North Carolina Central Law Review

Volume 6
Number 2 *Volume 6, Number 2*

Article 18

4-1-1975

# Photographic Evidence: Or, Is a Picture Really Worth a Thousand Words in North Carolina Courtrooms

Robert J. Hensley Jr.

to be an attorney one must be a judge, then he does not have to be. The effect of this decision will be to change the Justice Court System in California. Henceforth, all criminal tribunals where there is a potential jail sentence, will have to be presided over by an attorney judge. This decision does not affect the lay judge in deciding civil cases or in criminal cases where there is not a possibility of a jail sentence. The decision does permit a defendant or his counsel to waive the requirement of an attorney judge. To meet these requirements, the California court system will have to be changed to docket the criminal cases that this decision covers under attorney judges. New attorney judges may have to be elected to meet this demand.

The most distinguishing characteristic of the *Gordon* case is that the court has decided that time and the perplexity of criminal trials have changed the requirements of due process in criminal trials. The complexity of criminal trials today requires a judge to be able to understand and differentiate among the fine points of law which may distinguish one case from another. The ability to make this determination comes from a combination of common sense and formal legal training.

Due process requires more than common sense determinations of legal questions. Due process requires a judgment pursuant to the law. A common sense judgment that is not pursuant to the law is arbitrary and violates due process. Some non-attorney judges through personal research and learning may acquire the expertise necessary to conduct a trial that meets constitutional requirements. However, there should be some safeguard against non-attorneys without these capabilities. This can be done only by requiring judges to meet higher standards as the court has done here. This court has taken a positive step forward in refining the law and assuring the accused that, in the future, he will receive a fair, impartial and competent trial from a tribunal that is in step with the requirements of modern day due process.

JULIAN T. PIERCE

**Photographic Evidence: or, Is a Picture Really Worth a Thousand Words in North Carolina Courtrooms?**

A recent case handed down by the North Carolina Supreme Court may have a profound impact on the law governing admissability of photographs for other than illustrative evidence. In *State v. Foster*[1],

1. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

the Court held that photographs of fingerprints could be introduced as substantive evidence in a criminal prosecution for burglary. Although confining the opinion specifically to photographs of fingerprints[2], Huskins, J., has opened the door to reversal or modification of North Carolina case law that has stood substantially intact since 1929.[3]

The present case involved one Foster, who had been convicted of first degree burglary in a lower court on the testimony of a fingerprint expert. The expert's testimony was based upon photographs of latent fingerprints found on a flowerpot at the scene of the crime. The original fingerprints, preserved on a three-by-five white index card, had been misplaced by the clerk of the lower court subsequent to the first trial. The lower court allowed both the testimony of the expert and the photographs to be admitted as substantive evidence. Foster appealed, contending that the photographs were incorrectly admitted as substantive evidence, consequently rendering the expert's testimony based on such evidence incompetent.

The prime controversy in the *Foster* case arose as a result of the atrophy of one of the two rules under which photographic evidence had historically been admitted in North Carolina courts. Under one rule, photographs could be admitted as substantive evidence—as mute witnesses submitted to the jury for their conclusions. Another rule called for the use of photographs to be limited to the illustration of the testimony of a duly sworn witness.[4] Most present day writers discount the dichotomy,[5] suggesting that the two rules are merely separate sides of the same coin. Problems began to surface in North Carolina, however, when the latter "rule" was stressed to the exclusion of the former beginning with the 1929 decision of *Honeycutt v. Cherokee Brick Company*.[6]

*Honeycutt* concerned an action for injuries resulting from plaintiff's falling into a ditch on defendant's property.[7] Photographs were taken two years after the accident, at a time when the offending ditch had been eliminated. The Court held the photographs not relevant to the injury sustained by the plaintiff, but allowed their use in explaining the testimony of the witness.[8] Clark, J., dissented from the opinion, arguing that any competent photograph should be submitted to the jury for its consideration and weighted by other facts placed in evidence.[9]

2. *Id.* at 272, 200 S.E.2d at 792.
3. Honeycutt v. Cherokee Brick Co., 196 N.C. 556, 146 S.E. 227 (1929).
4. McKELVEY, EVIDENCE, § 378 (5th ed. 1944).
5. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE, § 34 (Brandies rev. 1973); McCORMICK, EVIDENCE, § 214 (2d ed. 1972) [hereinafter cited as McCORMICK].
6. Honeycutt v. Brick Co., 196 N.C. 556, 146 S.E. 227 (1929).
7. Hampton v. The Norfolk and Western R.R., 120 N.C. 534, 27 S.E. 96 (1897).
8. *Id.* at 537, 27 S.E. at 97.
9. *Id.* at 540, 27 S.E. at 98.

*Davis v. Railroad Co.*[10] in 1904, gave Clark (then C. J.) a chance to express his view in a majority opinion. Speaking of photographs of the injuries of the victims, he ruled that photographs "convey information to the jury and court with an accuracy not permissible to spoken words if their admission is properly guarded as to the time and manner when taken."[11]

*Pickett v. Atlantic Coast Line Railroad Co.*[12] and *Hoyle v. City of Hickory*[13] served to keep in balance the two rules of admissability. Both opinions involved water damage to real property. In the first case, photographs of damaged land were held admissable to illustrate the testimony of a witness.[14] The *Hoyle* case, however, held that the photographs themselves were competent as explanatory of other testimony and were, therefore, to be regarded as substantive.[15]

Two years after the *Hoyle* decision, Allen, J. modified the Court's stance by holding that photographs were admissable as substantive evidence when shown to be a true representation of that which they purport to depict.[16] In no uncertain terms, the Court was returned to the earlier opinions expounded by Clark that permitted almost any competent photograph to be submitted into evidence.

*State v. Jones*[17] presented a novel application of photographic evidence and served to further the illustrative rule. The case revolved around several photographs of various items which a witness testified could be assembled into an illegal distillery. Since it was necessary to introduce the photographs themselves into evidence, the Court routinely ruled them competent to illustrate the witness's testimony. The Court, in this instance, held that the photographs were somewhat akin to charts and diagrams used for explanatory purposes.[18] Clark, C. J., defending his position that competent photographs should be admitted as substantive evidence, wrote in a concurring opinion that the danger of equating photographs with charts and diagrams could possibly relegate the former to the position of merely illlustrating the testimony of witnesses in succeeding controversies.[19]

Indeed, the Chief Justice's fears were about to materialize. In the ten years between *Jones* and *Honeycutt*, only one case allowed photo-

10. Davis v. Railroad Co., 136 N.C. 115, 48 S.E. 591 (1904).
11. *Id.* at 116, 48 S.E. at 591.
12. Pickett v. Atlantic Coast Line R.R., 153 N.C. 148, 69 S.E. 8 (1910).
13. Hoyle v. City of Hickory, 167 N.C. 619, 83 S.E. 738 (1914).
14. Pickett v. Atlantic Coast Line R.R., 153 N.C. at 149, 69 S.E. at 9.
15. Hoyle v. City of Hickory, 167 N.C. at 622, 83 S.E. at 739.
16. Bane v. Atlantic Coast Line R.R., 171 N.C. 328, 88 S.E. 477 (1916).
17. State v. Jones, 175 N.C. 709, 95 S.E. 576 (1919).
18. *Id.* at 710, 95 S.E. at 578.
19. *Id.*

graphs to be introduced as substantive evidence. *State v. Lutterloh*[20] involved the admission of photographs to show the width and topography of the roads where a traffic accident occurred. In addition to the substantive content, the photographs were also allowed to be used for illustrative purposes by witnesses to convict a "colored" man of manslaughter by automobile. Curiously enough, in an immediately subsequent case,[21] the Court held that photographs of the scene of the crime could only be used to illustrate the witness's testimony. Likewise, two years later, the Court reaffirmed its position by allowing photographs of the relative positions of the deceased, the slayer, and the witnesses in a murder trial to be used to illustrate the testimony of the witnesses.[22]

The fact situations in *Lutterloh*, *Mitchem*, and *Matthews* arguably could support either position—admission as substantive or illustrative evidence. However, departure from the dichotomy came inexplicably and with a finality that was to last for forty-five years with the decision of *Honeycutt v. Cherokee Brick Company*.[23]

The photograph involved in *Honeycutt* showed the unprotected gears of a mud machine in which a worker had been crushed to death. The lower court judge had admitted the photograph as substantive evidence giving mute witness as to the inherent danger of operating the machine. On appeal, the Supreme Court held the admission of the photograph as error and reversed the decision of the lower court. In analyzing the *Honeycutt* case, Gardner in his cogent article, "The Camera Goes to Court,"[24] reports that appellant's counsel cited only cases favoring the illustrative rule, stating that no others could be found. Counsel for appellee cited no cases on the point. The Court's opinion was based only on the cases cited by appellant; consequently, a case that should have clearly been controlled by *Davis* and *Lutterloh* was controlled by their antitheses—*Pickett* and *Jones*.[25]

Following the doctrine outlined in *Honeycutt*, the use of photographs only for illustrative purposes has been sustained in the following instances: to show the machine which injured the plaintiff;[26] to show the scene of the crime;[27] to show the body of the deceased;[28] to show the wounds on the body of a murder victim;[29] to show a traffic accident

20. State v. Lutterloh, 188 N.C. 412, 124 S.E. 190 (1924).
21. State v. Mitchem, 188 N.C. 608, 125 S.E. 190 (1924).
22. State v. Matthews, 191 N.C. 378, 131 S.E. 743 (1926).
23. Honeycutt v. Brick Co., 196 N.C. 556, 146 S.E. 227 (1929).
24. Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233, 242-43 (1946).
25. *Id.* at 243.
26. Kelly v. Raleigh Granite Co., 200 N.C. 326, 156 S.E. 517 (1930).
27. State v. Perry, 212 N.C. 533, 193 S.E. 727 (1937).
28. Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940).
29. State v. Gardner, 228 N.C. 567, 46 S.E.2d 824 (1948).

scene;[30] and to show the positions of and damages to automobiles after collision.[31] This line of cases, however, is not unbroken. *State v. Cade*[32] in 1939 attempted to qualify *Honeycutt* by holding, through Barnhill, J., that photographs could be admitted into substantive evidence in the absence of a specific objection to restrict the photograph to illustrative purposes. The implications are clear—only where the pictures are irrelevant to the controversy, or where the opposing party's counsel is so incompetent as to not recognize the importance of limiting the evidentiary nature of a photograph would the *Cade* qualification be meaningful.

Until *State v. Foster*, the *Cade* case marked the end to the development of North Carolina case law regarding the admission of photographs into evidence. With *Foster* comes the opportunity for North Carolina to align herself with the majority of her sister states in this area. Such a change has been suggested by authorities on evidence.[33]

*Foster* is a definite break in the chain of precedents proceeding from the *Honeycutt* decision. It proposes one of the two following alternatives: either a return to the early days of photographic evidence in North Carolina when such evidence could be admitted under either of two rules—as substantive or illustrative evidence; or, in accordance with many prominent writers,[34] abolish entirely the distinction between these two rules and admit all competent photographs as substantive evidence to be qualified and weighted by a jury.

Although the *Foster* opinion specifically confines itself to photographs of fingerprints,[35] it fails to elucidate how one is to distinguish photographs of fingerprints from photographs of any other part of the body, when shown by testimony to be a fair and accurate depiction of the subject. Furthermore, why should one limit admissable photographs to parts of the body? Why should one not include photographs of other easily identifiable (unique, if one must) animate and inanimate objects within the scope of substantive evidence?

The answers to the above questions become clear when one examines certain anomolies inherent in North Carolina's evidence rules. For example, X-rays are readily admissable into evidence. The information on the plate cannot be seen or verified with the naked eye; yet, it has been held that a physician can testify substantively to the extent

30. Hawes v. Atlantic Refining Co., 236 N.C. 643, 74 S.E.2d 17 (1953).
31. State v. Norris, 242 N.C. 47, 86 S.E.2d 916 (1953).
32. State v. Cade, 215 N.C. 393, 2 S.E.2d 7 (1939).
33. McCORMICK, § 214; 3 WIGMORE, EVIDENCE, § 790 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE]; 2 SCOTT, PHOTOGRAPHIC EVIDENCE, § 1022 (2d ed. 1969) [hereinafter cited as SCOTT].
34. McCORMICK, § 214; WIGMORE, § 790; SCOTT, § 1022.
35. State v. Foster, 284 N.C. at 272, 200 S.E.2d at 792 (1973).

of a patient's injuries, such opinion being taken from X-rays not even introduced into evidence.[36] In addition, evidence gained by the use of scientific instruments is admitted upon a showing that the instrument and the procedures for operating it are recognized as standard by experts in the field. Presently, we treat the camera as producing less accurate evidentiary information than the microscope, spectrometer, or gas chromatograph. In the least this is inconsistent, as the results each of these instruments can be affected by defective structural elements or by design of the operator. These are precisely the shortcomings of the camera. If the results of one kind of instrument are admitted into substantive evidence upon their being shown as fair and accurate representation, why are the results of another instrument with approximately the same degrees of precision, relegated to the same evidentiary positions as mere charts and diagrams?

Finally, the inconsistency of not allowing competent photographs to be used as substantive evidence at trial is pointed out by Gardner's example of absurdity fostered by the illustrative rule:

> If a defective eye with a damaged optic nerve conveys an impression (gained in twilight or under other deceptive conditions) to a diseased brain, even after the eroding effects of weeks have advanced the process of forgetting, the owner of the eye—though he may be a simple soul of limited intelligence and even more limited vocabulary—will be permitted to describe in court what he *thinks* that he *remembers* he *saw*; but if a camera with cold precision and absolute fidelity records the view permanently and with minute accuracy that view is kept from the jury, perhaps (under the *Honeycutt* case), or its use is sharply circumscribed (under the "illustration" rule).[37]

Perhaps the Court by its opinion in *State v. Foster* has opened the door to a more realistic approach regarding admissability of photographic evidence at trial. At the present time, very few jurisdictions hold with North Carolina that photographs can only illustrate testimony of a witness.[38] The great majority of jurisdictions throughout the country (and indeed, throughout the world, in common law countries)[39] permit the admissibility of photographs for substantive purposes, subject to a showing that they truly represent that which they depict.[40]

---

36. State v. Norris, 242 N.C. at 54-55, 86 S.E.2d at 921 (1953).

37. Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233, 245 (1946).

38. *But cf.* Foster v. Bilbruck, 20 Ill. App. 2d 173, 155 N.E.2d 366 (1959).

39. *See* Wigmore, § 792, n.1 for a listing of English, Canadian, and Philipino court cases.

40. *See e.g.*, Santa Clara Val. Water Conservation Dist. v. Johnson, 41 Cal. Rptr. 846, 231 Cal. App. 2d 366 (1964); Lepri v. Town of Branford, 152 Conn. 210, 205 A.2d 486 (1964); Coyner Crop Dusters v. Marsh, 90 Ariz. 157, 367 P.2d 208 (1961); LaVallie v. General Insurance Co. of America, 17 Wis. 2d 522, 117 N.W.2d 703 (1962); Veneble v. Stockner, 200 Va. 900, 108 S.E.2d 380 (1965).

The decision in *State v. Foster* would probably have been necessitated in the near future because of an increasing reliance of police departments on photographs of fingerprints of suspects transmitted from other jurisdictions through photocopy machines connected by telephone lines. This, however, should not be the prime motivating force toward bringing North Carolina rules regarding photographic evidence into accord with sister jurisdictions. The first step has been made: pictures of fingerprints can be admitted as substantive evidence. The Supreme Court of North Carolina should, in future cases, extend the *Foster* doctrine to any photograph which is shown to be a true representation of what it purports to depict. The jury, defendant, and prosecution all deserve the clearest, most lucid forms of evidence at their disposal in North Carolina courtrooms.

ROBERT J. HENSLEY, JR.