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State v. Smith: Presumption of Husband's Coercion Over Wife

In North Carolina, a criminal act committed by a wife in the presence of her husband is presumed to have been compelled by her husband's threats, commands or coercion; unless this presumption is rebutted, the wife cannot be convicted.¹

This common law doctrine of presumed coercion by a husband over his wife, though uncertain in origin, has existed for over 1,000 years, as noted by Blackstone, and was therefore deeply embedded in England's law.² Most authorities agree that the presumption arose out of the marriage relation at a time when a woman had to remain totally obedient to her husband, since the husband had complete control over the person of his wife.³

Not only is the origin of the doctrine uncertain, the doctrine is itself a curious one. As noted by one authority:

It was a curious rule because it was apparently peculiar to common-law countries. . . . The origin, the limits, and the reasons for the rule are all more or less obscure. The reason most commonly given, that the wife should be excused because she acts in fear or out of affection for her husband, would seem to apply in whole or large part to the relationship of parent and child, master and servant, overlord and retainer, etc. But in none of these cases was mere coercion an excuse for criminal acts. Doubtless the common-law wished to encourage obedience by the wife, but this policy applies to other relationships where obedience has received no such reward. It is generally admitted that this common-law rule was illogical and artificial at the time of its origin.⁴

North Carolina's first encounter with this rule was in the 1871 case, *State v. Williams*.⁵ In this case the court stated that it was "more natural to suppose the principle to have been founded upon the fact that in most cases the husband has actually an influence and authority over the wife, which the law sanctions or at least recognizes."⁶ In *Williams*, a wife had been convicted of an assault and battery, but the jury was not

1. *State v. Williams*, 65 N.C. 398, 399 (1871).

2. 4 W. BLACKSTONE, COMMENTARIES *29.

3. IX WIGMORE ON EVIDENCE § 2514 (3rd Ed. 1940); 1 JONES ON EVIDENCE § 3.75 (1972); 3 C. VERNIER, AMERICAN FAMILY LAWS § 165 (1971); 2 R. LEE, N.C. FAMILY LAW § 212 (1963).

4. 3 C. VERNIER, AMERICAN FAMILY LAWS § 165 (1971).

5. 65 N.C. 398 (1871).

6. *Id.* at 400. See, e.g., *State v. Rhodes*, 61 N.C. 453 (1868) (held a husband was not guilty where he whipped his wife with a switch no larger than his thumb); and *State v. Black*, 60 N.C. 263 (1864) (held that a husband is allowed to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself).

instructed on the presumption of coercion by her husband. The supreme court reversed the wife's conviction and held that if a wife commits any felony (with certain exceptions)⁷ in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she acted under his constraint, and she cannot be convicted of the felony.⁸ In *State v. Nowell*,⁹ a husband and wife had been convicted of abducting a fourteen year old girl. In this case, the court held the wife had been given the benefit of the presumption where the jury had been instructed on the doctrine as presented in *Williams*. In *State v. Seahorn*,¹⁰ the court found that the lower court's charge, though not in strict compliance with *Williams* and *Nowell*, was a substantial compliance, and upheld the conviction of a husband and wife for a liquor law violation. Chief Justice Clark, concurring in *Seahorn*, urged that the presumption no longer comported with twentieth century conditions and should be abolished.¹¹ Yet, *State v. Cauley*¹² subsequently reaffirmed the doctrine of presumed coercion in a very brutal and grotesque child-beating case. In *State v. Robinson*,¹³ however, the North Carolina Court of Appeals held the presumption inapplicable where a wife conspired to commit murder, finding this crime to be one of the exceptions to which the presumption is inapplicable.¹⁴

The issue of presumed coercion was considered again by the North Carolina Court of Appeals in the recent case, *State v. Smith*.¹⁵ In *Smith*, a husband and wife were convicted of breaking and entering and larceny. The wife appealed on the ground that the lower court erroneously denied her motion for nonsuit since the state's evidence was insufficient to overcome the presumption that she was acting under the dominion and constraint of her husband at the time of the alleged crime. The court, affirming her conviction, held that she was not entitled to the presumption of coercion since she had testified in her own behalf.¹⁶

In reaching its decision, the court in *Smith* relied principally on *State*

7. This common law presumption is not applicable to all crimes; further, as to which crimes it will be applicable varies depending on the jurisdiction. For a discussion of the exceptions in the various jurisdictions, see, Comment, 35 N.C.L. Rev. 104 (1956).

8. 65 N.C. at 399.

9. 156 N.C. 648, 72 S.E. 590 (1911).

10. 166 N.C. 376, 81 S.E. 687 (1914).

11. *Id.* at 378, 81 S.E. at 689.

12. 244 N.C. 701, 94 S.E.2d 915 (1956).

13. 15 N.C. App. 362, 190 S.E.2d 270, *cert. den.*, 281 N.C. 762, 191 S.E.2d 363 (1972).

14. *Id.* The supreme court reasoned that "if the presumption was not available in a trial for murder, it is likewise not available in a trial for conspiracy to commit murder." 15 N.C. App. at 367, 190 S.E.2d at 273-74. See also, *supra* note 7, at 106.

15. 33 N.C. App. 511, 235 S.E.2d 860 (1970).

16. *Id.* at 519-20, 235 S.E.2d at 865-66.

v. Seahorn,¹⁷ interpreting *Seahorn* to hold that a wife is not entitled to the benefit of the presumption when she testifies in her own behalf.¹⁸

In *Seahorn*, the wife's counsel requested the court to instruct the jury that if the wife had made illegal liquor sales in her husband's presence and with his consent and approval, then she should be acquitted.¹⁹ However, the lower court refused to give the jury this instruction, reasoning that the wife had testified on her own behalf as to the circumstances of the sale and her own conduct.²⁰ Instead, the court charged the jury that "if you find that she was acting voluntarily in the sale of liquor on this occasion, actually making the sales, or aiding and abetting and assisting her husband, she was doing this willfully and deliberately, you should find her guilty."²¹ The court then continued the charge to the effect that if the jury found that the evidence showed coercion by the husband over his wife, however, then the jury should acquit the wife.²²

The North Carolina Supreme Court found that the lower court's charge in *Seahorn* was erroneous in that it failed to instruct that the law presumed the wife acted under the coercion of her husband; but, in affirming the wife's conviction, held the error was harmless since the trial court's charge was substantially in compliance with *State v. Williams*, and *State v. Nowell*; and further found that "the jury evidently understood that they should not convict the feme defendant unless they were fully satisfied that the wife was acting voluntarily and free from any constraint upon the part of her husband."²³

A close examination of *Seahorn* reveals that its holding was that the wife had in fact received the benefit of the presumption, regardless of whether she was entitled to it; not that a wife is entitled to the benefit of the presumption unless she testifies in her own behalf. While the lower court had refused to give the defendant's requested instruction to the jury because the wife had testified in her own behalf, the supreme court noted that it was entirely proper to decline to give this instruction because "the defendant did not ask for any instruction about a presumption."²⁴ The supreme court further noted that the wife had received the benefit of the presumption, which is evident in the court's language that, "we doubt, in view of all the circumstances and her own evidence, if she was entitled to this artificial presumption, but if so, she received

17. 166 N.C. 373, 81 S.E. 687 (1914).

18. 33 N.C. App. at 519-20, 235 S.E.2d at 865-66.

19. 166 N.C. at 376, 81 S.E. at 688.

20. *Id.*

21. *Id.* at 377, 81 S.E. at 687.

22. *Id.*

23. *Id.*

24. *Id.* at 378, 81 S.E. at 688.

the benefit of it."²⁵ Therefore, though the lower court may have felt that the wife was not entitled to the presumption where she testified in her own behalf, and thought that by its charge to the jury, it was not giving the wife the benefit of the presumption, the North Carolina Supreme Court found that the wife had in fact received the benefit of this common law presumption. The determination by the North Carolina Court of Appeals in *State v. Smith*²⁶ that *Seahorn* stood for the proposition that a wife is not entitled to the presumption where she testifies in her own behalf, is an erroneous conclusion based only on dicta in the *Seahorn* decision that the wife may not have been entitled to the presumption. There is no indication in *Seahorn* why the court doubted the wife's entitlement to the presumption. This doubt could have been due to her testifying in her own behalf. However, the court's doubt may have been due to a feeling that the presumption no longer serves a legitimate or useful purpose in light of changing circumstances. The court's reason for its statement is only subject to speculation. However, the fact remains that *Seahorn* held only that the trial court's charge was sufficient to give the wife the benefit of the presumption.

The present North Carolina position on this common law doctrine seems to be that the presumption is still available whenever a wife commits a crime (with certain exceptions)²⁷ in the presence of her husband. Thus, in *State v. Smith*,²⁸ the wife was entitled to the presumption. Consequently the court of appeals could have resolved the issue in only one of three ways. First, the court could have held that the presumption remained available, and reversed the lower court's decision for its refusal to give the wife the benefit of it; secondly, the court could have held that the presumption was no longer available; or thirdly, the court could have held that the presumption was still available, but carved out an exception for instances where a wife testified in her own behalf. As the court in *Smith* erroneously held that, based on *Seahorn*, the presumption was not available to a wife who testified in her own behalf, a reconsideration of this issue should be forthcoming, not only to decide whether an exception was or should be created under which the presumption would be denied in such circumstances, but also to determine the need for and justification of this presumption in light of present day circumstances.

In making such a determination it is enlightening to compare how other jurisdictions have dealt with this common law doctrine. A survey of the fifty states expectedly reveals that the majority no longer adheres

25. *Id.*

26. 33 N.C. App. 511, 235 S.E.2d 860 (1977).

27. *Supra* note 7, at 105-07.

28. 33 N.C. App. 511, 235 S.E.2d 860.

to the presumption or the defense of marital coercion. Generally, twenty-five states have dealt legislatively with the doctrine,²⁹ eighteen states have dealt judicially with it;³⁰ and as far as could be determined, the remaining seven states have yet to deal with the issue legislatively or judicially.³¹

Nineteen of the twenty-five states to deal legislatively with the doctrine have abolished not only the presumption, but also the defense of marital coercion.³² Five of these states have enacted statutes providing that even if a woman acts on the command of her husband, it is no defense unless she acted under such coercion as would establish a general defense of duress due to circumstances specified elsewhere in the states' statutes.³³ Illinois and Utah provide that "a married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion, or to any defense of compulsion except. . ."³⁴ as provided elsewhere by statute. Washington abrogated the presumption by statute, stating "the defense of duress is not established solely by showing that a married person acted on the command of his or her spouse."³⁵ Eight of the nineteen states first enacted statutes which abrogated the presumption, yet left the defense of marital coercion.³⁶ These eight states have since repealed their provisions,³⁷ with seven of the states replacing them with general duress statutes,³⁸ and the eighth

29. Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington and Wisconsin.

30. Alabama, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Nebraska, New Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Virginia and West Virginia.

31. Alaska, Connecticut, Mississippi, New Hampshire, North Dakota, Vermont and Wyoming.

32. Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Montana, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington and Wisconsin.

33. DEL. CODE tit. 11, § 431(c) (1974); HAW. REV. STAT. § 702-231(c) (1976); OR. REV. STAT. § 161.270(3) (1975); TEX. PENAL CODE ANN. tit. 2, § 8.05(e) (Vernon 1974); WISC. STAT. ANN. § 939.46(2) (West Supp. 1972).

34. ILL. ANN. STAT. ch. 38, § 7-11(b) (Smith-Hurd 1972); UTAH CODE ANN. § 76-2-302(3) (Supp. 1977).

35. WASH. REV. CODE ANN. § 9A.16.060(4) (1977).

36. ARIZ. REV. STAT. § 13-134 (1956) (repealed effective October 1, 1978); ARK. STAT. ANN. § 41-114 (1964) (repealed 1976); CAL. PENAL CODE § 26(7) (amended 1976 by rewriting exception (7)); COLO. REV. STAT. § 40-1-808 (1963) (repealed 1972); GA. CODE ANN. § 26-401 to 402 (1953) (repealed 1969); IDAHO CODE § 18-201(7) (1948) (repealed 1969); MONT. REV. CODES ANN. § 94-201 (1947) (repealed 1974); S.D. COMPILED LAWS ANN. § 22-5-3 (1967) (repealed 1977).

37. 1977 ARIZ. Sess. Laws ch. 142, § 44; 1975 Ark. Acts No. 208, § 208; 1976 Cal. Stats. ch. 1181, § 1; 1971 Colo. Sess. Laws ch. 121, § 1, at 411; 1968 Ga. Laws 1249, 1274; 1969 Idaho Sess. Laws ch. 204, § 1, at 599; 1973 Mont. Laws ch. 513, § 1; 1976 S.D. Sess. Laws ch. 158, § 5-2.

38. ARIZ. REV. STAT. § 13-402 (Supp. 1977); ARK. STAT. ANN. § 41-208 (1976); COLO. REV. STAT. 18-1-708 (1973); GA. CODE ANN. § 26-906 (1972); IDAHO CODE § 18-201(4) (Supp. 1977); MONT. REV. CODES ANN. § 94-3-110 (Supp. 1973); S.D. COMPILED LAWS ANN. § 22-5-1 (Supp. 1977).

state enacting no replacement since it previously had a general duress statute.³⁹ Ohio and Pennsylvania have judicially held that both the presumption and the defense of marital coercion have been abolished by statutes.⁴⁰ Oklahoma, the remaining state of the nineteen to abolish by legislation both the presumption and the defense of marital coercion, previously had five separate statutes that, read together, statutorily provided both the presumption and the defense.⁴¹ Three of the five provisions have been repealed,⁴² and the fourth amended,⁴³ thereby abolishing not only the presumption of coercion, but also eliminating the defense of marital coercion. Four of the twenty-five states to deal with the issue legislatively have abolished the presumption, but provided that proof of marital coercion; coercion is still a good defense.⁴⁴ The remaining two states of the twenty-five, Minnesota and New York, previously had statutes that abolished both the presumption and the defense of marital coercion; however, their statutes have since been repealed.⁴⁵ In both states, as it is provided that the common law shall continue in effect except where abrogated by statute,⁴⁶ it appears that the presumption would still be available, though it is doubtful that either state realized that the repeal of their respective statutes would have this effect.⁴⁷

39. CAL. PENAL CODE § 26(8) (West 1970) (amended 1976) (current version at CAL. PENAL CODE § 26(7) (West Cum. Supp. 1976)).

40. OHIO REV. CODE ANN. § 3103.0 (Page 1972), construed in *Ohio v. Herschberger*, 77 O.L.A. 487, 150 N.E.2d 671 (1958); PA. STAT. ANN. tit. 18, § 309 (Purdon 1973), construed in *Commonwealth v. Lawson*, 454 Pa. 23, 309 A.2d 371 (1973).

41. OKLA. STAT. ANN. tit. 21, § 152(7) (West 1958) (provides that persons who commit a criminal act under involuntary subjection to the power of a superior are incapable of committing a crime); OKLA. STAT. ANN. tit. 21, § 155(2) (West 1958) (provided that an inference of the involuntary subjection to the power of a superior would arise from coverture) (amended 1976 by omitting subsection (2)); OKLA. STAT. ANN. tit. 21, § 157 (West 1958) (listed certain crimes where an inference from coverture did not arise) (repealed 1976); OKLA. STAT. ANN. tit. 21, § 158 (West 1958) (provided that in those crimes specified in § 157, a wife must prove duress) (repealed 1976); OKLA. STAT. ANN. tit. 21, § 159 (West 1958) (provided that the inference arising from the fact of coverture may be rebutted) (repealed 1976).

42. OKLA. STAT. ANN. tit. 21, §§ 157 to 159 (West 1958) (repealed 1976).

43. OKLA. STAT. ANN. tit. 21, § 155(2) (West 1958) (amended 1976) (the 1958 statute provided that an inference of involuntary subjection to the power of a superior would arise from duress or coverture) (OKLA. STAT. ANN. tit. 21, § 155 (West Cum. Supp. 1977-1978) now provides that such an inference will arise only from duress).

44. MD. ANN. CODE art. 35, § 7 (1971); MICH. COMP. LAWS ANN. § 780.401 (MICH. STAT. ANN. § 28.1071 (Callaghan 1972)); NEV. REV. STAT. § 194.010(8) (1973); N.J. STAT. ANN. § 2A:85-3 (West 1969).

45. MINN. STAT. ANN. § 610.06 (West 1961) (repealed 1963); N.Y. PENAL LAW § 1092 (McKinney 1944) (repealed 1967).

46. *Jung v. St. Paul Fire Relief Ass'n.*, 223 Minn. 402, 27 N.W.2d 151 (1947) (The common-law is in force in Minnesota except where it has been abrogated by statute or is not adapted to the conditions of the state); N.Y. CONST. art. 1, § 14. (The common-law shall be and continue the law of the state of New York "subject to such alteration as the legislature shall make concerning the same.").

47. The 1963 Advisory Committee Comment on MINN. STAT. ANN. § 610.06 (West 1961)

Eleven of the eighteen states that have dealt with the doctrine judicially, recognized the presumption and the defense of coercion the last time the issue was before their courts.⁴⁸ It should be noted however, that with the exception of Missouri and North Carolina, none of these states has faced the issue in over forty years.⁴⁹ Therefore, in light of the dates of these decisions, the majority trend to abolish the presumption, and present day attitudes and circumstances, it is questionable whether these jurisdictions would reaffirm this issue today. The remaining seven states judicially abolished the presumption.⁵⁰ It is uncertain, however, whether the defense of marital coercion is still available. In seven states, no reported court decision or legislation dealing with this doctrine could be found.⁵¹

In conclusion, this writer urges that North Carolina judicially abolish not only the presumption, but also the defense of marital coercion. Chief Justice Clark, in his concurring opinion in *State v. Seahorn*⁵² over sixty years ago, stated that the presumption “. . . having been created solely by judicial decision, should be set aside in the same mode. . . .”⁵³ It might also be noted that a House Judiciary Commit-

(repealed 1963) states that the statute was premised on the assumption that in its absence the courts would hold that a crime committed by a wife in the presence of her husband would be a defense. The comment further states “[i]t is believed that no court would presently so hold in the absence of statute.”

48. *Spencer v. State*, 40 Ala. App. 168, 109 So.2d 756 (1958); *Conner v. State*, 95 Fla. 765, 117 So. 852 (1928); *Tomasello v. State*, 91 Ind. App. 670, 173 N.E. 235 (1930); *State v. Hollis*, 163 La. 952, 113 So. 159 (1927); *State v. Cleaves*, 59 Me. 298, 8 Am. Rep. 422 (1871); *State v. Ready*, 251 S.W.2d 680 (Mo. 1952); *State v. Smith*, 33 N.C. App. 511, 235 S.E.2d 860 (1977); *State v. Shee*, 13 R.I. 535 (1882); *State v. Minor*, 171 S.C. 120, 171 S.E. 737 (1934); *Martin v. Commonwealth*, 143 Va. 479, 129 S.E. 348 (1931); *State v. Buchanan*, 111 W. Va. 142, 160 S.E. 920 (1931).

49. The cases cited in note 43 *supra*, are the most recent decisions found for each state. It should be noted however, that the Reporter's Comments, found with LA. REV. STAT. ANN. § 14:18 (West 1974), a general duress provision, state that a provision to provide for the presumption of marital coercion was considered but rejected as unnecessary believing that to indulge in such a presumption would be absurd. Also LA. CODE CRIM. PRO. ANN. art. 3 (West 1967) abrogated the former rule that where there is no express law, the common law rules of procedure would prevail, by providing that “[w]here no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of the Code and other statutory or constitutional provisions.” Therefore it appears that Louisiana is no longer bound to follow the common law in absence of statute, hence, it is uncertain exactly what its position would be today.

50. *State v. Bazoukas*, 226 Iowa 1385, 286 N.W. 458 (1939); *State v. Hendricks*, 32 Kan. 559, 4 P. 1050 (1884); *Wiremann v. Commonwealth*, 224 Ky. 131, 5 S.W.2d 884 (1928); *Commonwealth v. Barnes*, 76 Mass. Adv. Sh. 143, 340 N.E.2d 863 (1976); *Smith v. Meyers*, 54 Neb. 1, 74 N.W. 277 (1898); *State v. Turnbow*, 67 N.M. 241, 354 P.2d 533 (1960); *Angel v. McClean*, 1973 Tenn. 191, 116 S.W.2d 1005 (1938).

51. Alaska, Connecticut, Mississippi, New Hampshire, North Dakota, Vermont and Wyoming.

52. 166 N.C. 373, 81 S.E. 687 (1914).

53. *Id.* at 379, 81 S.E. at 689. Chief Justice Clark used N.C. GEN. STAT. 52-6, which required a privy examination of a married woman whenever she joined her husband in a conveyance of real property, as an example of a statutory creation which could only be repealed by statute, (and stated that such action should have long been taken), to stress that the judiciary, which created the

tee⁵⁴ and a Senate Judiciary Committee⁵⁵ of the North Carolina General Assembly have considered adding a new section to Chapter 14 of the North Carolina General Statutes that would abolish the presumption and the defense of marital coercion by the following language: "*Defense of compulsion and coercion*-Any person charged with a criminal offense may assert the common-law defense of compulsion, but no presumption of coercion shall arise because of the marriage relationship alone."⁵⁶ The statutory language was formulated by the Legislative Research Commission,⁵⁷ which was directed by the 1975 General Assembly to study the problem of sex discrimination in North Carolina laws and practices.⁵⁸ The committee's report to the 1977 General Assembly suggests that the changes enumerated in their report are warranted in order to eliminate sex discrimination in the cases, laws, customs, and practices in North Carolina.⁵⁹

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presumption of marital coercion, is the proper body to abolish it. As the North Carolina Legislature repealed N.C. GEN. STAT. 52-6 by 1977 N.C. Sess. Laws ch. 375, § 1, it appears the appropriate time for the judiciary to take its respective action.

54. House Committee on Judiciary III, 1977 General Assembly of N.C.

55. Senate Committee on Judiciary II, 1977 General Assembly of N.C.

56. S.B. 353 and H.B. 1320, 1977 General Assembly of N.C. Both committees gave a favorable report on their bill but postponed further action indefinitely. Consequently, under § 2 of S.J.R. 915, 1977 General Assembly of N.C., which provided for adjournment, any bill indefinitely postponed may not be further considered without a joint resolution passed by a two-thirds majority in each house.

57. This commission was established by N.C. GEN. STAT. 120-30.10 (1974) (amended 1975) (current version at N.C. GEN. STAT. §§ 120-30.10 to 30.18 (1974 and Cum. Supp. 1975)).

58. 1975 N.C. Sess. Laws ch. 851, § 5.

59. N.C. LEGISLATIVE RESEARCH COMMISSION, REPORT ON SEX DISCRIMINATION 3 (1977).