University of Miami Law Review

Volume 17 | Number 3 Article 14

5-1-1963

Failure to Testify -- Comment by Co-Defendant

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Consequently, it is only the personal representative of the deceased husband's estate who can claim loss; the share which he would receive in his representative capacity has been substantially reduced by the change in the law regarding the widow's interest.

The dower interest has been increased at the expense of the share administered by the personal representative. This increase is equal to one-third of the indebtedness on the stock. Dower did not attach to the indebtedness when the basis used was the net value of the account.

The court's rationale for the resulting change in the law is subject to criticism. But one reason, not mentioned by the court, may be a prevailing factor in its liberal interpretation of the statutory change in language. This is the court's zealous protection of dower rights. Dower is a favored institution of the law,[30] and public policy is summoned to protect and extend it.

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FAILURE TO TESTIFY—COMMENT BY CO-DEFENDANT

The appellant and a co-defendant were charged jointly with violation of the narcotic laws. Each defendant retained his own attorney. The co-defendant's attorney, in arguing to the jury, contrasted his client's willingness with the appellant's unwillingness to take the witness stand and testify.[1] The appellant objected to the comments as being inflammatory and prejudicial and moved for a mistrial. The motion was denied and the jury found the appellant guilty and the co-defendant not guilty. On appeal, *held*, reversed and remanded: When one of two defendants jointly tried in a criminal proceeding in a federal court exercises his right not to testify, the Fifth Amendment protects him from prejudicial comments on his failure to testify made to the jury by an attorney for the co-defendant. *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962).

The roots of the self-incrimination clause of the fifth amendment lie in English law during a very confusing period of legal history.[2] The first formal description of the procedure whereby a man on mere suspicion

30. Dowling, *Dower In Florida*, 31 FLA. B.J. 345 (1957). The courts in Florida have long favored and protected the widow's right to dower.

1. The following is typical of the comments made by the co-defendant's counsel concerning the failure of the appellant to testify: "Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross examination, and tell you the whole story . . . . You haven't heard a word from this man [the appellant]." De Luna v. United States, 308 F.2d 140, 142 (5th Cir. 1962).

2. Kemp, *The Background of the Fifth Amendment in English Law: A Study of its Historical Implications*, 1 W. & M. L. REV. 247 (1958); Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 HARV. L. REV. 610 (1902).

was brought before an English court and forced to testify against himself is found in the Act of the Star Chamber of 1487.[3] The procedure evolved around the "ex officio" oath, upon which persons were sworn to tell the whole truth in answer to the questions put to them, and a refusal to take the oath or to answer under it were taken as a confession of the offense charged.[4] The oath first came under serious attack during the last quarter of the 16th century in the interest of the non-conforming Puritan clergymen, who were rapidly becoming its victims.[5] In 1589, Sir Edward Coke lent his important support to the assault against the oath and in 1607 formally laid down the doctrine that it could be legally extracted only in cases affecting wills and marriages.[6] The struggle against the oath came to a successful climax during the trial of John Lilburn.[7] It is important to note that Lilburn never claimed the right to refuse to answer an incriminating question; he had claimed the right to a proper proceeding of presentment or accusation.[8] However, in 1641 the "ex officio" oath to answer criminal charges was swept away,[9] and it began to be claimed, flatly, that no man is bound to incriminate himself on any charge or in any court.[10] By the end of Charles II's reign, there was no longer any doubt that the right against self-incrimination had evolved into a rule of law which the judges would recognize on demand.[11] The right of an accused person to refuse to testify was so important to our forefathers that they raised it to a constitutional enact-

3. 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 166-83, 337-45 (1883). The Star Chamber was vested with the authority to compel defendants to testify under the "ex officio" oath and in the exercise of this power torture was often employed.

4. VIII WIGMORE, EVIDENCE § 2250 (3d ed. McNaughton's Revision 1961).

5. Kemp, *The Background of the Fifth Amendment in English Law: A Study of its Historical Implications*, 1 W. & M. L. REV. 247, 251-86 (1958); Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 HARV. L. REV. 610 (1902).

6. ROGGE, THE FIRST AND THE FIFTH 138-203 (1960); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1 (1930); Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 HARV. L. REV. 610 (1902); VIII WIGMORE, EVIDENCE § 2250 (3d ed. McNaughton's Revision 1961).

7. Lilburn's Trial, 3 How. St. Tr. 1315 (1637). Lilburn was brought before the Star Chamber in 1637 for the illegal distribution of the writings of William Prynne. He refused to take the "ex officio" oath, for he did not wish to inform on his co-conspirators. He was sentenced and ordered to pay a fine of 500 pounds. The House of Commons held that his fine and imprisonment were contrary to English law.

8. *Ibid.*

9. Abolition of High Commission Court, 16 Car. 1, c. 11 (1640).

10. King Charles' Trial, 4 How. St. Tr. 993, 1101 (1649). The defendant objected to answering a question and, the court said, "perceiving that the question to be asked him tended to accuse himself, thought fit to waive his examination." See also Twelve Bishops' Trial, 4 How. St. Tr. 63 (1641).

11. Oates' Trial, 10 How. St. Tr. 1079, 1099, 1123 (1685). A witness may not be compelled to make himself "obnoxious to some penalty." Jenkes' Trial, 6 How. St. Tr. 1189, 1194 (1676). The defendant said, "I desire to be excused from all farther answer to such questions, since the law doth provide that no man be put to answer to his own prejudice;" and no further questions were asked. Scroop's Trial, 5 How. St. Tr. 1034, 1039 (1660). The judge told the defendant that "you are not bound to answer me, but if you will not, we must prove it."

ment,[12] and it has become "one of the most valuable prerogatives of the citizen."[13]

The Federal Constitution[14] and the constitutions of all but two of the states[15] include language relating specifically to self-incrimination. Embodied within the right against self-incrimination are those state statutes[16] and the Supreme Court's interpretation of the self-incrimination clause of the fifth amendment,[17] which provide that no presumption of guilt shall arise from the failure of the accused to testify and that the silence of the accused shall not be the subject of comment. The test laid down by the federal courts and followed, in most instances, by the state courts on what is or what is not comment is "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment upon the failure of the accused to testify?"[18] When the prosecution comments upon the failure of the accused to testify and the comment meets the above test, cases are legion in labeling the remarks as prejudicial and calling for reversal and a new trial.[19] In this regard, the Florida courts are in complete harmony with the federal courts.[20]

The reasoning behind these decisions was emphatically expressed by Mr. Justice Clark in *Slochower v. Board of Higher Education*[21] when he said, "the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." It is noteworthy that the federal courts in construing the application of the self-incrimination clause of the fifth amendment have never been faced with a situation where a defendant's silence is the subject of comment by counsel for a co-defendant.

In the instant case,[22] one of first impression in this country, the court was faced with the question of whether a defendant had a con-

12. U.S. CONST. amend. V.

13. Brown v. Walker, 161 U.S. 591, 610 (1896).

14. At note 12, *supra*.

15. See generally McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L., C. & P.S. 138, 139 (1960). Iowa reads the right against self-incrimination into its due process clause and New Jersey claims that the right is statutory.

16. For a list of the statutory enactments see Reeder, *Comment Upon the Failure of Accused to Testify*, 31 MICH. L. REV. 40, 41, 42 (1932).

17. Stewart v. United States, 366 U.S. 1 (1961); Pratt v. United States, 303 U.S. 642 (1938); Wilson v. United States, 149 U.S. 60 (1893).

18. Morrison v. United States, 6 F.2d 809, 811 (8th Cir. 1925).

19. United States v. Housing Foundation of America, 176 F.2d 665 (3d Cir. 1949); Milton v. United States, 110 F.2d 556 (D.C. Cir. 1940); Tomlinson v. United States, 93 F.2d 652 (D.C. Cir. 1937); United States v. Di Carlo, 64 F.2d 15 (2d Cir. 1933); Grantello v. United States, 3 F.2d 117 (8th Cir. 1924).

20. Gordon v. State, 104 So.2d 524 (Fla. 1958); Trafficante v. State, 92 So.2d 811 (Fla. 1957); Swarez v. State, 136 So.2d 367 (Fla. 2d Dist. 1962).

21. 350 U.S. 551, 557 (1956).

22. De Luna v. United States, 308 F.2d 140 (5th Cir. 1962).

stitutionally guaranteed right to decline to testify free from prejudicial comment by a co-defendant as well as by the prosecution. The court's decision is based primarily upon two important considerations. First, after a deep search into the development of the self-incrimination clause of the fifth amendment, the court concluded that "if the expansion of the individual's right of silence comes at the expense of the power and efficiency of the State, that is but in accord with the nature of the right and its historical development."[23] Second, the guiding philosophy behind the self-incrimination clause of the fifth amendment is based upon the premise that the security of the individual must be protected against the exertion of the power of the State to compel incriminating testimony so that the State cannot convict a man out of his own mouth.[24] Reasoning from these two propositions, the court concluded that the right against self-incrimination is no less inviolate when counsel for a co-defendant makes the prejudicial comments upon the failure of the accused to testify than when the prosecution makes the prejudicial remarks.

It is possible that this decision will create a procedural problem. A severance in advance of trial may be required when there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify, and claim their right to comment upon the failure of the other to testify.[25] When co-defendants are faced with certain conviction of a crime, they could conspire to promote a mistrial by having one of them comment upon the failure of the other to testify. However, the decision of the court is in keeping with the historical mandate of the right against self-incrimination and the long line of cases which look with great disfavor on prejudicial comment upon the failure of the accused to testify. The individual is sovereign and the proper rules of battle between the government and the individual require that the individual should not be conscripted by his opponent to defend himself. This rule should apply to a situation where the conscription is attempted by an individual's co-conspirator.

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23. *Id.* at 150.
24. Knapp v. Schweitzer, 357 U.S. 371, 380 (1958).
25. De Luna v. United States, *supra* note 22, at 156.