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# THE AUTOMOBILE PRESUMPTION IN THE NEW YORK NARCOTICS LAW

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NEW York Penal Law section 220.25 provides:

> 1. The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when he received possession thereof, or (c) when the controlled substance is concealed upon the person of one of the occupants.[1]

In short, the law provides that, except under certain circumstances, the mere presence of any controlled substance in a private automobile is sufficient evidence to convict every occupant of the automobile of knowing possession of the substance. For example, in *People v. Anonymous*,[2] a young man was arrested when a few seconal tablets were found on the floor of the car he was driving. His mother testified that the pills had fallen out of her purse on a prior trip and he was acquitted because the presumption had been overcome by " 'substantial evidence to the contrary.' "[3] But suppose that, instead of his mother, an acquaintance (in unlawful possession) had lost the pills on a prior trip and the young man and his present passengers were charged with possession. Would it be likely that the real violator would be found, or would testify?

Punishment on this theory of liability is very similar to the tort concept of *res ipsa loquitur* where there is a possibility of joint or successive tortfeasors.[4] But the plaintiff in a civil suit need only preponderate, while

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1. N.Y. Penal Law § 220.25 (McKinney Supp. 1973). The statute is discussed at length in Comment, Possession of Dangerous Drugs in a Car—New York's Criminal Presumption Statute, 21 Buffalo L. Rev. 188 (1971).

2. 65 Misc. 2d 288, 317 N.Y.S.2d 237 (Dist. Ct. 1970).

3. Id. at 289, 317 N.Y.S.2d at 239. See People v. Hargrove, 33 App. Div. 2d 539, 304 N.Y.S.2d 574 (1st Dep't 1969) (presumption rebutted after policeman testified that the defendant passenger had thrust an envelope, similar to an envelope containing marijuana, into the auto seat; defendant showed he was a hitchhiker and had previously refused marijuana from the driver).

4. See Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). For a general discussion of res ipsa loquitur see W. Prosser, Torts §§ 39-40 (4th ed. 1971).

the "plaintiff" in a criminal case must prove his case beyond a reasonable doubt. The criminal defendant, unlike his civil counterpart, supposedly is protected by a host of constitutional rights.[5]

Prior to the Court's decision in *Leary v. United States*,[6] statutory presumptions survived the due process hurdle because the Court felt a rational connection existed between the proved fact and the presumed fact,[7] or because the legislature could have made the conduct a crime anyway,[8] or because it would be easier for the defendant to disprove the presumed fact than it would be for the prosecution to prove it.[9] In *Leary*

5. Where the elements of the crime include both knowledgeable and unlawful possession of a controlled substance, the effect of requiring the defendant to prove that he was not in possession of a few little white pills when he was not even aware of their existence, is somewhat unjust. However, the Supreme Court has permitted the conviction of a defendant without the introduction of any evidence on some of the elements required for violation. See Mr. Justice Black's dissent in Turner v. United States, 396 U.S. 398 (1970):

"Few if any decisions of this Court have done more than this one today to undercut and destroy the due process safeguards the federal Bill of Rights specifically provides to protect defendants charged with crime in United States courts. Among the accused's Bill of Rights' guarantees that the Court today weakens are:

"1. His right not to be compelled to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;

"2. The right to be informed of the nature and cause of the accusation against him;

"3. The right not to be compelled to be a witness against himself;

"4. The right not to be deprived of life, liberty, or property without due process of law;

"5. The right to be confronted with the witnesses against him;

"6. The right to compulsory process for obtaining witnesses for his defense;

"7. The right to counsel; and

"8. The right to trial by an impartial jury." Id. at 425 (Black, J. dissenting).

6. 395 U.S. 6 (1969). For a collection of prior cases see id. at 32-33 n.56.

7. This test logically follows from the application of a straight due process standard. E.g., Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910).

8. This rationale is now considered irrelevant. Leary v. United States, 395 U.S. at 36. Mr. Justice Black's dissent in Turner is to similar effect: "Congress can undoubtedly create crimes and define their elements, but it cannot under our Constitution even partially remove from the prosecution the burden of proving at trial each of the elements it has defined. The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon . . . statutory presumptions . . . ." 396 U.S. at 429-30 (Black, J., dissenting).

9. Of the three tests suggested, this test comes closest to the tort analogy. See note 4 supra and accompanying text. While the application of tort concepts in criminal law is sometimes very helpful, it is not always appropriate. The res ipsa concept permits a plaintiff to come into court, prove injury, and then shift the burden of proof to the defendant because as between plaintiff and defendant, the latter is in a better position to explain the events leading up to the accident. In criminal law the burden should pass to the defendant only after his guilt has been established beyond a reasonable doubt, and then only if he desires it. Res ipsa is a doctrine of implied guilt and robs the defendant of the presumption of innocence to

the defendant was convicted of having knowingly possessed imported marihuana illegally. The government had had the benefit of a mandatory presumption requiring the jury to find that if the defendant possessed marihuana illegally, the marihuana was imported and he had knowledge of its importation.[10] The Court found that there was sufficient marihuana grown domestically so that it could not be said with substantial assurance that one in possession of marihuana knew that he possessed imported marihuana (regardless of whether the marihuana was in fact of the domestic or imported variety)[11] and hence the presumption had to be regarded as irrational, arbitrary, and therefore violative of due process.[12] Since the Court found the knowledge presumption unconstitutional under the "substantial assurance" requirement, it expressly declined to decide whether the presumption had to be valid beyond a reasonable doubt.[13]

The Court came closer to the reasonable doubt standard in *Turner v. United States*,[14] when it upheld a presumption of the knowledgeable possession of imported heroin because it had no reasonable doubts that heroin was not produced domestically. The jury had been instructed that "it was the sole judge of the facts and the inferences to be drawn therefrom, [and] that all elements of the crime must be proved beyond a reasonable doubt . . . ."[15] Thus, if the jury found beyond a reasonable doubt that the defendant had knowingly possessed imported heroin, with

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which he is entitled. A defendant no longer so protected is forced to take the witness stand to explain his actions, and this too is a violation of his constitutional guarantees.

10. Then 21 U.S.C. § 176a (1964), repealed by Act of Oct. 27, 1970, Pub. L. No. 91-513, § 1101(a)(2), 84 Stat. 1291.

11. 395 U.S. at 52-53.

12. "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Id. at 36.

13. Id. at 36 & n.64. The exact meaning of "substantial assurance" is not so readily ascertainable. A rational connection is an inference that vanishes upon the introduction of opposing evidence, Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910), and does not have the effect of evidence that prevails unless the other party successfully rebuts it by a preponderance of the evidence. Western & Atl. R.R. v. Henderson, 279 U.S. 639, 642 (1929). A substantial assurance is something more than a rational connection (which in turn is something less than a preponderance) and something less than "beyond a reasonable doubt." Since the presumed fact must more likely than not flow from the proved fact with substantial assurance, it would seem that the requirement is at least a mere preponderance. At least one court has in fact held that the standard is the civil standard of preponderance of the evidence. United States v. Vallejo, 312 F. Supp. 244, 248 (S.D.N.Y. 1970), aff'd sub nom. United States v. Liguori, 438 F.2d 663 (2d Cir. 1971).

14. 396 U.S. 398 (1970).

15. Id. at 406.

or without the aid of the presumption, the conviction was valid. Since the Court had no reasonable doubts that the heroin was imported, it reasoned the jury certainly could not have had such doubts.[16] It was, therefore, not unreasonable for the jury to find that the defendant also "knew" the heroin was imported.

But what is the standard against which a presumption is measured? If the Court is satisfied beyond a reasonable doubt it is certainly also substantially assured. The Court may be saying that as long as the jury hears and considers all the evidence presented to it and concludes that the defendant is guilty of all the elements of the crime (having heard no evidence on some of the elements) beyond a reasonable doubt, the presumption is valid. Juries, however, have always been certain beyond a reasonable doubt,[17] and if the Court had meant to go no further than *Leary*, the *Turner* opinion was not necessary. While the *Turner* Court said that the jury did not have a reasonable doubt, the Court also said that it had no reasonable doubts about the presumption. The Court applied a reasonable doubt standard to the presumption and it does not normally apply a standard it does not intend to be applied. Since a defendant has a right to have each element proven beyond a reasonable doubt,[18] logic demands that the connection between the proved and presumed facts also be demonstrated beyond a reasonable doubt.[19] But some courts have not necessarily seen it that way.[20]

The New York Court of Appeals has held specifically that a presumption need not establish the ultimate fact beyond a reasonable doubt.[21]

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16. Id. at 407.

17. In People v. Russo, 278 App. Div. 98, 103 N.Y.S.2d 603 (1st Dep't), aff'd, 303 N.Y. 673, 102 N.E.2d 834 (1951), the court applied the rational connection standard subsequently disapproved by Leary and noted: "It does not . . . change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction." Id. at 103, 103 N.Y.S.2d at 608.

18. E.g., Christoffel v. United States, 338 U.S. 84, 89 (1949); see United States v. Peeples, 377 F.2d 205, 211 (2d Cir. 1967); United States v. Gibson, 310 F.2d 79, 81 (2d Cir. 1962).

19. See Note, The Unconstitutionality of Statutory Criminal Presumptions, 22 Stan. L. Rev. 341, 349-50 (1970).

20. E.g., Overstock Book Co. v. Barry, 436 F.2d 1289 (2d Cir. 1970): "Use of such inferences is permissible in criminal cases at least when it can be said beyond a reasonable doubt, and perhaps when it is more likely than not, that the presumed fact flows from the proved fact." Id. at 1294 (citation omitted).

The Second Circuit has used the Leary "substantial assurance" standard even after Turner. United States v. Liguori, 438 F.2d 663, 666-67 (2d Cir. 1971).

21. People v. Kirkpatrick, 32 N.Y.2d 17, 25, 295 N.E.2d 753, 757, 343 N.Y.S.2d 70, 76, appeal dismissed, 94 S. Ct. 283 (1973).

All that need be established is that the "probabilities," based upon experience and proof, justify a presumption;[22] "[o]therwise, persons charged with crime could be required unfairly to prove their innocence . . . ."[23] Upon whose experience are these probabilities to be based? Not on the experience of a juror, for his decision cannot be based upon a probability; he must be free of all reasonable doubts. It must then be based upon the experience of the legislators and jurists who create presumptions. Thus, a juror may be permitted to find a fact proven beyond a reasonable doubt, because a legislator or jurist, reaching into the jury box, found it within the probabilities.

> The force of this conclusion should be evident quite apart from the profound subversiveness of a view that would countenance our telling juries in one breath that proof of all elements must be beyond a reasonable doubt while effectively saying in the next breath that the burden on some or all elements may actually be a good deal less substantial. . . . This would not be the first time, however, that the usually constructive and mutually inspiriting [sic] collaboration between judges and juries has been undermined by the use of fictions.[24]

Realizing that there may have been some confusion, the Supreme Court attempted to resolve the problems in *Barnes v. United States*.[25] The trial court had instructed the jurors that if the mail in question had been stolen recently, they could infer that the defendant possessed it with knowledge of its theft. (The defendant had cashed checks stolen from the mails, and had deposited them in his own account.) The defendant argued that the inference could not be shown beyond a reasonable doubt, and therefore was invalid.

The Court first noted that if the "reasonable doubt" and the "more likely than not" standards were met, then an inference "clearly accords with due process."[26] As regards the former, the Court noted that if "the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt"[27] the reasonable doubt standard is met. The Court then continued:

> [T]he challenged instruction only permitted the inference of guilt from unexplained [or unsatisfactorily explained] possession of recently stolen property. . . . On the basis

22. Id. at 24, 295 N.E.2d at 757, 343 N.Y.S.2d at 75. See United States v. Vallejo, 312 F. Supp. 244, 246 (S.D.N.Y. 1970), aff'd sub nom. United States v. Liguori, 438 F.2d 663 (2d Cir. 1971); People v. Reisman, 29 N.Y.2d 278, 286, 277 N.E.2d 396, 400-01, 327 N.Y.S.2d 342, 349 (1971), cert. denied, 405 U.S. 1041 (1972).

23. 32 N.Y.2d at 24, 295 N.E.2d at 757, 343 N.Y.S.2d at 75.

24. United States v. Adams, 293 F. Supp. 776, 784 & n.14 (S.D.N.Y. 1968) (Frankel, J.).

25. 412 U.S. 837 (1973).

26. Id. at 843.

27. Id.

of this evidence alone common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen.[28]

The most disturbing aspect of this passage is what has been omitted. The Court says that "common sense and experience tell us that" the petitioner should have had knowledge that the goods were stolen. The Court does not say that common sense and experience make us substantially assured that the presumed fact flows, more likely than not, from the proved fact. For common sense can also be used to determine if there is a rational connection between the presumed and proved facts; and what is sometimes referred to as common sense is often relied upon in determining if a statute or a presumption is rational and not arbitrary.[29] So that none might misinterpret its reasoning the Court, in a footnote,[30] quoted the *Tot v. United States*[31] standard, namely, that it is permissible to shift the burden of going forward with evidence when there is only a rational connection between the fact proved and the fact presumed or inferred.[32]

Therefore, to determine the constitutionality of the automobile presumption we must ascertain whether, following *Barnes*, there is a rational connection between the presence of a controlled substance in an automobile and each person in the automobile having knowledge of the presence of, and the ability to identify, the substance.[33] To complete the

28. Id. at 845 (footnote and emphasis omitted). Unless a presumption is mandatory, a presumption or inference either shifts the burden of proof or the burden of going forward to the defendant. He, therefore, is placed in a position where he must satisfactorily explain his innocence. The Court generally has left this unsaid and perhaps wisely so. By expressing it, the Court would admit that there are certain circumstances where the defendant is not presumed innocent, and that something less than a reasonable doubt is required to negate the presumption. Justice Black would be very troubled. See note 5 supra and accompanying text.

29. It is not contended that common sense should not be relied upon in determining the validity of statutes and presumptions. Nor is it suggested that, under either the Leary test or a more stringent reasonable doubt test, an inference of guilt would not be permissible where the defendant cashes several checks made out to several parties, none of whom he knows. The Barnes Court, however, enunciated a general rule for presumptions, finding that the common sense and experience of legislators is a sufficient alternative to the reasonable doubts of the jury. This is at best questionable.

30. 412 U.S. at 846 n.11.

31. 319 U.S. 463 (1943).

32. Id. at 467.

33. This is the Barnes standard, the minimum that is constitutionally permissible. New York courts may increase, but cannot decrease, the burden upon the state. Since it would take substantially more evidence to overcome a presumption involving commercial quantities of narcotics than it would if small quantities were involved, New York courts might require a stricter standard to test the constitutionality of a presumption involving the latter. This is ironic since one could make a stronger showing under Leary with commercial quantities. "[O]ne must look to the ease with which a presumption may be rebutted. If it is easy for

picture, analysis must also be made using the more stringent *Leary* standards.[34]

It is very unlikely that the owner of commercial quantities of controlled substances would permit anyone in the car with him who was not in some way connected with these substances.[35] Thus, both tests easily uphold the presumption in this situation.[36] However, if the controlled substances are in the glove compartment, attached beneath the car, or in the trunk, the owner might not be as worried about a person being in the car who is not associated with his business as he would if the substances were in plain view. In an analogous situation the legislature declined to apply the presumption "when the controlled substance is concealed upon the person of one of the occupants."[37] In the above hypotheticals one could make a strong argument that it is not more likely than not that a mere passenger would be in knowing "possession" of the drug;[38] however, the opposite conclusion is not an irrational one.

When the subject is no longer commercial quantities, it becomes significantly more difficult to determine if a passenger (assuming the driver is a possessor) also would be in knowing "possession." Here, the source of the "common knowledge and experience" the average defendant is charged with might be the determinative factor and a different result could be reached for each drug considered. Given the prevalence of drug use among many groups of American society today, and the acceptance of at least some drug use by non-users, it is likely that a person may not

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the defendant to rebut, then the presumption is a tolerable burden . . . . [A] plausible rebuttal may very well place the burden and going forward again on the prosecution if it is to . . . establish guilt beyond a reasonable doubt." People v. Kirkpatrick, 32 N.Y.2d 17, 25, 295 N.E.2d 753, 758, 343 N.Y.S.2d 70, 77 (1973) (citations omitted).

34. See notes 11-13 supra and accompanying text.

35. "We do not believe that persons transporting dealership quantities of contraband are likely to go driving about with innocent friends or that they are likely to pick up strangers. We do not doubt that this can and does in fact occasionally happen, but because we find it more reasonable to believe that the bare presence in the vehicle is culpable, we think it reasonable to presume culpability in the direction which [sic] the proven facts already point. Since the presumption is an evidentiary one, it may be offset by any evidence, including the testimony of the defendant, which would negate the defendant's culpable involvement." Temporary State Commission to Evaluate the Drug Laws, Interim Report, 1972 N.Y. Legis. Doc. No. 10, at 69 [hereinafter cited as Interim Report].

36. See People v. Terra, 303 N.Y. 332, 102 N.E.2d 576 (1951), appeal dismissed, 342 U.S. 938 (1952) (presumption that all those in a room in which a machine gun was found have knowing possession of said gun); People v. Russo, 278 App. Div. 98, 103 N.Y.S.2d 603 (1st Dep't), aff'd, 303 N.Y. 673, 102 N.E.2d 834 (1951) (revolver in an automobile).

37. N.Y. Penal Law § 220.25(1)(c) (McKinney Supp. 1973).

38. See United States v. Thomas, 453 F.2d 141 (9th Cir. 1971), cert. denied, 405 U.S. 975 (1972) (narcotics taped beneath a vehicle is insufficient without more to establish the guilt of a passenger for transporting).

be in criminal possession of a drug himself although in the presence of a person who is. It is also reasonable that a prior passenger may have accidentally lost or forgotten some of his drugs in another's car, or that a person hitchhiking may very well be unaware of a drug's presence in the car in which he is riding. If the drug were in common usage and were concealed in some manner,[39] it would not be rational to presume knowing possession by all in the car. If the drug were not concealed it may be argued (with probable success in many courts) that it is likely and at least rational that all in the car were in possession (at least if they were all in the same seat, front or back), but is it rational to presume all were in knowledgeable possession? Is it not arguably reasonable to assume that most people seeing a little while pill might mistake it for an aspirin? Considering the overabundance of multicolored pills in the American medicine cabinet, it would be most irrational to charge a person with knowledge of a substance's presence unless it was in some way *proven* that the person was familiar with the substance.[40]

The section has other constitutional problems. It provides in part that the presumption does not apply when one of the people in the car is authorized to possess the controlled substance, and the drug is in its original container.[41] Often when someone is under medication and has to take doses of different medicines throughout the day he will place a sufficient number of pills in a container and leave the rest at home. For the protection of his friends this person cannot ride in a car with others. New York's Temporary State Commission to Evaluate the Drug Laws concluded that this was irrational and recommended that the words "in the same container as when he received possession thereof" be eliminated.[42] The requirement of the original container surpasses reason and the limits of any standard of due process the Supreme Court may conceive.

An on-duty cab driver in his car, in which a controlled substance is found, is not burdened by the presumption.[43] In light of the present energy crisis and lack of gasoline, this privilege given the cab driver may invidiously discriminate against members of car pools, hitchhikers, and

39. Cf. Interim Report 69: "We believe, and find, that it is rational and logical to presume that all occupants of a vehicle are aware of, and culpably involved in, possession of dangerous drugs found abandoned or secreted in a vehicle when the quantity of the drug is such that it would be extremely unlikely for an occupant to be unaware of its presence."

40. Again, the standard here may well vary with the identity of the substance. For example, it may be easier to show that a person "knew" what marihuana was, as opposed to a seconal tablet.

41. N.Y. Penal Law § 220.25(1)(b) (McKinney Supp. 1973).

42. Interim Report 24, 77.

43. N.Y. Penal Law § 220.25(1)(a) (McKinney Supp. 1973).

the drivers of other private vehicles. That is, the purpose of the classification was to permit cab drivers to practice their trade without becoming liable for the criminal violations of a customer; the effect of the classification is to treat groups similarly situated in a significantly different manner; the distinction is arguably rational because the cab driver must take all customers,[44] while a private car operator need not, but with a gasoline shortage the freedom once experienced by the private operator may be diminished.

In short, the automobile presumption in the New York drug law presents severe constitutional difficulties. Given the new harsher penalties for drug use and possession in New York, it is imperative that the New York Legislature reconsider the wisdom of this presumption.

44. E.g., N.Y.C. Charter & Admin. Code § 436-2.0(f)(24)(b) (1971).