



STEVE CLARK
ATTORNEY GENERAL

B
STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

(501) 371-2007

January 23, 1985

OPINION NO. 85-20

The Honorable David R. Matthews
State Representative
P.O. Box 36
Lowell, Arkansas 72745

Dear Representative Matthews:

By letter you have requested of our office an opinion as to the "constitutionality of the creation of the 'rebuttal presumption'" in a bill that you propose to sponsor. The particular language to which our attention is called is in the form of an addendum to the present language of Ark. Stat. Ann. §75-659 (Repl. 1979) and provides:

In a proceeding for a violation of this act, proof that the particular vehicle described in the citation, complaint, or warrant was in violation of this act together with proof that the defendant named in the citation, complaint, or warrant was, at the time of the violation, a registered owner of the vehicle, shall constitute in evidence a rebuttable presumption that the registered owner of the vehicle was the driver of the vehicle at the time of the violation.

Presumptions are often regarded as being the same as an inference, however there are certain differences that set them apart. A line of cases in the United States Supreme Court has discussed the constitutional validity of the use, in criminal trials, of "permissive" inferences or presumptions. The Court has upheld such inferences as applied to certain situations and struck them down as applied to others. See, e.g., Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). In Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), the Court noting the value of inferences and presumptions to our adversary system observed:

. . . . The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity on a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068, 51 Ohio Ops 2d 323; *Mullaney v. Wilbur*, 421 U.S., at 702-703, n 31, 44 L.Ed.2d 508, 95 S.Ct. 1881. (Emphasis added.)

Ulster County Court v. Allen, 412 U.S. at 156, 60 L.Ed2d at 791.

If too loosely allowed, the inference or presumption could compromise the constitutional canon in criminal cases 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." In *RE Winship*, *supra*, at U.S. 364, 25 L.Ed.2d at 375. The Court in *Ulster* also drew a distinction between "permissive" and "mandatory" presumptions. The distinction being relevant when consideration is to be given the standard of judicial review as to the question of whether or not the statutory inference comports with the requirements of due process. See, *Ulster County Court v. Allen*, 412 U.S. at 157-160, 60 L.Ed.2d at 792-794. See also, *Stone v. Lockhart*, 414 F.Supp. 1180 (E.D. Ark. 1976).

There is Arkansas case law authority to support a position that the state courts would construe the term "rebuttable presumption" as a "justifiable inference", permissive in nature. See, *French v. State*, 256 Ark. 298, 506 S.W.2d 820 (1974); *Stone v. Lockhart*, *supra*. (A caveat needs to be expressed here, however, that the statute then in question also provided clearly that the presumption could be negated.) Given this interpretation, the burden in attacking the constitutional validity would rest heavily upon the application as opposed to the face of the statute.

Given the foregoing, it would be the opinion of this office that on its face the statutory language cited at

The Honorable David R. Matthews
Page 3
January 23, 1985

the outset of this opinion could pass constitutional muster. It could, however, be reworded in such a way that the State's position could be strengthened to withstand a constitutional challenge and we would consider this to be prudent. Even so, if in application the statutory language ran afoul of the principles enumerated in Ulster it would be extremely difficult to find constitutional validity. Moreover, although not addressed by your request or this opinion we note that the wording of section two of the proposed act could be subject to challenge on principles found within the Fifth Amendment.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Michael E. Wheeler.

Sincerely yours,


STEVE CLARK
Attorney General

SC:MEW:sfc

cc: Files