

that even before these events occurred, the defendant was driving recklessly on the highway in violation of the vehicle code.

However, it is our understanding that the question is not one of whether the defendant is convicted of two crimes, one of which is necessarily included or merged in the other, but how many penalties are imposed. If there is a merged crime, the accused is subject only to a single penalty. Ordinarily the court will impose the penalty on the count that charges the highest degree of the offense involved and not impose a penalty on the lesser included offense. 24 C.J.S. Criminal Law, Sec. 1457(5).

In *Commonwealth v. Soudini*, 398 Pa. 546, 159 A.2d 687 (1960), a defendant was convicted of an offense and a lesser included offense, with the sentences to run concurrently. On appeal the court held that only one penalty could be imposed and set aside the sentence on the lesser included offense, allowing the sentence on the greater to stand.

The defendant's post-trial motions will be denied.

#### ORDER OF COURT

April 19, 1982, the defendant's post trial motions are denied. It is ordered that the Franklin County Probation Department prepare a presentence investigation report and that the defendant appear at the office of the Franklin County Probation Department on the call of a probation officer to facilitate the preparation of this report. Sentence is deferred until May 26, 1982, at 9:00 o'clock a.m.

COMMONWEALTH V. WEST, C. P. Franklin County Branch,  
No. 414 of 1981

#### *Criminal Law - Conspiracy - Entrapment*

1. Conviction for conspiracy requires an overt act which is an act done in furtherance of the object of the conspiracy.
2. The making of a downpayment on the sum demanded for the killing of a person is an overt act upon which a conspiracy conviction can be based.
3. A conspiracy to commit murder threatens bodily injury and the defense of entrapment is statutorily unavailable to a defendant in such a case.

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4. Merely affording opportunities or facilities for the commission of a crime by one who already had the relevant criminal intent does not defeat the prosecution.

*John F. Nelson, Esq.*, District Attorney, Attorney for the Commonwealth

*Timothy W. Misner, Esq.*, Court-appointed attorney for the defendant

#### OPINION AND ORDER

EPPINGER, P. J., April 21, 1982:

George Peter West, Jr., the defendant, and Teresa Corbett engaged in a criminal conspiracy to murder Ralph Crites, who was a prospective witness in a case against West. The plot came to light when West contacted a fellow prisoner, Donald Darcy, to get someone on the outside to do the killing. West said to Darcy that with Crites out of the way, there would be no case against him.

Darcy wrote a number of letters, including one to the Commonwealth Attorney General and was ultimately told that he would hear from Trooper Harding of the Pennsylvania State Police. In the meantime West was pressuring Darcy to make the contact, and finally Darcy said to West, "If you are serious, I can help you." Not long after that the trooper went to the prison to talk with Darcy where arrangements were made for another state trooper, David Escalette, to be called Jim Darling, to act as the hit man.

Escalette talked to both West and Teresa Corbett. When he talked with Corbett at the Alamo Inn in Chambersburg on the first occasion, his testimony was of the conversations occurring between them, but on the second occasion he was "wired" and the tape was heard by the jury. A letter from West to "Jim" was concerned first with the money arrangements and how Corbett would get it to him and then said, "This guy (Crites) has to go, period, and I don't care how it is done." The evidence is clear that West and Corbett were engaged in a conspiracy to kill Crites.

Escalette spoke to West at the prison, posing as his lawyer, so their conversation could be in confidence. West reiterated

his desire for Crites to be killed and the price for Escalette's (Darling's) services was \$2000, \$200 to be paid in cash by Corbett. Escalette picked the money up from Corbett and after that the arrests were made.

Both West and Corbett were also charged with solicitation to commit murder. Corbett entered a guilty plea to one count and the jury found West guilty of both counts.

In his post-trial motions, West contends that (1) there was no overt act of conspiracy proven; (2) he should have been permitted to present an entrapment defense, and (3) the tape of Corbett's conversation with the undercover trooper should not have been admitted into evidence.

The Crimes Code, Sec. 903(e) provides that "no person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proven to have been done by him or by a person with whom he conspired." Act of 1972, Dec. 6, P. L. , No. 334, 18 Pa.C.S.A. Sec. 903(3). An overt act is an "act which is done openly by one of the co-conspirators to accomplish the purpose of the conspiracy," *Commonwealth v. Cohen*, 203 Pa. Super. 34, 199 A.2d 139 (1964), *cert. den.* 379 U.S. 902, or an "act done in furtherance of the object of the conspiracy," *Commonwealth v. Prep*, 186 Pa. Super. 442, 142 A.2d 460 (1958). There are many overt acts in this case, but if any of the others are questionable, surely the payment of the \$200 down on the \$2000 price for the job was clearly an overt act.

The Crimes Code in Sec. 313(c) states that the defense of entrapment is not available in a prosecution of a crime involving the causing or threatening of bodily injury. Crimes Code, supra, 18 Pa. C.S.A. Sec. 313(c). A conspiracy to commit murder threatens bodily injury.

Even without the statutory limitation on the defense, defendant's evidence would not have sustained it. For it must be shown that police conduct would have induced an innocent person to commit a crime. *Commonwealth v. Stokes*, 264 Pa. Super. 515, 400 A.2d 204 (1979). Merely affording opportunities or facilities for the commission of crime by one who already had the relevant criminal intent does not defeat the prosecution. *Commonwealth v. Lee*, 262 Pa. Super. 218, 396 A.2d 724 (1978).

West was disposed to commit the crime and the police did

not entrap him. He first spoke of the matter openly to Darcy, a prisoner, who had no connection with the police. He also talked to Corbett about it and concluded on his own the only way out was to kill Crites. All the police did was provide an undercover trooper to pose as a hit man.

West's final argument is that playing a tape recording of a conversation between Corbett and the undercover trooper acting as a hit man was error because no prima facie case of conspiracy had been shown. However, the Commonwealth had introduced a fair preponderance of evidence through Corbett and Darcy that a conspiracy existed, so Corbett's out-of-court statements were properly admitted against her co-conspirator West. *Hirsch*, 225 Pa. Super. 494, 311 A.2d 679 (1973); *Commonwealth v. Tiberi*, 239 Pa. Super. 152, 361 A.2d 318 (1976).

The post-trial motions will be denied.

#### ORDER OF COURT

April 21, 1982, the post-trial motions of George Peter West, Jr., the defendant, are denied.

It is ordered that a presentence investigation report be prepared by the Franklin County Probation Department and sentence is deferred until May 26, 1982, at 9:00 o'clock a.m. in Court Room No. 1, Court House, Chambersburg, PA. The Sheriff of Franklin County is directed to transport the said defendant from his place of confinement to the court for sentencing and then return him to such place of confinement and if any necessity exists, the defendant may be held temporarily in the Franklin County Prison to facilitate the sentencing proceedings.

MELLOTT V. MELLOTT, C.P., Franklin County Branch, A.D.  
1981 - 312

#### *Assumpsit - Lack of Seal - Lack of Consideration*

1. While a seal or a statement of intention to be legally bound may substitute for consideration, their absence does not automatically void the agreement.
2. Consideration for an agreement need not appear solely on the face of

the agreement, but rather, it may be inferred from the terms of the agreement.

3. Bargained-for, mutual promises supply adequate consideration necessary to form a valid and enforceable agreement.

*Thomas M. Painter, Esq.*, Counsel for Plaintiff

*Ronald J. Locke, Esq.*, Counsel for Defendant

#### OPINION AND ORDER

KELLER, J., May 27, 1982:

Plaintiff, Ernest R. Mellott, filed a complaint in assumpsit on October 20, 1981, which was served upon the defendant, Franklin D. Mellott, on October 29, 1981. The complaint alleged monies due and owing plaintiff as a result of a silent partnership agreement entered into between the parties on August 29, 1979. Defendant filed preliminary objections to the complaint in the nature of a motion for a more specific pleading and a demurrer. Arguments on the preliminary objections were heard on April 1, 1982, and the matter is now ripe for disposition.

Plaintiff concedes that defendant is entitled to a listing of the assets and liabilities of Mellott's Trucking Service at the time the partnership agreement was signed on August 29, 1979. Furthermore, plaintiff agrees that defendant is entitled to receive information concerning the various dates on which the property of the partnership was sold and distributed to creditors as alleged in the complaint. Therefore, defendant's motion for a more specific pleading is granted, and plaintiff is directed to file an amended complaint complying with defendant's request for more definite information concerning the assets and liabilities of the business on the date the partnership was formed and subsequent distributions made to creditors.

The defendant's demurrer contends that the agreement between the two parties is unenforceable since no seals are affixed to the signatures of the parties, no statement is contained in the agreement that the parties intend to be legally bound, and no mention is made of an exchange of consideration between the parties. While the parties apparently intended to have seals affixed to their signatures according to the language of the agreement, none are found on the document. However, absence of seals does not render the agreement unenforceable,