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CRIMINAL LAW—DUE PROCESS—BURDEN IS ON THE STATE TO AFFIRMATIVELY PROVE LACK OF LICENSE IN PROSECUTION FOR CARRYING PISTOL WITHOUT A LICENSE

In *Johnson v. Wright*,[1] the Fifth Circuit Court of Appeals held that where the State fails to prove that a defendant is not licensed to carry a pistol, a conviction for carrying a pistol without a license[2] violates the due process clause of the fourteenth amendment. First, it was held improper to allow an inference that the pistol was unlicensed after the State produced evidence that the defendant possessed a weapon. Additionally, it was impermissible to shift the burden of proof to the defendant to prove the existence of the license.

The defendant was originally convicted of armed robbery, carrying a concealed weapon, and possession of an unregistered pistol following his participation in the robbery of an Atlanta grocery store.[3] At the trial, the judge charged the jury,

> Now, this defendant has been charged . . . with the possession of a pistol without a license, and with the carrying of a pistol outside of his home, not in an open manner. I instruct you that the state has proven a prima facie case of the possession of a pistol in this case by someone who is alleged by the Grand Jurors here to have been the defendant, which the defendant denies. And when a prima facie case is made, I charge you that *it is then upon the defendant*, if you believe the defendant to be the person to have committed this crime, *to show that he did possess a license* to carry the weapon alleged to have been carried by the State. The defendant in doing so must prove that a license existed to carry the weapon in order to overcome the prima facie showing of the violation of this law by the State.[4]

The Georgia Supreme Court affirmed the conviction, citing the long line of cases holding that proof that a defendant has a license to carry a pistol is a matter of defense.[5] The defendant then petitioned for a writ of habeas corpus in the Federal District Court for the Northern District of Georgia.[6] The denial of the petition was appealed to the Fifth Circuit Court of Appeals, which found the procedure used to be an unconstitutional denial of due process and, therefore, remanded the case to the district court with

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1. 509 F.2d 828 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 334 (Dec. 8, 1975).
2. GA. CODE ANN. §26-2903 (Rev. 1972).
3. 509 F.2d at 829.
4. *Id.* at 830 (emphasis added).
5. Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973).
6. 509 F.2d at 828.

instructions to issue the writ as to appellant's conviction for possession of an unlicensed pistol.[7]

The procedure followed by the trial court in *Johnson* has long been standard in Georgia. The Georgia Supreme Court cited *Ezzard v. State*,[8] at the time, the most recent in the line of cases that have placed the burden of proof on the defendant to prove the existence of a pistol license, once the State has shown that the defendant possessed a pistol. The court tracked the language of *Ezzard* and earlier decisions which held that "[t]he appellant *in defense* had the privilege of showing he had a license to carry the pistol."[9] This has been the rule in Georgia since the case of *Blocker v. State*[10] originally made this determination over sixty years ago. The policy, as later amplified in the case of *McHenry v. State*,[11] is that when a crime involves the proof of a negative (in this situation, the absence of the license) which would be difficult for the State to prove and which is within the knowledge of the defendant, the State need only prove the prohibited act in order to shift the burden to the defendant to disprove the negative.

The rule whereby the State has only to prove the carrying of a pistol in order to place the burden upon the defendant to produce his license is found in most jurisdictions.[12] Constitutional authority for it is found in the Supreme Court decision, *Morrison v. California*.[13] That case dealt with a presumption of alienage in regard to a California law regulating the sale of land. Justice Cardozo outlined the basic philosophy in regard to shifting the burden in criminal cases.

> The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are that the state shall have proved enough to make it just for the defendant to be required to repel what has

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7. *Id.* at 832. On appeal, the appellant also alleged a violation of his fourth amendment right due to an unconstitutional search and seizure. The Fifth Circuit upheld the unconstitutionality of the search. *Id.* at 830.

8. 229 Ga. 465, 192 S.E.2d 374 (1972).

9. *Id.* at 466, 192 S.E.2d at 375 (emphasis in original). *See* Reed v. State, 195 Ga. 842, 25 S.E.2d 692 (1943); Fanning v. State, 39 Ga. App. 531, 147 S.E. 788 (1929); Webb v. State, 18 Ga. App. 44, 88 S.E. 751 (1916); Elkins v. State, 17 Ga. App. 479, 87 S.E. 713 (1916); Brown v. State, 15 Ga. App. 484, 83 S.E. 890 (1914); Blocker v. State, 12 Ga. App. 81, 76 S.E. 784 (1912).

10. 12 Ga. App. 81, 765 S.E. 784 (1912).

11. 58 Ga. App. 410, 198 S.E. 818 (1938).

12. *See* People v. Ross, 60 Cal. App. 163, 212 P. 627 (1922); State v. Sockum, 29 Del. 350, 99 A. 833 (1917); Williams v. United States, 237 A.2d 539 (D.C. Mun. Ct. App. 1968); People v. Clark, 24 Mich. App. 440, 180 N.W.2d 342 (1970); People v. Grass, 79 Misc. 457, 141 N.Y.S. 204 (1913); Commonwealth v. Anderson, 191 Pa. Super 313, 156 A.2d 624 (1959); City of Seattle v. Parker, 2 Wash. App. 331, 467 P.2d 858 (1970); State v. Merico, 77 W. Va. 314, 87 S.E. 370 (1915).

13. 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934).

> been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.[14]

The Georgia rule, as applied in prosecutions for unlicensed gun possession, is based on the same premise as this "balance of convenience" test.[15] The touchstone in both is the availability of the proof of innocence to the accused, as opposed to the difficulty for the state to prove a negative. Not only must it be more convenient for the defendant to prove the existence of a license under this policy, but if he does not it must be fair to presume that he doesn't have one.[16] This rather complex reversal of the general rule that the State must prove every element of an offense to obtain a conviction is most often summarized by the Georgia courts with the statement that the existence of a license is a matter of defense.[17]

It is in the area of evidentiary presumptions that certain elements of due process are injected. Basically, the problems result from deviation from the general principle that the State must prove every element of an offense beyond a reasonable doubt.[18] A two-step test has developed for testing the validity of an evidentiary presumption. The threshold inquiry is whether or not the inference to be drawn from the State's evidence is more likely than not correct. This method of testing the validity of a presumption was discussed in *Leary v. United States*,[19] where the presumption was that possession of marijuana was sufficient evidence for the jury to infer that the defendant knew it was illegally imported.[20] In overturning Leary's conviction, the Court stated that since the defendant had no way of knowing whether or not the marijuana was domestic or imported, such an inference would be

> "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.[21]

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14. *Id.* at 88-89, 54 S.Ct. at 284, 78 L.Ed. at 669.

15. Brown v. United States, 66 A.2d 491 (D.C. Mun. Ct. App. 1949), thoroughly discusses this situation in all of its permutations. The decision is unique in that the court concluded that due to the limited geographic area of the District of Columbia it was not inconvenient for the prosecution to determine if the defendant had a license.

16. Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934).

17. *See* Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973); Ezzard v. State, 229 Ga. 465, 192 S.E.2d 374 (1972); Reed v. State, 195 Ga. 842, 25 S.E.2d 692 (1943); Blocker v. State, 12 Ga. App. 81, 76 S.E. 784 (1912).

18. *In re* Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

19. 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

20. The case involved a statute, 21 U.S.C.A. §176 (Rev. 1972), which authorized the jury to make this inference.

21. 395 U.S. at 36, 89 S.Ct. at 1548, 23 L.Ed.2d at 82. *See* United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965); United States v. Gainey, 380 U.S. 63, 85 S.Ct.

A presumption or inference, based on a rational connection to a proved fact, still must meet a second more stringent standard. In *Barnes v. United States*,[22] the Court held that in addition to being "more likely than not," an inference must be grounded on evidence that would enable the jury to find the presumed fact beyond a reasonable doubt.[23] In that case, evidence of the unexplained possession of recently stolen United States treasury checks was sufficient for the jury to find beyond a reasonable doubt that the defendant knew they were stolen. Therefore, the inference met the strict requirements of due process.[24]

In *Johnson*, the Fifth Circuit applied both of the tests and concluded that the presumption that a pistol was unlicensed, once the State had shown evidence that the defendant possessed the gun, does not meet the due process requirements necessary for a conviction of carrying a pistol without a license.[25] After discussing the two standards used to judge a presumption or inference, the court concluded that the one in question did not meet either the "more likely than not" or "beyond a reasonable doubt" quantum of proof.[26] It is not logical that a jury could presume a gun was unlicensed merely from proof of its possession by the defendant. The court determined that the procedure, which demanded that the jury infer that a gun was unregistered based on evidence of possession and presume the defendant guilty of the offense, was clearly violative of due process.

> A more arbitrary and unreasonable conclusion can scarcely be imagined, since it is not even more likely than not that a given pistol will be unregistered.[27]

The court then went on to discuss the additional violation of due process that results from the shifting of the burden of proof to the defendant. It prefaced its remarks by stating that an inference which does meet the crucial tests of *Leary* and *Barnes* does not violate due process.[28] However, the court pointed out two distinctions between a presumption that meets these standards and one that does not in regard to shifting the burden of proof of an essential element of the crime. This was done by using the Dyer Act[29] as an example.

The Dyer Act allows an inference as to the knowing possession of stolen

754, 13 L.Ed.2d 658 (1965); Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943).

22. 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

23. *Id.* at 845, 93 S.Ct. at 2363, 37 L.Ed.2d at 387.

24. *Id.* at 845, 846, 93 S.Ct. at 2363, 37 L.Ed.2d at 387.

25. Johnson v. Wright, 509 F.2d at 831 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3344 (Dec. 8, 1975).

26. *Id.* at 831.

27. *Id.*

28. *Id.*

29. 18 U.S.C.A. §2312 (Rev. 1970).

property similar to the inference upheld in *Barnes*, except the *corpus dilecti* is stolen cars instead of checks stolen from the mail. First, the fact the inference goes to prove, "knowledge and intent," makes it the type that generally must be proved by circumstancial evidence.[30] It would be extremely difficult for the Government to prove its case unless the inference was allowed after the prosecution had proved possession of the physical object. The prosecution in *Johnson*, the court of appeals noted, only had to show possession of a pistol; not an unregistered pistol.[31]

Secondly, the opinion of the court of appeals points out that the inference used to convict Johnson required him to prove he had a license in order to prove his innocence of the charge. On the other hand, a presumption like the one in the Dyer Act is permissible. A conviction does not necessarily result when the defendant puts forth no evidence if the jury does not feel compelled by the evidence to make the inference;[32] but if the jury does make that inference based on the evidence, the conviction will be upheld. Based on a finding that the procedure used in Georgia impermissibly shifts the burden of proof to the defendant, in addition to finding the inference itself does not meet the requirements of due process, the court determined that Johnson's petition for a writ of habeas corpus should be granted as to his conviction for possession of an unlicensed pistol.[33]

The decision, which completely overturns an ingrained and long-lived procedure utilized by the prosecution in Georgia courts, already has had a dramatic effect within the State. In two recent cases[34] with fact situations similar to *Johnson*, the Georgia Supreme Court reversed convictions for carrying an unlicensed pistol. The decision in *Head v. State*,[35] citing *Johnson*, specifically overrules those cases which hold that whether an accused has a license to carry a pistol is a matter of defense and not an element of the offense.[36]

One potential short-coming of the decision is that it failed to address the question of relative convenience in proving whether or not a pistol is registered. However, the application of the ruling by the Georgia Supreme Court maintains the spirit of the Fifth Circuit's decision, while not putting a heavy burden on the State. The State is only required to show that the

30. Jackson v. United States, 330 F.2d 679, 681 (8th Cir. 1964).

31. Johnson v. Wright, 509 F.2d at 831. (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3344 (Dec. 8, 1975).

32. *Id.* at 832.

33. *Id.*

34. Head v. State, 235 Ga. 677, 221 S.E.2d 435 (1975); Todd v. State, 235 Ga. 679, 221 S.E.2d 800 (1975).

35. 235 Ga. 677, 221 S.E.2d 435 (1976).

36. *Id.* Ironically the case cited to exemplify this now defunct line of decisions was Johnson's original appeal to the Georgia Supreme Court, Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973).

defendant has not obtained a license to carry the pistol in the county of his residence.[37] According to Georgia law, this is where a pistol license must be obtained from the probate court.[38]

However, the reasoning breaks down in a situation in which the court of residence is unknown and the defendant has refused to divulge this fact for fear of self-incrimination. It is interesting to speculate whether, in this case, the balance of convenience would shift in favor of the State, or if a strict interpretation of *Johnson* would require the State to prove the residence and absence of a license as part of their burden of proof. In the typical case, where the defendant's residence is known, the prosecution need not go to great lengths to prove a fact within the defendant's knowledge.

The Fifth Circuit Court of Appeals has laid down a very broad rule in *Johnson*, where a much simpler and narrower holding could have been reached. The procedure being used in Georgia was phrased in terms that required a jury to find a defendant guilty of the charge of carrying a pistol without a license if he did not, as a defense to the charge, produce a license. However, the court chose to rule that even allowing a presumption, whereby the jury *could* find the defendant guilty, was impermissible since the evidence of possession of a pistol was not sufficient to raise a logical inference that the defendant did not possess a license to carry the weapon. Without the State presenting evidence that the defendant does not have a license in the county of his residence, the prosecution can no longer get to the jury with this particular charge. The court exercised judicial foresight in forming a decision that insures a defendant his right to due process.

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37. 235 Ga. at 679, 221 S.E.2d at 437.
38. GA. CODE ANN. §26-2903 (Supp. 1975).