University of Miami Law Review

Volume 21 | Number 4 Article 15

7-1-1967

Comment by Prosecutor on Defendant's Failure to Testify at Preliminary Hearing

Alan E. Weinstein

a result of the government's use of these statements will now be excluded by *Miranda*. Certainly this newest exclusionary principle *should* apply to private statements unwittingly made in the presence of an electronic eavesdropper. In such a case the defendant is clearly incriminating himself without having been informed of his right to remain silent and without having received the benefit of counsel, as guaranteed by the fifth and sixth amendments, respectively.[30]

Finally, the courts might choose to unequivocally establish a right of privacy in Florida independent of the fourth amendment. Almost four decades ago Justice Brandeis implied that such a path was preferable.[31] In the light of logic and recent decisions by this nation's highest court,[32] this latter route is both tenable and timely.

> Electrical information devices for universal, tyrannical womb-to-womb surveillance are causing a very serious dilemma between our claim to privacy and the community's need to know. The older, traditional ideas of private, isolated thoughts and actions . . . are very seriously threatened by new methods of instantaneous electric information retrieval . . . . [R]emedial control . . . must be exerted. . . . What's that buzzzzzzzzzzzzzzzzzzzzing?[33]

SANDRA ROTHENBERG

COMMENT BY PROSECUTOR ON DEFENDANT'S FAILURE TO TESTIFY AT PRELIMINARY HEARING

The defendant was tried and convicted of aggravated assault. At the trial he took the stand to testify in his own behalf. During the course of his cross-examination the prosecuting attorney elicited that the defendant had not testified at the preliminary hearing. On appeal to the Supreme Court of Florida, *held*, decision of the district court quashed: it is not error for a prosecutor on cross-examination to interrogate the defendant

---

30. Among the noteworthy statements arising from *Miranda* are these:

> [W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . . *Id.* at 1626.
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Id* at 1628.

For a discussion of *Miranda* and its impact on the law, *see* Taran, *The New Right—Fifth Amendment Right to Counsel*, 20 U. MIAMI L. REV. 893 (1966).

31. Olmstead v. United States, 277 U.S. 438, 478 (1928).

32. Griswold v. Connecticut, 381 U.S. 479 (1965), is one of numerous recent cases dealing with the right of privacy. Although the holding is inexact with regard to that right, it is noteworthy that six members of the United States Supreme Court found that such a right *existed. See generally*, 64 MICH. L. REV. 219, 229 (1965).

33. MCLUHAN, THE MEDIUM IS THE MASSAGE 12 (1967).

concerning his failure to testify at the preliminary hearing. *State v. Hines*, 195 So.2d 550 (Fla. 1967).

Under the common law an accused in a criminal action was considered an interested party and, therefore, was disqualified as a witness. By reason of this incompetency, the defendant could neither be called as a witness by the state nor take the stand to testify in his own behalf.[1] Indeed, it was not until the middle of the nineteenth century that the disability was removed in this country,[2] when almost all jurisdictions enacted statutory provisions terminating the disqualification of a criminal defendant as a witness.[3] Influenced by the existing constitutional prohibitions against compelled self-incrimination of an accused,[4] these statutes allowed but did not compel an accused to testify. The option to take the stand was left solely to the determination of the defendant.[5]

Coinciding with his newly acquired ability to become a witness if he chose to do so, a new and unique problem confronted an accused in a criminal proceeding. Since he was now free to testify and explain to the jury his version of the circumstances surrounding the charge, would the triers of fact draw any adverse inference from his failure to do so?[6] To rectify this difficulty, legislation was enacted throughout the United States designed to prevent the jury from drawing such an inference and to further prevent any comment by either court or counsel which would reflect upon the defendant's failure to testify.[7] Today, all but six states[8] have statutorily protected a defendant from such incriminating comments.

1. C. McCORMICK, EVIDENCE §§ 65, 122, 132 (1954).

2. C. McCORMICK, *supra* note 1, § 132; 8 J. WIGMORE, EVIDENCE § 2268 (McNaughton rev. ed. 1961).

3. *See* 2 J. WIGMORE, *supra* note 2, § 488.

4. *See* note 5 *infra*.

5. [T]he language of the constitutional provisions, generally that no one in a criminal case *shall be compelled* to be a witness . . . against himself, seemed to fit perfectly the case of an accused. Thus when the statute removed his disqualification, and the legislatures provided, as they generally did, that he could be called "at his own request and not otherwise," this legislative privilege not to be called or to be required to testify was naturally assimilated to the constitutional privilege.

C. McCORMICK, EVIDENCE § 122, at 257 (1954) (emphasis added). *See also* FLA. STAT. § 918.09 (1963) which is typical of the "permissiveness" element of these various statutes.

6. *See, e.g.*, Ruloff v. People, 45 N.Y. 213 (1871).

7. Florida's statute is illustrative of the statutes which preclude adverse comment upon a defendant's failure to testify. The statute provides:

In all criminal prosecutions the accused *may at his option* be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, *nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf*, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury.

FLA. STAT. § 918.09 (1963) (emphasis added.) For a comprehensive presentation of the statutory prohibitions throughout the United States regarding comment on an accused's failure to testify, *see* 8 J. WIGMORE, *supra* note 2, § 2272.

8. The six states which allow comment in one form or another do so either by constitutional provision (California and Ohio), by judicial decision (Connecticut, Iowa and New Jersey—the latter two states having no specific constitutional privilege), or by rules of court procedure (New Mexico).

8 J. WIGMORE, *supra* note 2, § 2272, at 427.

Nothwithstanding these safeguards which presumably protect a defendant from any adverse inference or comment upon his failure to offer testimony, a very practical problem confronts an accused during his trial. Regardless of instructions to the contrary, the jury may not be able to ignore the feeling that the absence of testimony by the accused implies an admission of guilt.[9] Faced with this dilemma the defendant will frequently take the stand despite his constitutional immunity from becoming a witness.[10]

When an accused does take the stand to testify in his own behalf, to what extent does he waive his privilege against self-incrimination and the correlative privilege against adverse inference and comment? Most jurisdictions[11] hold that upon taking the stand the prohibition against inferences and comment upon the defendant's failure to testify comes to an end, at least as to matters material and relevant to the present proceeding.[12] Once he has ascended the witness stand the accused is held accountable for his failure to properly deny or explain the evidence against him. It is assumed that one should naturally so respond having taken that opportunity, and the failure to do so is subject to both comment and inference.[13]

This note will examine whether this waiver should also permit comment to be made concerning an accused's *failure or refusal to testify during a prior proceeding*; *i. e.*, at a time when the privilege existed and any comment would have been prohibited.

This probe is necessarily predicated upon the judicial interpretation of the legislative mandate promulgated in each jurisdiction.[14] In the majority of those states which have dealt with this problem,[15] the courts have liberally construed the statutory prohibitions against comment on the defendant's failure to testify.[16] In extending the safeguard these courts

9. See the introductory discussion in 8 J. WIGMORE, *supra* note 2, § 2272, at 425-426; and the concluding paragraph of C. MCCORMICK, EVIDENCE § 132, at 280-281 (1954).

10. In an opinion that aptly enunciated the quandary in which an accused finds himself, it was said:

> [W]e consider that it is of the utmost importance to the fair trial of a defendant that he should not be placed upon the horns of a dilemma, that is: either to testify and become a witness against himself or have the jury prejudiced against him for his failure to do so.

Hathaway v. State, 100 So.2d 662, 664 (Fla. 3d Dist. 1958).

11. The discussion hereafter is inapplicable to those six states which allow comment upon the defendant's failure to testify. *See* note 8 *supra.*

12. [The] voluntary offer of testimony (by an accused) upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between all . . . . The result is, then, that the accused . . . has signified his waiver by the initial act of taking the stand." 8 J. WIGMORE, *supra* note 2, § 2276, at 459-62.

13. *E.g.*, Caminetti v. United States, 242 U.S. 470 (1917); Odom v. State, 109 So.2d 163 (Fla. 1959); Peel v. State, 154 So.2d 910 (Fla. 2d Dist. 1963).

14. *See* FLA. STAT. § 918.09 (1963) as quoted in note 7 *supra.*

15. *See* note 8 *supra.*

16. The tone of this liberal construction is evident from this statement in State v. Conway, 348 Mo. 580, 586, 154 S.W.2d 128, 134 (1941):

> We must not interpret this provision of our Constitution as if it was designed to protect the guilty, nor should we presume that one who avails himself of it is

have held that the failure to testify during a former proceeding is not subject to an adverse comment at a subsequent proceeding wherein the defendant elected to waive his immunity and become a witness.[17] The prior proceedings embraced by these decisions include preliminary hearings,[18] applications for the settings or reduction of bail,[19] habeas corpus hearings,[20] coroners inquests,[21] grand jury actions,[22] and former trials.[23] These decisions are ultimately founded on the premise that the waiver of the privilege against self-incrimination should be strictly limited and does not include a concurrent retroactive waiver of that right where it had been previously invoked during a separate and distinct proceeding.[24]

The underlying rationale employed by the majority can be classified into two basic propositions. First, the defendant should be able to exercise his statutory right without it subsequently being used by the state to his disadvantage.[25] Second, a failure to limit an accused's waiver of his privilege against self-incrimination to the proceeding wherein he testified[26]

---

hiding his guilt. The object of the law is to protect the innocent, and the law still covers the man with the presumption of innocence, even when he refuses to give testimony that might be turned against him.

17. Canada v. State, 22 Ala. 495, 117 So. 398 (1928); Simmons v. State, 139 Fla. 645, 190 So. 756 (1939); Hathaway v. State, 100 So.2d 662 (Fla. 3d Dist. 1958); Newman v. Commonwealth, 28 Ky. L. Rptr. 81, 88 S.W. 1089 (1905); Berg v. Penttila, 173 Minn. 512, 217 N.W. 935 (1928); State v. Youngquist, 176 Minn. 562, 223 N.W. 917 (1929); State v. Conway, 348 Mo. 580, 154 S.W.2d 128 (1941); Hall Motor Freight v. Montgomery, 357 Mo. 1188, 212 S.W.2d 748 (1948); People v. Russo, 251 App. Div. 176, 295 N.Y.S. 457 (1937); People v. Hunnicutt, 15 App. Div. 2d 536, 222 N.Y.S.2d 713 (1961); Smithson v. State, 127 Tenn. 357, 155 S.W. 133 (1913); Hare v. State, 56 Tex. Crim. 6, 118 S.W. 544 (1909); Lee v. State, 165 Tex. Crim. 113, 303 S.W.2d 406 (1957).

18. Simmons v. State, 139 Fla. 645, 190 So. 756 (1939) 17; Scroggins v. State, 97 Tex. Crim. 573, 263 S.W. 303 (1924) (an "examining trial" in Texas is synonymous with a preliminary hearing). *Contra, e.g.*, Smith v. Commonwealth, 136 Va. 773, 118 S.E. 107 (1923).

19. Newman v. Commonwealth, 28 Ky. L. Rptr. 81, 88 S.W. 1089 (1905).

20. Swilley v. State, 73 Tex. Crim. 619, 166 S.W. 733 (1914).

21. Fries v. Berberich, 177 S.W.2d 640 (Mo. App. 1944). *Contra, e.g.*, Allen v. State, 173 Md. 649, 197 A. 144 (1938).

22. See Tomlinson v. United States, 93 F.2d 652 (D.C. Cir. 1937); People v. McCrea, 303 Mich. 213, 6 N.W.2d 489 (1942). *Cf.* Grunewald v. United States, 353 U.S. 391 (1957).

23. Canada v. State, 22 Ala. 495, 117 So.2d 398 (1928); Smithson v. State, 127 Tenn. 357, 155 S.W. 133 (1913). *Contra, e.g.*, Morton v. State, 208 Ark. 492, 187 S.W.2d 335 (1945). *Cf.* Hall Motor Freight v. Montgomery, 357 Mo. 1188, 212 S.W.2d 748 (1948).

24. For an analogous discussion of the various waiver possibilities that might occur if the defendant determines to testify in his own behalf see 8 J. WIGMORE, *supra* note 2, § 2276(b)(2).

25. Concerning this concept of unrestrained freedom in the exercise of a defendant's rights, the court in State v. Conway, 348 Mo. 580, 586, 154 S.W.2d 128, 134 (1941) held:

> Since [the statutory protection against comment] is a right and a privilege granted the citizen, he should be permitted to exercise it with complete freedom and not at the peril of being impeached by it in the event that he should ever attempt to assert his innocence. No suspicion or incrimination should follow the assertion of a constitutionally given right.

26. In this regard, it is interesting to note that in the jurisdictions that permit comment upon a defendant's previous *failure* to testify once he has taken the stand, the waiver principle seems to work only in retrospect. Thus voluntary testimony at a prior proceeding is not a waiver for the main trial; nor is testimony at a prior trial a waiver for a subsequent trial. An accused may, if he chooses, still invoke his right against self-incrimination and no comment can be made concerning it; notwithstanding his earlier testimony. *See* In re

would bring pressure on him to testify in an initial proceeding for fear of the consequences of his silence should a subsequent trial become necessary.[27] Conversely, if he failed to testify initially he may be forced to remain silent throughout all proceedings lest his first silence be used against him.[28]

Those courts which permit the prosecutor to comment upon a defendant's failure to testify in a prior proceeding also arrive at their determination through statutory interpretation. Although the statutes enacted in these jurisdictions are essentially the same as those governing the jurisdictions which prohibit such comment,[29] the courts have held that a defendant unconditionally waives his right under those statutes upon his election to take the stand and testify.[30] From the moment he ascends the stand he is treated as any other witness.[31]

Insofar as the waiver during the present proceeding is deemed to be total, it is construed to extend to all prior proceedings as well.[32] Conse-

Neff, 206 F.2d 149 (3d Cir. 1953); Samuel v. People, 164 Ill. 379, 45 N.E. 728 (1896); State v. Allison, 116 Mont. 352, 153 P.2d 141 (1944).

27. *See* Hare v. State, 56 Tex. Crim. 6, 7, 188 S.W. 544, 545 (1909), wherein the court reversed because the prosecutor elicited the fact that the defendant had not testified during a former trial. In a portion of the opinion the court stated:

> [T]o construe the statutory inhibition [against comment] as applying only to the present trial would render it dangerous to any citizen's case if his counsel decided not to put him on the stand, when, if a subsequent trial was had, the state's case might be stronger and require defendant's testimony, and his previous silence (when he had a right to be silent) be used as an indication of fabrication.

28. State v. Conway, 348 Mo. 580, 154 S.W.2d 128 (1941).

29. *See* note 7 *supra.*

30. Tomlinson v. United States, 93 F.2d 652, 656 (D.C. Cir. 1937) contained the following statement which succinctly illustrates the concept of waiver as applied by these courts:

> The privilege of the defendant against self incrimination, and its corollary, the prohibition against comment by counsel for the government upon his failure to testify, have been jealously protected by the courts. But when the defendant elects, voluntarily, to take the stand, he waives his privilege, subjects himself to cross-examination and impeachment, and makes comment upon his testimony entirely proper.

31. The most convincing reasons for holding the privilege waived by testifying on the principal trial have been advanced by Mr. Justice Stone in the leading federal case of Raffel v. United States, 271 U.S. 494, 497-99 (1926) (emphasis added):

> The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, *he does so as any other witness*, and within the limits of the appropriate rules he may be cross examined as to the facts in issue . . . . His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing . . . . The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial, or to any tribunal, other than that in which the defendant preserves it by refusing to testify.

32. *See, e.g.*, Raffel v. United States, 271 U.S. 494 (1926); Tomlinson v. United States, 93 F.2d 652 (D.C. Cir. 1937). *But see*, Grunewald v. United States, 353 U.S. 391 (1957), where the prosecutor elicited from the defendant on cross examination the fact that he had refused to testify before a grand jury. Four Justices, concurring, felt such cross examination violated privilege and that Raffel v. United States, *supra*, should be overruled.

quently, the protection against self-incrimination under the statute is lost to the defendant and the prosecutor may properly elicit comment upon and draw adverse or incriminating inferences from the defendant's failure to offer testimony at any prior proceeding.

In the instant case,[33] the Supreme Court of Florida quashed the decision of the First District Court of Appeal[34] and held that it was not error for the prosecutor on cross-examination to interrogate the defendant concerning his failure to testify at the preliminary hearing. The court expressly repudiated the cases of *Simmons v. State*[35] and *Hathaway v. State*[36] and thereby overruled the former Florida position. The decision was predicated on the theory that since a defendant cannot be forced to take the stand, he is protected from such adverse comments. However, if he elects to testify he should be treated as any other witness and thus comment on his previous failure to testify should be allowed.[37]

It would seem that the better answer to the problem presented is found in the reasoning of those jurisdictions which prohibit comment on a defendant's failure to testify at a preliminary proceeding. As opposed to this, those courts which make prior silence a proper subject for comment if the defendant later testifies inherently place an unrealistic burden upon the accused. In effect, they require a defendant to anticipate during the preliminary stages the multitude of factors which will finally govern his decision whether or not to testify at trial. Under this latter rationale, the maxim "speak now, or forever hold your peace" was never more meaningful.

ALAN E. WEINSTEIN

33. State v. Hines, 195 So.2d 550 (Fla. 1967).

34. Hines v. State, 186 So.2d 820 (Fla. 1st Dist. 1966).

35. 139 Fla. 645, 190 So. 756 (1939).

36. 100 So.2d 662 (Fla. 3d Dist. 1958).

37. In setting forth the underlying rationale of its decision, the *Hines* court quoted Odom v. State, 109 So.2d 163, 165 (Fla. 1959):

> Whether or not a defendant becomes a witness for himself is purely a question for decision by him. If he elects not to testify, he is to be classified as a silent defendant whose silence must be ignored . . . . But if he decides to do so he is then to be regarded as any other witness, his testimony will be weighed the same as that of any other witness and the jury may in evaluating it take into consideration his interest in the trial and its result. And argument directed to what he says and does not say will be completely justified.

195 So.2d, at 551.