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Abstracts of Recent Cases

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Criminal Law—Comment on a Defendant's Failure to Testify

Defendant was charged with breaking and entering with intent to commit a misdemeanor. The prosecutor, in his argument to the jury, stated that "it's *uncontroverted*¹ . . . that (this defendant) told him² right there. . . that (he) committed this crime." Defendant was convicted as charged. *Held*, reversed. Comment by the prosecuting attorney that evidence against defendant was "uncontroverted" was reversible error where defendant did not testify. *Mims v. Florida*, 192 So.2d 62 (Fla. 1966).

The *Mims* decision raises the question of what constitutes a comment on the constitutional right of an accused to remain silent and to have no inference of guilt raised by this silence. This problem was recently considered in the 1965 decision of the United States Supreme Court in *Griffin v. California*.³ The court held that the self-incrimination guaranty of the fifth amendment, which applies to state actions through the due process clause of the fourteenth amendment,⁴ "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."⁵

Even prior to the decision of the Court in *Griffin* the right of an accused to remain silent in a federal prosecution and to be assured that such silence will not be the subject of comment had long been upheld.⁶ The protection of this right has, in fact, been explicitly provided for in the federal statutes.⁷ Early federal decisions were based on these statutes, and the question of whether the fifth amendment prohibited comment on the silence of an accused was not finally decided by the Court until the 1965 *Griffin* decision. There were, however, occasions for the Court to discuss this question in earlier decisions. In the 1937 case of *Adamson v. California*,⁸ a majority of the Court seemed to accept, in dicta, the proposition that the fifth amendment would prohibit comment by a prosecutor in a federal case.

¹ Emphasis added.

² Arresting police detective.

³ 380 U.S. 609 (1964).

⁴ *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁵ *Griffin v. California*, 380 U.S. 609 (1965).

⁶ *Wilson v. United States*, 149 U.S. 60 (1893).

⁷ 18 U.S.C. § 348 (1948).

⁸ 332 U.S. 46 (1943).

Most of the states have also accepted the proposition that comment by the prosecution, on the failure of an accused to testify, should not be allowed in the American system of criminal justice. At the time of the *Griffin* decision only five states permitted such comment.⁹ Prior to that decision, but subsequent to the fifth amendment being applied to the states in *Malloy v. Hogan*,¹⁰ New Jersey, which had permitted comment prior to *Malloy*, decided that to allow it violated the fifth and fourteenth amendments.¹¹

Since 1965, when the *Griffin* decision was handed down, the law in the United States has been to the effect that comment on the silence of an accused is not to be permitted. The only remaining question was what constituted such comment. In the principal case, the mere statement that the testimony of the arresting officer was "uncontroverted" was admitted by the state to be prohibited comment and error, and the conviction was reversed on that basis.

Whether such a statement would be considered a comment on the silence of an accused in West Virginia is doubtful. The applicable statute¹² in West Virginia provides that the failure of the accused "to testify shall create no presumption against him nor be the subject of any comment before the court or jury. . . ." Comment on the failure of an accused to testify has been held to be ground for annulling the trial unless waived,¹³ to be reversible error if permitted over the defendant's objection,¹⁴ and to entitle defendant to a new trial.¹⁵ However, the West Virginia Supreme Court of Appeals has held in numerous instances that references to the failure of an accused to testify are not the type of comment prohibited by the statute. In one case,¹⁶ the statement by the prosecuting attorney that "not a single witness has (controverted) those facts. . . ." without specifically alluding to defendant's failure to testify, was held not to be within the inhibition of the statute. In a later case,¹⁷ a statement by the prosecutor that none

⁹ California, Ohio, Iowa, Connecticut, and New Mexico. *Griffin v. California*: *Comment on Accused's Failure to Testify Prohibited by the Fifth Amendment*, 70 DICKINSON L. REV. 98.

¹⁰ 378 U.S. 1 (1964).

¹¹ *State v. Murphy*, 85 N.J. Super. 391, 204 A.2d 888 (1964).

¹² W. VA. CODE, ch. 57, art. 3, § 6 (Michie 1966).

¹³ *State v. Chisnell*, 36 W. Va. 659, 667, 15 S.E. 412 (1892).

¹⁴ *State v. Costa*, 101 W. Va. 466, 132 S.E. 869 (1926).

¹⁵ *State v. Self*, 130 W. Va. 515, 44 S.E.2d 582 (1947).

¹⁶ *State v. Nazel*, 109 W. Va. 617, 156 S.E. 45 (1930).

¹⁷ *State v. Simon*, 132 W. Va. 322, 342, 52 S.E.2d 725 (1949).

of the testimony on which the state relied had been denied, the defendant not having testified, was held not to amount to comment inhibited by the statute.

The federal courts, in construing the federal statute which prohibits comment on the accused's failure to testify,¹⁸ would seem to more closely follow the interpretation of the West Virginia court, as opposed to the view of the Florida court, exemplified by the principal case. In one case, a statement by a prosecuting attorney that certain evidence was not denied was held not to be a violation of the applicable statute prohibiting comment on the defendant's failure to take the stand.¹⁹ A federal court has also held that an attorney's argument that the evidence against defendants was not contradicted was not objectionable as comment on the failure of defendants to testify.²⁰

Thus, it would appear that the criteria for prohibitive comment varies among the jurisdictions. In the principal case there was an indirect and implied reference to the accused's failure to testify held as comment prohibited in that jurisdiction. Other cases in Florida are in accord. Indications are, however, that neither the West Virginia court nor the federal courts would go that far, and that a more direct comment on an accused's silence will be required before it will be deemed of the type prohibited.

Torts—Failure to Fasten Seat Belts Not Contributory Negligence

P was injured while a passenger in an automobile driven by *D* which was involved in an accident. *P* sued *D* for these injuries, and recovered. *D* appealed from the judgement, maintaining that *P*'s failure to fasten her seat belt constituted contributory negligence. *Held*, affirmed. There being do duty on an automobile passenger to use seat belts, the refusal to permit *D* to offer evidence of *P*'s failure to use them was not error. It was not within the

¹⁸ 18 U.S.C. § 48 (1948).

¹⁹ *Baker v. United States*, 115 F.2d 533 (8th Cir., 1940) *cert. denied*, 312 U.S. 692 (1941), *rehearing denied*, 312 U.S. 715 (1941), *rehearing denied*, 325 U.S. 894 (1945).

²⁰ *Bradley v. United States*, 254 F.2d 289 (8th Cir. 1918).

province of the court to legislate on this matter. *Brown v. Kendrick*, 192 So.2d 49 (Fla. 1966).

This case exemplifies an area of increasing litigation. Much attention has been given recently to problems of highway safety. Many states have adopted legislation in this area, with particular emphasis being given to safety devices in automobiles. Considerable controversy has also arisen with regard to some of these measures, and in some areas, such as regarding the use of seat belts, there remains a need for clarification by the legislatures.

Although a great number of states have adopted statutes which require installation of seat belts of certain approved types, only one state has yet gone so far as to require them to be used.¹ In the jurisdiction in which the principal case was decided, a statute exists which only requires approval of the type of seat belt to be used, if they are used.²

West Virginia has deemed it appropriate to adopt legislation in regard to this matter. Our statute³ is also limited in scope, however, and requires only that "no dealer . . . shall sell, lease, transfer or trade, at retail, any passenger automobile which is manufactured after (January 1, 1965), unless such vehicle is equipped with safety seat belts for the front seat" This statute applies only to passenger automobiles and only requires installation in the front seats of such vehicles.

It appears that if the use of seat belts is accepted as having a beneficial effect with regard to promotion of highway safety, and there are many studies so indicating, the West Virginia statute is defective. Indeed, it seems that the West Virginia Legislature was, in adopting this statute, impliedly accepting the proposition that the use of seat belts⁴ has a beneficial effect in regard to the number and the severity of injuries resulting from traffic accidents. For the Legislature to accept this proposition, and then to require only that seat belts be *installed* in the front seat of passenger

¹ Rhode Island has a statute requiring their use by drivers of public service vehicles. R.I. GEN. LAWS ANN. tit. 31, ch. 23, § 4 (Supp. 1967).

² FLA. STAT. ANN. ch. 317, § 951 (Supp. 1967).

³ W. VA. CODE ch. 17C, art. 15, § 43 (Michie 1966).

⁴ The W. Va. statute does not require the seat belts to be *used*.

automobiles, certainly raises questions regarding the adoption of the statute.

As is indicated above, the states which have adopted statutes regarding seat belts have, with one limited exception, only required their installation, as did West Virginia. But mere installation of seat belts does not prevent death or injury. As was stated in a recent article, "the legislatures have not proceeded far enough."⁵ "The legislatures, for the public good, should exercise their powers to make the use of seat belts mandatory."⁶ If this is done, there will be no such problems as existed in the principal case, concerning whether or not there is a duty, in the absence of statute, to make use of seat belts which have been installed.

Trusts—Allocation of Stock Distributed to Principal

A recent case involved a proceeding to determine whether shares of common stock distributed by a holding company pursuant to an antitrust divestiture decree should be allocated to the principal or income of a testamentary trust. The lower court allocated the shares to principal. The life tenant appealed. *Held*: Affirmed. Distribution of stock pursuant to an antitrust divestiture decree was properly treated as partial liquidation within the meaning of statutory provisions that such distributions should be allocated to the principal of a trust rather than to the income. *In re Anthony*, 223 A.2d 857 (Pa. 1966).

The court in deciding the principal case applied the Pennsylvania version of the Uniform Principal and Income Act (referred to hereafter as the Uniform Act). However, neither the Pennsylvania statute, known as the Principal and Income Act of 1947⁷ nor the Uniform Act, anticipates or deals specifically with the allocation problem presented in the principal case. The Pennsylvania court, therefore, looked to the Revised Uniform Principal and Income Act (hereafter referred to as the Revised Uniform Act), which,

⁵ 14 DEPAUL L. REV. 152 (1965).

⁶ *Ibid.*

⁷ PA. STAT. ANN. tit. 20 § 3470.1-3470.15 (1964).

although not adopted in Pennsylvania, provides, a clarified procedure for treating divestiture distributions,² and for their allocation to principal. By so doing, and by expressly giving great weight to the provisions of the Revised Uniform Act, the court concluded that the distribution of stock in the principal case was in the nature of a partial liquidation and was to be allocated to principal.

In a case³ involving a similar problem, a New Jersey court, in 1966, also held that shares distributed under a divestiture decree were to be allocated to principal. The applicable statute there was patterned after the Uniform Principal and Income Act and did not contain the provision of the Revised Uniform Act which specifically addresses itself to the situation faced by the court. Although the court reached the same conclusion as would have been reached under the Revised Uniform Act, it was only after extensive consideration and rationalization that it was able to do so.

Had the Revised Uniform Act been in force when the principal case and the cited New Jersey case were decided, the courts would have been able to base their decisions upon that Act, thereby reaching the same conclusions more easily.

Should this situation arise in West Virginia, our court would be faced with the same problem as was the court in the principal case, in that we have only the Uniform Act, which does not make specific provision for corporate distributions in compliance with divestiture decrees.⁴ In order to preclude a problem of the nature

² Revised Uniform Principal and Income Act, § 6(b)(3) which provides, in part

(b) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to

(3) a total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets.

³ In re Conway, 224 A.2d 7 (N.J. 1966).

⁴ W. Va. Code, ch. 36, art. 6, § 1-17 (Michie 1966). 36-6-5(3) provides as follows:

(4) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursement of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

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discussed above from arising in West Virginia, it would seem desirable that consideration be given by our legislature to possible adoption of the applicable provisions of the Revised Uniform Act.

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