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Intoxicating Liquors-Transporting-Sufficiency of Evidence

INTOXICATING LIQUORS—TRANSPORTING—SUFFICIENCY OF EVIDENCE—Police officers found appellant sitting in front seat of his automobile, which was standing between certain barns at the fairgrounds. He was alone. There were forty pints or half pints of liquor in the back seat. Before he was arrested, he told the officers that he had gotten the liquor in Osgood. There was no evidence except that which was given by the state. Appellant was tried by the court and found guilty on the second count of the affidavit which charged him with unlawfully manufacturing, transporting, and shipping intoxicating liquor, and by the judgment of the court he was fined in the sum of $200, and sentenced to imprisonment on the Indiana state farm for 90 days. On appeal he raised the question of the sufficiency of this evidence to sustain the conviction as charged. Affirmed, *Reynolds v. State*, Appellate Court of Indiana, 167 N. E. 544. (August 1, 1929.)

The opinion states: "From this evidence, the court evidently inferred that appellant *drove* the automobile from Osgood into the fairgrounds, *with the liquor in it*—a reasonable inference, no less so than in the following cases which were affirmed by the Supreme Court: *Lowery v. State*, 196 Ind. 316, 147 N. E. 151; *Simpson v. State*, 196 Ind. 499, 149 N. E. 50; *Payne v. State*, 194 Ind. 365, 142 N. E. 651; *Lowery v. State*, 199 Ind. 180, 156 N. E. 161."

In each of the cases cited by the court, with the exception of *Payne v. State*, which was an appeal from a conviction of grand larceny, the police officers saw the accused driving his automobile, and the arrest followed shortly after, under such circumstances as to plainly indicate that the liquor had been transported in the automobile. The Appellate Court here approved an inference of guilt from circumstances which were perhaps less convincing than those which appeared in the cases cited in the opinion. However, since the court, in reviewing denial of a motion for a new trial for insufficiency of evidence, will only consider evidence tending to prove guilt (*Lowery v. State*, 156 N. E. 161, 199 Ind. 180) the action of the court in the case under discussion is correct if there was any such evidence.

It appears that the prosecution was brought under the section of the statute which makes the manufacturing, transporting, and shipping of intoxicating liquor a misdemeanor, *Burns' R. S.* 1926, Sec. 2717, rather than under Sec. 2720, which makes it a felony to transport liquor in a vehicle. In cases brought under the latter section, the Supreme Court has held that the mere finding of liquor in a parked automobile will not be sufficient to support a conviction of the felony of transporting intoxicating liquor. *Thomas v. State*, 163 N. E. 593, — Ind. —. In that case the court, Travis, J., said: "There is no evidence . . . to sustain an inference that the two cans which contained grain alcohol were transported the slightest distance in an automobile, or that the defendant was present in the automobile at the time it was moving before it was found at a garage where it was being repaired, or that the liquor in question or any other liquor was in the automobile when it was moving, or that this defendant had anything to do with the transportation, if the liquor was ever transported, in this automobile, or that he was in or near the automobile when the automobile moved, or that he transported the liquor in any other manner. The evidence is clearly insufficient to sustain the finding."

In view of the uncontradicted testimony of the officer that the defendant stated he "had gotten the liquor that morning in Osgood" the holding of the Appellate Court is probably correct. Granting that the *Thomas* case *supra*, was decided under the felony statute which is narrower in terms, and evidently intended to comprise the offense of "transporting" intoxicating liquor, in a vehicle, it could hardly be said that the use of the word "transporting" differs in the two sections. C. W. W.