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Judicial Notice: Should the Court Know A Female When it sees one?- Sumpter v. State

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JUDICIAL NOTICE: SHOULD THE COURT KNOW A FEMALE WHEN IT SEES ONE?— *SUMPTER V. STATE*

INTRODUCTION

Despite sufficient evidence that Johnnie Marie Sumpter lived in a house of ill fame,[1] the Indiana Court of Appeals reversed Sumpter's conviction for that offense, holding that the prosecution had not proven Johnnie Marie to be a female as required by the statute.[2] The appeals court rejected as proof on this issue numerous references to the defendant as "she" and "her," by the state, the defense and witnesses, as well as inferences the jury may have drawn about the defendant's sex by viewing the defendant in court. Instead, the court required direct, lay-opinion testimony.

Although expressing belief that the appeals court decided the question correctly in light of Indiana precedent, the Supreme Court of Indiana remanded on the gender issue, significantly modifying Indiana law by requiring trial courts to take judicial notice of a defendant's sex when it is an element of a crime.[3] This drastic deviation from precedent was precipitated by the inordinate number of appeals in Indiana for lack of proof on gender and other personal traits necessary for criminal conviction. Nonetheless, in criminal trials, significant departures from normal procedure which aid the prosecution are suspect under due process; thus the holding in *Sumpter* raises serious questions regarding the constitutionality of judicial notice of various traits and of related judicially created presumptions. This note explores these constitutional questions, traces the history in Indiana of proof on obvious personal traits and analyzes the scope of the *Sumpter* holding.

INDIANA'S RESPONSE PRIOR TO *SUMPTER*

Gender was the most obvious element of Johnnie Marie Sumpter's crime, yet insufficient proof on this issue was the source for appeal rather than less obvious elements. Insufficient proof of gender, age and other relatively obvious[4] elements of crimes have been a source of appeal in other Indiana

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[1]The conviction was pursuant to IND. CODE § 35-30-1-1 (Burns 1971), which read in part: "*Prostitutes.* Any female who frequents or lives in a house or houses of ill fame, knowing the same to be a house of ill fame, or who commits or offers to commit one [1] or more acts of sexual intercourse or sodomy for hire, shall be deemed guilty of prostitution. . . ."

[2]Sumpter v. State, 296 N.E.2d 131 (Ind. Ct. App. 1973), *aff'd on other grounds,* 261 Ind. 471, 306 N.E.2d 95 (1974), *appeal dismissed,* 419 U.S. 811 (1974), *appeal after remand,* ____ Ind. ____ , 340 N.E.2d 764, *cert. denied,* 425 U.S. 952 (1976).

[3]261 Ind. 471, 475, 306 N.E.2d 95, 99 (1974).

[4]Age is obvious in this context in the sense that it may be apparent that a person is over or under a particular age.

cases.[5] Their obvious nature induces prosecutors to overlook or to slight them among matters which must be proved, permitting challenge by defendants on appeal. Prosecutors must than find language in the trial record to serve as proof of a characteristic which should be obvious to anyone who looks at the defendant.

The supreme court in *Sumpter* resolved this proof and appeal dilemma by permitting a presumption arising from judicial notice to serve as sufficient proof of the sex element of the crime, without testimony from the witness stand.[6] To reach that result, the court contradicted a substantial body of Indiana precedent demanding record evidence for proof of age and sex. In fact, the earliest cases, dealing with age, even prohibited consideration of a defendant's appearance.

For example, actual evidence of age was required in *Stephenson v. State*[7] The defendant appealed a conviction for selling goods on the sabbath day while being over the age of fourteen, claiming inadequate proof at trial of his age.[8] The trial judge had certified that no proof was necessary on this issue because the defendant presented an appearance to the court of a fully grown man. The Indiana Supreme Court rejected the judge's certification as proof of age, reasoning that if judges and juries may determine a defendant's age by personal appearance, and without formal introduction of evidence, the trial record will be devoid on this element of the crime, preventing the appeals court from adequately assessing the basis for conviction and depriving defendant of an adequate review. "[T]he judge was not a witness, and the state is not entitled to avail itself of his knowledge except upon matters of which the Court takes judicial notice."[9] Ordinary proof[10] to establish the defendant's age was required on remand.

Later cases[11] affirmed the *Stephenson* principle[12] prohibiting consideration

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[5]On the question of gender, see Howard v. State, 257 Ind. 166, 272 N.E.2d 870 (1971); on the question of age, see Bobbitt v. State, ____ Ind. ____, 361 N.E.2d 1193 (1977); Finch v. State, ____ Ind. ____, 338 N.E.2d 629 (1975); Robbins v. State, 257 Ind. 273, 274 N.E.2d 555 (1971); Asocar v. State, 252 Ind. 326, 247 N.E.2d 679 (1969); Willoughby v. State, 247 Ind. 210, 214 N.E.2d 169 (1966); Watson v. State, 236 Ind. 329, 140 N.E.2d 109 (1957); Benson v. McFadden, 50 Ind. 431 (1875); Stephenson v. State, 28 Ind. 272 (1867): McGowen v. State, ____ Ind. App. ____, 355 N.E.2d 276 (1976); Kautzman v. State, ____ Ind. App. ____, 316 N.E.2d 857 (1974); on the question of genus, see Russell v. State, ____ Ind. App. ____, 322 N.E.2d 384 (1975).

[6]261 Ind. 471, 475, 306 N.E.2d 95, 99 (1974).

[7]28 Ind. 272, 273 (1867).

[8]*Id.* at 272.

[9]*Id.* at 273.

[10]Presumably the court was requiring some record evidence that the defendant's age exceeded fourteen years. This could have included lay-opinion testimony of age, submission of a birth certificate or any other means by which evidence of age would appear in the trial record.

[11]Bird v. State, 104 Ind. 384, 389, 3 N.E. 827, 830 (1885); Swigart v. State, 64 Ind. 598 (1878) (per curium); Robinus v. State, 63 Ind. 235, 237 (1878); Ihinger v. State, 53 Ind. 251, 253 (1876). However, it is interesting to note that the *Bird* court said with reference to consideration of appearance, "[i]f the question under consideration could be properly considered an open one, some of the members of this court . . . would be inclined to take a different view of such question from that expressed in our previous decisions and here approved and followed." 104 Ind. 384, 389, 3 N.E. 827, 830 (1885).

[12]Although subsequent cases interpreted *Stephenson* to preclude the trial court from con-

of the appearance of a party or witness by a court or jury in determining questions of age. However, these holdings contradicted substantial case law in Indiana and elsewhere, permitting juries to inspect the defendant to establish the extent and character of personal injuries,[13] family resemblance,[14] and a host of other matters,[15] if inspection had evidentiary value and was not prejudicial.

Finally in 1957, in *Watson v. State*,[16] the Indiana Supreme Court expressly rejected[17] the *Stephenson* prohibition. In *Watson*, the defendant appealed an armed robbery conviction, claiming inadequate proof that his age exceeded sixteen as required by the statute. The court expanded permissible evidence of age beyond lay-opinion testimony by allowing jurors to infer age from observing the defendant in conjunction with a witness' testimony identifying and describing the defendant.[18]

By reducing the record evidence requirement to a description of the defendant and allowing consideration of appearance, *Watson* reflected approval of increased trial court discretion in deciding questions such as age, concurrently narrowing appellate review by requiring appellate judges to rely

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sidering appearance in determining questions such as age, careful reading indicates this may not have been the holding. *Stephenson's* only demand was for record evidence of age. With record evidence the court may not have disparaged appearance and may even have encouraged it. Consider this statement by the court:

> If the judge or jury trying a criminal cause may determine from the personal appearance of the defendant whether or not he be over a certain age, *without* hearing evidence, either as to age or its *indications*, it will, so far as that issuable fact is involved, deprive the defendant of this right of review.

28 Ind. at 273 (emphasis added). Not only is consideration of appearance not prohibited, but by suggesting testimony of *indications* of age *Stephenson* may be endorsing the very procedure adopted for proof in Watson v. State, 236 Ind. 329, 140 N.E.2d 109 (1957), the first Indiana case purporting to overturn *Stephenson*, which allowed consideration of appearance in conjunction with testimony *describing* the defendant.

[13]*See, e.g.*, City of Lanark v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894); Louisville, N.A. & C. Ry. v. Wood, 113 Ind. 544, 14 N.E. 572 (1887); Indiana Car Co. v. Parker, 100 Ind. 181 (1884); Barker v. Town of Perry, 67 Iowa 146, 25 N.E.100 (1885).

[14]*See, e.g., Ex parte* Chooey Dee Ying, 214 F. 873 (N.D. Cal. 1914); Kelly v. State, 133 Ala. 195, 32 So. 56 (1902); Young v. Makepeace, 103 Mass. 50 (1869); Fennegan v. Dugan, 96 Mass. (14 Allen) 197 (1867).

[15]*See, e.g.*, appearance permitted to determine racial origin, Gentry v. McMinnis, 33 Ky. (3 Dana) 382 (1835); competency for work duties, Keith v. New Haven & Northampton Co., 140 Mass. 175, 3 N.E. 28 (1885); intoxication, Walker's Trial, 23 How. St. Tr. 1055 (1794); and age, Commonwealth v. Hollis, 170 Mass. 433, 49 N.E. 632 (1898); State v. Arnold, 35 N.C. (13 Ired. L.) 173 (1851).

[16]236 Ind. 329, 140 N.E.2d 109 (1957).

[17]Referring to the *Stephenson* line of cases and the appearance rule the court said, "We are not persuaded or convinced at all by the reasoning in these cases. Indiana is clearly out of line in this respect with both the weight and overwhelming numerical authority." *Id.* at 335, 140 N.E.2d at 112.

[18]A defendant sitting in the court room may be pointed out and identified by various witnesses while testifying, and may be asked to stand for that purpose, if a description has been given for the jury's consideration. That is proper testimony coming from the witness stand from persons other than the defendant, and is evidence which the court and jury may properly consider. *Id.* at 335-36, 140 N.E.2d at 112.

more heavily upon the perceptions and conclusions of trial courts.[19] Permitting trial courts to use their senses in a way not previously legitimate reflected confidence that they needed less oversight on the question of age.

Except for allowing different record evidence and permitting an inference of age to be drawn from appearance, *Watson* was procedurally similar to previous cases. Since the age inference could only be drawn in conjunction with testimony by witnesses, prosecutors still had to present sufficient and appropriate evidence from the witness stand. This procedural restraint apparently continued because a personal trait "obvious" to the trial court would not be accessible or "obvious" to an appellate judge without record evidence on the matter. In practice, *Watson's* new holding required the same amount of time for proof, falling prey to previous problems such as prosecutors who either did not perceive or neglected their burden of proving these matters.

Watson still prohibited judicial notice of personal traits, presumably because they could otherwise "be proved without difficulty."[20] However, numerous appeals claiming lack of proof on these matters congested the courts, demonstrating that ease of proof did not guarantee production of such proof. Convenience encouraged invocation of judicial notice, but constitutional considerations demanded prudence; depending upon the court's procedure for noticing a fact, broad due process guarantees, the privilege against self incrimination, and the right to a jury trial and to confront witnesses might be infringed. Nonetheless, practicality prevailed in *Sumpter*, and judicial notice became sufficient proof of gender.

SUMPTER V. STATE: JUDICIAL NOTICE OF GENDER

The court in *Sumpter* prescribed judicial notice as the means to prove a defendant's sex.[21] Notice under *Sumpter* raises a rebuttable presumption of gender, shifting the burden of producing contrary evidence to the defendant. By meeting the production burden a defendant causes the presumption of gender to vanish, forcing the prosecution to likewise meet a burden of production if it seeks a different result. Only if the defendant fails to meet his production burden, is the gender presumption conclusive, precluding the jury

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[19]For example, more reliance by an appellate judge on trial court perception would probably be required with record testimony describing the defendant, than with an opinion in the record that the defendant is thirty-two years old. An opinion of the defendant's age seems more conclusive than a description.

[20]In refusing to accept designations such as "man," "woman," "boy" or "girl" as evidence that defendant was more or less than sixteen years old, the court said, "There is no authority for such a dividing line. Age can be proved *without difficulty*." 236 Ind. at 336, 140 N.E.2d at 112 (emphasis added). Dissenting Justice BeBruler also exhibited this attitude in *Sumpter*:

> Moreover there is no overriding necessity to create a presumption of femininity here. It is a *simple* matter for the State to carry its burden of proving the sex of the defendant by introducing affirmative evidence on the point in the same manner in which other elements of the crime are established. Sumpter v. State, 261 Ind. 471, 485, 306 N.E.2d 95, 104 (1974) (DeBruler, J., dissenting) (emphasis added).

[21]261 Ind. 471, 474, 306 N.E.2d 95, 99 (1974).

from deciding the issue.[22] Although beneficially limiting time and effort otherwise devoted to proof, the potential preclusive effect of the judicial notice procedure raises three broad constitutional questions dealing with due process, the privilege against self incrimination and the defendant's right to a jury trial. Depending on the degree of discretion accorded a trail judge, these provisions need not pose a constitutional barrier to judicial notice of various traits.

Initially, the *Sumpter* presumption must comply with due process safeguards. While courts have invalidated many legislative presumptions as denying due process,[23] judicial presumptions have survived similar attack,[24] and due process standards in this area have been formulated in response to legislative enactments. These standards require a rational connection between the fact proved and the ultimate fact presumed, weighing the relative difficulty of producing evidence and the degree to which defendants are subjected to unfairness or hardship.[25] Analysis demonstrates the *Sumpter* procedure complies with these requirements.

A presumption which arises from noticing gender should easily meet the rational connection test.[26] Furthermore, convenience is not served by requir-

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[22]The Court described the procedure thus:

> When an individual is charged with an offense, an element of which is the sex of the accused, the trial court will take judicial notice of the defendant's sex. However the judge's finding is not necessarily conclusive of the issue. Once the judge takes judicial notice of such fact, a rebuttable presumption arises in favor of the State. This is not to say that the burden of persuasion shifts from the State to the defendant. That burden never shifts. However, this procedure imposes a burden upon the defendant of producing evidence.

Id. at 474, 306 N.E.2d at 99 (1974). On appeal after remand the Indiana Supreme Court elaborated on the procedure by saying, "[J]udicial notice operates as a matter of law, whether the case be tried with or without a jury." 340 N.E.2d 764, 768 (1976). Referring to defendant's objection before the hearing on remand to being tried without a jury the court said, "Because the presumption was not rebutted, however, there was no need for jury trial on the issue of appellant's sex." *Id.* at 767.

[23]*See, e.g.*, Tot v. United States, 319 U.S. 463 (1943) (that possession of a firearm by a fugitive from justice is presumptive evidence that he received it from interstate commerce); Bolin v. State, 266 Ala. 256, 96 So.2d 582 (1957) (that possession of chemicals necessary for the manufacture of tear gas bombs is presumptive evidence that the possessor had possession for the purpose of such manufacture); Garcia v. People, 121 Colo. 130, 213 P.2d 387 (1949) (that refusal or inability to explain what had become of the hide of an animal butchered by the defendant is presumptive evidence that he stole the animal).

[24]With reference to judicial and legislative presumptions, commentators have said, "[t]hese challenges are most likely to be directed to presumptions created by the legislature, apparently because legislatures have been less restrictive than courts in creating rebuttable presumptions." W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 147 (1972). This is probably attributable to the fact that courts are more sensitive to potential due process violations than legislatures, more knowledgable of the requirements of due process and ready to believe that other judges are equally sensitive and knowledgable.

[25]*See* cases collected in 1 WHARTON'S CRIMINAL EVIDENCE § 94 n.40 (13th ed. 1972 & Supp. 1977). *See generally* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L. J. 165 (1969); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L. J. 919 (1970).

[26]The rational connection between the fact proved and the fact presumed is arguably much tighter with *Sumpter's* presumption than with many others because judicial notice bridges the in-

ing the prosecution to first submit official records of sex or lay-opinion testimony on the issue, because the defendant is a far more reliable source of this information. Although the prosecution could request that defendant submit to a physical examination, this might raise questions of invasion of privacy and would consume valuable judicial resources, problems which may be avoided by presuming gender and relying upon the defendant to rebut what otherwise seems obvious. The defendant is uniquely possessed of information on the issue and should have little difficulty rebutting the presumption, so that innocent defendants do not seem unfairly burdened.

Assuming the presumption complies with these due process requirements, a further attack may be raised that it violates the privilege against self incrimination.[27] This issue was not raised on appeal by the defendant in *Sumpter*, but received attention by dissenting Justice DeBruler. Justice DeBruler argued that the method prescribed by *Sumpter* compels the defendant to produce evidence on the issue of gender, even though self incriminating, or his silence will serve as proof of what the state must show to convict.[28] The conclusion that defendant is of a particular gender is effective under the *Sumpter* rule of judicial notice only when the defendant fails to rebut it; because the defendant thus controls the conclusive nature of judicial notice, Justice DeBruler's contention that silence by the defendant proves gender is doctrinally feasible. However, DeBruler's analysis proves shortsighted and against the weight of authority.

A multitude of cases involving presumptions sufficient to prove an ultimate fact unless competently rebutted by the defendant hold that the defendant is not thereby compelled to be a witness against himself within the purview of the fifth amendment.[29] A rebuttable presumption, according to

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ferential gap. For example, if proof of possession of stolen goods raises a rebuttable presumption that the possessor stole the goods, proof of possession is circumstantial evidence of actual stealing. In *Sumpter*, on the other hand, evidence of the presumed fact derives from judicial notice, a much more indisputable method of proof.

[27]"No person, in any criminal prosecution, shall be compelled to testify against himself." IND. CONST. art. 1, § 14. "No person . . . shall be compelled in any criminal case to be a witness against himself;" U.S. CONST. amend. V.

[28]The procedure for establishing sex works in this way. The Judge announces that he takes judicial notice that the accused is either a man or woman. At this point, the judicially-noticed fact, standing alone without more, cannot serve to satisfy the due process burden of the State to prove the statutory element of sex beyond a reasonable doubt . . . . However, this judicially-noticed fact can gain additional and sufficient evidentiary force or weight if the accused remains silent or fails to produce evidence sufficient to indicate that he is not of the sex alleged in the charge. . . . Silence elevates the quality of the judicially-noticed fact to certainty beyond a reasonable doubt and increases the probability of conviction.

340 N.E.2d 764, 771 (1976), (DeBruler, J., dissenting).

[29]The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of facts

these holdings, is analogous to massing evidence against the defendant, which creates pressure on him to testify but does not violate the privilege against self incrimination. Because gender merits judicial notice this principle is especially applicable to *Sumpter*. Although silence may prove gender in a mechanical sense by governing the finality of notice, this control reflects compliance with other constitutional provisions[30] more than the disputable character of judicial notice. In substance, proof of gender stems from notice, not from defendant's silence, thus raising no problem of self incrimination.

Finally, judicial notice of obvious traits may usurp the jury's function under Article I, § 19 of the Indiana Constitution.[31] A constitutional violation under this provision rests on the extent of power it permits the jury to exercise and the degree *Sumpter* circumscribes that power.

Interpretations of Article I, § 19 severely limit the trial judge's authority to ultimately determine guilt or innocence. Directed verdicts of guilt[32] and instructions to the jury analyzing the sufficiency of evidence to convict[33] or mandating a conclusion of guilt[34] have been prohibited. By removing the question of gender from the jury *Sumpter* may deny the right to a jury trial as delineated by these holdings if the defendant presents no evidence on the issue.

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necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case.

Yee Hem v. United States, 268 U.S. 178, 185 (1925). *See generally* cases collected in 1 WHARTON'S CRIMINAL EVIDENCE § 94 n.65 (13th ed. 1972 & Supp. 1977).

[30]A principal rationale for sustaining the presumption of gender under due process is the relative convenience for the defendant of producing evidence of gender, the defendant being uniquely possessed of such evidence. Accordingly, the defendant must have the opportunity to rebut the presumption or due process will likely be violated. In addition, that the defendant may get to the jury on the issue of gender by offering evidence to rebut the presumption appears to save the procedure from infringing on the defendant's right to a jury trial.

[31]"In all criminal cases whatever, the jury shall have the right to determine the law and the facts." IND. CONST. art. 1, § 19.

[32]Directed verdicts of guilt have not been an issue in Indiana, but other jurisdictions forbid them and there is little doubt that Indiana would. *See, e.g.*, State v. Estes, 185 N.C. 752, 117 S.E. 581 (1923); State v. Hill, 141 N.C. 769, 53 S.E. 311 (1906). However, in jurisdictions which extend a jury trial to "serious" but not "petty" offenses, a distinction Indiana has not followed, directed verdicts of guilt may be allowed when trying the latter, Taylor v. City of Pine Bluff, 226 Ark. 309, 289 S.W.2d 679 (1956). Furthermore, some cases suggest, but do not hold, that directed verdicts of guilt may be allowed when a defendant presents no evidence to rebut a presumption against him, Commonwealth v. Gamble, 36 Pa. Super. Ct. 146 (1907); State v. Godwin, 227 N.C. 449, 42 S.E.2d 617 (1947).

[33]It has been repeatedly held, and is well settled, that it is error for the court in a criminal action to instruct the jury what evidence will be sufficient to establish any ultimate fact. Such an instruction is an invasion of the constitutional right of the jury to determine the facts for itself.

Walter v. State, 208 Ind. 231, 239, 195 N.E. 268, 271 (1935).

[34]Who is to determine whether the eivdence proves the defendant's innocence, or whether it is sufficient to raise a reasonable doubt in the minds of the jury? The answer is obvious. It certainly cannot be the duty of the court to tell the jury that the evidence introduced proves the defendant guilty . . . or to say to the jury that the evidence is not sufficient. . . .

Dedrick v. State, 210 Ind. 259, 273, 2 N.E.2d 409, 416 (1936).

The *Sumpter* majority responded to this argument by noting that the jury's task is resolving disputed issues of fact only.[35] Accordingly, if the defendant fails to produce competent evidence rebutting the presumption of gender, there is no evidence supporting one side of the gender issue and no disputed issue for the jury. Although logical, this argument is not explicitly supported in the cases which hold that such determinations are for the jury, even if there is apparently conclusive evidence of guilt.[36] However, *Sumpter's* argument applied to facts distinguishable from cases stringently regulating the jury's "province" may be more immune to claims that a jury trial has been denied. The facts of *Sumpter* are distinguishable.

First, an analogy between *Sumpter's* procedure and directed verdicts is faulty to the extent that *Sumpter* removes from jury consideration only one element of a crime, whereas the cases prohibiting directed verdicts remove from jury consideration all elements of a crime.[37] Thus, decisions which deprive defendants of life, liberty or property under the *Sumpter* decision may be partially, but not entirely, removed from the jury. The jury ultimately determines guilt.

Secondly, under the *Sumpter* procedure judges do not exercise the degree of discretion normally associated with directed verdicts and preemptory instructions. The defendant, by either producing or not producing evidence of gender, determines whether the question is for the jury. The trial judge only responds automatically to whether the defendant presents competent evidence on this narrow issue. Because of defendants' control, they require less of the protection afforded by a jury against arbitrary and unfair judges.[38]

Admittedly, adverse implications of the doctrine that criminal juries decide only disputed issues may be significant when the question involved is more inherently disputable than gender, when a presumption envelopes the entire case rather than merely one element, or when removing a question from the jury is more left to trial judge initiative. As applied in *Sumpter*, however,

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[35]"[S]ince the right to trial by jury extends only to *debatable issues* of fact. . . ." 340 N.E.2d at 768. "There being no *disputed question* of fact as to the appellant's sex, there was no need for a jury trial." *Id.* at 769 (emphasis added).

[36]However, some isolated support for *Sumpter's* contention was expressed in this statement: "[W]here the existence of a fact . . . is established by the evidence without any conflict, contradiction or dispute whatever, it is not an available error for the court to instruct the jury that there is evidence tending to prove such fact." Koerner v. State, 98 Ind. 7, 13 (1884). *Koerner* cited many cases to support this holding but none were criminal.

[37]For instance, in State v. Hill, 141 N.C. 769, 53 S.E. 311 (1906), a prosecution for assault with a deadly weapon, "the judge stated in the presence of the jury that he would instruct them that the defendant was guilty." *Id.* at 770, 53 S.E. at 311. This instruction would be of guilt on the entire crime.

[38]Fear of arbitrary and unfair judges is often cited as a main purpose for criminal jury trials: "In many of the colonies, immediately preceding the revolution, the arbitrary temper and unauthorized acts of the judges, holding office directly from the crown, made the independence of the jury, in law as well as fact, a matter of great popular importance." Williams v. State, 32 Miss. 389, 396 (1856). *See, e.g.*, 24 NOTRE DAME LAW 265, 366 (1949); 45 ST. JOHN'S L. REV. 324, 324-25 (1971).

the effects of removing gender from the jury are minimal and positive. Thus, the *Sumpter* procedure does not appear to infringe the right to a jury trial under Article I, § 19.

Another constitutional problem, whether judicial notice can be mandatory, may arise in addition to the three broad issues raised above, depending upon the breadth of discretion permitted for judicial notice. To demand notice in all cases when sex is an element of the crime ignores rare cases when gender may be difficult to perceive, permitting inappropriate application of notice. Because some defendants may be unfit subjects for notice, at least theoretically,[39] mandatory application of notice could violate rules of evidence giving rise to claims of unfairness in individual cases. In addition, the opportunity for notice to be applied improperly raises the possibility that a presumption significantly tied to notice for reliability may not comply with the rational connection test of due process.[40] Unfortunately, *Sumpter* provides no clear rule whether trial judges must always notice a defendant's gender when it is an element of the crime.

According to *Sumpter*, notice may be taken of facts which are ordinarily but not universally true.[41] Deeming gender to be in this category, the court held that, "When an individual is charged with an offense, an element of which is the sex of the accused, the trial court *will* take judicial notice of the defendant's sex."[42] Because defendants may rebut notice of gender, and because gender is ordinarily obvious, it seems reasonable to infer that the court is demanding judicial notice in all such cases to take full advantage of whatever difficulty might be evaded by the process. Constitutionally, and practically, this result seems proper.

The *Sumpter* procedure does not infringe due process, the right to a jury trial or the privilege against self incrimination; arguments of constitutional violation in these regards are overly technical. To conserve judicial resources, prevent fortuitous appeals and permit more consistent application of the rule, mandatory notice thus seems a wise course. Even if the possibility of applying notice incorrectly was not remote, its effect in this context is not overpowering. Furthermore, that *Sumpter* easily complies with constitutional requirements is important not only for proof of gender, but also for proof of age and various other personal traits which have needlessly troubled Indiana courts. Because appeals on these other traits are more prevalent, *Sumpter*'s greatest significance may arise when applied to them.

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[39]Conceivably, some people's gender may be outside the category of facts indisputable or unlikely to be challenged, thus making them inappropriate subjects for judicial notice. If there are such people, the number should be extremely small, possibly making concerns of inappropriate judicial notice theoretical only.

[40]*See* notes 25 and 26 *supra* and analysis of due process in the text.

[41]____ Ind. ____ , 340 N.E.2d 764, 768 (1976).

[42]261 Ind. 471, 474, 306 N.E.2d 95, 99 (1974).

THE SCOPE OF *Sumpter*

Sumpter expressly applies only to sex but the predominant number of appeals in Indiana, claiming inadequate proof of obvious personal characteristics, relate to other matters.[43] To expedite proof on these matters, consideration should be given to extending *Sumpter*'s coverage. The evolving trend seems to be a common sense extension of the rule, depending on the facts of the particular case.

For example, *Russell v. State*[44] extended *Sumpter* by noticing a trait of someone other than the defendant. After a conviction for committing sodomy on a fellow prisoner the defendant in *Russell* appealed claiming inadequate proof that the victim was a human being as required by the statute. The Indiana Court of Appeals upheld the trial court's judicial notice that the victim was a human being, as within the contemplation of *Sumpter*.[45]

To rebut a presumption that the victim was a human being, the defendant would not be uniquely possessed of evidence as would a defendant under the *Sumpter* presumption of sex. In addition, a victim would probably cooperate with the prosecution, giving them access to pertinent information not available to the defense. However, because the element of the crime noticed in *Russell* is even more easily perceived than gender, a victim-related presumption easily complies with the rational connection test of due process. Although defendant's access to evidence no more than equals the prosecution's, the trait is so obvious that convenience demands noticing it rather than needlessly expending judicial resources in proof. Far from being unfair, notice and a presumption are highly appropriate on these facts.

Notwithstanding *Sumpter*, cases pertaining to age still adhere to requirements of proof similar to *Watson*.[46] Justice Sullivan, addressing the extension of *Sumpter* judicial notice to age, in *McGowan v. State*,[47] noted, "I do not view age (even in the context of an 'over or under' question) as sufficiently analogous to sex so as to prompt remand for a 'judicial notice' determination upon that issue alone."[48] Justice Sullivan did not repudiate notice of age in every case, but left determination of the appropriateness of notice to the particular situation.

Judicial notice that a defendant is over or under a particular age may be appropriate, especially under the Wigmore-Thayer approach that notice should encompass facts unlikely to be challenged as well as indisputable

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[43]Between the years 1957 and 1977 in Indiana there were eight appeals on the question of age, two on the question of gender and one on the question of genus.

[44]___ Ind. App. ___ , 322 N.E.2d 384 (1975).

[45]"In the case of Sumpter v. State . . . our Supreme Court held that there is ample reason to exercise judicial notice in determining whether a person was a human being." *Id.* at 386.

[46]*See* Finch v. State, ___ Ind. ___ , 338 N.E.2d 629 (1975); McGowan v. State, ___ Ind. App. ___ , 355 N.E.2d 276 (1976); Kautzman v. State, ___ Ind. App. ___ , 316 N.E.2d 857 (1974).

[47]___ Ind. App. ___ , 355 N.E.2d 276 (1976).

[48]*Id.* at 277 (Sullivan, J., concurring).

facts.[49] For example, judicial notice seems appropriate if the age of majority is relevant and the defendant's physical features are normally associated with maturity. However, a presumption of age must still meet the elements of due process—accuracy, access to evidence and fairness.[50]

In meeting the accuracy requirement, age, as a question of "over or under," may generally be more difficult to perceive than sex. Only the age of people at the extremes may be easily perceivable. But judicial discretion in noticing age would prevent gross misclassifications, and even if a judge is mistaken, the defendant should have little difficulty rebutting the presumption with official records or other evidence.

On the other hand, the prosecution is also well endowed with evidence of age; unlike gender, which may have changed from what is reflected in official records, age records are generally accurate. With relatively equal access to evidence, a presumption may seem unnecessary. The bias of our criminal system requires the prosecution to come forward with its case first; presumptions shifting the burden of presenting evidence should be used only in special circumstances. It is clear that the entire case against the defendant may not be presumed merely from an indictment or from probable cause, but with the number of appeals in Indiana claiming inadequate proof of age, a narrow question which should be easily proven, special circumstances may be presented which argue for permitting the presumption.

Methods of proof must be fair to defendants, and should be efficient. While a presumption of age following the *Sumpter* model would seem to provide both, the present method of proof is strikingly inefficient. Indiana has stumbled through decades of impressing upon prosecutors their affirmative burden of producing evidence of age, permitting defendants on appeal to quibble over the sufficiency of evidence, and requiring expenditure of scarce judicial resources at trial to prove what often is not seriously contested. Prosecutors' misconception or neglect of their duty, defendants' search for spurious means to appeal, and expenditure of judicial resources to prove the obvious may not be individually sufficient reasons to create a presumption, but collectively they demand effectuation of judicial notice procedures.

Accordingly, the scope of *Sumpter* appears to encompass at least traits closely analogous to gender which are elements of crimes, such as age and genus. Under the Wigmore-Thayer approach and the authority of *Sumpter*, trial judges should not hesitate to take judicial notice of these traits in appropriate situations. Furthermore, as with the humanity issue in *Russell*, judicial notice of victim-related traits may be proper when especially obvious. Notice in these situations expedites proof on matters not seriously contested and discourages dilatory appeals without diminishing fairness to innocent defendants who may easily overcome the presumption.

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[49]*See*, McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

[50]*See* Notes 25 and 26 *supra* and analysis of due process in the text.

CONCLUSION

Lack of proof on gender, age and other personal traits necessary for criminal conviction has frequently spawned appeals in Indiana. Early Indiana cases on proof of age demanded record evidence and prohibited trial courts from considering the appearance of defendants, fearing the right to appellate review would be violated. Although later cases dealing with age and gender maintained the record evidence requirement, it was modified to permit consideration of appearance in conjunction with testimony describing the defendant. Both methods of proof fell prey to prosecutors who either did not perceive or neglected their burden of proving these matters, encouraging challenge on the trait basis. Finally, in 1974, the Indiana Supreme Court in *Sumpter v. State* prescribed judicial notice and a rebuttable presumption as sufficient proof of gender, absent contrary evidence by the defendant.

Although the *Sumpter* holding raises broad issues of constitutional dimension pertaining to due process, the privilege against self incrimination, and the right to a jury trial, analysis indicates that the procedure for taking judicial notice of gender is constitutional. In addition, by preserving judicial resources and discouraging fortuitous appeals, the procedure is exceedingly practical and efficient. Its beneficial effects should be extended to proof of age and other personal traits in appropriate cases.

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