This issue distributed to:
Superior Court Judges, District Attorneys and Assistants, Public Defenders and Assistants, and Police Attorneys

ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

December 1980 No. 80/07

CONSPIRACY AND VICARIOUS LIABILITY--NORTH CAROLINA SUPREME COURT "DISAPPROVES" EXISTING CASELAW

by Kenneth S. Cannaday

In a case decided December 2, 1980, State v. Small (No. 101--Robeson), the North Carolina Supreme Court rejected principles of conspiracy law and vicarious liability previously believed to be well settled in this State.

THE FACTS

The defendant, James Lenard Small, was convicted of first-degree murder and sentenced to death on evidence showing that he contracted with one Paul Lowery for the murder of his (Small's) wife for the sum of $4,000. Lowery entered the home of defendant's estranged wife with a key provided by defendant and strangled the deceased in her bedroom. The defendant was not actually present at the time of the murder, nor was he in a position to aid in the murder or escape therefrom (and thus he was not constructively present[1]). At defendant's trial the judge charged the jury to convict the defendant of first degree murder if deceased was intentionally killed with malice, premeditation, and deliberation and in furtherance of a conspiracy in which defendant had participated.

---

1. The most frequent example in our case law of a defendant who, though not actually present, is constructively present because in a position to aid his confederates, is the defendant who waits nearby in a getaway car in order to aid in the escape from the crime scene. E.g., State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); State v. Sellers, 266 N.C. 734, 147 S.E.2d 225 (1966); State v. Bell, 205 N.C. 225, 171 S.E.2d 50 (1933).

SUPREME COURT'S OPINION

The Court, through Justice Exum, examined the federal rule of Pinkerton v. United States, 328 U.S. 640 (1946), which was also apparently the North Carolina rule at the time of defendant's trial.[2] That rule holds that one may be guilty as a principal to a crime committed by another in his absence, if he and the perpetrator are parties to a conspiracy and if the principal crime is committed in the furtherance of the conspiracy. The Court reasoned that this principle of vicarious liability had crept into North Carolina law as the result of over-broad language contained in cases that did not involve the absence of the defendant from the crime scene. The distinction between principals and accessories before the fact has been carefully preserved by legislation[3] and case law.[4] One may be a principal in either the first or second degree. A principal in the first degree is one who, being present, perpetrates the crime by his own hand or through the use of some innocent agent. One who acts in concert is a principal in the first degree. A principal in the second degree is one who is actually or constructively present and aids, abets, assists, or advises. An accessory before the fact is defined in G.S. 14-5 as one who, not being present at the time, "shall counsel, procure or command" another to commit a felony. A rule that in effect abolishes that distinction (by making an accessory before the fact guilty vicariously as a principal) is not authorized by any statute. The Court concluded that the co-conspirator rule[5] "is a valid and useful evidentiary rule when it is used to establish the existence and extent of the conspiracy itself or the nature and extent of the accomplishment of the conspiracy's object." (Emphasis the Court's.) In a footnote the Court states:

---

2. State v. Carey, 288 N.C. 254, 218 S.E.2d 387, death sentence vacated, 428 U.S. 904 (1976); State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975); State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958); State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

3. E.g., N.C.G.S. § 14-5.1.

4. E.g., State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924 (1977).

5. "[A]cts and declarations of one conspirator, made or done in the furtherance of or within the scope of the original conspiracy, may be imputed to other conspirators who were not present at the time . . . ." State v. Small, (No. 101-Robeson), 13.

This is the approach sanctioned by the drafters of the Model Penal Code: 'Conspiracy may prove command, encouragement, assistance or agreement to assist, etc.; it is evidentially important and may be sufficient for that purpose. But whether it suffices ought to be decided by the jury; they should not be told that it establishes complicity as a matter of law.

"This disposition is . . . faithful to the present American statutes, none of which declares the doctrine that conspirators are liable as such; the statutes on their face require 'inference that the offender has counseled or induced or encouraged the crime' (Cardozo, J., in People v. Swersky, 216 N.Y. at 476). However proper it may be to draw that inference from proof of a conspiracy, the jury ought to face in concrete cases whether or not, on the evidence, the inference is one that should be drawn." American Law Institute, Model Penal Code § 2.04(3) Comment, pp. 23-24 (Tent. Draft No. 1, 1953).[6]

The Court summarized its holdings as follows:

(1) Evidence sufficient to show defendant's involvement in a criminal conspiracy does not itself establish defendant's liability as a party to the substantive felony committed as a result of the conspiracy; it is reversible error for the court to so instruct the jury.

(2) Such evidence will nevertheless always be relevant to submit to the jury as proof of defendant's complicity in the substantive felony charged, in that it tends to show either (a) defendant, though absent at the felony's commission, nevertheless counseled, procured, or commanded its commission, or (b) that defendant, present at the scene of the felony, shared in the criminal intent of the actual perpetrators and thus aided and abetted in the felony's occurrence or acted in concert with those who committed it. What the evidence does in fact show, however, is for the jury to decide.

(3) Unless and until the legislature acts to abolish the distinction between principal and

---

6. Id. at 14, n. 9.

> accessory, a party to a crime who was not actually or constructively present at its commission may at most be prosecuted, convicted and punished as an accessory before the fact.[7]

Interestingly, the Court did not overturn the defendant's conviction. It held that since all the evidence against the defendant showed his guilt as an accessory before the fact, and in light of the judge's charge, the jury had in effect found defendant guilty as an accessory before the fact. The case was remanded "for the entry of a verdict of guilty of accessory before the fact of murder [citations omitted], and the imposition of a sentence of life imprisonment."[8]

PRACTICAL IMPLICATIONS

The Court's ruling creates an immediate problem for prosecutors. Only in cases in which indictments were returned before October 1, 1979, the effective date of G.S. 14-5.1, will an indictment charging the principal felony be sufficient to support a conviction for accessory before the fact.[9] In all other cases in which the theory of prosecution has been that the defendant is vicariously liable for a crime committed in his absence by a co-conspirator, new indictments will be necessary (assuming sufficient evidence of being an accessory before the fact).

SUMMARY OF THE COURT'S HOLDING:

(1) A person who is not actually or constructively present at the commission of the principal felony can at most be guilty as an accessory before the fact. No principle of vicarious liability for acts of a coconspirator may alter this rule.

(2) Acts and declarations of a defendant's co-conspirators may be admitted in evidence against him where relevant to show the defendant's guilt either

---

7. Id. at 24-25. Of course he may in addition be convicted of the conspiracy to commit the felony without violating double jeopardy.

8. Id. at 35.

9. The Court held that G.S. 14-5.1, requiring that accessory before the fact be separately pleaded, is effective prospectively from October 1, 1979.

(a) as a principal when the defendant is present and aiding and abetting or acting in concert, or

(b) as an accessory before the fact when the defendant, though not present, counsels, procures, or commands.

(3) The fact of conspiracy and the defendant's presence at the felony scene does not necessarily render him a principal. Together they permit an inference that he is, but the issue is a matter that the jury must decide.

(4) The fact of defendant's participation in a conspiracy does not necessarily make him an accessory before the fact of a principal felony committed in his absence. However, it does permit the jury to draw that inference.

(5) Indictments charging the principal felony returned on or after October 1, 1979, will not support a conviction of accessory before the fact.