

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002792-DG

CHARLES BROOKS

APPELLANT

ON DISCRETIONARY REVIEW FROM MCCRACKEN CIRCUIT COURT  
v. HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 00-XX-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MCANULTY, MILLER AND TACKETT, JUDGES.

MILLER, JUDGE: Charles Brooks brings this appeal from a November 9, 2000, order of the McCracken Circuit Court. We affirm.

On June 29, 2000, Brooks was in the Dillard's department store in Paducah, Kentucky with a woman. Security guards Floyd Habeck, and James Boyett were dispatched to the ladies' dress department after being alerted to unusual activity from Brooks and the female. Upon their arrival, Habeck and Boyett observed Brooks crouching behind a sales display. Brooks then came from behind the display, walking toward the front door

of the store, carrying a Sears shopping bag. The bag had a hole in it, with merchandise still on hangers protruding from it. Both guards followed Brooks as he headed toward the front doors. When Habeck stepped in front of Brooks, Brooks turned and went into the junior department. Brooks made no attempt to pay for the merchandise before leaving the ladies' department.

After entering the junior department, Brooks went behind another display still carrying the bag. He emerged from behind this display without the bag. Boyett retrieved it from the middle of the display. Both guards then stopped Brooks before he could exit the store. When Boyett spoke with Brooks about the bag, Brooks initially stated he did not know anything about it. He sought, however, to acquit himself of any wrongdoing by pointing out that he did not leave the store with it. The bag contained nine items of women's clothing, valued at \$187.82, still on Dillard's store hangers. No sales receipt was in the bag.

At a bench trial in the McCracken District Court on August 22, 2000, Brooks was found guilty of theft by unlawful taking (TBUT) under \$300.00 (Kentucky Revised Statutes (KRS) 514.030(2)). He was sentenced to six months in the county jail, with thirty days to serve, \$200.00 fine, court costs, and two years' probation. The McCracken Circuit Court affirmed the district court November 9, 2000. Discretionary review was granted by this Court by order dated February 9, 2001.

Brooks' sole assignment of error is that there was insufficient evidence upon which to find him guilty of TBUT. To

commit theft by unlawful taking under KRS 514.030, an individual must unlawfully (1) exercise control over another's movable property, and (2) do so with intent to deprive him thereof. Relevant to our disposition of this appeal, we concern ourselves only with the second element, intent to deprive.

When determining intent to deprive relative to shoplifting, KRS 433.234(1) is some times applicable, and reads as follows;

**Willful concealment** of unpurchased merchandise of any store or other mercantile establishment on the premises of such store **shall be prima facie evidence of an intent to deprive** the owner of his property without paying the purchase price therefor.  
(Emphases added).

By juxtaposing KRS 514.030(1)(a) and KRS 433.234(1), Brooks contends that the Commonwealth may convict a person of TBUT upon proving willful concealment of merchandise and without proving that person's intent to deprive. Stated differently, Brooks argues that by enacting KRS 433.234(1) the legislature has effectively substituted willful concealment for the element of intent to deprive required under KRS 514.030(1)(a). Brooks argues such "substitution" is unconstitutional as it creates a mandatory presumption that a person is guilty of TBUT upon a finding of willful concealment of merchandise. Brooks maintains such mandatory presumption is constitutionally violative because the Commonwealth is relieved of the burden of proving each element of TBUT beyond a reasonable doubt, i.e., the element of intent to deprive. It is, of course, fundamental that the Commonwealth bears the burden of proof of each element of an

offense beyond a reasonable doubt. This rule is codified in KRS 500.070.

Conversely, the Commonwealth argues that KRS 433.234(1) only creates a permissive inference as to the element of intent to deprive. Specifically, the Commonwealth maintains the language of the statutes operates to merely *allow* the trier of fact to find intent to deprive from proof of willful concealment. We agree with the Commonwealth. We think KRS 433.234(1) creates but a permissible inference or presumption. Relating to criminal law, permissible inference or presumption has been defined:

The most common evidentiary device is the entirely permissive inference or presumption, which allows--but does not require--the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant.

County Court of Ulster County, New York v. Court v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). A permissible inference or presumption imposes neither a burden of production nor a risk of non-persuasion upon the defendant. R. Lawson, The Kentucky Evidence Law Handbook, §10.00 (3d ed. 1993). Such inference or presumption represents the most common type of presumption in criminal law. Id. A permissible presumption is constitutional as there is a "rational connection between the fact proved and the ultimate fact presumed. . . ." Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943). Upon the whole, we conclude there obviously exists a rational connection between an individual's willful concealment of merchandise and that individual's intent to deprive the owner

thereof. In sum, we hold that KRS 433.234(1) merely creates a constitutionally permissible inference.

In the case at hand, while shopping at Dillard's, Brooks was carrying a Sears bag containing unpurchased Dillard's merchandise; he made no attempt to pay for the merchandise; he avoided the security guard; and hid the bag of merchandise inside a display. Viewing these facts most favorably to the Commonwealth, we think there was sufficient evidence to find Brooks guilty of TBUT.

For the foregoing reasons, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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