The Tortured Trail of Instructing the Jury on Presumption of Innocence In Kentucky

By Stephen C. Emery

Almost everyone is aware of the existence of what is called the presumption of innocence, but many know little about its origins and its historical application in criminal proceedings. The object of this article is to trace the jurisprudential origins of the presumption of innocence and the historical and present use of a jury instruction explaining its meaning.

Origins and Original Meaning

In Coffin v. United States,[1] the United States Supreme Court held that it was reversible error in federal court to refuse to instruct on the presumption of innocence, if such an instruction is tendered by the accused and that it was error to instruct the jury, under the circumstances of the case, that the burden had shifted and that it was incumbent upon the accused to show the lawfulness of their acts.

The origins of the presumption of innocence were thoroughly discussed in Coffin. Its importance was clearly stated in the opinion of the Court, as delivered by Justice White: "The principle that there is a presumption of innocence in favor of the accused is

[1] 156 U.S. 432, 39 L. Ed. 481, 15 S. Ct. 394 (1895).

the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[2] Coffin traces the origins of the presumption of innocence to Deuteronomy.[3] The Court attributes this statement of origin to Simon Greenleaf's text On Evidence, pt. 5, 29, etc.; however, the Court waffles on this point. My research of Deuteronomy reveals no direct reference to the presumption of innocence.[4]

While that particular point of origin is uncertain, the Court made clear that there was no question that the presumption was evident under Roman law.[5] Justice White, in Coffin, cites several examples of maxims of criminal justice administration that demonstrate evidence of the presumption's existence in Roman law.[6] One example cited in Coffin concerns an anecdote, related by Ammianus Marcellinus, of the Emperor Julian.[7] I commend you to the full text of the anecdote:

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2 Id. at 453.

3 See id. at 454.

4 Any reader who can point me to evidence to the contrary is invited to do so.

5 See Coffin, supra, n. 1, at 454.

6 See id.

7 See Coffin, supra, n. 1 at 455.

Numerius, the governor of Narbonensis, was on trial before the emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?'[8]

[8] Coffin, supra, n. 1 at 455. [Citation omitted.]

In Coffin the presumption of innocence was regarded, and it was perceived as such by the legal writers of the time, as an evidentiary presumption of law.[9] The Court later retreated from the conclusion that the presumption of innocence is evidence to be weighed by the jury.[10] Justice Reed, of the Kentucky Supreme Court, was probably most correct in referring to it as the assumption of innocence.[11] Reed's characterization is supported in Kentucky law inasmuch as in Kentucky it is "never proper to instruct the jury as to presumptions of law or fact[,]"[12] yet Kentucky courts do instruct the jury on the "presumption" of innocence.

The presumption of innocence is not found in the text of the United States Constitution, but it is recognized as a basic component of a fair trial under our criminal justice system.[13] However, the use of an instruction explaining its meaning to the jury was not always common practice in the state courts.

Historical Overview of the Use of a Presumption of Innocence Jury Instruction

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9 See Coffin, supra, n. 1, at 459.

10 See Agnew v. United States, 165 U.S. 36, 51-52, 41 L. Ed. 624, 17 S. Ct. 235 (1897); see also Taylor v. Kentucky, 436 U.S. 478, 483, n. 12, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978).

11 See Whorton v. Commonwealth, Ky., 570 S.W.2d 627, 635 (1978) (Reed concurring).

12 Pacific Mutual Life Insurance Co. v. Meade, 281 Ky. 36, 134 S.W.2d 960, 965 (1939); see also Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 824 (1992).

13 See Estelle v. Williams, 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976).

At the time Coffin was decided, Texas required its courts to state the presumption of innocence along with the doctrine of reasonable doubt, even in the absence of a request to do so.[14] Indiana held it error to refuse to charge the presumption of innocence, if requested.[15] Michigan held that the failure to mention presumption of innocence, when the doctrine of reasonable doubt was fully and fairly stated, was not error if no request was made for the charge.[16] Ohio held it was not error to refuse to charge the presumption of innocence if the jury had been charged with a reasonable doubt instruction.[17]

In Kentucky, presumption of innocence charges were permitted, but not encouraged.[18] The preferred practice was to give an instruction on reasonable doubt, only, in conformity with the Criminal Code.[19] The view held in Kentucky in the 1940's was that an instruction to the effect that the law presumes the innocence of the accused was "too favorable to the defendant."[20] In 1977, it was

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14 See Coffin, supra, n. 1, at 457.

15 Id.

16 Id.

17 Id.

18 See Minniard v. Commonwealth, 158 Ky. 210, 164 S.W. 804 (1914).

19 Id.

20 Swango, supra, n. 17, at 183.

"[t]he well established law of Kentucky [] that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary."[21]

Effective January 1, 1963, Kentucky adopted Kentucky Rule of Criminal Procedure (RCr) 9.56, which supplanted the former Criminal Code. In 1978, following the United States Supreme Court decision in Taylor v. Kentucky,[22] RCr 9.56 was rewritten in its present form, which includes a presumption of innocence charge.[23]

Taylor v. Kentucky - Kentucky's Practice Reversed

The long-held views in Kentucky changed only at the insistence of the United States Supreme Court, following its decision in Taylor v. Kentucky.[24] In Taylor, defense counsel requested a jury instruction stating that:

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21 Taylor v. Commonwealth, Ky. App., 551 S.W.2d 813, 814 (1977), citing Mink v. Commonwealth, 228 Ky. 674, 15 S.W.2d 463 (1926); Swango v. Commonwealth, 291 Ky. 690, 165 S.W.2d 182 (1942).

22 Supra, n. 7.

23 See Whorton v. Commonwealth, Ky., 585 S.W.2d 388, 389 (1979).

24 Supra, n. 7.

> The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a 'clean slate.' That is, with no evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.[25]

[25] Taylor, supra, n. 7, at 480.

In addition, the defendant's counsel asked the trial court to instruct the jury that the indictment was not evidence to be considered against the defendant.[26] While the court did instruct on reasonable doubt, neither of these other offered instructions was charged to the jury.

The Court, in a limited holding on the facts, said that "the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."[27] The Court based its conclusion on the cumulative effect of the potentially damaging circumstances, including statements made by the Commonwealth during closing argument, of the case.[28] However, the Court did not reach the claim of error presented in refusing to instruct that an indictment is not evidence.[29]

The Whirling Whorton Case

Shortly after the Taylor decision was handed down, the Kentucky Supreme Court, in Watson v. Commonwealth,[30] held that it was reversible error to refuse to give a presumption of innocence instruction, if it was requested by the accused. The Court in Watson

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26 Taylor, supra, n. 7, at 481.

27 Taylor, supra, n. 7, at 490.

28 See Taylor, supra, n. 7, at 487.

29 Id.

30 Ky., 579 S.W.2d 103 (1979).

refused to apply the harmless error doctrine, electing, in keeping with Whorton I,[31] "not to engage in the mental gymnastics inherent in the application of the harmless error doctrine."[32] The Court chose "simple prophylaxis over Talmudic hair splitting."[33]

Later that year, the Court retreated from its position in Watson and Whorton I. Following the United States Supreme Court decision in Whorton II,[34] which reversed the Kentucky Supreme Court decision in Whorton I and directed the Court to determine whether the failure to give a presumption of innocence instruction under the facts of the case had deprived the accused of Due Process in light of the totality of the circumstances, the Kentucky Supreme Court in Whorton III[35] adopted the harmless error in reverse rule. In Whorton III, the Court held that "in light of the totality of the circumstances the trial court's refusal to instruct on the presumption of innocence did not prejudice or deprive Whorton of his due-process right to a fair trial."[36] This is the state of the law concerning presumption of

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31 Ky., 570 S.W.2d 627 (1978).

32 Watson, supra, n. 27, at 104.

33 Id.

34 441 U.S. 786, 60 L. Ed. 2d 640, 99 S. Ct. 2088 (1979).

35 Supra, n. 20.

36 Id. at 389.

innocence instructions in Kentucky today.[37]

This is a confused and tortured trail. If all of this seems confusing to you, imagine what it will be like explaining it to a client.

Gratitude and thanks are extended to Jeffrey Trapp for providing me with his editorial services and advice in preparing this article.

[37] See Duvall v. Commonwealth, Ky. App., 593 S.W.2d 884 (1979)(holding that it is harmless error to fail to give presumption of innocence instruction where the evidence of the accused's guilt was overwhelming and all but admitted); but cf., Carver v. Commonwealth, Ky., 634 S.W.2d 418 (1982)(holding that the failure to give requested presumption of innocence instruction raised serious doubt about the constitutional fairness of the proceeding when the evidence was not overwhelming but merely a "swearing contest").