# North Carolina v. White

256 S.E.2d 505 (1979) | Cited 0 times | Court of Appeals of North Carolina | July 17, 1979

If the husband has access to his wife up to 265 days before birth of the child and the wife thereafter lives in adultery for a period of several months beginning 262 days before birth, is the husband conclusively presumed to be the father of the child?

The trial court answered this question in the affirmative by charging in pertinent part that the "normal period of gestation . . . [m]ay be anywhere from seven, eight, nine, nine and a half or ten months from the date of birth of the child, and the only way the assumption of legitimacy may be rebutted is by evidence

tending to show the husband could not have had access to the wife during the period of time referred to."

Did the court err in so instructing the jury? We have found the law in North Carolina somewhat confusing, both on the question of the period of gestation and the presumption of legitimacy.

Judicial notice that the normal period of gestation is between seven to ten months was first recognized in State v. Key, 248 N.C. 246, 102 S.E.2d 844 (1958), and followed in State v. Hickman, 8 N.C. App. 583, 174 S.E.2d 609, cert. denied, 277 N.C. 115 (1970); and State v. Snyder, 3 N.C. App. 114, 164 S.E.2d 42 (1968). Other cases support the presumption that the child was conceived 280 days, or ten lunar months, prior to the date of birth. Mackie v. Mackie, 230 N.C. 152, 52 S.E.2d 352 (1949); State v. Bryant, 228 N.C. 641, 46 S.E.2d 847 (1948); State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943). In Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968), the court commented that protracted pregnancies of more than 280 days, while uncommon, are not considered extraordinary. In Searcy v. Justice, 20 N.C. App. 559, 562, 202 S.E.2d 314, 316, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974), quoting 3 Lee, N.C. Family Law, § 250 at 191-92 (1963), the court stated: "'There is neither medical nor legal agreement as to the period of gestation in human beings.'"

The presumption that the child was lawfully begotten in wedlock is conclusive if there were access. Eubanks v. Eubanks, supra; Ray v. Ray, 219 N.C. 217, 13 S.E.2d 224 (1941). See Bailey v. Matthews, 36 N.C. App. 316, 244 S.E.2d 191 (1978). In State v. Greene, 210 N.C. 162, 163, 185 S.E. 670, 671 (1936), the court stated: "The ancient rule of the common law that if the husband was within the four seas no proof of nonaccess was admissible . . . has been modified in this State only to the extent that the presumption of legitimacy may be rebutted by evidence tending to show the husband could not have had access or was impotent. (Citations omitted)."

The modern doctrine is stated in State v. Hickman, 8 N.C. App. 583, 584, 174 S.E.2d 609, 610, cert. denied, 277 N.C. 115 (1970), as follows:

"It is presumed that a child born in wedlock is the legitimate child of that marriage unless it is shown that the

husband could not have had access to the spouse at a time when the child could have been conceived or that the husband was impotent or that other circumstances would prevent the husband from being the father of the child." See 10 C.J.S. Bastards § 3b. (1938).

It is unclear whether this modern doctrine has been accepted, in toto, by the North Carolina Supreme Court. In Eubanks v. Eubanks, supra, decided in 1968, the court stated that the presumption of legitimacy was conclusive if there were access by the husband. But in light of State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), reversed, 432 U.S. 233, 53 L. Ed. 2d 306, 97 S. Ct. 2339 (1977), such conclusive presumption may place an unconstitutional burden on a defendant in a criminal case where paternity is an issue.

In the case before us the uncontradicted evidence established that defendant-husband had access to the spouse (prosecuting witness) at a time when the child could have been conceived, and there was no evidence that defendant-husband was impotent or that there were other circumstances which prevented him from being the father of the child. Though the State's evidence also established that the mother lived in open adultery for several months with Carl Pinnley beginning 262 days before birth of the child, if we rely on State v. Key, supra, and take judicial notice that the normal period of gestation is 7 to 10 months, then both defendant and Carl Pinnley had access to the mother when the child could have been conceived, and either could have been the father; but the defendant is conclusively presumed to be the father of the child since he failed to offer evidence that he could not be the father.

In view of the failure of the defendant to offer evidence that he could not be the father of the child, we do not find the instructions of the trial court erroneous. If in the case sub judice, the defendant offered evidence of impotency or a blood test which revealed that he could not be the father of the child (G.S. 8-50.1 and G.S. 49-7), then the instructions to the jury would have been erroneous. Though the original firm and conclusive presumption has been modified by the so-called modern rule, apparently accepted in this State, the presumption is still a strong one. Perhaps the modern rules should be further modified in light of

technological advances in genetics and blood-typing and because the presumption places a heavy, perhaps unreasonable, burden on the defendant-husband in a criminal case.

No error.

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Disposition

No error.

Judge Carlton dissenting.

I agree with the majority's enunciation of current North Carolina law with respect to the crime of abandonment and nonsupport. Prevailing decisions in this jurisdiction require the defendant to show that he did not have access to the spouse at a time when the child could have been conceived, or that he was impotent, or that other circumstances would prevent him from being the father of the child, in order to rebut the presumption of legitimacy. It seems to me, however, that these rules contravene the principles established in In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), reversed, 432 U.S. 233, 53 L. Ed. 2d 306, 97 S. Ct. 2339 (1977). I think that an application of the principles established by those cases to the case at bar would require a holding here that the North Carolina rule does not comport with the requirement of the Due Process Clause of the Fourteenth Amendment that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

I also agree with the majority that some confusion exists from the decisions in this jurisdiction, both on the question of the period of gestation and the presumption of legitimacy. I suspect that this results in large part from our courts' application of rules established in civil cases to criminal proceedings. The question of parenthood is clearly a ripe area for this kind of confusion. This is an obvious and serious danger. There are vast differences between the consequences to defendants in civil actions and those in criminal actions.

For these reasons, I respectfully dissent.