Evidence -- Automobiles -- Identification of Driver

Hurshell H. Keener

land." A few states, however, with regard to the sufficiency of a stake for such purposes, have held otherwise.[14]

Course and distance. Where there has been no practical location by the parties to the instrument, or no monuments are called for in the deed nor can be ascertained by evidence, then course and distance will prevail over less certain descriptive elements.[15] Between the two, course is given priority.[16]

Area. The courts are almost unanimous in holding that area or quantity as an element of description could be significant, but they likewise infer that the possibility is a remote one since area or contents called for is usually only an approximation.[17] Consequently, for all practical purposes, area is virtually disregarded.

In the principal case, then, it is readily apparent that the North Carolina court reached a decision in accord, not only with prior rulings in this jurisdiction, but with the decided weight of authority. Plaintiff's argument, based on the application of the practical location rule, failed when the court declared that *stakes* were not such monuments as to satisfy the requisites of practical location, and therefore oral evidence as to their erection was inadmissible. Defendant's contention, on the other hand, that the highway as it existed at the time the deeds were executed was the true boundary, found support in the fact that the highway, *i.e.,* monument, was called for in the deeds. No call for the "survey of the highway," as contended for by plaintiff, was mentioned.

In light of the fact that application of the practical location doctrine violates the parol evidence rule, it is well that the North Carolina Supreme Court did not permit further laxity in its scope.

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Evidence—Automobiles—Identification of Driver

In ruling on a motion for judgment of non suit in a criminal case,[1]

[14] Winbourne v. Russell, 50 So. 2d 721 (Ala. 1951) (iron stakes recognized by the parties for 20 years); Arnold v. Hanson, 91 Cal. App. 2d 15, 204 P. 2d 97 (1949) (wood stakes driven by surveyor replaced with iron ones by subdivider); Dean v. Thompson, 213 S. W. 2d 327 (Tex. Civ. App. 1948).

[15] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); Cherry v. Slade, 7 N. C. 82 (1819); *accord,* Wagers v. Wagers, 238 S. W. 2d 125 (Ky. 1951); TIFFANY, *op. cit. supra* note 11, §673.

[16] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); *accord,* Forest Preserve District v. Lehmann Estate, 388 Ill. 416, 58 N. E. 2d 538 (1944). See TIFFANY, *op. cit. supra* note 11, §673, where it is stated that between course and distance there is no preference, citing Hall v. Eaton, 139 Mass. 217, 29 N. E. 660 (1885).

[17] Tice v. Winchester, 225 N. C. 673, 36 S. E. 2d 257 (1945); *accord,* Hollars v. Stephenson, 99 N. E. 2d 258 (Ind. 1951); Askins v. Oil Producing Co., 201 Okla. 209, 203 P. 2d 877 (1949); Parrow v. Proulx, 111 Vt. 274, 15 A. 2d 835 (1940); TIFFANY, *op. cit. supra* note 11, §673.

[1] N. C. GEN. STAT. §15-173 (Supp. 1951) provides for criminal law non suit and serves the same purpose in criminal prosecutions as is accomplished by N. C. GEN. STAT. §1-183 (Supp. 1951) in civil actions. State v. Ormond, 211 N. C. 437,

the court considers only incriminating evidence[2] and the state is entitled to the most favorable interpretation of the circumstances and of all inferences that may fairly be drawn therefrom.[3] The court does not pass upon weight or credibility,[4] but merely determines if there is "more than a scintilla of evidence" to sustain the allegations of the bill of indictment.[5] Evidence which raises a mere conjecture or suspicion of guilt, or a mere possibility of the existence of an essential element of the offense is not sufficient to be submitted to the jury.[6]

In a recent prosecution for reckless driving[7] the officers identified a speeding automobile as belonging to the defendant,[8] but were unable to overtake it, or to identify the driver. Later the defendant stated that he was the only driver of his car on the night in question, but at the same time denied having been at the place in question. On this evidence, defendant's motion for non suit was denied. The North Carolina Supreme Court reversed, holding that the evidence was insufficient to identify defendant as the driver of the vehicle.

Identification of defendant's vehicle is often used to corroborate physical identification of the defendant as the perpetrator of a crime.[9]

191 S. E. 22 (1937); State v. Fulcher, 184 N. C. 663, 113 S. E. 769 (1922). See Note, 23 N. C. L. REV. 223 (1945).

[2] State v. Moses, 207 N. C. 139, 176 S. E. 276 (1934); State v. Martin, 182 N. C. 846, 109 S. E. 74 (1921). The rule is often expressed that the court is not confined to evidence offered by the State but can consider all the evidence before the court. State v. Norton, 222 N. C. 418, 23 S. E. 2d 301 (1942); State v. Killian, 173 N. C. 792, 92 S. E. 499 (1917).

[3] State v. Hendrick, 232 N. C. 447, 61 S. E. 2d 349 (1950); State v. Mann, 219 N. C. 213, 13 S. E. 2d 541 (1941); State v. Rountree, 181 N. C. 535, 106 S. E. 669 (1921).

[4] State v. Hammond, 216 N. C. 67, 3 S. E. 2d 439 (1939); State v. Cooke, 176 N. C. 731, 97 S. E. 171 (1918). Deciding the weight and credibility of the evidence is the province of the jury, and when reasonable inferences may be drawn from the circumstances in evidence pointing to the defendant's guilt, it is a matter for the jury to decide whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt. State v. Ewing, 227 N. C. 535, 42 S. E. 2d 676 (1947); State v. Lawrence, 196 N. C. 562, 146 S. E. 335 (1929) (excellent summary of the North Carolina law of nonsuit).

[5] State v. Weinstein, 224 N. C. 645, 31 S. E. 2d 920 (1944); State v. Shermer, 216 N. C. 719, 6 S. E. 2d 529 (1940); State v. Landin, 209 N. C. 20, 182 S. E. 689 (1935).

[6] State v. Webb, 233 N. C. 382, 64 S. E. 2d 268 (1951); State v. Prince, 182 N. C. 788, 108 S. E. 330 (1921); State v. Vinson, 63 N. C. 335 (1869).

[7] State v. Lloyd, 233 N. C. 227, 63 S. E. 2d 151 (1951).

[8] Identification was based upon color and equipment; spotlights, mirror, venetian blinds on back window, and tires.

[9] State v. Bovender, 233 N. C. 683, 65 S. E. 2d 323 (1951) (microscopic and spectrographic examination of paint particles from defendant's vehicle as circumstantial evidence); State v. Merritt, 231 N. C. 59, 55 S. E. 2d 804 (1949) (identity of defendant's abandoned vehicle used to corroborate physical identification); State v. Fogleman, 204 N. C. 401, 168 S. E. 536 (1933) (defendant's automobile resembled car stopped at deceased's store on the evening of the homicide); State v. Leonard, 195 N. C. 242, 141 S. E. 736 (1928) (automobile like one involved in collision passed witness at high speed; circumstantial evidence of identity in manslaughter case). *Cf.* State v. Cain, 175 N. C. 825, 95 S. E. 930 (1918) (presence of man on a mule similar to one owned by defendant used to substantiate physical identification).

But identification of the defendant's automobile by license plate or by physical appearance alone is not sufficient in North Carolina to identify the owner of the vehicle as the driver at the time the offense was committed.[10] Some states, by statute, have made identification of the license plate prima facie evidence in certain types of criminal cases that the owner of the vehicle is the driver. However provisions are made for rebutting this presumption.[11] North Carolina has a similar statute, but its application is limited to restricted types of civil suits and has no application in criminal actions.[12]

Where defendant's vehicle is identified by license or by physical appearance at the scene of the offense, and shortly thereafter the car is found nearby and the defendant is found near the car,[13] or is seen leaving the car,[14] this is sufficient to identify the defendant as the driver of the vehicle at the place in question. This is true even though there was no personal identification of the defendant at the scene of the offense. Also where defendant's vehicle is identified at the scene and his footprints are found there,[15] or where the defendant is seen driving

[10] Although such evidence would be sufficient to establish that the crime was committed by whoever was in defendant's vehicle, there is nothing to link defendant to the automobile at the time and place of the offense. State v. Simms, 208 N. C. 459, 181 S. E. 269 (1935), And it is fundamental that in a criminal case the state must prove, not only that the crime was committed, but also that it was done by the person or persons charged. State v. Norggins, 215 N. C. 220, 1 S. E. 2d 88 (1939).

[11] PA. STAT. ANN. tit. 75, §739 (Supp. 1950) "in any proceeding for a violation of the provisions of this act [Vehicle Code], or any local ordinance, rule or regulation, the registration plate displayed on such vehicle shall be prima facie evidence that the owner of such vehicle was operating the same. If at any hearing or proceeding, the owner shall testify under oath that he was not operating the said vehicle at the time of the alleged violation and shall submit himself to an examination as to who at that time was operating such vehicle, and reveal the name if known to him, then the prima facie evidence arising from the registration plate shall be overcome and the burden of the proof shifted." Also, CONN. GEN. STAT. §2542 (1949) makes basically the same provision in cases of speeding, reckless driving, racing, and passing railway cars or school busses. See Notes, 33 MICH. L. REV. 1231 (1935); 33 MICH. L. REV. 443 (1935). *Cf.* Commonwealth v. Ober, 285 Mass. 310, 189 N. E. 601 (1934) (registered owner of vehicle convicted of parking in violation of ordinance although there was no evidence that the owner parked the vehicle himself).

[12] N. C. GEN. STAT. §20-71.1 (Supp. 1951) makes proof of the registration of a motor vehicle in the name of any person or firm "prima facie evidence of ownership and that such vehicle was being operated by or under control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment. . . ." in actions "to recover damages for injury to person or property, or for the death of a person, arising out of an accident or collision involving a motor vehicle."

[13] State v. Newton, 207 N. C. 323, 177 S. E. 184 (1934).

[14] State v. Dooley, 232 N. C. 31, 59 S. E. 2d 808 (1950) (defendant left his car shouting, "scatter, scatter, I wasn't driving").

[15] State v. Young, 187 N. C. 698, 122 S. E. 667 (1924). Note that the footprints and tiretracks alone would not have been sufficient to identify defendant as the perpetrator of the crime unless it is shown that they were made at the time of the crime, and correspond respectively with the shoes worn by the accused at the time of the crime and the car driven by the accused at the time, as well as having been found at or near the place of the crime. State v. Palmer, 230 N. C. 205, 52 S. E. 2d 908 (1949) (collects principal cases on footprints and tiretracks).

near the scene and a piece of metal corresponding to that missing from his car is found at the scene[16] this has been held sufficient to link defendant to the vehicle as the driver.

Thus, the evidence of identification in the instant case seems *at least* as strong as was present in those cases. For, in addition to identification of the automobile, the defendant admitted that he was the only person driving his car on the night in question. If no one but the defendant drove the car on the night in question, then the conclusion is inescapable that he was driving it when it was observed by the officers. While it is true that defendant's admission was coupled with a denial that he was at the place in question the State can offer such distinct and severable parts of the statement as tend to establish its own position[17] and the jury may believe the whole or any part thereof.[18] Thus, in *State v. King*,[19] such an admission, coupled with a similar denial, was held to be sufficient to identify the defendant as being the driver of the automobile.

The evidence offered in the principal case seems to have been sufficient for the court to have affirmed the trial court in overruling the defendant's motion of non suit.[20]

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Executors and Administrators—Status of Back Pay Owed Deceased Military Personnel

Title 10 of The United States Code, Section 868,[1] provides in part:

"In the settlement of the accounts of deceased officers or enlisted persons of the Army, where no demand is presented by a

[16] State v. Durham, 201 N. C. 724, 161 S. E. 398 (1931). See Note, 99 A. L. R. 799 (1935).

Merely being seen near the scene is not sufficient to identify defendant as the driver at the scene. State v. Ray, 229 N. C. 40, 47 S. E. 2d (1948) (defendant, near scene of accident, driving truck which bore scratches and paint smears).

[17] State v. Corpening, 157 N. C. 621, 73 S. E. 2d 214 (1911). But the defendant is entitled to bring out those parts which tend to discharge him as well as those which tend to charge him. State v. Watts, 224 N. C. 771, 32 S. E. 2d 348 (1944).

[18] STANSBURY, NORTH CAROLINA EVIDENCE §181 (1946).

[19] 219 N. C. 667, 14 S. E. 2d 803 (1941). Marks led from the scene of the accident to the defendant's damaged automobile. The defendant's admission that no one else had driven his car on the night in question was held sufficient to identify defendant as the driver of the vehicle, even though neither defendant nor his vehicle were seen at or near the accident.

[20] The apparent conflict between the instant case and prior decisions on this point could be reconciled by a statute creating a presumption that the owner of an automobile is the driver. Such a presumption could be created by expanding N. C. GEN. STAT. §20-71.1 (Supp. 1951), which creates such a presumption in certain types of civil actions (see note 12 *supra*), to include violations of the motor vehicle law. Such a statute undoubtedly has objectionable features (*e.g.*, shifting the burden of proof in a criminal action) which should be considered before any changes are adopted. The legislature must weigh these objections against the need for efficient law enforcement before determining the future policy of the State.

[1] 34 STAT. 1094 (1906), as amended, 10 U. S. C. §868 (1946).