Wyoming Law Journal

Volume 6 | Number 3 Article 5

December 2019

An Affirmative Defense in a Criminal Action

Oscar A. Hall

In conclusion, it can only be said that the problem seems to revolve around the extent to which the courts will accept the legislative determination that prices of barbers bear a real and substantial relation to the public health and welfare.

BOB C. SIGLER.

AN AFFIRMATIVE DEFENSE IN A CRIMINAL ACTION

"The law imposes upon the state in criminal prosecution the burden of proving the case set forth in the indictment or information, in all its material parts, beyond a reasonable doubt. . . ."[1] In the Anglo-American system of jurisprudence, unlike the Continental system ,the parties themselves apportion the task of abducing evidence.[2] They must apprise themselves of both the burden of proof and the burden of going forward with the evidence. Thus in criminal cases the state, as heretofore mentioned, must assume the former burden beyond a reasonable doubt if a conviction is to stand; in civil cases the plaintiff assumes the same burden by a preponderance of the evidence.

Preponderance and reasonable doubt are of course not synonymous terms.[3] The distinction had its origin about the end of the 1700's and was first applied in capital cases.[4] But where the accused in a criminal action interposes an affirmative defense this distinction seems to become less clear, according to some decisions.

The courts are not in agreement as to what in fact constitutes an affirmative defense. The term has been defined as "some distinct substantive ground of defense to a criminal charge, not necessary to a prosecution on which the indictment is founded,"[5] or "facts wholly disconnected from the body of the particular offense charged."[6] Such defense is matter not covered by pleas of guilty, not guilty and former conviction or acquittal.[7] Alibi has been said to be an affirmative defense,[8] as well as the contrary.[9] The discord may stem in part from the fact that particular matter may constitute an affirmative defense under some circumstances while not so under others. An exception within a statute may be part of the offense, in which instance the state will plead and prove it, or it may be an excuse or justification providing an affirmative defense[10] to be pleaded and proved by defendant. An exception is part of the offense when it qualifies the

1. 20 A.J. 1111.
2. 9 Wigmore, Evidence, 266.
3. Lovejoy v. State, 62 Ark. 478, 36 S.W. 575 (1896).
4. 9 Wigmore, Evidence, 317.
5. Commonwealth v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410 (1854).
6. Commonwealth v. Gentry, 261 Ky. 564, 88 S.W.(2d) 273 (1935).
7. Ibid.
8. People v. Meisenhelter, 381 Ill. 378, 45 N.E.(2d) 678 (1942) dictum.
9. State v. Hubbard, 351 Mo. 143, 171 S.W.(2d) 701 (1943).
10. State v. Stallman, —R.I.— 79 A.(2d) 611 (1951).

offense charged or is part of its description or definition. For example, in a prosecution under an abortion statute, the exception, "unless the same be necessary to preserve her life," was held a constituent element of the offense and must be proved as a necessary part of the state's case.[11] It is a defense when proof of it relieves defendant of criminal liability. Thus under a statute prohibiting transportation of garbage without a license, unless the one so transporting was a householder, that defendant was a householder transporting his own garbage was an affirmative defense.[12] And confining a defense to the original transactions on which the charge is founded will not give rise to an affirmative defense.[13]

Insanity,[14] duress,[15] self-defense,[16] prior jeopardy,[17] intoxication,[18] asphasis,[19] entrapment,[20] exceptions under the circumstances before mentioned,[21] the defense of a wife's adultery interposed to a criminal action for non-support of the wife,[22] and the defense of killing another's dog to protect accused's smaller dog,[23] have all been held to be affirmative defenses.

If the defense is affirmative (or positive[24] as sometimes called) the effect upon a criminal case may be threefold. First, it is said that such defense may be outside the bounds of the regular pleas and defendant must bring it in by a special plea.[25] It is not a denial of the allegations of the information.[26] Secondly, some courts hold that defendant then assumes the burden of going forward with the evidence,[27] though the burden of proof does not shift.[28] And last, in conflict with the foregoing, other courts hold that the defendant then assumes the burden of proof.[29] The state first must make out a prima facie case before the latter two requirements apply.[30] If on appeal a defense is held to be affirmative, and the accused did not assume either burden in the trial court, he will be convicted. Therefore, he must orginally ascertain this fact at his peril. Failure to assume the burden of proof also accounts for the fact that the quantum of proof of such defense is not defined in many cases because an instruction was not given in the court below.[31]

---

11. State v. Angelo, 72 R.I. 412, 52 A.(2d) 513 (1947).
12. See note 10, supra.
13. Wharton, American Criminal Law, 212.
14. People v. Dillon, 8 Utah 92, 30 Pac. 150 (1892).
15. State v. Sappienza, 84 Ohio St. 63, 95 N.E. 381 (1911).
16. State v. Stockley, 3 Boyce (Delaware) 246, 82 A. 1078 (1911).
17. State v. Taylor, 70 N.D. 201, 293 N.W. 219 (1940).
18. State v. Hill, 46 La. Ann. 27, 14 So 294, 49 Am.St.Rep. 316 (1894).
19. Commonwealth v. Morrison, 266 Pa. 223, 109 A. 878 (1920).
20. People v. Grijalva, 48 Cal. App.(2d) 690, 121 P.(2d) 32 (1941).
21. City of Brentwood v. Nalley, 208 S.W.(2d) 838, (Mo. 1948).
22. State v. Schweitzer, 57 Conn. 532, 18 A. 787 (1889).
23. State v. Stewart, 199 S.C. 1, 18 S.E.(2d) 528 (1942).
24. People v. Lee, 9 Cal. App.(2d) 99, 48 P.(2d) 1003 (1935).
25. State v. Carte, 157 Kan. 139, 138 P.(2d) 429 (1943).
26. See note 17, supra.
27. Anderson v. State, 147 Tex. Cr. 410, 181 S.W.(2d) 78 (1944).
28. Stribling v. State, 18 Okla. Cr. 48, 192 Pac. 590 (1920).
29. State v. Rosi, 120 Wash. 514, 208 Pac. 15 (1922).
30. Hawkins v. State, 77 Tex. Cr. 520, 179 S.W. 448 (1915).
31. Bennett v. State, 100 Miss. 684, 56 So. 777 (1911).

The courts have encountered great difficulty in ascertaining the quantum of such proof to be required when an affirmative defense has been pleaded. This is especially true of the defense of insanity. Where insanity has been interposed as a defense it has sometimes been held that it must be established by a *preponderance* of the evidence,[32] but other courts have instructed that, if upon the whole evidence the jury entertain a reasonable doubt as to sanity, they must acquit.[33] One state has declared by statute that insanity must be proved beyond a reasonable doubt.[34] Thus, there are two major points of view, which can be reconciled in part. The courts of the first persuasion begin with the presumption that everyone is sane until the contrary is shown, and that when the commission of a crime is admitted or clearly proved, and insanity is alleged as a defense, it being an independent, affirmative defense, and opposed to the natural order of things, it must be established by a preponderance of the evidence.[35] Courts of the latter persuasion begin with the presumption that everyone is innocent, that the burden of proving all elements of crime rests on the state and never shifts; and that, when the defendant's sanity is put in issue, the state must prove it beyond a reasonable doubt, because, without a mind capable of crime, there can be no crime committed.

With the affirmative defenses other than insanity, the presumption of innocence alone is to be overcome; still the decisions fall into the same two main categories as to quantum of proof. The courts holding that defendant must establish his affirmative defense by a preponderance of the evidence reason that defendant has admitted the state's prima facie case, but seeks to avoid criminal liability because of justifying or mitigating circumstances. Invocation of the positive defense assumes that the act charged as a public offense was committed.[36] The presumption of innocence has been overcome, and if the case were to rest at this point defendant would be found guilty. The burden of proof has shifted. It is likened to confession and avoidance in a civil action at common law. Defendant must then go forward with the evidence as well as sustain the burden of proof as to his defense. This amounts to compelling accused to prove his innocence.

Under the "reasonable doubt" rule, the defendant has the benefit of the presumption of innocence throughout the case, for the rule is founded on that presumption. "Reasonable doubt is that state of the case which, after the *entire* comparison and consideration of *all* the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction . . . of the truth of the charge. . . ."[37] The state's prima facie case does not affect the burden of proof but relates only to what may

32. Tunget v. Commonwealth, 303 Ky. 834, 198 S.W.(2d) 785 (1946).
33. Davis v. U.S., 160 U.S. 469, 16 Sup.Ct. 353, 40 L.Ed. 499 (1895). And see Miller on Criminal Law, 136.
34. Oregon Compiled Laws Annotated, Sec. 26-929.
35. State v. Clark, 34 Wash. 485, 76 Pac. 98 (1904).
36. See note 24, supra.
37. Chief Justice Shaw in Commonwealth v. Webster, 5 Cush. (Mass.) 295 (1850).

be called the burden of going forward with the evidence, or more accurately, the risk of non-persuasion.[38] The burden of proving defendant guilty of the crime as charged remains with the prosecution throughout the case. Though defendant must introduce some evidence, it is sufficient that his evidence create a doubt in the minds of the jury.[39] Evidence sufficient to raise such doubt may fall short, equal, or be in excess of that evidence required to prove the defense by the preponderance rule.

The problem is quite controversial. It is the writer's opinion that the reasonable doubt rule is the better rule. The presumption of innocence should continue throughout the trial, and the state should have the burden of proving guilt.[40] This rule was followed by the Wyoming Supreme Court where the defense of insanity was interposed.[41] By following the rule of preponderance of evidence as to affirmative defenses, the court must instruct as to both rules in any criminall action. Instructions on two different quanta of proof only serve to confuse the jury and to compel the defendant to assume a greater burden than required. Moreover, the distinction between civil and criminal cases tends to become obliterated. But perhaps in practice it is not of such great moment after all. As the Supreme Court of Washington once said, "The distinction between the quantum of proof necessary to raise a reasonable doubt and that necessary to constitute a fair preponderance of the evidence is more fanciful than real. When evidence is sufficient to raise a reasonable doubt as such doubt is usually defined and understood, it may also be said in a sense to preponderate. The distinction . . . is of little value."[42]

OSCAR A. HALL.

38. State v. Davis, 214 N.C. 787, 1 S.E.(2d) 104 (1939).
39. Cook v. People, 60 Colo. 263, 153 Pac. 214 (1916).
40. State v. Brennan, 85 Ohio App. 175, 88 N.E.(2d) 281 (1949).
41. State v. Pressler, 16 Wyo. 214, 92 Pac. 806, 15 Ann.Cas. 93 (1907).
42. See note 35, supra.