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Evidence - Admissibility of Silence After Arrest As Implied Admission

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NOTES

EVIDENCE — ADMISSIBILITY OF SILENCE AFTER ARREST AS IMPLIED ADMISSION

In a murder prosecution a deputy sheriff was permitted to testify that two other deputies gave him a pistol and a whiskey bottle, the deputies stating that these items were taken from the defendant when he was arrested. The defendant was present when the statement was made and apparently remained silent. In overruling an objection to this evidence, the trial court held that since the statement was made in the presence of the defendant, it was not hearsay.[1] On appeal the Louisiana Supreme Court reversed and remanded. *Held,* the defendant's silence while under arrest in response to statements made by a law enforcement officer is not admissible as an admission. *State v. Hayden,* 243 La. 793, 147 So. 2d 392 (1962).

A party's relevant, nonprivileged, out-of-court statements and conduct are generally admissible against him by virtue of an exception to the hearsay rule for express and implied admissions.[2] It is well settled that evidence of silence of a defendant in a criminal case in response to incriminating statements made in his presence which, if false, would normally provoke a denial, is admissible as an admission.[3] Evidentiary weight apparently is

1. *But see The Work of the Louisiana Appellate Courts for the 1961-1962 Term — Evidence,* 23 LA. L. REV. 406, 412 (1963), in connection with another case: "With deference, it is submitted that the mere fact that an out of court statement was made in the presence of an accused should not *necessarily* cause it to be classified as non-hearsay or admissible as an admission. At times, because of its independent relevance, the fact that a statement was made in the presence of an accused outside of court may be admissible as fact of utterance rather than utterance of fact as for example to show that the accused was possessed of certain information."

2. 4 WIGMORE, EVIDENCE §§ 1048-1059 (3d ed. 1940) [hereinafter cited as WIGMORE]. Express admissions are those resulting from a person's statements of fact; implied admissions result from his conduct. MCCORMICK, EVIDENCE § 239 (1954) [hereinafter cited as MCCORMICK]. Admissions may be offered against party litigants in a civil case or the defendant in a criminal case.

Although courts generally characterize admissions as an exception to the hearsay rule, there is strong support for considering many implied admissions as non-hearsay because of their non-assertive nature. MCCORMICK §§ 239, 246. For an analysis of the hearsay rule and its treatment in Louisiana, see Comment, 14 LA. L. REV. 611 (1954).

3. 4 WIGMORE § 1071. In general Professor Wigmore treats admissions by silence in terms of "adoption" of the third person's statement. 2 WHARTON, CRIMINAL EVIDENCE § 405, at 153 (12th ed. 1955) [hereinafter cited as WHARTON]; MCCORMICK, § 246, at 528.

given only to the silence, and not the statement which is admitted solely to give meaning to the response.[4]

There is a division of authority whether evidence of a defendant's silence after arrest is admissible.[5] Many courts hold the fact that the defendant was in custody alone renders his silence inadmissible,[6] finding a common belief that silence while under arrest is most conducive to one's welfare whether guilty or innocent and that an accused's silence may be attributed as easily to this belief as to a consciousness of guilt.[7] However, an approximately equal number of courts hold that all of the surrounding circumstances must be weighed to determine admissibility, the circumstance of arrest being but one consideration.[8]

Silence as an admission is recognized in Louisiana;[9] the jurisprudence, however, has generally held the silence of an accused under arrest inadmissible.[10] In the early case of *State v.*

4. See McCORMICK § 246, at 528-29; Annot., 80 A.L.R. 1235, 1236 (1932).
It seems unrealistic to expect members of a jury to draw this fine distinction; they will naturally regard the statement as evidence of the facts stated.

5. 2 WHARTON § 410, at 165; 20 AM. JUR. *Evidence* § 574 (1939); Annots., 115 A.L.R. 1505 (1938), 80 A.L.R. 1259 (1932).

6. McCORMICK § 246, at 529.

7. 2 WHARTON § 410, at 166; Annot., 115 A.L.R. 1505 (1938).

8. McCORMICK § 246, at 529.
One court has held that to admit evidence of a defendant's silence after arrest would be a violation of the privilege against self-incrimination. Crabb v. State, 86 Okla. Crim. 323, 192 P.2d 1018 (1948); Towery v. State, 13 Okla. Crim. 216, 163 Pac. 331 (1917). *Contra*, Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947). See Comment, 6 U.C.L.A. L. REV. 593 (1959) for a discussion of this aspect of the constitutional problem of self-incrimination.

9. State v. Sharbino, 194 La. 709, 719, 194 So. 756, 759 (1940): "We think, therefore that the testimony, being a definite statement of a matter of fact, and having been made in the presence and hearing of the defendants, was of such a nature as to call for a reply or correction, and that the defendant, having failed to make a reply or correct the statements of the deceased, such statements are admissible as tending to show an acquiescence as to the truth of the statement." City of Shreveport v. Marx, 148 La. 31, 86 So. 602 (1920); State v. Munston, 35 La. Ann. 888 (1883); State v. Johnson, 35 La. Ann. 842 (1883).
For civil cases involving this point, see Olivier v. Louisville & Nashville R.R., 43 La. Ann. 804, 9 So. 431 (1891); Morton v. Rils, 5 La. 413 (1833); Dumisnil v. Steinberg, 130 La. 135 (La. App. 1st Cir. 1930).

10. State v. Rini, 151 La. 163, 91 So. 664 (1922); State v. Roberts, 149 La. 657, 89 So. 888 (1921); State v. Carter, 106 La. 407, 409, 30 So. 895 (1901) ("It is well settled that the exception by which uncontradicted statements are taken out of the rule against hearsay does not extend to cases where the accused was under arrest when the statements were made."); State v. Sadler, 51 La. Ann. 1397, 26 So. 390 (1899); State v. Estoup, 39 La. Ann. 906, 3 So. 124 (1887); State v. Diskin, 34 La. Ann. 919, 921, 44 Am. Rep. 448, 449 (1882). In the *Diskin* case, the defendant, after being arrested, was taken to the bedside of the man he allegedly shot and was there confronted by the statement: "[Y]ou hit me, and shot me for nothing, own up." The defendant remained silent. The court held the statement inadmissible, saying: "Mere silence while a party is held in custody under a criminal charge, affords no inference whatever of acquiescence in

Diskin,[11] the Louisiana Supreme Court reasoned that an inference of acquiescence in the truth of accusations could not be drawn from a defendant's silence after arrest. Subsequent cases[12] have usually applied *Diskin* with little discussion. Recently, however, *State v. Ricks*[13] raised some doubt as to the authority of this line of cases. Of an objection made to testimony of a deputy sheriff regarding identification of a gun, the court stated: "The testimony was not hearsay for, as pointed out by the judge, the entire incident took place in the presence of the accused."[14]

In the instant case, the court distinguished *Ricks* on the ground that Ricks' arrest had not been urged as requiring exclusion of the evidence of his silence. The prior jurisprudence was reaffirmed by the declaration that a person under arrest has a "right to remain silent"[15] with no duty to engage in argument with his captors. This position was additionally supported by the conclusion that silence of one under arrest cannot be construed as conceding the truth of the statement made in his presence. This language indicates the decision hinges on the relevance of the defendant's silence. If so, the court in effect holds silence after arrest either completely irrelevant or only so slight-

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statements made in his presence." *Id.* at 921, 44 Am. Rep. at 448. *But see* State v. Bell, 129 La. 550, 56 So. 504 (1911).

The Louisiana Supreme Court rendered a somewhat anomalous decision in the case of State v. Pace, 183 La. 838, 165 So. 6 (1935); the court held admissible evidence of the silence after arrest of a defendant who failed to explain his possession of recently stolen goods. The court relied on what is now LA. R.S. 15:432 (1950), which states: "[A] legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such as the presumption . . . that the person in the unexplained possession of property recently stolen is the thief . . . ." The presumption that one in the unexplained possession of stolen goods is the thief had been established by several cases prior to the statutory enactment. State v. Stickney, 167 La. 1050, 120 So. 853 (1929); State v. Thompson, 137 La. 547, 68 So. 949 (1915); State v. Kelly, 50 La. Ann. 597, 23 So. 543 (1898); State v. Daly, 37 La. Ann. 576 (1885); State v. Kimble, 34 La. Ann. 392 (1882). *But see* State v. Rock, 162 La. 299, 110 So. 482 (1926). However, these cases involved either instructions to the jury as to the presumption of possession of stolen goods or remarks made by the prosecutor to the jury concerning the presumption. None involved the introduction of evidence of the accused's failure to explain possession of goods recently stolen. If the statute was intended only as a codification of prior jurisprudential law, which seems probable, the *Pace* decision may be open to question. It would seem odd to admit testimony of the defendants' silence in cases involving theft and exclude such testimony in all other cases.

11. 34 La. Ann. 919 (1882).

12. State v. Rini, 151 La. 163, 91 So. 664 (1922); State v. Roberts, 149 La. 467, 89 So. 888 (1921); State v. Estoup, 39 La. Ann. 906, 3 So. 124 (1887).

13. 242 La. 823, 138 So. 2d 589 (1962).

14. *Id.* at 831, 138 So. 2d at 592.

15. State v. Hayden, 243 La. 793, 799, 147 So. 2d 392, 394 (1962).

ly relevant that its relevance[16] is outweighed by the danger that the testimony would be misused by the jury.[17] This determination is supported by the observation that men commonly believe silence after arrest is good strategy. It is urged that courts must require at least a high degree of relevance in such cases because of the danger that a jury is likely to give primary weight to the accusatory statements rather than to the resulting ambiguous silence of the accused.

In addition, it seems unfair as a matter of policy to allow the state to place an accused in a position in which he must speak or suffer an adverse inference.[18] To allow such conduct seems contrary to the "spirit if not the letter"[19] of the constitutional privilege against self-incrimination. The court in the instant case, in declaring that the defendant had a "right to remain silent,"[20] seems to accede to this principle. Superadding this constitutional consideration to the weakness of the inference of guilt to be drawn from the defendant's ambiguous silence, the instant decision settles the water muddied by *State v. Ricks* by a compelling reaffirmation of the principle that silence to statements ordinarily calling for a response is not admissible as an admission when the defendant is under arrest.[21]

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INSURANCE — DIRECT ACTION — BREACH OF NOTICE REQUIREMENTS AS DEFENSE

Plaintiff, injured in a collision with an automobile insured by defendant, recovered a default judgment against its operator who was an insured under the omnibus clause of defendant's policy.[1] Neither the owner — named insured — nor the defend-

16. For an analytical discussion of relevance see James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

17. See MCCORMICK § 246, at 529.

18. See State v. Dills, 208 N.C. 313, 315, 180 S.E. 571, 572 (1935): "We think in remaining silent the appellants acted within their legal rights, since no man should be forced to incriminate himself or to make false statements to avoid so doing."

19. Helton v. United States, 221 F.2d 338, 341 (5th Cir. 1955).

20. 243 La. 793, 799, 147 So. 2d 392, 394 (1962).

21. In finding the trial court committed reversible error the court stated that defendant's constitutional right to confrontation of witnesses was violated. See LA. CONST. art. I, § 9. This problem is outside of the scope of this Note. For a general discussion of the right to confrontation see 5 WIGMORE § 1397.

1. "Insured" was defined in the policy as the named insured or anyone using