NORTH CAROLINA

_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. _____

STATE OF NORTH CAROLINA,

vs.

_____,

BRIEF IN SUPPORT OF MOTION TO DISMISS

The defendant in this case is seeking an order of the Court dismissing the misdemeanor charge now lodged against the defendant upon the grounds that defendant had reasonable grounds to fear for his brother's safety, had no other acceptable choice but to drive to pick up his brother, and therefore requests the Court to dismiss the case against him. In support of this motion, defendant offers unto the Court the following brief in support of the motion.

FACTS

On November 12, 2011, defendant spent the evening watching a game in his home alone. During this time defendant drank some beer.

At approximately 11:30 p.m., defendant received a telephone cellular call from his younger brother, who lives with defendant. In that telephone conversation, his brother told defendant that he had been at a party, had been drinking, was thrown out, and was walking toward home in Mebane from Person County on Highway 70, a distance of approximately 20 miles.

When defendant told his brother that he had been drinking alcohol and should not drive, his brother told defendant that he had tried to contact others and had not been able to reach anyone. Defendant then tried to contact others regarding his brother's plight and was not able to reach anyone. Fearing that his brother would kill himself walking along busy Highway 70 for 20 miles at night and hurriedly forgetting his driver's license in a panic, defendant got into his car and drove toward his brother's location.

Not driving even 10 minutes, defendant rounded a curve and was stopped at a checkpoint. Sheriff B.D. Marsh's dwi report, admitted into evidence on the previous court date, recounts defendant's statement to the officer as " . . . I had to be a good brother and pick him up."

Officer March issued defendant a warning ticket for not having his driver's license and on November 13, 2012, charged defendant in Orange County with the offense of driving while impaired.

QUESTION PRESENTED

Does North Carolina recognize the defense of coercion/duress/necessity in Driving While Impaired cases? If so, does this defense apply to defendant and if so is he entitled to a verdict of not guilty in this case?

ARGUMENT

In State v. Borland, 21 N.C. App. 559, 205 S.E.2d 340 (1974) the Court of Appeals recognized the defense of compulsion/duress in a motor vehicle case. In that case the defendant was convicted in the Superior Court of Carteret County of reckless driving and speeding 110/60. The evidence revealed the Defendant was driving recklessly and at a speed in excess of 110 mph while being pursued by a Deputy Sheriff from Carteret County. The evidence further revealed that the deputy's car was not equipped with any siren, blue light, or any insignia of any kind indicating it was a law enforcement vehicle. Other evidence indicated the deputy sheriff fired gunshots in the air during the chase. The Defendant admitted his speed during the chase but contended that he had no idea he was being chased by a law enforcement officer and was violating no law when the chase began. The Defendant further testified that he did not stop at a well-lighted location because he did not think that would prevent his getting shot if the man wanted to shoot him.

In reversing the conviction, the Court of Appeals held that the defendant was entitled to have the jury instructed that if they believed the defendant did not know the pursuing car was a law enforcement officer, he had the right to attempt to evade the pursuers when he had reasonable grounds to fear for his safety. This is the first North Carolina to recognize the defense of compulsion, necessity, or duress in a motor vehicle case.

In State v. Hudgins, 167 N.C. App. 705, 606 S.E.2d 443 (2005) the Court of Appeals recognized the defense of necessity in an impaired driving case. Defendant was placed on trial for the offense of habitual impaired driving and DWLR. The State's evidence at trial revealed defendant was driving a motor vehicle which was involved in a motor vehicle accident. Defendant was arrested and blew a .26 on the intoxilyzer. Defendant admitted he was impaired but indicated he was riding as a passenger in a truck driven by a friend. Defendant testified that his friend stopped the truck on the side of the road to examine a dead tree. Defendant further testified that after he and his friend exited the truck, it began rolling down the road. Defendant indicated then ran to the truck and began pumping the brakes to no avail. As defendant approached a sharp curve, defendant steered the vehicle across the road whereupon an accident occurred. Defendant was convicted of habitual impaired driving and DWLR and was sentenced to prison.

At trial defendant requested an instruction on the defense of "necessity" which was refused by the trial court. In reversing the conviction the Court of Appeals stated since the record contained substantial evidence of each element of the necessity defense, the trial judge should have instructed the jury on that defense. The Court said failure to do so was reversible error. In discussing the defense of necessity/coercion/duress the Court stated that the Court had previously implicitly acknowledged the defense of duress in State v. Cooke, 94 N.C. App. 386, 387, 380 S.E.2d 382 (1989) when it stated, "The trial court was correct in refusing to instruct the jury on the defense of coercion, compulsion or duress as there was no evidence that defendant faced threatening conduct or any kind at the time the officer saw him driving while intoxicated."

The Court recognized with respect to a defense of necessity that, "{a} person is excused from criminal liability if he acts under a duress of circumstances to protect life or limb or health

in a reasonable manner and with no other acceptable choice," Hudgins, 167 N.C. App. at 710, 606 S.E.2d at 447, quoting State v. Thomas, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215 (1991), *review denied by* State v. Thomas, 329 N.C. 792, 408 S.E.2d 528(1991). The Hudgins Court went on to say, "Our Supreme Court long ago restricted the necessity defense to situations where a 'human being was thereby saved from death or peril or relieved from severe suffering.'" Id., quoting State v. Brown, 109 N.C. 802, 807, 13 S.E. 940, 942 (1891).

In discussing the defenses of necessity/coercion/duress in Hudgins, the Court of Appeals cited cases from other jurisdictions which have specifically held that the defense of necessity is available in a DWI prosecution.

State v. Shotton, 142 Vt. 558, 458 A.2d 1105 (1983) is a case cited by the Court of Appeals in Hudgins, supra. In Shotton, the defendant was stopped by a State Trooper for erratic driving, noticed she was impaired, and arrested her for DWI. The defendant was taken to the police department where she refused the intoxilyzer. The defendant testified she had been assaulted and pushed down a flight of stairs by her husband. She testified that her telephone was disconnected so she could not use it to call for help. She further indicated that she did not want to walk to neighbors' houses out of fear no one would have been home. She indicated she therefore drove her vehicle to get to the hospital for treatment. After the defendant was processed for DWI, she was taken to the hospital where it was determined she had multiple rib fractures. Defense counsel requested a charge on the defense of necessity which was refused by the trial court. In reversing the conviction the Vermont Court of Appeals stated: "The evidence presented at trial was sufficient to raise a question of fact for the jury as to whether defendant drove because if was reasonably conceived by her to have been a necessity; accordingly, an instruction on the issue should have been given upon request."

The Court further discussed the elements of the defense of necessity and stated that the elements of that defense were as follows:

> "(1) there must be a situation of emergency arising without fault on the part of the actor concerned;
> (2) this emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
> (3) this emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
> (4) the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong."
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> Id., 142 Vt. At 560, 561, 458 A.2d at 1106.

The North Carolina criminal jury instructions 310.10 indicate: "There is evidence in this case tending to show that the defendant acted only because of [compulsion] [duress] [coercion]. The burden of proving [compulsion] [duress] [coercion] is upon the defendant. **It need not be proved beyond a reasonable doubt, but only to your satisfaction**. The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of [compulsion] [duress] [coercion] is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt."

In the context of defining insanity as a defense to a murder charge, the Court in State v. Castillo, 713 S.E.2d 190, 194 (2011) explained the differing burdens of proof as follows: "This means that the defendant has the burden of proof on the issue of sanity—of insanity. However, unlike the State, which must prove all the other elements of the crime beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction; that is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt but simply to your satisfaction that the defendant was insane at the time of the alleged offense.

In making this determination, you must consider all of the evidence before you which has any tendency to throw any light on the mental condition of the defendant, including lay testimony reciting irrational or rational behavior of the defendant before, during or after the alleged offense; opinion testimony by lay and expert witnesses or other evidence admitted. None of these things are conclusive, but all are circumstances to be considered by you in reaching your decision." Id.

In State v. Weeks, 322 N.C. 152, 175 (1988), the Court used a plain English definition. "Defendant contends that the trial court should have defined "satisfaction." However, as conceded by defendant, this issue has previously been addressed by this Court, and we found no error in the trial court's refusal to define "satisfaction" to the jury. State v. Franks, 300 N.C. 1, 265 S.E.2d 177. In the present case, as in Franks, the jury was properly instructed on the standard of proof needed by defendant to prove his insanity. Furthermore, from its own determination and from the trial court's instructions, a jury knows what satisfies it, and a "jury is presumed to have understood the plain English contained" in the trial court's instruction." Id.

In the case before the Court, the evidence clearly reveals that defendant was in fear for his brother's safety. Defendant was worried that his impaired brother, kicked out of a party and walking on a busy highway for 20 miles, would get hit by a car and killed. Both Brett and defendant had tried to contact others but to no avail. Defendant's coercion or duress was present, imminent and impending and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act was not done. The danger to his brother was continuous throughout the time when the act was committed and was one from which defendant could not withdraw in safety. The situation presented no reasonable opportunity to avoid the injury without doing the criminal act. His actions to drive his car to avoid injury to his brother were certainly reasonable, and under this particular set of circumstances, were justified. For this reason the defendant respectfully requests the Court to enter a verdict of not guilty.

Conclusion

As shown above, North Carolina recognizes the defense of coercion/duress/necessity in Driving While Impaired cases. Defendant respectfully requests the Court to consider all the circumstances and to find to its satisfaction that this defense applies to this defendant and that defendant is thus not guilty of the charge of Driving While Impaired.

This is the _____ day of _____, 20_____.

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