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State v. Dix: Common Law Kidnapping Requires a Substantial Asportation and an Increased Risk of Harm

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public school teachers, and (2) avoiding any accusations against dismissed professors that would require later substantiation at a hearing.

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STATE v. DIX: Common Law Kidnapping Requires A Substantial Asportation and an Increased Risk of Harm*

The day after defendant escaped from a state prison camp he returned to a county jail to free three of his friends. He knocked on the front door of the jail, and the assistant jailer opened it. Defendant then pulled a gun on the jailer and threatened to kill him if he would not release his companions. Holding the gun to the jailer's back, defendant marched him from the jail vestibule, through his office, and down a hall to a cell block which he compelled the jailer to open. After his three "buddies" came out defendant forced the jailer into the cell. He again threatened to kill the jailer, held the pistol to his head and pulled the trigger, but the gun did not discharge. Defendant then withdrew, locked the cell block, and fled with his three companions. The jailer was released nine minutes later by a trustee who heard his cries for help. Defendant was convicted of kidnapping by the trial court. The court of appeals, finding no error, affirmed. *Held*, reversed. Defendant's conduct in forcing the jailer to walk from the front door to the cell, and in locking him inside, did not amount to asportation within the common law definition of kidnapping. *State v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1973).

The question presented to the North Carolina Supreme Court was whether the jailer was "carried away" or "conveyed to some other place" as these terms are used with reference to asportation as an element of kidnapping.[1] The majority stated that the "carrying away, transportation, or asportation of the victim from the place where he is seized to some other place is an essential element of common law kidnapping."[2] After reviewing past kidnapping cases from North Carolina as well as other common law jurisdictions, they noted that every such

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1. 282 N.C. 490, 494, 193 S.E.2d 897, 899 (1973).

2. *Id.*

case required a substantial asportation of the victim.[3] The question immediately became: what constitutes a "substantial" asportation?

To answer this question the court looked to two recent cases decided in other jurisdictions, *People v. Daniels*[4] and *People v. Adams*.[5] Both of these jurisdictions required an asportation before the defendant was convicted of kidnapping.[6] The approach common to these cases was that a movement did not amount to an asportation unless it had independent significance.[7] In other words, if the asportation was "incidental" to the commission of another crime then the person charged with that crime could not be charged with kidnapping. To ascertain whether or not a "carrying away" was independently significant the court in *Daniels* applied a test of dangerousness. If the asportation substantially increased the risk of harm to the victim, then the asportation element of kidnapping was satisfied.[8]

The *Adams* court, on the other hand, applied an "environmental" test: "unless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant."[9] Although movement was a necessary condition, it was not always sufficient for an asportation. Thus,

> [i]n the hostage situation, if the victim is removed from the environment where he is found, the removal will *generally* have significance adverse to the victim independent of the assault and the offense of kidnapping will be completed upon his removal from the environment.[10]

Where the victim's environment was changed without a substantially increased risk of harm there was no asportation. Both elements, an environmental change and a substantially increased risk of harm, must be present to constitute an asportation.[11]

Although the court applied this test to the instant case it did not recognize that both elements must exist before there is an asportation.

3. *Id.* at 497-98, 193 S.E.2d at 901.

4. 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969).

5. 34 Mich. App. 546, 192 N.W.2d 19 (1971).

6. Unlike North Carolina, California and Michigan have not retained the common law definition of kidnapping in their statutes. However, both jurisdictions require the element of asportation. *See* CAL. PEN. CODE § 207 (West 1970); MICH. COMP. LAWS ANN. § 750.349 (1968).

7. People v. Adams, 34 Mich. App. 546, 551, 192 N.W.2d 19, 21 (1971); *accord*, People v. Daniels, 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969).

8. 282 N.C. at 499, 193 S.E.2d at 902 (citation omitted).

9. *Id.* at 500, 193 S.E.2d at 903 (citation omitted).

10. 34 Mich. App. at 571 n.39, 192 N.W.2d at 31-32 n.39 (emphasis added).

11. Since the court in *Adams* found that the victim experienced no change of environment it devoted little discussion to the question of dangerousness. There was no showing of any increased risk of harm so the issue of a substantial increase was never reached.

Couching the law in this manner, however, had no effect on the decision since neither element was present. The court held that the movement of the victim from the front door to the cell block was not independently significant.[12] It was purely incidental to the defendant's assault upon the jailer and to the jail break which he achieved.[13] The jailer was not removed from the environment in which he was found; he remained inside the jail.[14] Furthermore, he was exposed to no increased risk of harm.[15]

The dissent basically agreed with the doctrine set forth in the majority opinion. Like the majority, the dissenting Justices would require more than a mere technical asportation.[16] However, they felt that under the facts of the instant case there was an asportation of the victim.[17] This conclusion was expressed in the following way in the dissenting opinion:

> [W]here, as here, by force and against his will, the victim is unlawfully taken and carried away from the free environment in which he was found and locked in a jail cell located elsewhere, the asportation is more than 'merely technical' and the 'environment' after the abduction is not the environment in which the victim was found.[18]

Clearly, the dissent argued that the movement from the jail vestibule to confinement in the cell block was a change of environment. But, no mention was made of whether or not the movement exposed the jailer to a substantially increased risk of harm. The dissent apparently assumed that the movement from the vestibule to the cell block exposed the jailer to a risk of harm substantially greater than the risk inherent in the escape attempt itself. It appears that the only rational basis for making such an assumption was that of the increased danger accompanying protracted incarceration. If, at the time the jailer was locked in the cell, there was a strong probability that he would be imprisoned for several hours and as a result would suffer severe emotional distress, then there was a basis for assuming a substantially increased risk. The jailer was forced into the cell at about 1:30 a.m., and was freed nine minutes later. In retrospect, it seems that the likelihood of an extended stay was virtually nil. But without additional facts it is impossible to ascertain with certainty whether or not he was placed in a position of substantially increased danger.

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12. 282 N.C. at 501-02, 193 S.E.2d at 904.
13. *Id.* at 502, 193 S.E.2d at 904.
14. *Id.* at 501, 193 S.E.2d at 904.
15. *Id.* at 502, 193 S.E.2d at 904. As in the *Adams* case, the question of dangerousness was never reached. *See* note 11 *supra.*
16. 282 N.C. at 503, 193 S.E.2d at 905.
17. *Id.*
18. *Id.*

Even though the analysis in this case is lacking, the doctrine endorsed by the majority and dissent is correct. The crime of kidnapping can isolate the dangers and provocations peculiar to asportation which are not proscribed by other criminal laws.[19] The rationale for classifying kidnapping as a separate crime is the risk of harm, not usually associated with assault or false imprisonment, which arises when a victim is forcibly transported and restrained for a protracted period.[20] Where asportation exposes the victim to a risk of serious bodily harm a misdemeanor penalty for false imprisonment is inadequate.[21] Or, if the goal of kidnapping is the commission of another offense the penalty for the latter, when combined with a penalty for false imprisonment, may not be commensurate with the gravity of the behavior as a whole.[22] Therefore, as long as the offense is limited to substantial isolation of the victim from his normal environment, it reaches a form of terrifying and dangerous aggression not otherwise adequately punished.[23]

By requiring both a substantial asportation and a substantially increased risk of harm the crime of kidnapping is restricted to those crimes which are not punished by other offenses. If a mere technical asportation is sufficient there is no incentive for the defendant to refrain from moving his victim as he pleases. The defendant will be charged with kidnapping if the victim is moved in any way. He has nothing to lose by asporting the victim one hundred miles after a movement between two rooms has been declared asportation. On the other hand, if a substantial asportation is necessary the defendant will be deterred from "carrying away" his hostage. By keeping the victim in the same "environment" he can avoid the additional penalty for kidnapping.

Futhermore, if an asportation without substance is permitted to satisfy the requisite movement, the crime of kidnapping becomes co-extensive with the crime of false imprisonment.[24] If a prosecution could be undertaken on the same facts for either offense with the choice left to the prosecutor, an equal protection issue might arise.[25] This would happen if it could be shown that a definable "class" has been subjected to invidious discrimination. For example, if an investigation demonstrates that, under identical fact situations, blacks are charged with kidnapping whereas whites are charged with false imprisonment, then such practices would clearly be a denial of equal protection of the laws. However, if a substantial asportation is necessary the two crimes are

19. Note, 110 U. PA. L. REV. 293, 296 (1961).
20. *Id.* & n.26.
21. MODEL PENAL CODE § 212.1, Comment (Tent. Draft No. 11, 1960).
22. *Id.*
23. *Id.*
24. Note, 35 S. CAL. L. REV. 212, 216 (1962).
25. *Id.*

distinct and there will be no issue of equal protection.

Similarly, if a showing of a substantially increased risk of harm is not required, defendants will be punished for innocuous offenses. As mentioned earlier, sometimes the asportation itself will expose the victim to an increased risk of harm, but at other times it will not. The appropriate approach is to determine whether or not the asportation created a risk distinct from that inherent in the crime which the movement accompanied.[26] If no such risk is apparent an indictment for kidnapping should be dismissed.[27] After all, the harm sought to be prevented is not movement of the victim, but his removal from one place to another with its attendant increased risks.[28]

The decision in this case will probably have only a marginal impact on the development of the law of kidnapping outside the state of North Carolina. This is because most states have re-defined the law of kidnapping by statute,[29] and of these only a few require an element of substantial asportation.[30] Although the decision lends support to the tendency toward requiring substantial asportation, one can only conjecture upon the extent to which it will force other jurisdictions to re-examine their own definitions of asportation. However, if such a re-appraisal is forthcoming it would scarcely be in response to the holding in *Dix*. Instead, an early decision of the California Supreme Court[31] would probably be noted as the turning point. And certainly the most influential case in this area of the law is *Daniels*.[32]

Nevertheless, within the State of North Carolina and perhaps the other jurisdictions which retain the common law definition of kidnapping the decision will have a significant impact. First, it serves to clarify the definition of common law kidnapping. By adopting the "environmental" test the Supreme Court of North Carolina has provided the lower courts with a valuable tool for ascertaining when an asportation has occured. Second, as stated earlier, criminals in North Carolina will now be discouraged from moving their victims when committing a related offense. Third, the decision should lead to fewer prosecutions for kidnapping. Because both a substantial asportation

26. Note, 110 U. PA. L. REV. at 296.

27. *Id.* at 297.

28. People v. Adams, 34 Mich. App. 546, 568 & n.34, 192 N.W.2d 19, 30 & n.34.

29. 282 N.C. at 492, 193 S.E.2d at 898.

30. The states which retain substantial asportation in their statutes are: Alaska, Arizona, Georgia, Louisiana, Maryland, New Jersey, North Carolina and Oregon. The courts in California, Michigan and Missouri have construed their respective statutes so as to require substantial asportation.

31. Cotton v. Superior Court, 56 Cal. 2d 459, 364 P.2d 241, 15 Cal. Rptr. 65 (1961).

32. *People v. Daniels* overturned the rule laid down in the famous case of People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001 (1951).

and a substantially increased risk of harm must be present the scope of kidnapping behavior should be sharply reduced.

The discretion of prosecutors will also be restricted. In California the prosecution was given considerable discretion once the necessity of movement across a state or county line was removed.[33] Conversely, this decision will limit the discretion of prosecutors. A district attorney will find it far more difficult to use the threat of kidnapping conviction as a means of extracting a guilty plea from a defendant. The defendant will be more eager to stand trial for offenses formerly connected to kidnapping. Or, if he chooses to enter a guilty plea, his sentence will be less severe.

In all probability, a kidnapping indictment will no longer permit escalation of penalties for the commission of an outrageous crime. Previously, where a trivial movement was sufficient, the public could pressure the prosecution into bringing a charge of kidnapping. If a defendant forced a group of children off the school playground and into a classroom where he sexually assaulted them, he could have been tried and convicted of kidnapping as well as assault. Since kidnapping probably carried the larger sentence, the net effect was a longer prison term even if the sentences ran concurrently. However, where a substantial asportation and a substantial risk of harm are necessary, an escalation of penalties in this fashion should occur much less frequently. Penalties for crimes related to kidnapping may come to be regarded as inadequate deterrents to the more offensive types of conduct previously punished as kidnapping.[34] The decision in *Dix* could force the legislature of North Carolina and of other states to reconsider the penalties which are imposed for these offenses.

Crews v. Taylor: A Testator's Intent Can Be No Less Than His Command?

In *Crews v. Taylor*,[1] a recent case decided in the North Carolina Court of Appeals, the court was presented with several important issues concerning the testamentary intent and the "words of art" which a testator utilizes to demonstrate this intent. The provision of the instrument which preciptated the action before the court read

1. 21 N.C. App. 296, 204 S.E.2d 193 (1974).

33. Note, 35 S. CAL. L. REV. at 215.

34. Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540, 558 (1953).