempted complicity" from R.C. 2923.02 and 2923.03 and the inclusion of "complicity in an attempt to commit an offense" in R.C.2923.03(C)

¹ Appellant filed a Notice of Appeal and Memorandum in Support of Jurisdiction in this case on September 25, 2006.

also indicates that “attempted complicity” is not an offense under Ohio law. As this Court has stated: “[All] statutes relating to the same general subject matter must be read *in pari materia* (with reference to each other). *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 29, 697 N.E.2d 610. In addition, related and co-existing statutes must be read to “harmonize and accord full application to each of these statutes unless they are irreconcilable and in hopeless conflict.” *State v. Patterson* (1998), 81 Ohio St.3d 524, 526, 692 N.E.2d 593. In light of these provisions, the fact that “complicity in an attempt to commit an offense” is described specifically by the General Assembly, and “attempted complicity” is not, further supports the Court of Appeals’ conclusion that “attempted complicity” is not offense under Ohio law.

There is also no support from appellate courts for the State’s argument that this is a matter of great public or general interest. As the State concedes in its jurisdictional memorandum, reviewing courts have not addressed this issue, and the State has not been able to support any case law in support of its position.

Therefore, this is not a case of public or general interest. It raises no new questions of law and rests on the clear, well-established principles articulated under Ohio law for statutory construction. Accordingly, Appellee submits that this Court should not exercise its jurisdiction in this matter with respect to the State’s cross-appeal.

ARGUMENT

The State errs in its argument that “attempted complicity” and “complicity in an attempt to commit an offense” describe the same conduct and that attempted complicity is a valid offense under Ohio law. This argument is unsupported by the plain language of the complicity statute, relevant case law, and canons of statutory construction. Therefore, the Second Appellate District was correct when it ruled that Appellant could not have been convicted of the offense of attempted complicity to commit kidnapping.

The plain language of the statute clearly supports the appellate court’s decision. Ohio’s complicity statute prohibits the imposition of criminal liability unless a criminal offense has actually occurred. R.C. 2923.03(C) sets forth narrow circumstances under which a criminal defendant may be convicted of complicity in the absence of an underlying offense. Specifically, the statute provides:

No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

Further, in describing the section, the Legislative Service Commission stated in 1973: “An offense must actually be committed, however, before a person may be convicted as an accomplice. The single exception to this rule permits conviction as an accomplice in an attempt to commit an offense.” *See* R.C. 2923.03, 1973 Legislative Service Commission Notes.

Indeed, a plain reading of R.C. 2923.03(C) reveals that “attempted complicity” and “complicity in an attempt to commit an offense” describe two different kinds of activity. “Attempted complicity” to commit an offense would permit conviction where a defendant attempts to assist another person in committing the inchoate offense of complicity, regardless of whether or not the

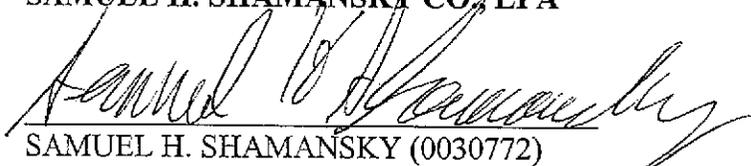
underlying substantive offense occurs (or even could occur). “Complicity in an attempt to commit an offense,” by contrast, is logically limited to situations where there has been an attempt to commit an offense, committed by another person and which is itself an offense, that is assisted by the defendant.

In other words, in the latter situation, the defendant would be guilty of complicity to the underlying offense of attempt by another person. In the former scenario of “attempted complicity,” the defendant could be convicted merely for attempting to assist another person in the absence of an underlying offense beyond some sort of complicity by that other person. This is precisely the situation prohibited by R.C. 2923.03(C), which requires the actual commission of an offense. Therefore, it is clear that R.C. 2923.03 does not permit a conviction for attempted complicity to commit a criminal offense.

Finally, basic tenets of canons of statutory construction support the Court of Appeals’ decision in this case. R.C. 2901.04(A) requires that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally in favor of the accused.” In the instant case, R.C. 2923.03(C) precisely sets forth the circumstances under which an individual can be convicted at the intersection of attempt and complicity. There is no legal, statutory, or logical reason to expand that application in favor of the State of Ohio. Further, the State’s reliance on R.C. 1.49 is misplaced, because there is no ambiguity in the complicity statute. Therefore, the Court of Appeals was correct when it vacated Appellant’s conviction for attempted complicity to commit kidnapping.

Accordingly, based on the foregoing, this issue is not a matter of great public or general interest and the State’s request for review should be denied.

Respectfully submitted,
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing was duly served upon Scott D. Schockling,
Assistant County Prosecutor, 200 North Main Street, Urbana, Ohio 43078, on November 27, 2006,
by regular United States mail.



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