SUPREME COURT OF LOUISIANA

No. 98-KA-1415

STATE OF LOUISIANA

Versus

MICHAEL Q. CARUSO

LEMMON, J. Concurring

I reluctantly agree that the ambiguous language in La. Rev. Stat. 14:220 may be interpreted as the Legislature's intending to establish only a permissive presumption. I write separately to caution trial judges that simply parroting the statutory language, without an explanation in the jury instructions, may cause reversal of convictions.[1]

The real problem is that permissive presumptions are generally inappropriate in statutes which define a crime. While conclusive presumptions may be appropriately included in such statutes, inclusion of a permissive presumption generally serves no useful purpose. In the present statute, for example, proof that the defendant failed to return the vehicle within fifteen days of notice is clearly admissible as evidence bearing on the issue of intent to defraud. Thus the language does not facilitate the admissibility of evidence bearing on intent. Moreover, the jury, unless provided with further explanation in the trial judge's instructions, may erroneously construe the statutory language as making such evidence alone sufficient to support a conviction beyond a reasonable doubt, without any other evidence presented by the prosecution. In such a case, the statutory language would unconstitutionally shift the burden to the defendant to prove his or her innocence without the prosecutor's having established the

[1]The Lindsey case, relied on by the majority, was before the court in the pre-trial stage, as is the present case.

defendant's guilt beyond a reasonable doubt.[2] Francis v. Franklin, 471 U.S. 307 (1985).

Therefore, the only apparent legitimate purpose of the statutory language is to permit the jury to consider such evidence as raising an inference that defendant acted with intent to defraud. The language, however, is unnecessary for that purpose, since the jury, in the absence of the statute, undoubtedly may consider such evidence (and other circumstantial evidence relevant to the issue of intent) as raising an inference with the intent to defraud.

These very valid concerns perhaps prompted my majority opinion in State v. McCoy, 395 So. 2d 319 (La. 1980), a six-to-one decision. And perhaps we went too far in our decision in the McCoy case that inclusion of such language in a statute is not constitutionally permissible, in the light of the reasoning of the Lindsey opinion. But as pointed out above, significant problems may occur if the judge instructs the jury by quoting the statutory language without explanation, perhaps misleading the jury into believing that a permissive presumption either is sufficient evidence either to prove intent to defraud beyond a reasonable doubt or to shift the burden to the defendant to prove his lack of intent to defraud.[3] See State v. Lollar, 389 So. 2d 1315 (La. 1980) (Lemmon, J., Concurring).

The Legislature, after Sandstrom v. Montana, 442 U.S. 510 (1979) and County Court of Ulster County v. Allen, 442 U.S. 140 (1979), perhaps attempted to remedy

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[2]If the prosecutor only introduced evidence that defendant rented the vehicle and then failed to return it within fifteen days of notice, and then rested, and if the defendant thereafter simply rested without introducing any evidence, then the evidence would be insufficient to support a conviction, since there are other reasonable hypotheses of innocence consistent with that evidence on intent to defraud.

[3]The average juror (as well as many attorneys and judges), upon hearing that something is presumed, immediately tends to believe that no further proof is necessary. It is therefore dangerous to use a derivative of the word "presumption" in a statute, unless the presumption is mandatory.

statutes which contained presumptions by declaring that the presumptions were "only presumptive evidence." It would have been far preferable to simply remove permissive presumptions from the statutes.

Moreover, if the Legislature desires to make it a crime to rent a vehicle and not return it within fifteen days of notice, then the Legislature can simply provide that such failure is an element of the crime, rather than classifying the failure as presumptive evidence.