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Criminal Law--Use of Presumptions To Shift Burden of Proof

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without the punishment of the blameless. The requirement of a substantial age difference in favor of the male, and the provision for an affirmative defense of mistake of age are significant steps in the direction of providing justice in this area for all parties concerned.

Robin Wiseman

Criminal Law—Use of Presumptions To Shift Burden of Proof

The defendants were engaged in a lottery operation and were convicted under a federal statute that imposed criminal liability for willful failure to register for and pay a gambling tax. On appeal, conviction was reversed for lack of proof that the defendants had knowledge of the law, and thus lacked the willful intent necessary for conviction. The United States was granted a rehearing. *Held*, convictions affirmed. The court held that circumstantial evidence, aided or supplemented by a presumption that the defendants knew the law, would support a finding of knowledge sufficient to impose willful intent. *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964).

The court appears to hold that where willfulness is an essential element of a crime, the prosecution may be aided by a presumption that the accused knew the law, and if the accused does not offer evidence to rebut this presumption, the presumption may be used as probative force. This holding seriously affects the presumption of innocence where proof of a special mental element is necessary for conviction of a criminal act.

In the trial court, the jury was instructed that “[I]t is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law unless and until outweighed by evidence to the contrary. The presumption is that every person knows what the law forbids and what the law requires to be done.” The effect of this instruction is to establish willfulness on the strength of the defendants’ refusal to present evidence to the contrary.

The court in the principal case premises its holding upon a rule that where knowledge of certain facts is an essential element of a crime, the burden of going forward with evidence on the issue is sometimes placed upon the defendant if the matter is peculiarly

within his knowledge. Most writers would agree to this rule where certain facts can be more easily established by the accused than by the prosecution. 1 WHARTON, CRIMINAL EVIDENCE § 109 (12th ed. 1955). The rule has been applied in cases where a state makes it an offense to pursue a certain occupation without a license, or in placing upon the accused the burden of proving insanity. 9 WIGMORE, EVIDENCE § 2486 (3d ed. 1940).

However, this does not appear to be the law where a special mental element is an essential part of a crime. There is nothing more obvious than the defendant's knowledge of his own state of mind at the time of the criminal act, and the burden of proving this rests upon prosecution. WILLIAMS, CRIMINAL LAW § 293 (2d ed. 1961). In *Imholte v. United States*, 226 F.2d 585 (8th Cir. 1955), the defendant was convicted of willful attempt to evade payment of a tax. The court held that where such an intent constituted a necessary element of the crime and is not a general intent inherent in the act itself, such intent must be proved by, or clearly inferred from, evidence necessary to warrant a conviction, and necessity of such proof may not be eliminated by a presumption. In *United States v. Palermo*, 259 F.2d (3d Cir. 1958), the court stated that "willfulness," as used in denoting willful failure to make timely payment of incomes taxes, requires a specific wrongful intent, and the existence of that intent must be established with the burden upon the government.

In a criminal trial, the accused is always presumed to be innocent until proven guilty beyond a reasonable doubt. *United States v. Fleischman*, 339 U.S. 349 (1950). The burden of proof remains on the prosecution to overcome this presumption. *Leland v. Oregon*, 343 U.S. 790 (1952). The burden of proof never shifts, but the burden of evidence will sometimes shift to the accused where the prosecution has established the existence of certain facts. If the accused does not rebut the evidence, then these facts may be inferred as being true. In this manner, a presumption may aid in the conviction of the accused if the establishment of the essential element of the crime by the prosecution raises no reasonable doubt in the minds of the jurors.

The burden of evidence when placed upon the accused does not operate in itself as a supplement to evidence if the accused fails to rebut or surmount facts established by prosecution. In *People v. Kendall*, 111 Cal. App. 2d 204, 244 P.2d 418 (1952), the court stated

that the defendant cannot be compelled to testify, and his failure to do so does not create a presumption or warrant an inference of guilt. Nor does it relieve the prosecution of the burden of proving every essential element of the crime as well as guilt beyond a reasonable doubt. The defendant, the court continued, can rely upon the state of the evidence, and no lack of testimony on his part will supplement failure of proof by the people.

The court in the instant case, relies upon the axiom that everyone is presumed to know the law. Ignorance of the law would logically negate intent where a specific state of mind is necessary to violate the law. PERKINS, CRIMINAL LAW 821 (1957).

Normally, when a criminal act is committed, a general intent may be presumed by its very commission. In this situation, the accused is held responsible for a general intent by a presumption raised in law that a person is presumed to intend the natural and probable consequences of his act. *People v. Sandoval*, 35 Cal. Rep. 227 (Dist. Ct. App. 1963). In the instant case, there is little question that a general intent would exist with reference to the voluntary commission of the battery of activities by the accused. However, it is difficult to perceive any nexus between these acts and that of a willful failure to pay the taxes with which the accused is charged. Where the word "willfully" requires a bad purpose or evil intent to be shown, it is a reversible error to instruct the jury that a person is presumed to intend the natural consequences of his act, for such an instruction conveys a meaning that if the accused did an act which had a harmful effect, he intended that harm. *Wardlow v. United States*, 203 F.2d 884, 885 (5th Cir. 1953).

Presumptions are raised because they have a substantial backing of probability. The court may, of course, refer to this probability in charging a jury. However, the jury should be permitted to weigh the presumption as it deems best, undisturbed by the thought that the inference has some probative force which must influence their deliberation. *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F.2d 724 (4th Cir. 1935).

It is submitted that proper instructions should indicate to the jury that it is necessary for the prosecution to prove willfulness beyond a reasonable doubt and that the failure of the accused to introduce evidence in rebuttal does not affect the burden upon the

prosecution to overcome the presumption of the accused's innocence.

The questions of burden of proof and presumptions are bound up with the substantive law. This means the risk of not persuading the jury is upon the prosecution. It also means that there is a duty upon the prosecution of going forward with evidence on which the jury can reasonably find that the facts were proved.

In capturing the truth, convenience of form should not be used to deny rights in substance.

Frank Cuomo, Jr.

Criminal Law—West Virginia Kidnapping Statute—Single Offense

P, petitioner, was indicted under state statutory provisions for the crime of kidnapping. The indictment charged that *P* kidnapped *X* and transported him without his consent and against his will with the intent of taking advantage of him to the county where this indictment was rendered. The jury found *P* guilty as charged, and the court sentenced him to imprisonment for sixty years. *P* urged that the indictment was void on the basis that it did not specify under which offense of the statute he was being charged and was awarded a writ of habeas corpus. *Held*, reversed. The statute prescribing kidnapping creates a single capital offense and not three separate and distinct offenses even though it provides for varying degrees of punishment depending upon the treatment accorded the victim. Consequently, the indictment was not insufficient because it failed to make reference to the punishment sought or to the treatment of the victim. *Pyles v. Boles*, 135 S.E.2d 692 (W. Va. 1964).

The West Virginia statute makes kidnapping a felony and provides for the imposition of three different penalties. Conviction under the statute is punishable by death unless the jury recommends life imprisonment. If the victim is permitted to return unharmed after ransom has been paid, the minimum sentence is twenty years, but if no ransom has been paid, the minimum penalty is ten years. W. VA. CODE ch. 61, art. 2, § 14(a) (Michie 1961).

In interpreting the statute to create a single capital offense, the