Washington University Law Review

Volume 1957 | Issue 3

January 1957

Criminal Law: Proof of Intent Under Burglary Tool Statutes, Benton v. United States, 282 F.2d 341 (D.C. Cir. 1956)

desire to assist "white" orphans subordinate to a general desire to help indigent orphans regardless of race.[33]

It is submitted that, of the two available alternatives, selection of the one deleting the word "white" from the will and retaining the present trustee as administrator of the college would be the better choice. First of all, there is language in the testator's will that easily could be interpreted as expressing a general intent to educate poor people, irrespective of their race or color,[34] thus making the doctrine of cy pres available to the court.[35] Further, given the changing political and social conditions realized under the Thirteenth and Fourteenth Amendments,[36] there is some reason to suppose that deletion of "white" from the will would not be *contrary* to the intent of the testator.[37] Finally, since administration of the college can no longer lawfully continue as in the past, there is much reason to believe that the primary intent of the testator would be to keep the school operating, free from further obstructions, as nearly in accordance with the previous mode of operation as possible.[38]

CRIMINAL LAW: PROOF OF INTENT UNDER BURGLARY TOOL STATUTES

Benton v. United States, 232 F.2d 341 (D.C. Cir. 1956)

Following a search of defendant's car which yielded a burlap bag containing an axe, a sledge hammer, a chisel, a brace and bit, a hacksaw and four blades, twenty-five feet of rope, and two wrecking bars, defendant was convicted of possessing implements which "may reasonably be employed in the commission of any crime."[1] The pertinent part of the applicable statute provides that "no one shall have in his possession in the District any instrument, tool or other implement for picking locks or pockets, or that is usually employed or reasonably

33. See note 27 *supra.*

34. "I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed . . . . I have sincerely at heart the welfare of the city of Philadelphia . . . ." Vidal v. Girard's Executors, 43 U.S. 127, 129 (1884). See also Attorney-General v. Price, [1912] 1 Ch. 667 (C.A.). *But see* Craft v. Shroyer, 81 Ohio App. 253, 74 N.E.2d 589 (1947).

35. *But see* 386 Pa. at 569, 127 A.2d at 297.

36. The Thirteenth Amendment was ratified in 1865 and the Fourteenth Amendment in 1868, respectively thirty-five and thirty-eight years after the testator's will was drawn.

37. There is reason to believe that a man of such philanthropy and truly human generosity as was Stephen Girard, who devoted almost his entire fortune to promoting public works and alleviating human suffering, would place himself beyond any barriers of color. See 386 Pa. at 617-18, 127 A.2d at 319-20 (dissenting opinion). See also note 34 *supra. But see* 386 Pa. at 577-78, 127 A.2d at 300-01 (concurring opinion).

38. See 386 Pa. at 568, 127 A.2d at 296.

1. D.C. CODE ANN. § 22-3601 (Supp. 1951).

may be employed in the commission of any crime, if he is unable to satisfactorily account for the possession of such implement. . . ."[2] The court of appeals, in upsetting the conviction, held: that although not specifically mentioned in the statute, felonious intent was an essential element of the crime; that the statute raised a presumption of such intent where one merely possessed tools "which may be employed in the commission of any crime"; and that the statute was therefore unconstitutional when applied to possession of tools which do not in themselves give rise to sinister implications because there was no rational connection between the possession of such tools and the intent presumed.[3]

The court's interpretation of the statute as requiring felonious intent raises the question of the character and quantum of evidence that the state must adduce to prove that intent under the burglary tool statutes of the various jurisdictions.[4] Generally these statutes can be separated into four categories: (1) those that expressly require proof of intent; (2) those that require proof of circumstances which "evince" intent; (3) those that require circumstances from which intent can be presumed or inferred; and (4) those which make no reference to intent.

The vast majority of states have statutes which come within the first category.[5] Statutes of this type declare that possession of certain designated tools, accompanied by the requisite intent, constitutes a substantive crime. Thus the state must prove felonious intent just as it must prove any other element of the crime,[6] *i.e.*, beyond a reason-

2. *Ibid.*

3. Benton v. United States, 232 F.2d 341 (D.C. Cir. 1956).

4. All the states except Delaware, Maine, Texas and West Virginia have burglary tool statutes of some kind, although some states classify them under different headings. Thus the burglary tool statute of New Jersey is classified under "Disorderly Persons," the burglary tool statute of Louisiana is classified under "Illegal Carrying of Weapons," and the burglary tool statute of Kansas is classified under "Explosives."

5. ALA. CODE ANN. tit. 14, § 90 (1940); ARIZ. REV. STAT. ANN. c. 2, § 13-304 (1956); CAL. CODE ANN. P.C. § 466 (Deering 1949); COLO. REV. STAT. c. 40, § 8 (1953); CONN. GEN. STAT. c. 419, §§ 8408-09 (1949); FLA. STAT. ANN. tit 44, § 810-06 (1941); GA. CODE ANN. c. 26, § 2701 (1935); IDAHO CODE ANN. c. 14, § 18-1406 (1955); ILL. ANN. STAT. c. 38, § 87 (1954); KY. REV. STAT. § 433.130 (1953); LA. REV. STAT. tit. 14, § 95 (1950); MASS. ANN. LAWS c. 266, § 49 (1954); MICH. STAT. ANN. c. 286, § 28.311 (1938); MONT. REV. CODE tit. 94, § 94-908 (1953); NEB. REV. STAT. art. 5, § 28-534 (1950); N.H. REV. STAT. ANN. c. 583, § 583.12 (1955); N.J. REV. STAT. tit. 2, § 2:202-7 (1939); N.C. GEN. STAT. c. 14, § 14-35 (1950); N.D. REV. CODE § 12-3503 (1943); OHIO REV. CODE tit. 29, § 2907.111 (Baldwin 1956); OKLA. STAT. ANN. tit. 21, § 1437 (1937); PA. STAT. ANN. tit. 18, § 4904 (Purdon 1939); P.R. ANN. LAWS tit. 33, § 1621 (1954); R.I. GEN. LAWS c. 608, § 8 (1938); TENN. CODE ANN. c. 9, § 39-908 (1956); UTAH CODE ANN. c. 9, § 76-98 (1953); VT. REV. STAT. c. 363, § 8303 (1947); WIS. STAT. ANN. c. 343, § 343-131 (1957); WYO. COMP. STAT. ANN. § 9-312 (1945).

6. Under statutes of the first category, the elements of the crime are: (1) suitability of the tools for breaking and entering; (2) possession of the tools with knowledge of their character; and (3) intent. People v. Taylor, 410 Ill. 469, 102

able doubt.[7] It is not necessary for the state to show that the defendant specifically intended to use the tools for committing a particular burglary.[8] It need only prove that the defendant had the tools in his possession with a general intent to commit a burglary.[9] That such a general intent can be proved with greater facility than the intent to commit a specific burglary is manifest.[10]

The statutes which fall into the second category,[11] while also requiring intent by their terms, take the nature of the evidence necessary to prove intent out of the realm of conjecture. Thus, what is implicit in statutes of the first category is actually spelled out in statutes of the second category: the circumstances surrounding the possession of the tools must allow the intent to commit a burglary to be reasonably inferred.[12]

The third category,[13] into which the principal case falls,[14] while

N.E.2d 529 (1951); People v. Dorrington, 221 Mich. 571, 191 N.W. 831 (1923). See also 30 CHI.-KENT L. REV. 278 (1952). It should be noted that the tools need not be designed and manufactured specifically to be used in a burglary. If the tools are suitable for the purpose, the first element of the crime is satisfied, even though they can also be used for innocent purposes. State v. Widenski, 50 R.I. 148, 146 Atl. 407 (1929); Commonwealth v. Riley, 192 Ky. 153, 232 S.W. 630 (1921); Commonwealth v. Tivnon, 74 Mass. (8 Gray) 375 (1857).

7. State v. Salernitano, 27 N.J. Super. 537, 99 A.2d 820 (App. Div. 1953). See also 20 AM. JUR., *Evidence* § 149 (1939); MCCORMICK, EVIDENCE § 318 (1954); 9 WIGMORE, EVIDENCE § 2497 (3d ed. 1940), where the author points out that there is some difference of opinion among the courts whether the state must prove each element of the crime beyond a reasonable doubt, or only the whole issue. For a discussion of the history and meaning of "reasonable doubt" see 9 *id.* § 2497; and MCCORMICK, *op. cit. supra* at § 321.

8. Commonwealth v. Tivnon, 74 Mass. (8 Gray) 375, 380 (1857).

9. Commonwealth v. Dionisio, 178 Pa. Super. 330, 116 A.2d 109 (1955); People v. Taylor, 410 Ill. 469, 102 N.E.2d 529 (1951); Commonwealth v. Tivnon, 74 Mass. (8 Gray) 375 (1857). See also 30 CHI.-KENT L. REV. 278 (1952); 12 C.J.S., *Burglary* § 69 (1938).

10. The cases are uniform in holding that circumstantial evidence can be used to prove the necessary intent. This comment is directed towards the question: what *kind* of circumstances must the state prove in order to make its case?

Courts have held that in proving the general intent necessary under statutes of the first category, the state will be permitted to show: that the defendant is a burglar, that he was in haste to leave town, and gave different points of destination, People v. Jefferson, 161 Mich. 621, 126 N.W. 829 (1910); that he had the tools secreted in his clothing, People v. Donovan, 216 Mich. 231, 184 N.W. 863 (1921); that he was associating with burglars at the time of his arrest, Brown v. State, 32 Ohio Cir. Ct. 93 (1910); that he had other tools in his possession, which, when viewed in connection with the tools, the possession of which formed the gravamen of the crime, indicated that he had the intent to commit a burglary, State v. Widenski, 50 R.I. 148, 146 Atl. 407 (1929) (flashlight), State v. Salernitano, 27 N.J. Super. 537, 99 A.2d 820 (App. Div. 1953) (gloves and flashlights).

11. MINN. STAT. ANN. c. 621, § 621.13 (1945); N.M. STAT. ANN. c. 40, § 40-9-8 (1953); N.Y. PENAL CODE § 408; S.C. CODE c. 5, § 16-302 (Supp. 1952); WASH. REV. CODE tit. 14, § 2582 (1953).

12. State v. Pulley, 216 S.C. 552, 59 S.E.2d 155 (1950).

13. IND. ANN. STAT. c. 7, § 10-703 (Burns 1956); IOWA CODE ANN. tit. 35, § 708-7 (1950); MD. CODE ANN. § 576 (Flack 1951); MISS. CODE ANN. tit. 11, § 2046 (1942); NEV. REV. STAT. § 205.080; S.D. CODE § 13-3707 (1939); VA. CODE § 18-159 (1950).

14. The court construed that part of the statute which required the possessor of the tools to "satisfactorily account" for them (see text at note 2 *supra*) as raising the forbidden presumption.

also requiring intent, purports to alleviate the state's burden of proof. Under these statutes the necessary intent is presumed upon a showing by the state that the defendant possessed "burglary tools."[15] The accepted yardstick for measuring the constitutionality of such statutory presumptions is the "rational connection test"[16] which was first enunciated by the Supreme Court in *Mobile, J.K.R.R. v. Turnipseed.*[17] The rational connection test requires that there be some rational relationship—in common experience—between the fact proved and the fact presumed. Due process is violated under the test whenever a criminal statute presumes guilty intent from wholly innocuous circumstances.[18] For example, category three statutes will be upheld against a constitutional challenge only if there is a rational connection between the possession of certain tools and the presumption that the defendant intended to use them to commit a burglary. The distinction between the first two categories and this one is that in the first two, the state must adduce evidence to prove felonious intent, while in the third, in order to satisfy the rational connection test, the state must prove that the tools which the defendant had in his possession might in common experience be designated as "burglary tools."

Only three states, Missouri,[19] Arkansas,[20] and Kansas[21] have statutes which fall into the last category. Although the Missouri and Arkansas statutes are worded almost exactly alike,[22] the courts of

15. The effect of a presumption in a criminal case, that is, whether it authorizes a directed verdict of guilty, is beyond the scope of this comment. The trial court in the principal case submitted the issues to the jury. The "general trend" under the "stolen goods" statutes, which are closely analogous to the burglary tool statutes, is to hold that the presumption merely authorizes the court to send the case to the jury and the jury to convict. See 9 WIGMORE, *op. cit. supra* note 7, at § 2513. For a general discussion of presumptions and their effects, see 9 *id.* §§ 2485-93; MCCORMICK, *op. cit. supra* note 7, at c. 36.

16. Tot v. United States, 319 U.S. 463 (1943); Morrison v. California, 291 U.S. 82 (1934); McFarland v. American Sugar Refinery Co., 241 U.S. 79 (1916).

17. 219 U.S. 35 (1910). The Court, speaking through Justice Lurton, said: "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Id.* at 43.

18. The rational connection test has not met with the universal approval of legal scholars. For a history and discussion of the test, and a comparison between it and other tests used to determine the constitutionality of statutory presumptions, see MCCORMICK, *op. cit. supra* note 7, at § 313. See also Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17, 178 (1930); Keeton, *Statutory Presumptions—Their Constitutionality and Their Legal Effect*, 10 TEXAS L. REV. 34 (1931); Comment, 38 MICH. L. REV. 366 (1940).

19. MO. REV. STAT. § 560.115 (1949).

20. ARK. STAT. ANN. § 41-1006 (1947).

21. The Kansas statute requires only that the "instrument or mechanical device" be "designed or commonly used" for breaking and entering. KAN. GEN. STAT. ANN. art. 24, § 21-2437 (1949). Although the statute has been in effect at least since 1923, no cases decided under it have been found and it is therefore disregarded in the following analysis.

22. The Arkansas statute reads as follows:
41-1006—*Possession or manufacture of burglar's tools.* Any person who

these states have reached diametrically opposite results. The Supreme Court of Missouri has construed its statute to make intent an essential element of the crime.[23] Thus by interpretation the court placed the statute in category one, with its attendant requirements regarding proof of intent. The Supreme Court of Arkansas, on the other hand, has held that under its statute proof of mere possession of "burglary tools" is enough to sustain a conviction.[24] The Arkansas courts, have, however, recognized that many tools can be used innocently as well as to commit a burglary, and have declared that if the statute is construed to make mere possession of "common, ordinary, every-day work tools" a felony, the statute would be unconstitutional.[25] However, if the combination of the tools in the defendant's possession, or the circumstances surrounding their possession would permit a jury

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makes, mends, designs or sets up, or who has in his custody or concealed about his person, any tool, false key, lockpick, bit, nippers, fuse, force screw, punch, drill, jimmy, bit, or any material, implement or other mechanical device whatsoever, adapted, designed or commonly used for breaking into any vault, safe, railroad car, boat, vessel, warehouse, store, shop, office, dwelling house, or door, shutter, or window of a building of any kind, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two (2) years, nor more than ten (10) years.

The Missouri statute reads as follows:

§ 560.115—Any person who makes, mends, designs or sets up, or who has in his custody or concealed about his person any tool, false key, lock pick, bit, nippers, fuse, force screw, punch, drill, jimmy, bit, or any material, implement, *instrument,* or other mechanical device, whatsoever, adapted, designed, or commonly used for breaking into any vault, safe, railroad car, boat, vessel, warehouse, store, shop, office, dwelling house, or door, shutter, or window of a building of any kind, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two years, nor more than ten years. (Emphasis added.)

Note that the word "instrument" in the Missouri statute is not present in the Arkansas statute. This is the only difference between the two.

23. State v. Hefflin, 338 Mo. 336, 89 S.W.2d 938 (1935). See also State v. Lorts, 269 S.W.2d 88 (Mo. 1954).

24. Cascio v. State, 213 Ark. 418, 210 S.W.2d 897 (1948); Prather v. State, 191 Ark. 903, 88 S.W.2d 851 (1935); Satterfield v. State, 174 Ark. 733, 296 S.W. 63 (1927). Indictment under the statute need not allege intent. Jones v. State, 181 Ark. 336, 25 S.W.2d 752 (1930).

25. The court in Satterfield v. State, 174 Ark. 733, 296 S.W. 63 (1927) said:

This statute was passed in 1915, and has never before been before this court for construction. It is notable that the statute does not require an intent to commit the crime of burglary to make the possession of such tools or implements unlawful. The bare possession thereof, without anything more, is made a felony. In this respect it is unlike the statutes of some of the other states. This being a criminal statute, it must be strictly construed. . . . And the construction must be strict as against the defendant but liberal in his favor. . . . But this rule of strict construction must be applied with other rules of construction in mind so as not to work an absurdity or to defeat the intent of the legislature. . . .We must attribute to the legislature, in enacting the above statute, the intention to accomplish a useful and laudable purpose, that of eliminating the crime of burglarly as far as possible, by making it unlawful to make, mend, design, set up or have in possession burglar tools, such tools as are peculiarly and fittingly "adapted, designed, or commonly used for breaking into any vault [etc.] . . ." We can not attribute to the legislature the intention to prohibit the making, mending or designing, setting up or having in possession of the common, ordinary, everyday work

reasonably to believe that they are in fact "burglary tools," then the mere possession of them would be enough to sustain a conviction.[26]

It is submitted that the state must introduce the same character and quantum of evidence in all four categories, although for different purposes. In the first two categories by the terms of the statutes, and in Missouri by judicial interpretation, the state must prove felonious intent, and it does this by showing that the circumstances under which the defendant had the tools in his possession would allow a jury reasonably to believe that the defendant intended to commit a burglary. In the third category the state must show that the tools found in the defendant's possession were in fact "burglar's tools," that is, that the intent may be presumed from them without contravening the requirements of the rational connection test. It strains the imagination to conceive of any tool which can be used exclusively for committing burglaries.[27] Therefore, the only way in which the state can meet the requirements of the rational connection test is to show that the combination of tools in the defendant's possession, or the circumstances under which they were found in his possession, would justify classifying them as "burglar's tools"[28] in common experience.

Finally, although the Arkansas court has interpreted its statute as not requiring the state to show felonious intent, the state must, nevertheless, adduce evidence, direct or circumstantial, from which

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tools of a mechanic, plumber, carpenter, farmer, or other person who may require such tools in his business, trade, or profession. *If so it would be unconstitutional and void.* The tools mentioned, including the particular enumeration of tools (and every tool mentioned may be had for a lawful purpose), must be such as are "adapted, designed, or commonly used by burglars." (Emphasis added.)

26. Cascio v. State, 213 Ark. 418, 210 S.W.2d 897, 898 (1948); Prather v. State, 191 Ark. 903, 88 S.W.2d 851, 852 (1935).

27. Mahar v. Lainson, 247 Iowa 297, 72 N.W.2d 516 (1955); Prather v. State, 191 Ark. 903, 88 S.W.2d 851 (1935); State v. Erdlen, 127 Iowa 620, 103 N.W. 984 (1904). The court in the *Erdlen* case said:

> The statute does not, however, undertake to define what tools come within the meaning of the term as used. And, turning away from the statute, we cannot say that any particular tool or set of tools is so generally and exclusively known as burglar's tools that the common mind must needs picture the same upon the bare utterance of the expression, and without further description. Quite to the contrary, it is undoubtedly true that any one of possible thousands of tools may be used by a burglar in the prosecution of his marauding expeditions. Indeed, it is difficult to conceive that there can be any tools made use of by burglars—from the bungler to the expert—which may not also have a place in the uses of legitimate industry.

Id. at 621, 103 N.W. at 985.

The court in the principal case, however, indicated that certain implements give rise to sinister implications per se, citing "lottery tickets" and "opium" as examples. That neither of these is a burglary tool is patent. It is submitted that the rule of the *Erdlen* case is the correct one.

28. It is apparent that if the view of State v. Erdlen, *supra* note 27, is accepted, and the decision of the court in the principal case is interpreted as restricting the presumption to tools which in themselves give rise to sinister implications, without any extrinsic evidence to show that the circumstances make them sinister, no such presumption could ever be valid.

the jury might reasonably believe that the tools were in fact "burglar's tools" within the purview of the statute. It is submitted, therefore, that as a practical matter, the variations in wording and interpretation of the burglary statutes of the several states are really distinctions without a difference.

TORTS: THE REMEDY OF A PERSON DEFAMED ON RADIO OR TELEVISION AGAINST HIS DEFAMER—A CRITIQUE

Basic to the Anglo-American legal system is the premise that the common law is a flexible instrument of justice, capable of developing to meet the needs of a society living in conditions completely different from, and entirely unanticipated by, the society in which the law originated.[1] The capacity of the common law to grow has been seriously challenged in recent years by the inventions of radio and television and the appearance of broadcast[2] defamation cases. Whether the common law affords the person defamed on a broadcast a remedy against his defamer is a question which the courts have found especially difficult to answer.[3] The causes of this difficulty lie in peculiarities of the common law which date from 1812, when the division of defamation into the torts of libel and slander was definitely settled by *Thorley v. Lord Kerry*.[4] At that time it was believed that the distinction between the torts was a purely formal one: libel was written, slander was oral, defamation.[5] Libel, however, carried the more serious consequences. The plaintiff in a libel suit recovered upon showing he had been defamed, without proving damage.[6] In slander, on the other hand, unless the offensive words fit into one of several narrow categories known as "slander per se,"[7] plaintiff was required to prove special damage.[8] Special damage was restricted to actual pecuniary loss, pleaded in detail and proved precisely as pleaded.[9]

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1. See Woods v. Lancet, 303 N.Y. 349, 354-55, 102 N.E.2d 691, 694, 27 A.L.R.2d 1250 (1951).

2. Throughout this comment, the word "broadcast" is used to denote radio and television cases collectively.

3. This comment deals primarily with this problem. The equally intriguing question of the liability of the broadcasting station is not considered except as it illuminates the main issue.

4. 4 Taunt. 355, 128 Eng. Rep. 367 (1812).

5. PROSSER, TORTS § 93 (2d ed. 1955) (hereafter cited PROSSER).

6. *Ibid.*; 1 HARPER & JAMES, TORTS § 5.9 (1956); 3 RESTATEMENT, TORTS § 569 (1938) (hereafter cited RESTATEMENT).

7. The categories were: imputations of serious crimes; imputations of certain loathsome diseases; imputations affecting the plaintiff in his business, trade, profession or office; and, in some jurisdictions, imputations of unchastity to women. PROSSER § 93.

8. *Ibid.*; RESTATEMENT § 575.

9. MCCORMICK, DAMAGES §§ 114-15 (1935).