



Volume 68 | Issue 3

Article 10

April 1966

Criminal Law--Comment on Defendant's Failure to Testify

James Truman Cooper
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Criminal Law Commons](#)

Recommended Citation

James T. Cooper, *Criminal Law--Comment on Defendant's Failure to Testify*, 68 W. Va. L. Rev. (1966).
Available at: <https://researchrepository.wvu.edu/wvlr/vol68/iss3/10>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

Criminal Law—Comment on Defendant's Failure to Testify

D was tried for grand larceny. He chose not to testify, and the jury requested instructions as to whether the state could have required his testimony. In reply to this inquiry, the judge read from portions of the constitution and statutes of the state of Ohio and told the jury that no person could be compelled to be a witness against himself, but that it was permissible for one to testify in his own behalf. The jury found *D* guilty, and *D* appealed on the ground that the court's instruction constituted reversible error because it was comment upon his failure to testify. *Held*, affirmed. Such instruction did not constitute reversible error as it was not an infringement of *D*'s immunity from self-incrimination. *State v. McRae*, 4 Ohio App. 2d 217, 211 N.E.2d 875 (1965).

Until recently it was not necessary for state courts to observe federal standards involving comment on an accused's failure to testify. In 1908 the Supreme Court of the United States reviewed a decision of a New Jersey court holding as permissible comment upon a defendant's failure to testify in a criminal case. The defendant argued that such comment by the court was a denial to him of his privilege and immunity as a citizen of the United States guaranteed by the fourteenth amendment in that he was compelled to be a witness against himself in violation of the fifth amendment. The Supreme Court held that the fifth amendment was not to be applied to the several states through the fourteenth amendment. *Twining v. New Jersey*, 211 U.S. 78 (1908). The *Twining* doctrine was reiterated by later cases. *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937).

Fifty-six years of precedent were overruled in 1964 with the Supreme Court decision of *Malloy v. Hogan*, 378 U.S. 1 (1964), which made the fifth amendment applicable to the states via the fourteenth amendment. The defendant refused to testify during a state criminal investigation. Held in contempt and committed to prison until he agreed to testify, he filed a writ of habeas corpus which the highest Connecticut court denied. On certiorari, the Supreme Court of the United States reversed the Connecticut court, with Mr. Justice Brennan writing,

What is accorded [by the fifth amendment] is a privilege of refusing to incriminate one's self and the feared prosecution

may be by either federal or state authorities. . . . It would be incongruous to have different standards determine the validity of a claim of privilege based upon the same federal prosecution, depending upon whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.

The *Malloy* decision has greatly changed procedures in state criminal actions regarding comment on an accused's failure to testify. *Griffin v. California*, 380 U.S. 609 (1965), was almost an inevitable consequence of the *Malloy* decision. California's constitution provides that an accused shall not be compelled to testify against himself in a criminal case, but that his failure to testify may be commented upon by the court and by counsel and may be considered by the court or jury. CAL. CONST. art. 1, § 13. In *Griffin*, the trial court, applying the California constitution, instructed that silence of a defendant is evidence of guilt. The Supreme Court of the United States granted certiorari and held that such instructions were reversible error and that the provisions in the California constitution allowing such comment were in violation of the fifth amendment as absorbed by the fourteenth amendment to the federal constitution. The court in reaching its decision commented upon the language of *Malloy v. Hogan*, quoted *supra*, stating,

We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government and its bearing upon the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instruction by the court that such silence is evidence of guilt.

As Ohio's comment rule is similar to California's, it also would appear to be unconstitutional. 15 W. RES. L. REV. 797, 802 (1964).

The Ohio court in the principal case, stating that it was bound by *Griffin v. California*, *supra*, distinguished the principal case from the latter upon a factual basis. When the Ohio jury asked the trial judge to instruct them as to *D's* failure to testify, the court read portions of the Ohio constitution and code which state that a person in a criminal trial may, at his own request, be a witness, but that otherwise such person's testimony shall not be compelled.

OHIO CONST. art. 1, § 10; OHIO REV. CODE ANN. ch. 2945, § 43 (1954). If the trial court had read the complete provisions of the Ohio constitution and code to the effect that the failure of an accused to testify may be considered by the court and jury and may be made subject of comment by counsel, there would have been error similar to that in *Griffin v. California, supra*. As this pitfall was avoided, the trial judge's response did not amount to improper comment on *D's* failure to testify.

Because the recent Supreme Court rulings require state courts to apply federal standards regarding improper comment in criminal prosecutions, it is now necessary that the states be aware of what the federal standards are. In *Wilson v. United States*, 149 U.S. 60, 66-68 (1893), the prosecutor stated that if he were on trial, he would not hesitate to testify in his own behalf. The defendant's counsel objected to this statement, and the trial judge replied, "I suppose the counsel should not comment upon the defendant not taking the stand." The Supreme Court said that the judge should have instructed that counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant for his failure to testify. Thus, the prosecutor's language coupled with the trial court's failure to instruct properly constituted reversible error.

In *Cross v. United States*, 68 F.2d 366 (5th Cir. 1933), the prosecutor made a comment tending to call to the jury's attention the fact that the defendant had not testified. It appears that counsel immediately realized his mistake, withdrew his remarks and that the judge at once instructed the jury as to the law. The court held that this was not reversible error and differentiated the facts from *Wilson v. United States, supra*, on the ground that the court in *Wilson* failed to give the proper instruction after the prosecutor's comments.

A similar situation arose in *Milton v. United States*, 110 F.2d 556 (D.C. Cir. 1940). A prosecuting attorney's alleged misconduct in interpreting the defendants' argument and asking defendants' counsel whether he wanted one of the defendants to take the stand was held not to be grounds for reversal. Although the defendants' counsel had failed to call the remark to the court's attention, the court on its own initiative instructed that the jury should not infer anything against the two defendants because of their failure to

testify. Thus, it appears that language indirectly referring to a defendant's failure to testify does not constitute reversible error in federal courts if, subsequent to such indirect comment, the judge instructs that such comment is forbidden and shall not create a presumption against the defendant.

The dividing line as to what constitutes and what does not constitute comment on a defendant's failure to testify is not readily ascertainable. In two recent federal cases prosecutors stated that defendants had produced no evidence in contradiction to statements made in testimony against them. The courts held that such statements by the prosecution did not draw improper attention to the defendants' failure to testify because they referred only to lack of witnesses on behalf of the defendants and not to lack of defendants' personal testimony. Consequently, there was no need to instruct the juries concerning the prosecutions' comments because the defendants' rights were not prejudiced. *United States v. Johnson*, 337 F.2d 180, 203 (4th Cir. 1964), *cert. granted*, 85 Sup. Ct. 703 (1965) (No. 9223, 1964 Term; Renumbered No. 695, 1965 Term); *Davis v. United States*, 279 F.2d 127 (4th Cir. 1960).

West Virginia's constitution and code provide that a person has the right to refuse to testify against himself and that failure to testify shall create no presumption against him. W. VA. CONST. art. 3, § 5; W. VA. CODE ch. 57, art. 3, § 6 (Michie 1961). These constitutional and statutory provisions, and the court decisions interpreting them, seem to conform with federal standards. *State v. Nazel*, 109 W. Va. 617, 156 S.E. 45 (1930), held that a statement of the prosecuting attorney in his argument to the effect that no witnesses had been introduced by the defendant to controvert the evidence, but without specific allusion to the defendant's failure to testify, does not come within the inhibitions of the code. Previously the court had instructed the jury that the defendant's failure to testify was not a presumption of guilt. In *State v. Simon*, 132 W. Va. 322, 52 S.E.2d 725 (1949), a defendant elected not to testify. The prosecutor stated that the state had proved its case and that none of the state's evidence had been denied. The defendant's counsel took exception to these references of the prosecutor, and the judge instructed that the defendant's failure to testify should not be taken as evidence of guilt, and that no presumption should be formulated against him because of his failure to testify in his defense. There was no reversible error in either

case. In light of *United States v. Johnson, supra*, and *Davis v. United States, supra*, it may well be that there would have been no reversible error, even if no corrective instructions had been given by the West Virginia trial courts.

Problems arising in the principal case and *Griffin v. California, supra*, apparently have not troubled West Virginia courts. These cases will provide guidelines for future practices incident to comment upon an accused's failure to testify in states such as Ohio and California. The problem has been alleviated in part by the recent Supreme Court ruling that there will be no retrospective application of federal standards on self-incrimination in the several states. *Tehan v. United States*, 86 Sup. Ct. 459 (1966). West Virginia's standards seem to be consistent with federal standards concerning comment on a defendant's failure to testify and self-incrimination. Therefore, the recent decisions should not disturb established and recognized West Virginia standards.

James Truman Cooper

Criminal Law—Use of Injunctive Proceedings to Suppress Evidence

During the course of an income tax investigation, books and records belonging to *P* and his wholly-owned corporation were examined by Internal Revenue agents. On several occasions special agents participated in the examination. Although the special agents were identified as such, *P* was unaware that their presence indicated he was undergoing a criminal tax fraud investigation. Without informing *P* of his constitutional guarantees of freedom from self-incrimination and right to counsel under the fifth and sixth amendments, the agents questioned *P* and confiscated certain books and records against receipt. *P*, a resident of North Carolina, instituted an action in another forum to prohibit the retention or use of the information obtained by unconstitutional means. The district court refused to grant the injunction. *Held*, affirmed. In the exercise of discretion, a court may properly withhold relief that might involve interference in the criminal proceedings of another forum. The proper forum for such a proceeding is the district in which the property was seized or in which the criminal trial is to be held. *Smith v. Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965).