

3.03. Presumptions in Criminal Proceedings – Evidence in People’s Case

(1) A presumption is created by statute or decisional law and requires proof of a specified fact (the “basic fact”) from which another fact (the “presumed fact”) may be inferred.

(2) When the prosecution submits evidence from which the trier of fact finds that a basic fact is proven beyond a reasonable doubt, the trier of fact may, but is not required to, infer the presumed fact.

(3) When the prosecution presents evidence in support of a basic fact, the defendant may, but is not required to, present evidence in rebuttal of that fact and the presumed fact. Unless the court determines that the presumption is not applicable, or that there is insufficient evidence warranting a finding of the basic fact, and irrespective of whether the defendant presents rebuttal evidence, it remains for the trier of fact to consider whether the basic fact has been proven beyond a reasonable doubt and whether to infer the presumed fact.

Note

Subdivision (1) provides that this rule applies to a presumption when applied against the defendant in a criminal proceeding. It recognizes that constitutional principles, both federal and state, limit the operation of a presumption in a criminal proceeding against a defendant.

The definition of a presumption is derived from the decisional law of both the United States Supreme Court and the Court of Appeals. (*See County Court of Ulster Cty. v Allen*, 442 US 140, 156 [1979] [“Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an ‘ultimate’ or ‘elemental’ fact—from the existence of one or more ‘evidentiary’ or ‘basic’ facts”]; *People v Leyva*, 38 NY2d 160, 168 n 3 [1975] [a presumption is “a deduction or an inference which the trier of fact may draw from facts found or otherwise established during the course of the trial”].)

As noted by subdivision (1), presumptions may be established by statute (*see e.g.* Penal Law § 220.25 [presumption of possession of a controlled substance]), as well as by decisional law (*see e.g.* *People v Kirkpatrick*, 32 NY2d

17, 23 [1973], *appeal dismissed for want of a substantial federal question* 414 US 948 [1973] ["Generally, possession suffices to permit the inference that the possessor knows what he possesses"]; *People v Hildebrandt*, 308 NY 397, 400 [1955] ["presumptions, in criminal law, need not necessarily be statutory"]. Whether created by statute or decisional law and whether specific to an element of a crime or of general application (such as the presumption of regularity) the finder of fact must be instructed as set forth in subdivision (3).

Before a presumption may be presented to a jury, there must be (or have been) a judicial determination that there is a reasonably high degree of probability that the presumed fact follows from those proved directly. As the Court of Appeals explained in *Leyva* (38 NY2d at 165-166), the United States Supreme Court held that

"a rational connection between facts proved directly and ones to be inferred from them requires a 'substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'. (*Leary v United States*, 395 US 6, 36; see, also, *Turner v United States*, 396 US 398, 407.) Our court has exacted an even higher standard of rational connection. As we said in *People v McCaleb* (25 NY2d 394, 404), the connection must assure 'a reasonably high degree of probability' that the presumed fact follows from those proved directly."

Subdivision (2) sets forth the requirement that a presumption in a criminal case is in fact a permissive inference (*People v McKenzie*, 67 NY2d 695, 696 [1986]; *People v Leonard*, 62 NY2d 404, 411 [1984]; *People v Getch*, 50 NY2d 456, 466 [1980]). Thus, in the criminal law, the term "presumption" set forth by statute or decision law is used interchangeably with the term "inference" (*Leyva*, 38 NY2d at 168 n 3 ["Legislatures have been somewhat loose in their use of the word 'presumption' when an inference is clearly what is intended, thus leading to a good deal of unnecessary confusion"]; see CJI2d[NY] Penal Law § 220.25 [1] [instruction for the presumption of possession of a controlled substance: "What this (presumption) means is that, if the People have proven beyond a reasonable doubt (the 'basic' fact), then you may, but you are not required to, infer from that fact (the 'presumed' fact). Whether or not to draw that inference is for you (the jury) to decide and will depend entirely on your evaluation of the evidence"]]).

The Court of Appeals has cautioned that a " 'mandatory' or 'conclusive' presumption, which operates to *require* the finder of fact to hold against the defendant in the absence of some showing by the defendant to the contrary, may never be applied in a criminal case with respect to one of the elements of the crime being prosecuted" (*Leonard*, 62 NY2d at 411 [a conclusive presumption of regularity as to the conduct of a public official was held to be impermissible]).

Requiring the basic fact to be proved beyond a reasonable doubt is a due process safeguard. (*Barnes v United States*, 412 US 837, 843 [1973] ["if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt)

as well as the more-likely-than-not standard, then it clearly accords with due process”]; *see* CJI2d[NY] Penal Law §§ 165.15 [4]; 165.55, 220.25, 265.15 [instructions for presumptions].)

Examples of the application of a presumption in a criminal case include:

- *Kirkpatrick* (32 NY2d at 23): “Generally, possession suffices to permit the inference that the possessor knows what he [or she] possesses, especially, but not exclusively, if it is in [the possessor’s] hands, on [the possessor’s] person, in [the possessor’s] vehicle, or on [the possessor’s] premises.”
- *People v Everett* (10 NY2d 500 [1962]): The recent and exclusive possession of the fruits of a crime, if unexplained or if falsely explained, permits the inference that the possessor participated in the theft of the property.
- Penal Law § 165.05 (1): A person who takes, operates, exercises control over, rides in, or otherwise uses a vehicle without the owner’s consent is presumed to know that he or she does not have such consent. (*See Matter of Raquel M.*, 99 NY2d 92, 94 [2002].)
- Penal Law § 220.25 (1): The presence of a controlled substance in an automobile is presumptive evidence of knowing possession of that substance by each and every person in the automobile at the time the controlled substance was found unless the controlled substance was concealed upon the person of one of the occupants. (*See Leyva*, 38 NY2d 160.)
- Penal Law § 220.25 (2): The presence of narcotic drugs in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully prepare same for sale is presumptive evidence of knowing possession of the drugs by each person in close proximity to them (*see People v Tirado*, 38 NY2d 955, 956 [1976] [the basic facts establishing that the premises constituted a “drug factory” were proved and permitted the inference that those found in the premises were engaged in the illicit enterprise]; *compare People v Kims*, 24 NY3d 422, 433 [2014] [a basic fact that was necessary to establish the presumption, i.e. that the defendant was “in close proximity” to the drugs, was not proved and thus the presumption was not applicable]).
- Penal Law § 265.15 (3): The presence in an automobile (other than a stolen one or a public omnibus) of contraband weapon is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon is found except if the weapon is found upon the person of one of the occupants therein. (*See People v Lemmons*, 40 NY2d 505 [1976] [whether a pistol found in the handbag of a woman passenger of a car was found “on her person” was a question of fact for the jury]; *County Court of Ulster Cty.*, 442 US 140 [Lemmons’

codefendant unsuccessfully challenged the constitutionality of the presumption].)

- Penal Law § 250.45 (3) (b): When a person uses or installs, or permits the utilization or installation of an imaging device in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, there is a rebuttable presumption that such person did so for no legitimate purpose.

Subdivision (3) is primarily drawn from *Leyva* (38 NY2d at 168-170):

“The purpose of the presumption was to prove the fact of possession [of drugs], inferential though such proof may be. As such, it formed part of the support for the prosecution’s prima facie case. No less than with any other proof of facts offered by a prosecution, contrary evidence from a defendant does not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions. . . .

“It might be possible, of course, that a defendant’s evidence will prove the truth of his choice of inferences so conclusively that reasonable persons could no longer believe the inference authorized by the statute. There is nothing arcane about such a situation; where a defendant’s proof is conclusive and reasonable persons cannot disagree about the matter at issue, our courts always have the power to issue a trial order of dismissal (CPL 290.10) or direct the jury’s finding on an element of a crime. . . .

“In such a case, the fact that a jury is not given the opportunity to consider the inference authorized by the statute does not mean that the inference plays no role in the case. It merely means that, though the presumption suffices to enable the prosecution to make out a prima facie case, it is no longer sufficiently tenable to permit a jury, in the light of the defendant’s evidence, to consider it. It receives the same treatment that any other ‘fact’ so thoroughly controverted would receive.” (See e.g. *People v Adamkiewicz*, 298 NY 176, 181 [1948] [a statutory presumption of intent to possess a weapon unlawfully was rebutted]; *Kims*, 24 NY3d at 433 [a statutory presumption of criminal possession of drugs was inapplicable because the defendant was not in “close proximity” to the drugs].)