

acts required to be alleged (see Penal Law, § 105.20), the indictment charged that at stated times and places (1) the defendant met a certain individual and told him that he intended to have his father-in-law murdered and (2) the defendant and his coconspirator met another individual and agreed to pay him \$10,000 for committing the murder. These “overt acts” consist of nothing more than words; there is no charge that defendant did anything in furtherance of the conspiracy other than to talk (cf. *People v Hines*, 284 NY 93, 112-113; *People v De Cabilia*, 10 Misc 2d 923, 924, affd 8 AD2d 825, affd 7 NY2d 823). In failing to allege an overt act, the indictment therefore fails to allege the crime of conspiracy (cf. Penal Law, § 105.20). Nor does it allege any lesser included offense (cf. CPL 1.20, subd 37). Consequently, it fails to allege facts sufficient to constitute a crime. This is a jurisdictional defect which defendant cannot waive (see *People v Koffroth*, 2 NY2d 807). His conviction is therefore jurisdictionally defective despite his plea of guilty (see *People v Scott*, 3 NY2d 148, 153; *People v Tompkins*, 202 Misc 147, 150) and cannot be upheld, since he was deprived of his constitutional right not to be “punished for a crime without a formal and sufficient accusation” (*Albrecht v United States*, 273 U.S. 1, 8).

Martuscello, Acting P. J., Cohalan, Rabin and Mollen, JJ., concur.

Copr. (C) 2017, Secretary of State, State of New York

End of
Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

WESTLAW

People v Russo

Supreme Court, Appellate Division, Second Department, New York April 11, 1977 57 A.D.2d 578 393 N.Y.S.2d 435 (Approx. :)

View National Reporter System version

57 A.D.2d 578, 393 N.Y.S.2d 435

The People of the State of New York, Respondent,

v.

Frank Russo, Appellant

Supreme Court, Appellate Division, Second Department, New York

April 11, 1977

CITE TITLE AS: People v Russo

Appeal by defendant from a judgment of the County Court, Suffolk County, rendered July 1, 1976, convicting him of attempted conspiracy in the first degree, upon his plea of guilty, and imposing sentence. The appeal also brings up for review the denial of that branch of defendant's omnibus motion which sought dismissal of the indictment.

HEADNOTE

CRIMES

CONSPIRACY

(1) Sufficiency of indictment --- 'Overt acts' --- Judgment convicting defendant of attempted conspiracy, first degree, upon his plea of guilty reversed, on law, and defendant's motion which sought dismissal of indictment granted; plea of guilty vacated, and indictment dismissed --- Defendant and another were indicted for conspiracy, first degree, in that they allegedly conspired to cause death of defendant's father-in-law --- As to overt acts required to be alleged (see Penal Law, § 105.20), indictment charged 'overt acts' which consist of nothing more than words; there is no charge that defendant did anything in furtherance of conspiracy other than to talk --- In failing to allege overt act, indictment therefore fails to allege crime of conspiracy (cf. Penal Law, § 105.20) or any lesser included offense (CPL 1.20, subd 37); consequently, it fails to allege facts sufficient to constitute crime --- This is jurisdictional defect which defendant cannot waive; his conviction is, therefore, jurisdictionally defective despite his plea of guilty. Judgment reversed, on the law, and the said branch of the motion is granted; plea of guilty vacated, and indictment dismissed.

The defendant and another were indicted for conspiracy in the first degree in that they *579 allegedly conspired to cause the death of defendant's father-in-law. With regard to the overt