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Self Incrimination

Despite the judge's charge to the jury that the jury should not make any negative inferences when a witness asserts his Fifth Amendment privilege, the prosecution's conduct led to an unfair trial for the defendant.[43] Thus, the New York Court of Appeals reversed and ordered a new trial.[44]

In sum, under both the Federal and New York Constitution, reversible error may be committed when the prosecution calls a witness for the sole purpose of using his or her assertion of the privilege against self-incrimination against the defendant. Respectfully enforcing the United State Supreme Court's decision in *Namet*, the New York Court of Appeals held that reversible error may be committed where the prosecution makes a "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege"[45] or where a witness's invocation of the privilege unduly prejudices the defendant.[46]

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Spinelli[47]
(decided September 15, 1995)

The defendant, Thomas Spinelli, was convicted in the Supreme Court, Queens County of second-degree manslaughter and moved to have this verdict reversed on the ground that his right against self-incrimination was violated.[48] The Appellate Division,

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43. *Id.*

44. *Id.* at 224, 654 N.E.2d at 1226, 630 N.Y.S.2d at 978.

45. *See* Namet v. United States, 373 U.S. 179, 186 (1963).

46. *Id.* at 187.

47. 214 A.D.2d 135, 631 N.Y.S.2d 863 (2d Dep't 1995).

48. *Id.* at 138, 631 N.Y.S.2d at 864. *See* U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Id.*; N.Y. CONST.

Second Department held that the use of the defendant's silence in summation deprived the defendant of a fair trial because the defendant was not confronted with his omissions nor was he given an opportunity to explain his omissions.[49]

The defendant and the victim, Jerry Liebowitz, were involved in an altercation which took place on the street near the parties' residences.[50] When the police arrived, Liebowitz was lying halfway inside his car with a gunshot wound in his chest.[51] The defendant stated "I shot him. I shot him."[52] After the gun was recovered in the defendant's house, the defendant was read his rights and was placed under arrest.[53] The defendant then said, without any police questioning, "another man Eddie was involved. He had a gun and he ran and put it in the house."[54] The defendant was referring to Eddie Cintron, who was employed by Liebowitz, and was present at the scene of the crime.[55] Cintron testified at trial for the prosecution. He stated that as Liebowitz pulled his car out of its parking spot, the defendant threw a bag of trash at the car, and tried to pull Liebowitz out of the car.[56] When Cintron saw the defendant shoot Liebowitz, he ran into Liebowitz' apartment and got a gun which Cintron pointed at the defendant.[57] When the defendant went back into his house, Cintron became worried that he would be blamed for the murder, so he replaced the gun in Liebowitz' house prior to the arrival of the police.[58]

The defendant testified at trial that, after he threw the bag of garbage at Liebowitz' car, he tried to walk away, but Liebowitz

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art. I, § 6. This section provides in pertinent part: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself." *Id.*

49. *Spinelli*, 214 A.D.2d at 139, 631 N.Y.S.2d at 866.
50. *Id.* at 137, 631 N.Y.S.2d at 864.
51. *Id.*
52. *Id.* at 137, 631 N.Y.S.2d at 864-65.
53. *Id.* at 137, 631 N.Y.S.2d at 865.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

"lunged" his car at him and he was hit twice.[59] The defendant further testified that Liebowitz got out of the car with a gun in his hand and started to hit him with the gun.[60] The defendant stated that, in his attempt to pull the gun out of Liebowitz' hand, the gun accidentally fired.[61] When Liebowitz noticed the blood on himself, he sat down in his car and the defendant picked up the gun and put it in his house, out of the reach of his children.[62]

At trial, the prosecutor neglected to cross-examine the defendant regarding his failure to tell the police that the shooting was accidental or was for the purpose of self-defense.[63] Instead, on redirect examination of the investigating officer, the prosecutor asked, "[s]o he [the defendant] never said to you anything about an accident or self-defense, did he?"[64] Furthermore, during his closing argument, the prosecutor repeatedly stated that the defendant's account of the events was unworthy of belief because the defendant failed to tell police at the scene of the crime that the shooting was an accident or was done in self-defense.[65] The prosecutor stated that the only explanation for why the defendant did not tell the police the version of the story which the defendant told on the stand, was "because it never happened that way."[66]

On appeal, the defendant argued that he was denied a fair trial due to the prosecutor's use of the defendant's pretrial silence during redirect examination of the investigating officer and during closing arguments.[67] The appellate division held that the prosecution's closing statements deprived the defendant of a fair trial because the "defendant was not confronted with his omissions and given an opportunity to explain them."[68] In

59. *Id.*
60. *Id.*
61. *Id.* at 137-38, 631 N.Y.S.2d at 865.
62. *Id.* at 138, 631 N.Y.S.2d at 865.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 139, 631 N.Y.S.2d at 866. The *Spinelli* court rejected the claim that the prosecutor's question to the investigating officer on redirect

reaching its holding, the court cited *People v. Basora*,[69] which stated the New York rule that the exercise of a defendant's constitutional right to remain silent may not be used by the State as part of their direct case.[70] The *Basora* case also held that, pursuant to New York State's rules of evidence, "silence in the face of police interrogation shortly after evidence of a crime is uncovered is usually ambiguous and its probative value minimal."[71] The *Spinelli* court continued its analysis by stating that "[r]egardless of whether the defendant's omission of exculpatory facts from his statements to the police could be used to impeach his credibility once he testified, the People could not attempt to use those omissions as direct proof of his guilt."[72]

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examination constituted reversible error because "[t]he court sustained the defendant's objection, [the officer] did not answer the question, and the jury was instructed that the question was 'completely inappropriate' and that they were to disregard it." *Id.*

69. 75 N.Y.2d 992, 556 N.E.2d 1070, 557 N.Y.S.2d 263 (1990). In *Basora,* the defendant's agent sold drugs to an undercover police officer while the defendant watched from a distance. *Id.* at 993, 556 N.E.2d at 1070, 557 N.Y.S.2d at 263. At trial, it was the state's theory that the defendant, who was a major drug dealer, had planned the sale but had carefully taken precautions so as to protect himself from liability. *Id.* at 993, 556 N.E.2d at 1071, 557 N.Y.S.2d at 264. In order to support the state's theory, the state called an arresting officer as a witness who testified that after the defendant was informed of the arrest, the defendant "kind of smiled." *Id.* During the prosecution's closing arguments, the prosecutor commented on the fact that the defendant smiled in order to show that the defendant believed that he adequately protected himself so as to avoid a finding of guilt. *Id.* Though the *Basora* court found that the defendant's Fifth Amendment right had been violated "by attributing communicative value to his act of smiling," the error was harmless beyond a reasonable doubt based on the abundance of proof indicating the defendant's guilt. *Id.* at 993-94, 556 N.E.2d at 1071-72, 557 N.Y.S.2d at 264-65.

70. *Id.* at 993, 556 N.E.2d at 1071, 557 N.Y.S.2d at 264. *See also* People v. DeGeorge, 73 N.Y.2d 614, 620, 541 N.E.2d 11, 14, 543 N.Y.S.2d 11, 14 (1989) (holding that defendant's pre-arrest silence, when investigating officer inquired as to what took place, could not be used to impeach defendant's testimony on cross-examination or as direct evidence of his "depraved indifference to human life" in committing the assault).

71. *Basora*, 75 N.Y.2d at 993, 556 N.E.2d at 1071, 557 N.Y.S.2d at 264.

72. *Spinelli*, 214 A.D.2d at 139, 631 N.Y.S.2d at 866.

The *Spinelli* court explained that when a defendant gives a voluntary statement to the police which fails to include "exculpatory circumstances" which the defendant testifies to at trial, the constitutional privilege against self-incrimination does not prohibit cross-examination of the defendant regarding the reason why the defendant failed to mention the exculpatory circumstances to the police.[73] The court added that it is not necessary that the defendant give a "complete narrative" of circumstances surrounding the crime before the defendant may be questioned on cross-examination regarding his omissions.[74] It is merely necessary that the defendant's communication to the police was voluntary and the omitted circumstances which are testified to are significant.[75] The omissions which were made by the defendant in the case at bar were deemed by the court to be

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73. *Id.* at 140, 631 N.Y.S.2d at 866. *See* People v. Savage, 50 N.Y.2d 673, 409 N.E.2d 858, 431 N.Y.S.2d 382, *cert. denied*, 449 U.S. 1016 (1980). In *Savage*, the defendant was arrested for shooting the victim outside of a bar during an argument. *Id.* at 676, 409 N.E.2d at 859, 431 N.Y.S.2d at 383. Immediately following the arresting officer's recitation of the defendant's Miranda warnings, the defendant stated "I'm glad I'm caught-I'm tired," and then described his role in the crime and confessed that he shot the victim. *Id.* at 677, 409 N.E.2d at 859, 431 N.Y.S.2d at 383. When the defendant took the stand in his own defense, he stated that he shot the victim when an altercation ensued because the victim had tried to rob him, and that the firing of the gun was accidental. *Id.* at 677, 409 N.E.2d at 859-60, 431 N.Y.S.2d at 383. During cross-examination, the prosecutor questioned the defendant so as to insinuate recent fabrication regarding the exculpatory circumstances to which the defendant testified to on the stand. *Id.* at 677, 409 N.E.2d at 860, 431 N.Y.S.2d at 383. The court held that such prosecutorial questioning was permissible because the defendant had voluntarily responded to the police officer's questions, and the defendant's statements "expressly incorporated essential elements of the crime with which he was to be charged . . . [b]ut excluded from all this was the crucial exculpatory circumstance to which the defendant later was to testify . . . ." *Id.* at 678, 409 N.E.2d at 860-61, 431 N.Y.S.2d at 384. The *Savage* court focused on the importance of the omission, stating that "what was omitted is far from an inconsequential detail or a collateral matter, but a fact of such overwhelming significance that its absence from the narrative was at least as calculated to distort his recitation as a most affirmative falsehood." *Id.* at 679, 409 N.E.2d at 861, 431 N.Y.S.2d at 384.

74. *Spinelli*, 214 A.D.2d at 141, 631 N.Y.S.2d at 867.

75. *Id.*

"extraordinarily probative" regarding the jury's evaluation of the defendant's testimony on the stand.[76] This was because the omissions directly concerned the circumstances of the shooting.[77]

Theoretically, the prosecutor's closing statements regarding Spinelli's omissions would have been permissible had the prosecutor laid the proper foundation by cross-examining the defendant regarding the omissions when the defendant was on the stand.[78] However, the prosecutor failed to address the omissions during cross-examination of the defendant and his comments during summation were "fundamentally unfair."[79] The *Spinelli* court stated that when omissions of exculpatory circumstances are used for purposes of impeachment on cross-examination, there are certain protections which must be afforded to the defendant:[80]

> The court is required, upon the defendant's request, to advise the jury that he was under no obligation to speak, and the defendant must be provided an opportunity to explain the omissions, either through his answers to the prosecutor's questions or through questioning by defense counsel on redirect examination.[81]

By waiting until the closing arguments of the case, the State took away the defendant's opportunity to explain why he did not recite the exculpatory circumstances to the police.[82] The defendant's silence in such a situation could be for a number of different reasons which the jury was never given a chance to hear.[83]

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76. *Id.*
77. *Id.*
78. *Id.* at 142, 631 N.Y.S.2d at 868.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id. See* People v. Conyers, 52 N.Y.2d 454, 458, 420 N.E.2d 933, 935, 438 N.Y.S.2d 741, 743 (1981). The *Conyers* court stated that:

> [T]he individual's silence in such circumstances may simply be attributable to his awareness that he is under no obligation to speak or to the natural caution that arises from his knowledge that anything he says might later be used against him at trial . . . [or to the fact] that some of our citizens harbor a mistrust for law enforcement authority which leads them to shun contact with the police even when the avoidance of contact is not in their own best interest.

The federal system treats the use of pre-arrest silence differently than New York State. In *Jenkins v. Anderson,*[84] the defendant fatally stabbed the victim, but did not explain the circumstances surrounding the stabbing to the police.[85] The defendant took the stand and testified that the stabbing was an act of self-defense, in response to an attack by the victim who had allegedly robbed the defendant the night before.[86] On cross-examination and in closing arguments, the prosecutor referred to the defendant's pre-arrest silence in order to attack his credibility as a witness.[87] The defendant sought a writ of habeas corpus, arguing that his Fifth Amendment right against self-incrimination was violated.[88] The Supreme Court of the United States held that such cross-examination is not a violation of the defendant's Fifth Amendment right because this right is waived once the defendant takes the stand as a witness.[89] The *Jenkins* Court interpreted the Fifth Amendment as guaranteeing a criminal defendant the right to remain silent during the course of his trial and prohibiting the prosecution from using such silence as a means of attack.[90] Once a defendant takes the stand, however, he is subject to the same cross-examination rules as any witness.[91]

Furthermore, the Court elaborated on the policy justifications for such an interpretation of a defendant's pre-arrest silence. The prosecution's attempted impeachment of a criminal defendant on cross-examination allows the credibility of a defendant to be tested by forcing them to justify their inconsistent statements.[92] The Court noted that the defendant need not take the stand, and such a decision is a choice of "litigation tactics" which are left to

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Id.

84. 447 U.S. 231 (1980).
85. *Id.* at 232-33.
86. *Id.*
87. *Id.* at 233-34.
88. *Id.* at 234-35.
89. *Id.* at 235.
90. *Id.* (citing Griffin v. California, 380 U.S. 609 (1965)).
91. *Jenkins*, 447 U.S. at 235.
92. *Id.* at 238.

the defendant.[93] The Court concluded by stating that "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial."[94]

The *Jenkins* case was decided in a dramatically different way than a New York State court would have decided the same issue. In *People v. Conyers,*[95] the defendant's conviction of several crimes, including robbery, was reconsidered based on his argument that his Fifth Amendment rights were violated.[96] The defendant remained silent to the investigating police officers, but offered testimony on the stand which stated that there had been no robbery.[97] The prosecutor cross-examined the defendant regarding his pretrial silence and commented on this silence during closing arguments.[98] The court of appeals held that a defendant's silence during arrest may not be used to impeach his credibility because such a use would violate a defendant's Fifth Amendment rights.[99] The State petitioned the Supreme Court of the United States to review the decision, and while such appeal was pending, the case of *Jenkins v. Anderson* was decided. After the *Jenkins* decision, the Supreme Court granted the State's petition for certiorari and vacated the decision in *Conyers I.*[100] The Supreme Court instructed the Court of Appeals of New York to reconsider *Conyers* in light of the *Jenkins* decision.[101]

In *Conyers II*, the Court of Appeals reaffirmed their earlier holding that, even in light of the *Jenkins* decision, "[New York] State rules of evidence preclude the use of a defendant's pretrial

93. *Id.*

94. *Id.*

95. 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402, *vacated*, New York v. Conyers, 449 U.S. 809 (1980), *on remand sub nom.* People v. Conyers, 52 N.Y.2d 454, 420 N.E.2d 933, 438 N.Y.S.2d 741 (1981).

96. *Conyers,* 49 N.Y.2d at 176-77, 400 N.E.2d at 344, 424 N.Y.S.2d at 404.

97. *Id.* at 176, 400 N.E.2d at 344, 424 N.Y.S.2d at 404.

98. *Id.*

99. *Id.* at 177, 400 N.E.2d at 345, 424 N.Y.S.2d at 405.

100. *Conyers*, 52 N.Y.2d at 456, 420 N.E.2d at 934, 438 N.Y.S.2d at 742.

101. *Id.*

silence to impeach his trial testimony."[102] The *Conyers II* court added that "the use of such evidence for impeachment purposes cannot be justified in the absence of unusual circumstances."[103]

Whereas the federal view regards a defendant's Fifth Amendment right as waived once he takes the stand, New York believes that even if a defendant takes the stand, his pretrial silence may not automatically be used to impeach his credibility. According to federal interpretation, the Fifth Amendment gives the defendant the right to remain silent and not take the stand during his trial. New York's interpretation provides more extensive protection to a defendant who is silent at the time of arrest. This is achieved by making him immune, absent unusual circumstances, to cross-examination which tries to impeach his credibility by attacking his silence as conflicting with his trial testimony. It is imperative to note, however, that, in New York, when a defendant voluntarily offers information to police officers at the time of arrest, but is silent as to very significant details, the prosecutor may question a defendant who takes the stand in regard to such omissions for purposes of impeachment.[104]

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102. *Id.* at 457, 420 N.E.2d at 934, 438 N.Y.S.2d at 742. The New York Court of Appeals based its holding on the premise that the probative value of evidence of silence at the time of arrest which is later used for impeachment purposes is often outweighed by its potential prejudice to the defendant. *Id.* at 459, 420 N.E.2d at 936, 438 N.Y.S.2d at 744.

103. *Id.* at 459, 420 N.E.2d at 935-36, 438 N.Y.S.2d at 744.

104. *Spinelli*, 214 A.D.2d at 140, 631 N.Y.S.2d at 867 (2d Dep't 1995).