Source of Narcotic Drug Determines Validity of the Presumption of Knowledge of Such Source - Turner v. United States

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percentage, a statement must be filed pursuant to section 13(d) and related SEC regulations.

The application of section 13(d) in *Bath* could easily be seen as a fulfillment of the fears of those opposed to the Williams Act—the further imbalancing of the power relationship of entrenched management and of dissident shareholders. The use of section 13(d) protected the interests of corporate management. It was a weapon to stave off the threat to one man's job. As to the defendants in *Bath*, section 13(d) could be labeled nothing more than a "tender trap."

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Turner was convicted on four counts of federal narcotics violations.[1] The first and third charged receipt and concealment of heroin and cocaine, respectively, with knowledge of their unlawful importation into the United States.[2] The second and fourth counts charged purchase or distribution of the same drugs not in or from the original stamped package.[3] No evidence of any element except possession was offered by the Government,[4] but the jury returned guilty verdicts on all four counts. The conviction was upheld by the court of appeals,[5] and the United States Supreme Court granted certiorari.[6] *Held*: Heroin counts *affirmed*; cocaine counts *reversed*: The presumption that one in possession of heroin knows of its illegal importation is

[1] The defendant was arrested with two packages in his possession, one containing 14.68 grams of a mixture containing 5% cocaine, the other containing 48.25 grams of a 15% heroin mixture packaged in 275 individual glassine bags.

[2] Narcotic Drugs Import and Export Act of 1909, 21 U.S.C. § 174 (1964). This statute prohibits the illegal importation of narcotic drugs, or the receipt, concealment, or sale of any drug which has been illegally imported, with knowledge on the part of the defendant that it was illegally imported. The statute contains the provision that whenever the defendant is shown to have had possession, "such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." *Id.*

[3] INT. REV. CODE of 1954, § 4704. This statute prohibits purchasing, selling, or distributing any drug not in or from the original package bearing the tax stamp. The statute provides that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." *Id.*

[4] The presumptions in these statutes are considered necessary because the federal government has no general criminal jurisdiction under the Constitution. Article 1, § 8 gives the federal government criminal jurisdiction only over piracies and felonies on the high seas, offenses against the law of nations, and offenses on federal reservations or within federal districts. Congress must therefore bring drug possession within the power to regulate trade or the power to lay and collect taxes in order to make possession a federal offense. U.S. CONST. art. I, § 8. Congress' need to provide for federal regulation of the drug trade is based on two facts. First, drug laws are difficult to enforce on any level because drug offenses are victimless crimes and citizen participation in enforcement is low. Second, the illicit drug trade is largely controlled by organized crime, against which state authorities are generally ineffective. A. LITTLE, DRUG ABUSE AND LAW ENFORCEMENT 49 (1967) (submitted to the President's Commission on Law Enforcement and Administration of Justice); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 7, 12 (1967).

[5] United States v. Turner, 404 F.2d 782 (3d Cir. 1968).

[6] 395 U.S. 933 (1969).

valid, because the amount of heroin available from domestic sources is infinitesimal. The same presumption is invalid with respect to cocaine, because some cocaine is available from domestic sources. The presumption that possession establishes purchase or distribution of a drug not in or from the original stamped package is sound with respect to heroin, because there are no stamped packages of heroin from which the drug might filter into the drug trade. The quantity and packaging of the heroin involved indicate that it was not for defendant's own use, but rather for eventual distribution. The same presumption applied to cocaine is invalid because there are stamped packages from which cocaine may be obtained, and the amount involved could have been for defendant's own use. *Turner v. United States*, 396 U.S. 398 (1970).

I. History of Presumption Tests

Legislation providing that one fact is presumed from another does no more than enact a rule of evidence, which is within the general power of government.[7] A statutory presumption operates only as an inference of guilt or liability in the absence of contradicting evidence.[8] The power to create presumptions is, of course, limited by the Constitution. The due process clauses of the fifth and fourteenth amendments limit the power of Congress and state legislatures to make the proof of one fact evidence of the ultimate fact upon which guilt is predicated.[9] It is not permissible to establish a presumption which is "purely arbitrary,"[10] or to shift the burden of proof "by arbitrarily making one fact, which has no relevance to the guilt of the offense, the occasion of casting upon the defendant the burden of exculpation."[11] Thus, a presumption, which relieves the prosecution of the burden of proving one or more elements of the offense, violates the due process requirement if it is arbitrary or unreasonable. Certain tests have been formulated to determine which presumptions fail to meet the due process mandate.

An early test of the validity of a statutory presumption was announced in *Mobile, Jackson, & Kansas City Railroad v. Turnipseed*,[12] which involved a wrongful death action. There, the Supreme Court established the rule that a presumption must be "reasonable," and there must be a "rational connection between the fact proved and the ultimate fact presumed . . . ."[13] A Mississippi statute[14] provided that injury inflicted by a train was prima facie evidence of negligent operation. The Court upheld this statute on the ground that it was not an unreasonable inference that derailment of a train resulted from some negligence on the part of the railroad. Later, in *Ferry v. Ramsey*,[15] the Supreme Court established the rule that a presumption

[7] Mobile, J., & K.C.R.R. v. Turnipseed, 219 U.S. 35, 42 (1910).
[8] *Id.* at 43.
[9] Tot v. United States, 319 U.S. 463, 467 (1943).
[10] Mobile, J., & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910).
[11] Tot v. United States, 319 U.S. 463, 469 (1943).
[12] 219 U.S. 35 (1910).
[13] *Id.* at 43.
[14] *Id.* at 41-42.
[15] 277 U.S. 88 (1928).

may be valid if the state might have punished the proven element upon which the presumption rests, even without the presumed element.[16] A state statute[17] made a bank director personally liable for deposits made when the director assented to the deposits, knowing the bank to be insolvent. The director's assent and knowledge of insolvency were presumed. The Supreme Court held that the presumption was reasonable because the legislature might have made the bank director liable even without the elements of assent and knowledge. A third test of a presumption's validity was announced in *Morrison v. California.*[18] There, the Supreme Court held that a presumption is valid if the defendant has more convenient access to the fact which is presumed than does the state. A California statute[19] concerning the occupation of land by aliens contained a provision that the allegation of alienage would put the burden upon the defendant to prove his eligibility for citizenship. The Court upheld the presumption of alienage on the basis that the defendant had more convenient access to the facts of his own citizenship than did the state, so the burden of coming forward with the evidence was not unreasonable.

The Supreme Court made an authoritative statement of its position on statutory presumptions in *Tot v. United States.*[20] Tot was convicted under a federal statute[21] which prohibited the receipt of firearms shipped in interstate commerce by any person who had been previously convicted of a crime of violence. The statute provided that possession of a firearm by such a person was sufficient to establish that the weapon had been shipped interstate with the defendant's knowledge. The Court reaffirmed the test of *Mobile*, adopting the "rational connection" language of that case.[22] However, the Court was unable to find such a rational connection in *Tot* and reversed the conviction. The Court also reduced the *Morrison* "convenience" test[23] to a corollary, holding that convenience alone will not make a presumption permissible when it fails to meet the rational connection standard and may subject the defendant to unfairness.

II. Application of Presumption Tests in Drug Cases

Narcotics.[24] *Yee Hem v. United States*[25] upheld the presumption of knowledge of illegal importation with respect to opium. The Supreme Court applied the "reasonable inference" test of *Mobile* and held that the

[16] For example, the presumption of knowledge of illegal importation would be valid under this test if the state could have made mere possession (the proven fact upon which the presumption rests) a crime.

[17] 277 U.S. at 93.

[18] 291 U.S. 82 (1934).

[19] *Id.* at 84.

[20] 319 U.S. 463 (1943).

[21] Federal Firearms Act § 2(f), 75 Stat. 757 (1961), *as amended*, 18 U.S.C. §§ 922(a)(1), (c), (e)-(i) (Supp. III, 1968).

[22] *See* note 13 *supra*, and accompanying text.

[23] *See* notes 18-19 *supra*, and accompanying text.

[24] Narcotics are defined in federal prosecutions as any compound of opium, isonipecaine, coca leaves, or opiates. Int. Rev. Code of 1954, § 4731. Marijuana is defined as a compound derived from the plant *Cannabis sativa L. Id.* at § 4761.

[25] 268 U.S. 178 (1925).

inference of knowledge of illegal importation was permissible under a statute which made the importation of smoking-opium illegal.[26] Legitimate possession, the Court observed, was "highly improbable."[27] The Court went on to note that since defendants knew that opium cannot be lawfully imported,[28] they must be prepared to rebut the "natural inference of unlawful importation or [their] knowledge of it."[29]

The section 4704 presumption[30] was upheld in *Casey v. United States*.[31] Applying the reasonable inference test once again, the Supreme Court held that the presumption was permissible because it did no more than thrust upon defendants the "burden of proving facts peculiarly within their knowledge and hidden from discovery by the government."[32]

The Supreme Court reaffirmed its position on narcotic presumptions in *Roviaro v. United States*.[33] In approving the presumption of knowledge of importation as applied to heroin, the Court noted that the presumption does not "shift the burden of proof, but rather places upon the accused the burden of going forward with his defense."[34] The Court approved the presumption based on a reference to *Casey* and little else.

Marijuana—Leary v. United States.[35] Leary, having been refused entrance into Mexico, was apprehended with marijuana in his possession. He was subsequently convicted of failing to pay the marijuana tax[36] and of transporting and concealing marijuana which had been illegally imported into the United States.[37] Knowledge of illegal importation was presumed. In examining this presumption, the Supreme Court concluded that the test should be whether the presumed fact "is more likely than not to flow from the proved fact upon which it is made to depend."[38] The Court declined to consider the first element of the presumption, illegal importation itself, choosing instead to consider at some length the element of knowledge. In order to sustain the presumption of knowledge the Court stated that it would be necessary to find that "a majority of marijuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* marijuana was grown abroad."[39] The opinion enumerated five possible ways that a possessor might know that his marijuana was imported,[40] and then considered the probability of each. The Court

[26] Narcotic Drugs Import and Export Act of 1909, 21 U.S.C. § 173 (1964).
[27] 268 U.S. at 184.
[28] Presumably the defendants were held to know that such importation was illegal on the theory that ignorance of the law is no excuse.
[29] 268 U.S. at 184.
[30] *See* note 3 *supra*.
[31] 276 U.S. 413 (1928).
[32] *Id.* at 418.
[33] 353 U.S. 53 (1957).
[34] *Id.* at 63.
[35] 395 U.S. 6 (1969).
[36] Marijuana Tax Act, 26 U.S.C. §§ 4741-45 (1964). The Court's disposition of this count is the subject of Note, *Leary v. United States: Marijuana Tax Act—Self-Incrimination*, 23 Sw. L.J. 939 (1969).
[37] 21 U.S.C. § 176a (1964).
[38] 395 U.S. at 36.
[39] *Id.* at 47.
[40] The five ways enumerated are as follows: (1) The defendant might deduce that his mari-

concluded that "it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marijuana."[41]

III. Turner v. United States

The Import Counts. The substance of the Government's case was that Turner possessed heroin and cocaine. There was no evidence of importation or of the defendant's knowledge of importation. The Court, upholding the importation presumption, observed that despite the fact that section 174 has been law since 1909, no evidence had been offered in the many cases under it, including this one, to indicate that heroin is produced domestically. If such a defense were available, the Court reasoned, defendants would long ago have discovered and used it. The Court summarily dismissed the objection that Turner might not have known of the foreign source of the drug. Those who traffic in heroin, said the Court, are aware of the foreign source of their commodity unless "they practice a studied ignorance to which they are not entitled."[42]

With respect to cocaine, the Government conceded that it was reasonable to infer that the less than one gram of cocaine in Turner's possession had been stolen from some legitimate source in this country. The Court concluded that, although a greater percentage of the cocaine consumed in this country is smuggled rather than stolen, the application of the "more likely than not" standard of *Leary* required a reversal of the charge of receipt and concealment of cocaine.

The Tax Violations. The Court then directed its attention to the violations of section 4704, purchasing or distributing heroin and cocaine not in or from the original taxed package. The Government pointed out that since heroin is neither produced in nor legally imported into the United States, there would be no way to acquire it from a stamped package.[43] The Court offered alternate theories upon which the purchase or distribution elements of Turner's conviction might be upheld. First, possession of 275 glassine bags of heroin "solidly established that Turner's heroin was packaged to supply individual demands and was in the process of being distributed . . . ."[44] If this analysis were rejected, continued the Court, the conviction still could be sustained because heroin is a high-priced product, and "it would be very unreasonable to assume that any sizable number of possessors have not paid for it . . . ."[45]

The Court then considered the violation of section 4704 with respect to

juana was imported based on his knowledge of the proportion which is produced domestically. (2) He might have smuggled it himself. (3) He might have learned indirectly that marijuana in his area or furnished by his supplier is imported. (4) He might have specified foreign marijuana in making his purchase. (5) He might be able to discern the foreign origin by the appearance, packaging, or taste of the marijuana. *Id.*

[41] *Id.* at 53.

[42] 396 U.S. at 417.

[43] Brief for Appellee at 32, Turner v. United States, 396 U.S. 398 (1970).

[44] 396 U.S. at 420.

[45] *Id.* at 422.

cocaine. The evidence established that a significant amount of cocaine is stolen from legitimate channels, where the drug would in fact bear the required stamp. The Government's contention that the presumption was valid because the cocaine involved was not in the form in which it would be distributed for medicinal reasons[46] was rejected. The Court also noted that the amount of the drug involved did not put the defendant in the position of a trafficker in cocaine. The inference that he had purchased or was distributing the drug was not considered to follow from the bare fact of possession.

Turner Contrasted with Leary. *Leary* represented something of a deviation from the traditional approach of the Supreme Court in previous drug cases. The statement of the Court in *Yee Hem* that defendants must be prepared to rebut the "natural inference" of their knowledge of illegal importation[47] exemplified the Court's prior attitude toward drug offenders. *Leary* charged marijuana possessors with no such "natural inference" of knowledge. In considering the ways in which one might actually know that the drug he possessed was imported, the Court modified a stance which had long charged drug possessors with such knowledge without the benefit of an individual examination of the facts of each case. *Turner*, on the other hand, reverts back to the old line of reasoning. In dismissing the possibility of lack of knowledge, the Court used an approach strikingly similar to that in *Yee Hem*. An impermissible "studied ignorance" of the source of a drug[48] is not far removed from a "natural inference" of knowledge of illegal importation.

The material difference between affirmance of Turner's conviction for what was in essence possession of heroin and the reversal of Leary's conviction for the same offense with respect to marijuana is the amount of each drug available from sources other than illegal importation. The *Leary* Court found that significant portions of marijuana are grown domestically,[49] while the Court in *Turner* found that virtually no heroin enters the drug trade except through illegal importation.

IV. Conclusion

Drug laws pose a unique problem to the courts. *Turner* indicates that drug statutes will have to be tested for reasonability on a drug-by-drug basis.[50] *Leary* rejected the presumption of knowledge of importation as applied to marijuana; *Turner* upholds it with respect to heroin and rejects

[46] Brief for Appellee at 33, Turner v. United States, 396 U.S. 398 (1970).

[47] Yee Hem v. United States, 268 U.S. 178 (1925); *see* notes 25-29 *supra*, and accompanying text.

[48] *See* note 42 *supra*, and accompanying text.

[49] Leary v. United States, 395 U.S. 6, 41 (1969). The Court evidently accepted a ratio of approximately 90% imported to 10% produced domestically.

[50] The reversal of the cocaine convictions indicates that the Court will no longer provide a blanket approval for these laws, as the Court itself states with respect to Casey v. United States, 276 U.S. 413 (1928). *See* note 31 *supra*, and accompanying text. The Court states that *Casey* is limited by *Turner* so far as it gives general approval to the § 4704 presumption. 396 U.S. at 424.