2482. PINKERTON VS. AIDING AND ABETTING

A defendant in a case charging a conspiracy may be liable for each of the substantive counts charged in an indictment under three separate theories:

1. Actual commission of the crime;

2. Participation in the crime as an aider or abettor;

3. Liability under a *Pinkerton* theory.

United States v. Ainsworth, 867 F.Supp. 980, 987 (D. Kan. 1994). The government may prove liability under any alternative theory, and the jury will not return a verdict indicating the precise manner in which the defendant committed the crime. *Id.* Furthermore, a jury finding that one is guilty of aiding and abetting a crime is not the equivalent of a finding of a conspiratorial agreement. *United States v. Palasiuk*, 71 F.3d 1253, 1257 (6th Cir. 1995). There is no requirement that there be an agreement in order to convict one of aiding and abetting. *United States v. Frazier*, 860 F.2d 878, 886 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 1141, 107 L.Ed.2d 1046 (1990). Conspiracy to commit a crime and aiding and abetting in the commission are distinct offenses. *Id. See also United States v. Superior Growers Supply*, 982 F.2d 173, 178 (6th Cir. 1992).

The *Pinkerton* rule was pronounced in *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Walter and Daniel Pinkerton were brothers who were charged with violations of the Internal Revenue Code. The indictment alleged the Pinkertons committed one conspiracy count and the ten substantive counts. A jury found each of them guilty of the conspiracy and several of the substantive counts. The main issue arose from the facts that there was no evidence to show Daniel Pinkerton participated directly in the commission of the substantive offenses although there was evidence showing these substantive offenses were in fact committed by Walter Pinkerton in furtherance of the unlawful agreement or conspiracy existing between the brothers. *Id.*, 328 U.S. at 645, 66 S.Ct. at 1183.

The question was submitted to the jury on the theory that each brother could be found guilty of the substantive offenses if it was found at the time those offenses were committed the brothers were parties to an unlawful conspiracy and the substantive offenses were, in fact, committed in furtherance of it. *Id.* Daniel Pinkerton was not indicted as an aider or abettor, nor was his case submitted to the jury on that theory. *Id.* at n.6.

Daniel argued *United States v. Nall*, 176 F.2d 745 (3d Cir. 1940), in support of his contention that participation in the conspiracy is not in itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. *Id.*, 328 U.S. at 646, 66 S.Ct. at 1183. *Nall* held that, in addition to evidence that the offense was in fact committed in furtherance of the conspiracy, evidence of direct participation in the commission of the substantive offense or other evidence from which participation might fairly be inferred was necessary. *Id.*

The Supreme Court took a different view. It noted the facts showed a continuous conspiracy with no evidence that Daniel attempted to withdraw from it. *Id.* Therefore, he continued to offend. *Id.* So long as the partnership in crime continues, the partners act for each other in carrying it forward, and an overt act of one partner may be the act of all without any new agreement specifically directed to that act. *Id.*, 328 U.S. at 647, 66 S.Ct. at 1184. The criminal intent to do an illegal act by one of the conspirators in furtherance of the unlawful project is established by the formation of the conspiracy. *Id.* Each conspirator instigates the commission of the crime. *Id.* The unlawful agreement contemplated what was done in the substantive acts, the substantive crimes were performed in the execution of the enterprise. *Id.*

Similar to the rule of aiding and abetting, the overt acts of one partner in a conspiracy is attributable to all partners. *Id.* The court concluded that if an overt act, which is an essential ingredient to a conspiracy, can be supplied by one conspirator, then likewise the same or other acts in furtherance of the conspiracy should be attributable to the others for the purpose of holding them responsible for the substantive offense(s). *Id.*

The court did note that a different result would arise if the substantive offense committed by one of the conspirators was not, in fact, done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *Id.*

The rule of *Pinkerton* does service where the conspiracy is one to commit offenses of the character described in the substantive charges. *Nye & Nissen*, 336 U.S. at 620, 69 S.Ct. at 770. Aiding and abetting has a broader application. *Id.* It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. *Id.* And if a conspiracy is also charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is done pursuant to the conspiracy. *Id. Pinkerton* is narrow in its scope. Aiding and abetting rests on a broader base. It states a rule of criminal responsibility for acts which one assists another in performing. *Id.* The fact that a particular one might conceivably be submitted to the jury on either theory is irrelevant. It is sufficient if the proof adduced and the basis on which it was submitted were sufficient to support the verdicts. *Id.*

See also Chapter 34 of *Federal Narcotics Prosecutions* (OLE 1999) for a further discussion of *Pinkerton* liability.

[updated April 1999]

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