St. John's Law Review

Volume 60, Spring 1986, Number 3 Article 15

Penal Law § 265.02(4): Criminal Possession of a Weapon in the Third Degree--Defendant Bears Burden of Production as "Home or Place of Business" Exception

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is substantially similar interlock, regardless of their comparative reliability, is antithetical to that end.

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PENAL LAW

Penal Law § 265.02(4): Criminal possession of a weapon in the third degree—defendant bears burden of production as to "home or place of business" exception

Under section 265.02(4) of the Penal Law,[1] a person possessing a loaded firearm is guilty of a class D felony, unless "such possession takes place in such person's home or place of business."[2] New York courts have held that the home or place of business exception

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[1] N.Y. PENAL LAW § 265.02 (McKinney 1980). Section 265.02 provides in pertinent part:

A person is guilty of criminal possession of a weapon in the third degree when:

. . .

(4) He possesses any loaded firearm. Such possession shall not . . . constitute a violation of this section if such possession, takes place in such person's home or place of business.

Criminal possession of a weapon in the third degree is a class D felony.

Id.. Mere possession of a firearm, regardless of whether it is loaded or where it is possessed is a class A misdemeanor. *See* § 265.01(1) (McKinney Supp. 1986).

[2] N.Y. PENAL LAW § 265.02(4) (McKinney 1980). The exception for possession of a loaded firearm in one's home or place of business reflects a conscious effort to balance society's need to restrict illegal weapons and the individual's need to protect himself and his property. *See* People v. Rondon, 109 Misc. 2d 394, 395, 439 N.Y.S.2d 803, 804 (Sup. Ct. N.Y. County 1981); People v. McWilliams, 96 Misc. 2d 648, 651, 653-54, 409 N.Y.S.2d 610, 612, 614 (Nassau County Ct. 1978). Courts have generally applied the place of business exception when a defendant's personal property interests are at stake. *See, e.g.*, People v. Santana, 77 Misc. 2d 414, 415, 354 N.Y.S.2d 387, 389 (N.Y.C. Crim. Ct. Queens County 1974) (taxicab is driver's place of business); People v. Anderson, 74 Misc. 2d 415, 419, 344 N.Y.S.2d 15, 19 (N.Y.C. Crim. Ct. Bronx County 1973) (same). *But see* People v. Levine, 42 App. Div. 2d 769, 769, 346 N.Y.S.2d 756, 756 (2d Dep't 1973) (mem.) (exception inapplicable when taxi-driver unnecessarily brandished loaded gun in argument with another motorist).

Courts will not apply the place of business exception if possession of the weapon is incidental or irrelevant to legitimate protection of property. *See, e.g.*, People v. Fearon, 58 App. Div. 2d 1041, 1041, 397 N.Y.S.2d 294, 294 (4th Dep't 1977) (mem.) (where defendant shot co-worker, exception did not apply merely because shooting occurred at place of employment), People v. Francis, 45 App. Div. 2d 431, 434, 358 N.Y.S.2d 148, 152 (2d Dep't 1974) (United States postal worker could not take advantage of exception where he was not required by his superiors to protect government property), *aff'd on other grounds*, 38 N.Y.2d 150, 341 N.E.2d 540, 379 N.Y.S.2d 21 (1975); People v. Rondon, 109 Misc. 2d 394, 399, 439 N.Y.S.2d 803, 808 (Sup. Ct. N.Y. County 1981) (director of not-for-profit corporation does not fall within exception unless authorized by corporate employer to carry weapon).

is an element of the crime,[3] which must be pleaded and upon which the People have the ultimate burden of proof.[4] Recently, however, in *People v. Rodriguez*,[5] the Appellate Division, Second Department, held that the prosecution need not prove this element to support a conviction unless the defendant first produces some credible evidence to raise the issue.[6]

The defendant in *Rodriguez* had been arrested in a public laundromat in Brooklyn while attempting to hide a loaded handgun.[7] He was convicted of criminal possession of a weapon in the third degree at a bench trial approximately six years later.[8] At trial, neither party presented any evidence as to whether the laundromat in which the defendant had been arrested was his place of business.[9] The defendant appealed, claiming that the prosecution

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[3] *See, e.g.*, People v. Newell, 95 App. Div. 2d 815, 816, 463 N.Y.S.2d 538, 539 (2d Dep't 1983) (mem.); People v. Meyer, 46 App. Div. 2d 904, 904, 362 N.Y.S.2d 190, 191 (2d Dep't 1974) (mem.); *cf.* People v. McWilliams, 96 Misc. 2d 648, 656, 409 N.Y.S.2d 610, 615 (Nassau County Ct. 1978) (indictment which did allege "not in home or place of business" was defective where issue was not presented to Grand Jury). *But see* United States *ex rel.* Presenzano v. Deegan, 294 F. Supp. 1347, 1349 (S.D.N.Y. 1969) (by indicting for possession of weapon "as a felony," prosecution implicitly negatived home or place of business exception).

The determination of whether a statutory exception to an offense is treated as an element of the crime or as a defense generally turns on the proximity of the exception to the clause defining the offense. Where an exception is defined in the same clause as the crime, the inapplicability of that exception is usually found to be an element which must be pleaded and proved in every case by the prosecution. *See* People v. Kohut, 30 N.Y.2d 183, 187, 282 N.E.2d 312, 314-15, 331 N.Y.S.2d 416, 420 (1972); People v. Meyer, 46 App. Div. 2d 904, 904, 362 N.Y.S.2d 190, 191 (2d Dep't 1974) (mem.); 1 WHARTON'S CRIMINAL EVIDENCE § 20 (C. Torcia 13th ed. 1972). An exception created subsequently in the statute or in a different statute is generally called a "proviso" and treated as a defense which the prosecution need neither plead nor disprove to establish a prima facie case against the defendant. *See, e.g., Kohut*, 30 N.Y.2d at 187, 282 N.E.2d at 315, 331 N.Y.S.2d at 420 (defense of statute of limitations in Penal Law); People v. Baur, 102 Misc. 2d 971, 972, 423 N.Y.S.2d 800, 801 (Dist. Ct. Nassau County 1980) (exception to speed limit law for emergency vehicles in Vehicle & Traffic Law); People v. Kollender, 69 Misc. 995, 1009-10, 10 N.Y.S.2d 252, 255 (Nassau County Ct. 1939) (zoning ordinance with subsequent proviso preserving legality of prior non-conforming use).

[4] *See* 3 CJI, PL 265.02(4) (People must prove beyond reasonable doubt defendant not within home or place of business). CPL § 70.20 provides:

> No conviction of an offense by verdict is valid unless based upon trial evidence which is legally sufficient and which establishes beyond a reasonable doubt every element of such offense and the defendant's commission thereof.

CPL § 70.20 (McKinney 1981).

[5] 113 App. Div. 2d 337, 496 N.Y.S.2d 448 (2d Dep't 1985).

[6] *Id.* at 338, 496 N.Y.S.2d at 449.

[7] *Id.*

[8] *Id.* at 339, 496 N.Y.S.2d at 449.

[9] *Id.*

had failed to prove every element of the offense beyond a reasonable doubt.[10] The Appellate Division, Second Department, affirmed the conviction, holding that the defendant bears the burden of production as to whether he falls into the "home or place of business" exception of section 265.02(4).[11]

Writing for the court, Justice Eiber noted New York's strong policy against handguns[12] and the personal nature of the evidence which would relate to the statutory exception.[13] The court recognized that the exception is an element of the crime which the People must plead, and that the burden of proof rests ultimately on the prosecution.[14] Justice Eiber reasoned, however, that since the defendant's access to such knowledge is unrestricted, "fairness and

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[10] *Id.*

[11] *See id.* at 342, 496 N.Y.S.2d at 451.

[12] *See id.* at 340, 496 N.Y.S.2d at 449-50. *See generally,* Governor's Memorandum on Approval of chs. 233 and 234, N.Y. LAWS (June 13, 1980), *reprinted in* [1980] N.Y. LAWS 1857 (McKinney) (New York has "the toughest gun law in the country. . . .").

[13] 113 App. Div. at 340, 496 N.Y.S.2d at 450. Justice Eiber reasoned that since the facts which would make the exception applicable "are primarily within the defendant's knowledge," *id.*, the People may be unaware that the exception is at issue in any particular case. *Id.* Therefore, it is reasonable to require the defendant to come forward with some credible evidence to alert the prosecution that this exception is germane to the case. *Id.* This rationale has been held to apply to a claim of good cause for failure to honor a subpoena, *see* People v. D'Amato, 12 App. Div. 2d 439, 440-41, 211 N.Y.S.2d 877, 878 (1st Dep't 1971), and proof of licensure, *see* People v. Bradford, 227 N.Y. 45, 47-48, 124 N.E. 118, 119-20 (1919). *See also* People v. Kibler, 106 N.Y. 321, 324, 12 N.E. 795, 796 (1887) (in prosecution for selling adulterated milk, defendant's claim that he came within exception for selling skimmed milk related to facts peculiarly within his knowledge, disproof of which was not necessary to People's prima facie case).

The *Rodriguez* court further supported its holding by quoting at length from *People v. Rosa*, 65 N.Y.2d 380, 386-87, 482 N.E.2d 21, 25-26, 492 N.Y.S.2d 542, 546-47 (1985). In *Rosa*, the defendant made a motion to suppress evidence, claiming that the prosecution failed to disprove that he was represented by counsel on another charge, although he was interrogated without the presence of such counsel. *Id.* at 382-83, 482 N.E.2d at 23-24, 492 N.Y.S.2d at 544. The Court of Appeals held that it would be extraordinarily difficult for the People to prove that the defendant was nowhere represented by counsel. "[P]lacing the burden of proof on the defendant in numerous contexts collateral to the question of guilt has long been upheld." *Id.* at 387, 482 N.E.2d at 26, 492 N.Y.S.2d at 547 (citations omitted).

It is submitted that the *Rodriguez* court erred in its reliance on *Rosa*, because the *Rosa* holding was limited to "contexts collateral to the question of guilt," while the exception promulgated by section 265.02(4) is not collateral to the defendant's guilt but is an element essential to the offense. Moreover, it is suggested that the facts necessary to establish whether the section 265.02(4) exception applies are not as difficult to prove as the claim of representation by counsel which was at issue in *Rosa*. *See infra* notes 18 and 32 and accompanying text.

[14] 113 App. Div. 2d at 340, 496 N.Y.S.2d at 450. The indictment alleged that Rodriguez did not possess the weapon in his home or place of business and was therefore legally sufficient. *Id.* at 340 n.1, 496 N.Y.S.2d at 450 n.1.

common sense dictate that the initial burden of production . . . should be placed on the defense. . . ."[15]

Justice Lazer dissented, arguing that by placing the burden of coming forward to negative an acknowledged element of the crime on the defendant, the court had unjustifiably rejected the normal presumption of innocence in criminal trials.[16] Although the burden of coming forward has been placed on a criminal defendant in situations where the relevant information is uniquely within his possession, Justice Lazer contended that the comprehensive provisions for defenses and affirmative defenses in the New York Penal Law[17] obviate the need for such an analysis when applied to the elements of a crime.[18]

It is submitted that the *Rodriguez* court's holding will serve to relieve prosecutors of their burden of proof by requiring defense counsel to alert the People that the home or place of business exception will be asserted.[19] No longer will the defendant be able to rely on the prosecutor's failure to prove every element of the offense beyond a reasonable doubt; the accused must, rather, treat the home or place of business element as a defense, raising it if he

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[15] *Id.* at 342, 496 N.Y.S.2d at 451. Justice Eiber cited three cases which have indicated that the defendant bears the burden of production on the home or place of business exception of section 265.02(4): *People v. Witherspoon*, 120 Misc. 2d 648, 653, 466 N.Y.S.2d 611, 614-15 (Sup. Ct. Kings County 1983); *People v. McWilliams*, 96 Misc. 2d 648, 655, 409 N.Y.S.2d 610, 615 (Nassau County Ct. 1978) and *United States* ex rel. *Presenzano v. Deegan*, 294 F. Supp. 1347, 1350 (1969). *See Rodriguez*, 113 App. Div.2d at 342, 496 N.Y.S.2d at 451.

[16] *See* 113 App. Div. 2d at 344, 496 N.Y.S.2d at 453 (Lazer, J.P., dissenting). Justice Lazer asserted that the effect of the holding "transforms an element the People were obligated to prove in all cases into a defense for which the defendant has the burden of going forward before the People must shoulder their burden." *Id.*

[17] *See* N.Y. PENAL LAW § 25.00 (McKinney 1980); *infra* note 23.

[18] 113 App. Div. 2d at 345, 496 N.Y.S.2d at 453-54 (Lazer, J.P., dissenting). Since the Legislature did not define the home or place of business exception as a defense, Justice Lazer argued that the court ignored the Legislature's intent by employing a burden-shifting device by which the People may obtain a felony conviction under section 265.02(4) by merely establishing facts sufficient to support a misdemeanor conviction under section 265.01(1). 113 App. Div. 2d at 346, 496 N.Y.S.2d at 454 (Lazer, J.P., dissenting).

In addition, Justice Lazer noted that the three cases relied upon by the court were all decided on other grounds, and merely stated in dicta that the burden of production is on the defendant. *Id.* Finally, as for the court's reliance on *People v. Rosa*, 65 N.Y.2d 380, 482 N.E.2d 21, 492 N.Y.S.2d 542 (1985), Justice Lazer claimed such reliance was misplaced, since the case at bar did not involve an issue collateral to guilt, but rather "a material element of a crime to be pleaded and proven by the People in every case and not classified as a defense." 113 App. Div. 2d at 346-47, 496 N.Y.S.2d at 454 (Lazer, J.P., dissenting).

[19] *See* 113 App. Div. 2d at 343, 496 N.Y.S.2d at 452.

does not wish to lose its protection.[20]

It is suggested, moreover, that by shifting the burden of coming forward to the defendant, the *Rodriguez* court disregarded the constitutionally mandated presumption of innocence. The due process clause of the fourteenth amendment requires the prosecution in a criminal case to prove each element of the crime charged beyond a reasonable doubt.[21] The home or place of business exception of section 265.02(4) is an element of the crime,[22] not a defense or an affirmative defense.[23] It is urged that a court may not shift the burden of production to the defendant and treat it as such.[24]

Although the prosecutor may sometimes have the benefit of a presumption to establish proof of an element, such a presumption can arise only when there is a "reasonably high degree of probability" that the presumed fact will follow from the facts proven.[25] It is urged that mere proof of the defendant's possession

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[20] *See id.* at 344-45, 496 N.Y.S.2d at 453 (Lazer, J.P., dissenting). "[W]here a defense serves to negate an element, the defendant cannot, as a practical matter, be made to bear the burden of production." P. ROBINSON, CRIMINAL LAW DEFENSES, § 4(a)(2) (1984).

[21] *See In re* Winship, 397 U.S. 358, 364 (1970). In *Winship*, the United States Supreme Court "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* Although a state may define affirmative defenses on which the defendant bears the burden of persuasion by a preponderance of the evidence, *see* Patterson v. New York, 432 U.S. 197, 205-07 (1977), a defendant cannot be required to offer proof to refute an element of a crime. *See id.* at 215.

[22] *See supra* note 4 and accompanying text.

[23] *See* N.Y. PENAL LAW § 25.00 (McKinney 1980). Every defense is defined under the Penal Law and has been labelled either an ordinary defense or an affirmative defense. *See id.*; New York State Commission on Revision of the Penal Law and Criminal Code: Staff Comments on Changes in the new Penal Law since the 1964 Study Bill, art. 25 [1965], *reprinted in* [1974] GILBERT'S CRIMINAL LAW & PROCEDURE 2A-120; N.Y. PENAL LAW § 25, commentary at 62 (McKinney 1975); J. ZETT, NEW YORK CRIMINAL PRACTICE § 63.1[2] at 63-64.

[24] *Compare* CPL § 70.20 (every element must be proven beyond a reasonable doubt) *with* N.Y. PENAL LAW § 25.00 (McKinney 1975) (defense, *once raised*, must be disproven beyond a reasonable doubt).

[25] People v. Leyva, 38 N.Y.2d 160, 166, 341 N.E.2d 546, 550-51, 379 N.Y.S.2d 30, 35 (1975). In defining presumptions, the Legislature may base its judgment on common sense and experience. *See id.* (presumption that all occupants of automobile knew of drugs carried within, declared constitutional); People v. McCaleb, 25 N.Y.2d 394, 404, 255 N.E.2d 136, 141, 306 N.Y.S.2d 889, 897, (1969) (in prosecution for joyriding, where no permission was given by owner, it may be presumed defendant knew he had no permission); People v. Robinson, 97 Misc. 2d 47, 54-55, 411 N.Y.S.2d 793, 797-98 (Sup. Ct. Crim. Term Kings County 1978) (where utility lines were tampered with to effect theft of services, knowledge of each tampering may rationally be imputed to recipient of such services).

The United States Supreme Court has applied a somewhat more relaxed standard with regard to presumptions. *See* County Court of Ulster County v. Allen, 442 U.S. 140, 165

of an illegal firearm in a public laundromat cannot logically lead to the conclusion that the laundromat was not the defendant's place of business;[26] hence, no such presumption may arise. In addition, the Penal Law establishes comprehensive defenses and statutory presumptions relating to specific offenses.[27] The fact that the exception in section 265.02(4) is not among these suggests that the legislature did not intend it to be considered a defense or presumption.[28]

Notwithstanding the constitutionality of requiring a defendant to come forward to refute an element of a crime where the evidence is peculiarly within his knowledge,[29] it is submitted that such an approach was inappropriate in *Rodriguez*. The burden of production has historically been placed on the defendant only in such limited circumstances that requiring the People to prove the element would be overly burdensome.[30] Neither the fact that the

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(1979); Barnes v. United States, 412 U.S. 837, 843 (1973); Leary v. United States, 395 U.S. 6, 36 (1969). The constitutional standard for a presumption to be valid is that the presumed fact must be "more likely than not" to occur because of the existence of the proven facts. *Compare, Barnes*, 412 U.S. at 845-46 (common law presumption of knowledge from possession of stolen goods constitutional) *with Leary*, 395 U.S. at 37-38 (presumption of knowledge of importation from possession of marijuana unconstitutional) *and* Tot v. United States, 319 U.S. 463, 468 (1943) (presumption from possession of gun by felon that it was acquired through interstate commerce after certain date unconstitutional).

[26] *See* 113 App. Div. 2d at 348, 496 N.Y.S.2d at 455 (Lazer, J.P., dissenting). The *Rodriguez* court, while applauding the standard expressed in People v. Witherspoon, 120 Misc. 2d 648, 653, 466 N.Y.S.2d 611, 614-15 (Sup. Ct. Kings County 1983), rejected the rebuttable presumption analysis set forth therein. *Id.* at 343, 496 N.Y.S.2d at 452. Common experience does not teach that a person's presence in a public laundromat proves he does not work therein. *Cf.* Tot v. United States, 319 U.S. 463, 468 (1943) (presumption from fact that felon possessed gun that such gun was acquired through interstate commerce after a certain date held irrational and therefore unconstitutional).

[27] *See, e.g.*, N.Y. PENAL LAW § 265.15 (McKinney 1975) (presumptions relating to illegal weapons), *id* at §§ 25.00-40.10 (defenses generally applicable).

[28] *See* 113 App. Div. 2d at 346, 496 N.Y.S.2d at 454 (Lazer, J.P., dissenting); *supra* note 18.

[29] *See supra* notes 21-24 and accompanying text (discussion of constitutionality of shifting burden to defendant).

[30] *See* People v. Kollender, 169 Misc. 995, 1004, 10 N.Y.S.2d 252, 260 (Nassau County Ct. 1939) ("this exception is almost always applied in cases where a course of conduct is prohibited unless it be licensed . . . ."). Other situations where the defendant may have the burden of coming forward include bigamy (claim that first marriage is invalid), age (claim that defendant is a minor), and assault with a gun (claim that gun was not loaded). *See* 1 WHARTON'S CRIMINAL EVIDENCE § 14 (C. Torcia 13th ed. 1972).

The term "peculiarly within the knowledge" is generally construed as meaning almost exclusively within the defendant's control or knowledge, *see* People v. Bradford, 227 N.Y. 45, 48, 124 N.E. 118, 118-19 (1919) (defendant has possession of hunting license); 1 WHARTON'S CRIMINAL EVIDENCE § 20 (C. Torcia 13th ed. 1972), or incapable of direct proof by the

defendant clearly has the relevant knowledge, or access thereto, nor the fact that it is more convenient for the defendant than the prosecutor to produce such knowledge, is enough to shift the burden to the defendant.[31] Since the prosecutor must know where a defendant charged under section 265.02(4) was arrested,[32] it is suggested that proving the character of such location with respect to the defendant does not present any special difficulty which justifies shifting the burden of production to the defendant.[33]

The *Rodriguez* holding may set a dangerous precedent. While courts certainly should interpret the law with respect to the legislative intent to limit handguns, they must not do so at the expense of due process. It is submitted that the prosecutor's failure to prove an element of the crime ought to have been fatal to his case, and that the court violated Rodriguez's constitutionally mandated presumption of innocence by holding otherwise.

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Addendum: As this article was going to press, *People v. Rodriguez* was reversed. In a *per curiam* opinion, the Court of Appeals adopted Justice Lazer's Appellate Division dissent, 68 N.Y.2d 674, 496 N.E.2d 682, 505 N.Y.S.2d 593 (1986), thus preserving the home or place of business exception as an element of Section 265.02(4). Defendants may, therefore, continue to rely on the constitutional

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prosecution. *See* People v. Rosa, 65 N.Y.2d 380, 386, 482 N.E.2d 21, 25, 492 N.Y.S.2d 542, 546 (1985) (People would have to prove that defendant was nowhere represented by counsel); People v. D'Amato, 12 App. Div. 2d 439, 445, 211 N.Y.S.2d 877, 882 (1st Dep't 1961) (intolerable burden for prosecution to negative every possible excuse constituting good cause for failure to appear when subpoenaed).

[31] *See* Tot v. United States, 319 U.S. 463, 469 (1943).

> [T]he fact that the defendant has the better means of information [can not], standing alone, justify [shifting the burden of proof]. In every criminal case the defendant has at least an equal familiarity with the facts and in most [cases] a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much.

Id.

[32] To prove commission of a crime, the prosecutor must present evidence to identify the defendant as the perpetrator, *see* 1 WHARTON'S CRIMINAL EVIDENCE § 16 (C. Torcia 13th ed. 1972), and therefore it is submitted that information regarding the knowledge of where the defendant possessed the gun would clearly be within the People's reach.

[33] Such proof does not require establishing a negative incapable of direct proof, as in *Rosa* or *D'Amato*. The prosecutor must simply show that one particular site, that of defendant's arrest, was neither lived at nor worked at by the defendant.

requirement that the prosecutor prove each and every element of the offense in every case to sustain a conviction.