

OP. NO. 04-020

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PEACE AND ORDER – UNLAWFUL USE OF TELEPHONES.

Person who conspires to make threatening or obscene telephone calls is not subject to misdemeanor punishment for using telephone unlawfully.

The Honorable J. Brandon Bell, II
Member, Senate of Virginia
April 16, 2004

Issue Presented

You ask whether a conspiracy to make obscene or threatening phone calls may be considered a violation of § 18.2-427.

Response

It is my opinion that conspiracy is not a criminal act punishable under § 18.2-427. Therefore, a person who conspires to make threatening or obscene telephone calls is not subject to the misdemeanor punishment prescribed in § 18.2-427 for the unlawful use of a telephone.

Background

You relate that you are concerned that a person may potentially avoid prosecution under § 18.2-427 by asking another person to make obscene or threatening telephone calls.

Applicable Law and Discussion

Section 18.2-427 provides:

If any person shall use obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act with the intent to coerce, intimidate, or harass any person, over any telephone or citizens band radio, in this Commonwealth, he shall be guilty of a Class 1 misdemeanor.^[1]

Section 18.2-22(a) provides that "[i]f any person shall conspire, confederate or combine with another ... to commit a felony ..., he shall be guilty of a felony." Generally, under this statute, "a person cannot conspire to commit a misdemeanor."²

Section 18.2-22 does not apply to any person who conspires to commit a drug-related offense as defined in the Drug Control Act³ or in Article 1, Chapter 7 of Title 18.2.⁴ Section 18.2-256 specifically applies to persons who conspire to commit the drug-related offenses defined in Article 1, Chapter 7 of Title 18.2 or in

the Drug Control Act. The Supreme Court of Virginia has recognized that the prohibition in § 18.2-256 applies to conspiracies to commit particular drug-related crimes, regardless of their classification as a felony or misdemeanor, while § 18.2-22 applies only to conspiracies to commit crimes that are classified as felonies.⁵

In other circumstances, the General Assembly has expressly criminalized conspiracy to engage in particular acts despite their felony or misdemeanor classification.⁶ No similar provision, however, applies to the criminal acts proscribed under § 18.2-427, which are punishable as a Class 1 misdemeanor.

Conclusion

Accordingly, it is my opinion that conspiracy is not a criminal act punishable under § 18.2-427. Therefore, a person who conspires to make threatening or obscene telephone calls is not subject to the misdemeanor punishment prescribed in § 18.2-427 for the unlawful use of a telephone.

¹The authorized punishment for conviction of a Class 1 misdemeanor is "confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both." Va. Code Ann. § 18.2-11(a) (LexisNexis Supp. 2003).

²See *Wright v. Commonwealth*, 224 Va. 502, 506, 297 S.E.2d 711, 713 (1982) (Compton, J., dissenting).

³Va. Code Ann. tit. 54.1, ch. 34, §§ 54.1-3400 to 54.1-3472 (LexisNexis Repl. Vol. 2002 & Supp. 2003).

⁴Sections 18.2-247 to 18.2-264 (Michie Repl. Vol. 1996 & LexisNexis Supp. 2003).

⁵*Graves v. Commonwealth*, 234 Va. 578, 580-81, 363 S.E.2d 705, 707 (1988).

⁶See, e.g., § 18.2-23(A)-(B) (LexisNexis Supp. 2003) (conspiring to commit trespass is punishable as Class 3 misdemeanor; larceny as felony); § 18.2-195(4) (Michie Repl. Vol. 1996) (conspiring to commit credit card fraud is punishable as Class 6 felony); § 18.2-367 (Michie Repl. Vol. 1996) (conspiring to cause spouse to commit adultery is punishable as Class 6 felony); § 18.2-408 (Michie Repl. Vol. 1996) (conspiring to incite riot is punishable as Class 5 felony).

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