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Self Incrimination

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Diggs[1915]
(decided August 31, 1992)

The defendant, Bernard Diggs, appealed his conviction of robbery in the first degree upon a jury verdict, on the grounds that his state[1916] and federal[1917] constitutional right against self-incrimination and the right to a fair trial were violated when the prosecutor sought to introduce testimony that the defendant had refused to answer questions after being informed of his *Miranda* rights.[1918] Although the defendant failed to preserve these errors for appellate review, the court, in its discretion, found that defendant's constitutional rights were, in fact, violated and thus, was deprived of a fair trial.[1919] Accordingly, the court reversed the defendant's conviction and remanded the case for a new trial.[1920]

At trial, the prosecution, during the People's case-in-chief, presented testimony from the arresting police detective establishing that the defendant, after being informed of his *Miranda* rights, refused to answer any questions.[1921] Immediately thereafter, the

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1915. 185 A.D.2d 990, 587 N.Y.S.2d 406 (2d Dep't 1992).

1916. N.Y. CONST. art. I, § 6.

1917. U.S. CONST. amend. V.

1918. *Diggs,* 185 A.D.2d at 990, 587 N.Y.S.2d at 406; *see* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

1919. *Diggs,* 185 A.D.2d at 990, 587 N.Y.S.2d at 406-07. The court reaffirmed the long standing rule that under article I, section 6 of New York Constitution, and the the Fifth Amendment of Federal Constitution "a criminal defendant has the constitutional right to remain silent at the time of his arrest." *Id* at 990, 587 N.Y.S.2d at 406.

1920. *Id.* at 990, 587 N.Y.S.2d at 406.

1921. *Id.*

court struck the testimony and provided curative instructions to the jury.

Although the defendant failed to preserve any errors for appeal,[1922] the court felt compelled, "in the interest of justice," to address the errors.[1923]

The court began its analysis by stating that it is "axiomatic that a criminal defendant has the constitutional right to remain silent at the time of his arrest."[1924] The court maintained that state law prohibits the People from introducing the defendant's exercise of his right to silence in its case-in-chief.[1925] In support of this contention, the court cited to *People v. Basora*,[1926] which

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1922. *Id.*; *see* People v. Medina, 53 N.Y.2d 951, 424 N.E.2d 276, 441 N.Y.S.2d 442 (1981) (defense counsel failed to request curative instruction or make motion for mistrial for comments made by prosecuting attorney during summation thereby preserving nothing for appeal); People v. Larsen 157 A.D.2d 672, 549 N.Y.S.2d 772 (2d Dep't 1990) (defense counsel's failure to request further curative instructions left nothing to preserve for appellate review).

1923. *Id.* In reaching this conclusion, the court cited to *People v. Ortiz*, 125 A.D.2d 502, 509 N.Y.S.2d 418 (2d Dep't 1986), a case in which the second department held that a prosecutor's comments were so prejudicial that they were subject to review although the defendant failed to object to them at trial. *Id.* In his summation, the prosecutor stated to the jury, "I think the testimony of all of [the defendant's] witnesses clearly indicate [sic] that they were lying." *Id.* at 503, 509 N.Y.S.2d at 419. Moreover, the prosecutor concluded his summation by stating that the "man is a liar and he is a good liar. But he is also a murderer," and that if the jury determines that defendant "is lying he should be found guilty of murder." *Id. See also* People v. Hamilton, 121 A.D.2d 176, 502 N.Y.S.2d 747 (1st Dep't 1986). In *Hamilton*, the appellate division reversed defendant's conviction and remanded the case for a new trial "as a matter of discretion in the interest of justice" because of the prosecutor's prejudicial opening remarks. *Id.* at 176, 502 N.Y.S.2d at 747.

1924. *Diggs*, 185 A.D.2d at 990, 587 N.Y.S.2d at 406 (citing People v. Basora, 75 N.Y.2d 992, 556 N.E.2d 1070, 557 N.Y.S.2d 263 (1990)). In *People v. Basora*, the court held that no legitimate inferences could be drawn from the defendant's smiling when he was arrested. 185 A.D.2d at 994, 556 N.E.2d at 1071, 557 N.Y.S.2d at 264. Relying in part on the Fifth Amendment right to remain silent, the court ruled that a defendant's smile is impermissible evidence for a prosecutor to admit during his case in chief. *Id.* at 993, 556 N.E.2d at 1071, 557 N.Y.S.2d at 264.

1925. *Diggs*, 185 A.D.2d at 990, 587 N.Y.S.2d at 406.

1926. 75 N.Y.2d 992, 556 N.E.2d 1070, 557 N.Y.S.2d 263 (1990).

recognized the well settled rule that "a criminal defendant has the constitutional right to remain silent at the time of his arrest . . . and his exercise of that right at or after his arrest cannot be used by the People as part of their direct case."[1927] *Basora* further recognized the great risk of prejudice in admitting such evidence and acknowledged its limited probative value.[1928] The *Diggs* court followed this reasoning and concluded that allowing the prosecutor to admit evidence of the defendant's silence thwarted defendant's constitutional right to remain silent and the prejudicial impact tainted his right to a fair trial.[1929]

Finally, the court, citing to *People v. Ayala,*[1930] held that this constitutional error mandated a reversal.[1931] In *Ayala,* the New York Court of Appeals stated that "constitutional error . . . must lead to reversal unless there is no reasonable possibility that the error might have contributed to the conviction."[1932] Thus, the court found that there was a strong possibility that the detective's testimony had a prejudicial impact on the defendant's trial even though the jury was given curative instructions.[1933]

The United States Supreme Court first addressed this issue in *Griffin v. California.*[1934] In *Griffin,* the Court ruled that it is a violation of the Fifth Amendment to invite a jury in a state criminal trial to draw an unfavorable inference from a defendant's fa-

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1927. *Diggs,* 185 A.D.2d at 990, 587 N.Y.S.2d at 406 (citing *Basora,* 75 N.Y.2d at 993, 556 N.E.2d at 1071, 557 N.Y.S.2d at 264).

1928. *Basora,* 75 N.Y.2d at 994, 556 N.E.2d at 1071, 557 N.Y.S.2d at 264.

1929. *Diggs,* 185 A.D.2d at 990, 587 N.Y.S.2d at 406-07. The court stated that "since there exists a reasonable possibility that [the prosecutor's conduct] might have contributed to the defendant's conviction," the conviction required reversal. *Id. See also* Fahy v. Connecticut, 375 U.S. 85, 86 (1963) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."); People v. Ayala, 75 N.Y.2d 422, 431, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) ("Constitutional error . . . must lead to reversal unless there is no reasonable possibility that the error might have contributed to the conviction.").

1930. 75 N.Y.2d 422, 553 N.E.2d 960, 554 N.Y.S.2d 412 (1990).

1931. *Diggs,* 185 A.D.2d at 990, 587 N.Y.S.2d at 406-07.

1932. *Ayala,* 75 N.Y.2d at 431, 553 N.E.2d at 964, 554 N.Y.S.2d at 416.

1933. *Diggs,* 185 A.D.2d at 990, 587 N.Y.S.2d at 406-07.

1934. 380 U.S. 609 (1965).

ilure to testify.[1935] The Court reasoned that such an inference would impose a penalty upon the defendant that was unacceptable because it impinged on the constitutional privilege against self-incrimination.[1936] The Court noted that "[t]he overwhelming consensus of the States . . . is opposed to allowing comment on the defendant's failure to testify."[1937] The Court stated further that "[t]he legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, 'an unwarrantable line of argument.'"[1938]

In order to prove that a comment violates the rule, the Second Circuit Court of Appeals, in *United States v. Araujo*,[1939] stated that a petitioner must establish that the language used was "'manifestly intended or . . . of such character that the jury would naturally and necessarily take it to be comment on the failure of the accused to testify.'"[1940] Further, if curative instructions are given to the jury, as they were in *Diggs*, the defendant must prove that the court's instruction failed to cure any existing prejudice.[1941] Lastly, even if the defendant succeeds

1935. *Id.* at 615 ("[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").

1936. *Id.* at 614. The Court stated "that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege." *Id.* (citation omitted).

1937. *Id.* at 611 n.3.

1938. *Id.* (quoting State v. Howard, 4 S.E. 481, 483 (S.C. 1892)).

1939. 539 F.2d 287 (2d Cir.), *cert. denied*, 429 U.S. 983 (1976).

1940. *Id.* at 291 (quoting Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955)).

1941. *See, e.g.*, Arizona v. Washington, 434 U.S. 497 (1978). The Court stated that "it must be recognized that the cases are legion in which convictions have been upheld despite the jury's exposure to improper material relating to the defendant's past conduct, often because curative instructions have been found sufficient to dispel any prejudice." *Id.* at 521 n.4. Furthermore, "[i]f instructions may be found to have cured prosecutorial error relating to the defendant's past misconduct beyond a reasonable doubt, they ought surely to be considered in deciding whether to subject a defendant to a second trial

in establishing a constitutional violation, he must be able to prove that the error was not harmless.[1942]

In *United States v. Hale*,[1943] the Supreme Court held that silence following *Miranda* warnings was not "sufficiently probative" to warrant admission as evidence to impeach the defendant.[1944] One year later, in *Doyle v. Ohio*,[1945] the Supreme Court stated that "while it is true that *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."[1946] Therefore, the Court held that the use of post-arrest silence was "fundamentally unfair" and a deprivation of due process.[1947]

In *People v. Conyers*,[1948] the New York Court of Appeals concluded that the New York State rules of evidence preclude the use of defendant's pretrial silence to impeach his trial testimony.[1949] Nor can it be introduced as direct evidence

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because of defense error in referring to past misconduct by the prosecution." *Id.*

1942. *See* Chapman v. California, 386 U.S. 18, 22 (1967). The Court noted that "[a]ll 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" *Id.* (quoting 28 U.S.C. §2111 (1982)). Furthermore, 28 U.S.C. § 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *Id.* The Court in *Chapman* thus concluded "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman*, 386 U.S. at 22.

1943. 422 U.S. 171 (1975).

1944. *Id.* at 180.

1945. 426 U.S. 610 (1976).

1946. *Id.* at 618.

1947. *Id.*

1948. 52 N.Y.2d 454, 420 N.E.2d 933, 438 N.Y.S.2d 741(1981).

1949. *Id.* at 457, 420 N.E.2d at 934, 438 N.Y.S.2d at 742.

because it offers little probative value and is ambiguous in nature.[1950]

Therefore, under both state and federal constitutional law, it appears that a criminal defendant's right to remain silent prohibits the prosecution from using the criminal defendant's post-arrest, pre-*Miranda* silence in its case-in-chief or for impeachment purposes. However, should the prosecution comment on, or elicit testimony of, the defendant's silence, no constitutional violation will be found if curative instructions provided by the court are sufficient to erase any prejudicial effect upon the jury.

1950. *Id.* at 459, 420 N.E.2d at 935-36, 438 N.Y.S.2d at 743-44. The court found that

> [b]ecause evidence of a defendant's pretrial silence may have a disproportionate impact upon the minds of the jurors and because the potential for prejudice inherent in such evidence outweighs its marginal probative worth, we conclude that the use of such evidence for impeachment purposes cannot be justified in the absence of unusual circumstances.

Id.