North Carolina Criminal Law Blog: When Does DWI Resulting in Death Amount to Second Degree Murder?

By Shea Denning

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Jeff wrote here about a recent high-profile case in which a defendant, Raymond Cook, was charged with multiple felony offenses after he drove while impaired and crashed into a young woman's car in North Raleigh, killing her. In Cook's case, the jury found the defendant guilty of impaired driving, involuntary manslaughter and felony death by vehicle, but acquitted him of second-degree murder.

Driving while impaired and proximately causing the death of another constitute both involuntary manslaughter and felony death by vehicle. A person convicted of both offenses arising from the same incident may, however, be sentenced only for felony death by vehicle, the more serious offense. *See* State v. Lopez, 363 N.C. 535, 536 (2009).

Because the act of driving while impaired violates a safety statute designed for the protection of human life and limb, it amounts to culpable negligence as a matter of law, see State v. Davis, 198 N.C. App. 443, 447 (2009). Thus, driving while impaired and proximately (but unintentionally) causing the death of another is involuntary manslaughter, a Class F felony. However, the act of impaired driving and thereby causing the death of another does not, without more, constitute second-degree murder. That is because second-degree murder requires malice, a state of mind that can be proved in vehicular homicide cases by showing that the defendant intended to drive in a reckless manner reflecting knowledge that injury or death would likely result. See State v. McAllister, 138 N.C. App. 252 (2000).

The United States Court of Appeals for the Fourth Circuit in United States v. Fleming, 739 F.2d 945 (4th Cir. 1984), distinguished impaired driving and death cases involving malice (and thereby supporting murder charges) from those involving culpable negligence (supporting a conviction for manslaughter, but not murder) this way:

> In the vast majority of vehicular homicides, the accused has not exhibited such wanton and reckless disregard for human life as to indicate the presence of malice on his part. In the present case, however, the facts show a deviation from established standards of regard for life and the safety of others that is markedly different in degree from that found in most vehicular homicides. In the average drunk driving homicide, there is no proof that the driver has acted while intoxicated with the purpose of wantonly and intentionally putting the lives of others in danger. Rather, his driving abilities were so impaired that he recklessly put others in danger simply by being on the road and attempting to do the things that any driver would do. In the present case, however, danger did not arise only by defendant's determining to drive while drunk. Rather, in addition to being intoxicated while driving, defendant drove in a manner that could be taken to indicate depraved disregard of human life, *particularly* in light of the fact that *because he was drunk* his reckless behavior was all the more dangerous.

Id. at 948.

Following are examples of evidence deemed sufficient by North Carolina's appellate courts to establish malice in impaired driving cases resulting in the death of someone other than the driver:

- Driving by the defendant with a revoked license and having previously been convicted of impaired driving, see State v. Armstrong, 691 S.E.2d 433, 438 (N.C. App. 2010); State v. McAllister, 138 N.C. App. 252 (2000)
- Driving with a blood alcohol concentration measuring 0.113 three hours after the accident and driving into the victim's lane of travel after having previously been convicted of driving after consuming by a person under 21, and, while facing pending charges of driving while impaired and driving while license revoked, see State v. Gray, 137 N.C. App. 345 (2000)
- Driving while substantially impaired after prior convictions for driving while impaired, driving with a revoked license

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and using false license tags along with an inspection sticker obtained by lying to inspection personnel, see State v. McBride, 109 N.C. App. 64, 68 (1993)
- After fighting with bar proprietor, driving away and passing a car in a no passing zone, striking a motorcycle, and driving through a red light into an intersection at 60 miles per hour, crashing into a car and killing all three of its occupants, see State v. Snyder, 311 N.C. 391, 392-394 (1984)

In Cook's case, the State introduced evidence that the defendant drove 30 mph over the speed limit on a North Raleigh Street, with an alcohol concentration two or three times over the legal limit. Such evidence appears legally sufficient to establish malice, but, of course, even evidence legally sufficient to establish guilt may be insufficient to convince the jury.

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North Carolina Criminal Law Blog: State v. Pierce: Malice and Foreseeability in Death by Vehicle Prosecutions

By Shea Denning

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The court of appeals' recent decision in State v. Pierce, __ N.C. App. __ (October 18, 2011), analyzed whether a defendant could properly be convicted of second degree murder for the death of a law enforcement officer who was speeding to assist another officer who in turn was chasing the defendant as he fled in his vehicle. The court's analysis of malice, the foreseeability of such injury and the relevance of the victim's contributory negligence struck me as worthy of highlighting in a post.

Here's what happened: Wilmington Police Corporal Richards attempted to stop defendant's sports utility vehicle on suspicion that its occupants recently had engaged in a drug transaction. The defendant initially pulled to the side of the road, but drove away before Corporal Richards could get out of his patrol car.

Corporal Richards pursued the defendant, while informing the dispatcher and nearby officers of the chase and its location. During Corporal Richards' pursuit, the defendant drove at 65 mph in a residential area with a speed limit of 25 mph and bags of marijuana were thrown from the car. Wilmington Police Officer Matthews, who was a few miles away, responded to Corporal Richards' radioed report by driving toward the area of the chase at "high speeds." Along the way, Officer Matthews swerved to avoid debris in the road, lost control of his vehicle, and died after his vehicle ran off the road and hit a stand of trees.

Among the arguments the defendant raised on appeal was that the trial court erred by denying his motion to dismiss the second degree murder charge as there was insufficient evidence of malice and insufficient evidence that his flight from Corporal Richards caused Officer Matthews' death. The court of appeals disagreed.

The court rejected the defendant's contention that the evidence of malice was insufficient, citing as support its statement in State v. Lloyd, 187 N.C. App. 174 (2007), that "'the very act of fleeing from the police certainly constitutes malice.'" Slip op. at 6 (quoting *Lloyd* , 187 N.C. App. at 180). The court compared the defendant's conduct in the instant case with the conduct found sufficient to establish malice in State v. Bethea, 167 N.C. App. 215, 218 (2004), a case in which the defendant drove with a revoked license, fled law enforcement officers, sped through a stop light and stop signs, drove up to 100 mph, crossed into the oncoming traffic lane, and turned his car lights off on dark rural roads while traveling 90 to 95 miles per hour. The *Bethea* court concluded that the defendant's actions, along with a "mind unclouded by intoxicating substances that might have hindered his ability to appreciate the dangers of his actions," showed an "'intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.'" *Id.* at 219-20. The *Pierce* court likewise concluded that the defendant's intentional flight from Corporal Richards in the instant case reflected knowledge that injury or death would likely result and manifested depravity of mind and disregard of human life. Thus, the court found the evidence sufficient to allow the jury to infer malice.

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The defendant argued that the State could not rely upon his conduct during the police chase to establish malice for purposes of a second degree murder prosecution arising from the death of Officer Matthews, since Officer Matthews was not chasing the defendant when he crashed his car and died. While recognizing that malice requires conscious indifference to consequences when the probability of harm to another within the circumference of such conduct is reasonably apparent, the court held that it could not conclude that the harm that befell Officer Matthews "was so far beyond the circumference of Pierce's reckless actions as to absolve Pierce of liability for Officer Matthews' death." Slip op. at 8. The court deemed foreseeable other officers' participation in the pursuit of the defendant and held that "Pierce's reckless flight, Officer Matthews' proximity to the chase, and the danger inherent in a motor vehicle pursuit" were sufficient evidence of "Pierce's conscious indifference to the reasonably apparent probability of harm to an officer such as Officer Matthews." Slip. op. at 9.

The defendant further contended that there was insufficient evidence that his flight from Corporal Richards was the proximate cause of Officer Matthews' death. Noting that proximate cause is a cause (1) that "in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable," the court determined that the evidence was sufficient to establish proximate cause.

The court reasoned: Defendant fled from Corporal Richards' lawful attempt to stop him, creating a police exigency. Officer Matthews, a nearby officer, was informed of the exigency and sped to provide assistance and apprehend the defendant. On his way, Officer Matthews swerved to avoid an object in the road, and, because of the speed at which he was traveling to join the pursuit of the defendant, he ran off the road into the trees, and was killed. The court viewed this evidence as sufficient to establish that (1) Officer Matthews' death would not have occurred if the defendant had remained stopped when Corporal Richards pulled him over; and (2) an injurious result such as Officer Matthews' death was reasonably foreseeable under the circumstances. Slip op. at 10. Thus, court rejected the defendant's argument that the court erred in denying his motion to dismiss the second degree murder charge on the grounds that there was insufficient evidence to show that his flight proximately caused Officer Matthews' death.

Defendant also argued that his conviction for second-degree murder should be overturned because the trial court "unconstitutionally barred him from presenting a full defense by excluding evidence tending to show that Officer Matthews was negligent in speeding to the pursuit and, therefore, was the cause of his own death." Noting that "'contributory negligence [] has no place in the law of crimes,'" the court explained that Officer Matthews' alleged negligent conduct could absolve the defendant of criminal liability only if Officer Matthews' conduct so entirely intervened or superseded the defendant's negligence that it alone produced the injury. The court determined even if Officer Matthews was negligent, no reasonable person could conclude that his conduct, undertaken in response to an exigency created by the defendant, was the sole cause of his death. The court of appeals therefore concluded that the trial court's decision to exclude evidence of Officer Matthews' alleged negligence did not violate the defendant's "'right to a full and fair defense.'" *Id.* at 12.

The analysis in *Pierce* accords with that of other state courts confronting similar arguments. See, e.g., State v. Anderson, 12 P.3d 883 (Kan. 2000) (concluding that reckless speeding by motorcyclist while being pursued by police created situation that resulted in the death of a person whose car was struck by a patrol car that ran stop sign during the chase and that defendant reasonably could have foreseen such harm); State v. Lovelace, 738 N.E.2d 418 (Ohio App. 1999) (affirming defendant's conviction for involuntary manslaughter based on the death of a person who was killed when a police officer who was seeking to join in the chase of the defendant ran a stop sign and collided with the person's vehicle); *see also* People v. Schmies, 51 Cal Rptr.2d 185 (Cal. App. 3 Dist. 1996) (rejecting defendant's claim that in vehicular manslaughter trial the trial court improperly excluded evidence relating to the reasonableness of the police officers' conduct while chasing the defendant on his motorcycle; during the pursuit a police officer failed to stop at intersection and crashed into another car, killing its driver).

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North Carolina Criminal Law Blog: Qualifying Predicate Traffic Violations for Purposes of Misdemeanor Death by Vehicle

By Shea Denning

Article: http://nccriminallaw.sog.unc.edu/qualifying-predicate-traffic-violations-for-purposes-of-misdemeanor-death-by-vehicle/

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Misdemeanor death by vehicle is defined in G.S. 20-141.4(a2) as (1) unintentionally causing the death of another person (2) while violating a State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic—other than impaired driving under G.S. 20-138.1—where (3) commission of the offense is the proximate cause of the death. (A defendant who drives while impaired and unintentionally, but proximately, causes the death of another commits the offense of felony death by vehicle in violation of G.S. 20-141.4(a1).) As I explained here, for offenses committed on or after December 1, 2011, misdemeanor death by vehicle is an implied consent offense, rendering it subject to implied consent testing procedures.

G.S. 20-141.4(a2) broadly defines the types of traffic violations that can satisfy the second element set forth above. I wonder, however, whether violations of traffic laws that do not involve or affect the method in which a defendant operates a vehicle can satisfy the second prong of the statute or, even if they do, can ever properly be considered the proximate cause of a death resulting from the defendant's driving.

Consider, for example, a defendant who drives a motor vehicle on a public highway while her license is revoked in violation of G.S. 20-28(a). A deer darts in front of the defendant's car. The defendant, who is driving the speed limit, swerves to avoid colliding with the deer. As she does so, she veers off the roadway and loses control of the car, colliding with a tree. A passenger riding in the defendant's car is killed on impact. Has the defendant committed the offense of misdemeanor death by vehicle?

The defendant, while driving, unintentionally caused the death of another. At the time she drove, she was violating a state law prohibiting her from driving while her license was revoked. But for the defendant's driving, her passenger would not have been killed. And let's assume that 100 yards before the deer, the defendant passed a road sign indicating that there were deer in the area, rendering foreseeable the presence of deer in the roadway. Notwithstanding all of these factors, I'm not sure that the defendant *has* committed the offense of misdemeanor death by vehicle.

G.S. 20-141.4(a2)(3) requires that commission of the traffic offense (as opposed to mere operation of the vehicle) proximately cause another's death. Though there are no North Carolina appellate court decisions addressing this issue, it appears that for driving while license revoked to serve as predicate offense for misdemeanor death by vehicle, the *revocation* element of driving while license revoked must, like the *driving* element, cause the death. *Cf. People v. Schaefer* , 473 Mich. 418, 703 N.W.2d 774 (2005) (holding that legislature intended in enacting statute criminalizing driving while impaired and "by the operation of that motor vehicle causing the death of another person" that the defendant's *operation* of the motor vehicle—not the defendant's intoxicated manner of driving—cause the victim's death).

Confronted with this issue several years ago, the Ohio Court of Appeals found it "difficult to conceive of a situation in which driving while under suspension could properly be the underlying crime in an involuntary manslaughter charge." State v. Jodrey, 1985 WL 6740 (Ohio Ct. App. Apr. 10, 1985) (unpublished op.). The court explained that driver's licenses are revoked for numerous traffic offenses of varying degrees of seriousness and for varying periods of time and that when the revocation ends, the driver generally is authorized to resume driving without any testing. Thus, the court reasoned: "It is difficult to imagine any real difference between one's vehicle operation skills while under suspension and immediately after the suspension is terminated. We cannot find that the driving under suspension is the proximate cause of a death that occurs when a person drives while under suspension, as reprehensible as that activity certainly is." *Id.* at *2. In a more recent published opinion the Ohio Court of Appeals relied upon *Jodrey* in holding that an involuntary manslaughter conviction could not be predicated upon the misdemeanor offense of driving while under suspension since "the act of driving under suspension is not relevant to the quality of the driving, and therefore, it is not relevant to causation." State v.

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DeMastry, 952 N.E.2d 1151, 1157 (Ohio App. 2011). The Ohio courts' analysis makes sense to me.

The view that driving with a revoked license is not relevant to causation is, however, a bit hard to reconcile with the North Carolina Court of Appeals' consideration of prior convictions for driving while license revoked as well as commission of the act itself as among the factors that can establish malice in impaired driving cases that result in death, as discussed here and here.

Perhaps the notion that driving while license revoked cannot serve as a predicate offense for misdemeanor death by vehicle is so well-established that the issue never arises. Perhaps not. For enlightenment on that front, I turn to you, knowledgeable readers.

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