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Constitutional Law - Ciminal Statutory Inferences in Federal Narcotic Laws. Turner v. United States, 90 S. Ct. 642 (1970)

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ability, continue to maintain its present role as guarantor of the individual's basic rights within a complex administrative system.

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Constitutional Law—CRIMINAL STATUTORY INFERENCES IN FEDERAL NARCOTICS LAWS. *Turner v. United States*, 90 S. Ct. 642 (1970).

The petitioner was convicted of the statutory offense of transportation and concealment of illegally imported heroin and cocaine.[1] The statute permitted the jury to infer from the fact of possession that the drugs were illegally imported and that the petitioner knew of the illegal importation.[2]

In affirming, the Court of Appeals for the Third Circuit held that the statutory inference was not violative of due process.[3] The Supreme Court, relying on *Leary v. United States*,[4] upheld the conviction of transportation and concealment of heroin, but reversed the conviction of transportation and concealment of cocaine.

To constitute a crime under the statute in question, one must knowingly receive, conceal, or transport a narcotic drug which was illegally

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Russell on Conference Committee action)) which Congress sought to prevent when it enacted § 10(b)(3).

Id. at 258-59.

See also Slone v. Local Board No. 1, 414 F.2d 125 (10th Cir. 1969); Petersen v. Clark, 411 F.2d 1217 (9th Cir. 1969); 20 SYRACUSE L. REV. 749, 751 (1969).

1. Turner v. United States, 90 S. Ct. 642 (1970). The petitioner was also convicted on two counts for failure to attach revenue stamps to the drug packets. *See infra* note 19.

2. 21 U.S.C. § 174 (1964). The relevant portion of this section provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned ....
>
> Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

See Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L.C. & P.S. 7 (1966).

3. 404 F.2d 782 (3rd Cir. 1968).

4. 395 U.S. 6 (1969).

imported and which the accused knows to have been illegally imported.[5] The statutorily provided inference, however, allows the government to obtain a conviction under this section merely by proving possession.[6]

Despite repeated challenges, the statutory inference in section 174 has been consistently upheld in cases of heroin possession.[7] The earlier, liberal application of the inference is demonstrated in *Yee Hem v. United States*,[8] wherein the Court stated that to validate the inference it is necessary to show only "some rational connection" [9] between the proven and the presumed facts.[10]

Later Supreme Court decisions show an increasing tendency to restrict the application of similar statutory inferences. The Court's attempt to define "some rational connection" in *Tot v. United States*[11] initiated this tendency to view the inferences unfavorably. The *Tot* Court explained that a statutory inference must be struck down if there is a lack of connection between the proven and presumed fact "in common experience." [12] Finally, in the landmark decision of *Leary v. United* States,[13] the Court carried the *Tot* doctrine as far as possible without declaring all similar criminal presumptions null and void. The *Leary* Court held that a criminal statutory presumption must be regarded as un-

5. Turner v. United States, 90 S. Ct. 642, 646 (1970).

6. *Id.* at 648.

7. Roviaro v. United States, 353 U.S. 53 (1957); Garcia v. United States, 373 F.2d 806 (10th Cir. 1967); Lucero v. United States, 311 F.2d 457 (10th Cir. 1962); United States v. Gibson, 310 F.2d 79 (2d Cir. 1962); United States v. Savage, 292 F.2d 264 (2d Cir. 1961); Walker v. United States, 285 F.2d 52 (5th Cir. 1960); Cellino v. United States, 276 F.2d 941 (9th Cir. 1960).

8. 268 U.S. 178 (1925).

9. *Id.* at 183, quoting Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35, 43 (1910). The *Yee Hem* Court saw no difficulty in applying a standard promulgated in a civil case to a criminal matter, but it is arguable that the application was a compromise of the requirement that guilt be established beyond a reasonable doubt.

10. In Casey v. United States, 276 U.S. 413, 418 (1928), the Court stated that the inference served to place upon the accused the burden of producing evidence which he was singularly equipped to supply. This viewpoint was later reduced to a corollary, necessary for use of the inference but insufficient alone to render the inference valid. *See* Tot v. United States, 319 U.S. 463 (1943). It also has been argued that the inference served to make possession itself a crime. *Cf.* Ferry v. Ramsey, 277 U.S. 88 (1928). The crime defined by the statute is not possession, however, and the Court has rejected the contention. Roviaro v. United States, 353 U.S. 53, 62-63 (1957).

11. 319 U.S. 463 (1943).

12. *Id.* at 468. For other manifestations of the restrictive view applied to similar inferences *see* United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965).

13. 395 U.S. 6 (1969).

constitutional "unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact . . . ." [14]

The *Leary* test is an attempt to arrest arbitrary application of statutory criminal inferences. Under *Leary*, courts are charged with the responsibility of testing these inferences against the standard of experience before submitting the inference to a jury.[15] Any jury may still reject a constitutionally valid inference if it feels that the particular case does not warrant its application.

In applying the *Leary* test, the *Turner* Court considered the data available concerning heroin traffic[16] and determined that heroin in the United States necessarily has been illegally imported and that anyone dealing in heroin would reasonably be aware that the drug has been so imported.[17] The Court concluded, on the basis of these findings, that the inference in section 174 clearly satisfies the "more likely than not" test when applied to heroin. When applied to the possession of cocaine, however, the test yielded a different result. In *Erwing v. United States*,[18] the Court found that coca leaves are legally imported for the manufacture of cocaine and that there is no evidence of illegal importation of coca leaves or cocaine. Based on these findings, the *Turner* Court held the statutory inference inapplicable to the possession of cocaine.[19]

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14. *Id.* at 36.

15. The *Leary* test had been anticipated in *United States v. Adams*, 293 F. Supp. 776 (S.D.N.Y. 1968). The *Adams* court stated "[B]efore the inferred relationship may serve as a basic element establishing criminal guilt, the two facts must be 'very probably connected;' the inference must be one 'very likely' to be correct." United States v. Adams, 293 F. Supp. 776, 782 (S.D.N.Y. 1968).

16. It is illegal both to import heroin and to manufacture it in the United States. Heroin can be manufactured from opium, but the opium poppy cannot be grown in the United States without a special license, and no such licenses have been issued. Although there have been recurring thefts of narcotics from legal channels, the conversion of all the stolen drugs into heroin would yield less than one per cent of the total illicit heroin marketed each year. There is no evidence that heroin is being synthesized or manufactured illegally from other drugs. 90 S. Ct. at 649-52.

17. *Id.* at 652-53.

18. 323 F.2d 674 (9th Cir. 1963).

19. The prosecution for failure to attach revenue stamps was founded on 26 U.S.C. § 4704(a) (1964):

> It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package . . .; and the absence of appropriate taxpaid stamps . . . shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

In *Turner* the Supreme Court affirmed the conviction under § 4704(a) as to heroin but

Under Turner, statutory inference is invalid in cases involving narcotic drugs which are legally imported or manufactured for medicinal purposes. This category includes crude opium, cocal leaves, cocaine, morphine, and codeine.[20] The inference may now be constitutionally applied only in cases involving possession of heroin or opium processed for smoking.[21]

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reversed as to cocaine. The Court concluded from the amount of heroin found in Turner's possession that he was engaged in distribution and the statutory inference of § 4704(a) was unnecessary to sustain the conviction involving heroin. 90 S. Ct. at 646-53. In order to sustain the conviction as to cocaine, however, the Court would have had to uphold the inference contained in the section that one in possession of unstamped cocaine had purchased it in an unstamped package. Since most cocaine in this country has been legally manufactured and stamped the Court held that the § 4704(a) inference did not meet the "more likely than not" test. 90 S. Ct. at 653-54.

20. Section 173 of title 21 permits importation of crude opium and coca leaves. *See* 21 U.S.C. § 502 for a list of narcotic drugs which may be manufactured under license.

21. Heroin is contraband under 26 U.S.C. § 4733. Opium processed for smoking is contraband under 21 U.S.C. § 173, which also prohibits importation of heroin.