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Criminal Law - Admissions by Accused - Tacit Admission by Silence

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evident trend toward greater emphasis upon policy considerations[38] this opinion seems conspicuously erroneous and unrealistic. This lack of accord from jurisdiction to jurisdiction is extremely dangerous. It leads to positions that cannot possibly be reconciled with one another and this necessarily must breed forum-shopping.

In the final analysis each court must determine whether the mechanistic stability and uniformity of the *lex loci delecti* doctrine with its thoughtless application is worth the price that must be paid. It seems that it is not, because as has been pointed out, courts have always found ways of avoiding its application, and because it stands as a monumental obstacle in the path of progressing toward meaningful and necessary public policy considerations. The overwhelming majority of writers are opposed to its retention, and contemporary cases are running clearly contra to it. The problem, of course, is that there is a good deal of spirited debate as to what is the proper method for analyzing and solving these problems. At the present time, the choice of law doctrine finds itself in a muddled and embarrassing posture. Only time and a creative, responsible judiciary can lead us to a more sound and consistent position. Minnesota appears to be headed clearly in the right direction.

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CRIMINAL LAW—ADMISSIONS BY ACCUSED—TACIT ADMISSION BY SILENCE—While in jail on a charge of burglary, the confession of the defendant's confederate was read to the defendant by the police, after the defendant was informed by the police of his right to remain silent. The defendant, Staino, remained silent or periodically said, "I have nothing to say" His failure to deny was received in evidence at the trial as a tacit admission and the defendant appealed his conviction. The equally divided Superior Court of Pennsylvania affirmed the conviction and *held* the evidence was admissible under the tacit admissions doctrine.[1] *Commonwealth v Cavell,* 207 Pa. Super 274, 217 A.2d 824 (1966)

The tacit admissions doctrine[2] is an exception to the exclusion-

38. Babcock v. Jackson, *supra* note 26, Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d. 796 (1964), Pearson v. Northeast Airlines, Inc., 309 F.2d. 553 (2d Cir. 1962), *cert. denied,* 372 U.S. 912 (1963).

1. The dissenting justices said the doctrine violated the rules of self-incrimination.

2. [W]hen a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not challenged or contradicted by the accused although he has opportunity and liberty to speak, the statement and the fact of his failure to deny are admissible in evidence as an implied admission of the

ary rules of hearsay evidence[3] and is predicated on the presumption that the accused is more likely to acquiesce to a true charge than a false charge.[4] One theory of interpretation states that the failure to deny the accusation shows that the accused intended to communicate agreement and thus, by his conduct, adopted the accusation.[5] Another theory maintains that the accused's failure to deny was behavior showing a consciousness that he was guilty.[6] The two theories are often difficult to distinguish, as is shown by an opinion of the Supreme Court of California in which the two doctrines were used interchangably.[7]

It is important to point out that the incriminating statement is not admitted as substantive proof of the fact asserted therein, but is only an element necessary to show the substantive evidence of the accused's reaction or response when confronted with the incriminating statement.[8] The paradox in the doctrine is readily apparent, for, if the accused specifically asserts his constitutional right to remain silent or denies the charge, the statement and reaction would be inadmissible;[9] if, however, he relies on a statement by the police concerning his right to remain silent, his exercise of such a right would be damaging, admissible evidence. Staino's reply and his silence was more indicative of a desire to exercise his right to silence than it was an indication of acquiescence. Although an admonition is given to the jury to consider only the conduct and not to consider the statement itself as evidence, the prejudice factor remains to influence the jury and affect their deliberations,[10] as well as to increase the chance that the implied admission will be treated as a confession.[11]

The prerequisites to admissibility of a tacit admission have differed among the jurisdictions, but, generally, all include the require-

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truth of the charges thus made." Commonwealth v. Vallone, 347 Pa. 419, 32 A.2d. 889, 890 (1943), Comment, 31 U.CHI.L.REV. 556 (1964), *Developments in the Law—Confessions*, 79 HARV. L.REV. 935, 1041-1044 (1966).

3. 4 WIGMORE, EVIDENCE, § 1071 (3d. 1940) [hereinafter cited as WIGMORE].

4. People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924). The idea has also been expressed in the Latin phrase. Qui tactet consenti Videtur - The silence of a party implies his consent. *Compare Mark* 15 3, 4, 5, (King James).

5. 4 WIGMORE, *op. cit. supra* note 3, at 68.

6. See, *e.g.*, State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941). Wigmore seems to suggest this theory to be preferable since it includes such intentional admissions. 4 WIGMORE, *op. cit. supra* note 3, § 1072 (6) (a). *Accord,* MODEL CODE OF EVIDENCE rule 507, comment b.

7. People v. Simmons, 28 Cal.2d. 699, 172 P.2d 18 (1946).

8. See People v. Yeager, 194 Cal. 452, 229 Pac. 40 (1924) Annot., 80 A.L.R. 1235 (1932), Annot., 115 A.L.R. 1510 (1938). Infirmities in the incriminating statement such as lack of personal knowledge by the accuser or inadmissibility on other grounds have been held not to affect the admissibility of such testimony. See *e.g.* Nunn v. State, 143 Ga. 451, 85 S.E. 346 (1915) Commonwealth v. Hoff, 315 Mass. 551, 53 N.E.2d. 680 (1944). *But see* People v. Page, 162 N.Y. 272, 56 N.E. 750 (Ct. App. 1909). Naturally, a tacit admission without other proof is not sufficient evidence for a conviction.

9. *E.g.*, Kern v. State, 237 Ind. 144, N.E.2d. 705 (1957), Commonwealth v. Towber, 190 Pa. Super. 93, 132 A.2d. 917 (1959).

10. Commonwealth v. Vallone, *supra* note 2, at 898 (dissent).

ments that the accusation occur within the accused's hearing and that it be understood by him as an accusation of himself[12] which would naturally provoke or demand a denial from an innocent person.[13] Some jurisdictions have held the doctrine wholly inapplicable as self-incrimination[14] or have followed the Massachusetts rule[15] prohibiting such evidence if the accused is under arrest at the time of the accusation and tacit admission.[16] Other jurisdictions have modified the Massachusetts rule and have held that arrest alone is merely a factor that deserves consideration as one of the circumstances under which the accusation was made.[17]

The instant case, decided March 24, 1966, is an example of the apparent confusion following the cases of *Malloy v Hogan*[18] and *Escobedo v Illinois*[19] and the reluctance of some courts to expand and interpret the guidelines for criminal procedure established in those cases.[20] The Supreme Court in the *Malloy* case emphasized the "right of a person to remain silent unless he chooses to speak in an unfettered exercise of his own will, and to suffer no penalty . for such silence."[21] When confronted with the confession and direct charge in the instant case, it should have been evident that the "accusatory stage" noted in *Escobedo*[22] had been reached and that Staino should have had an absolute constitutional right to remain silent.[23] The rules enunciated in *Malloy* and *Escobedo* should have provided the impetus to eliminate the doctrine since it is only applicable when the investigation has focused upon a specific individual suspect, amply demonstrated here by Staino's arrest and the

11. See, People v. Bracamonte, 197 Cal. App.2d. 385, 17 Cal. Rptr. 62 (1961) Miller v. State, 231 Md. 215, 189 A.2d. 635 (1963).

12. See, *e.g.*, Irving v. State, 92 Miss. 662, 47 So. 518 (1908), 22A C.J.S. *Criminal Law* § 734 (1) 31A C.J.S. *Evidence* § 294-296.

13. People v. Simmons, *supra* note 7 at 25.

14. *E.g.*, McGrew v. State, 293 P.2d. 381 (Okla. Crim. App. 1956). Most federal courts are included, *e.g.*, United States v. Lo Biondo, 135 F.2d 130 (2d Cir. 1943). Most jurisdictions allow the jury to decide the question of voluntariness and validity. *E.g.*, Thurmond v. State, 212 Miss. 36, 53 So.2d 44 (1953). This would appear to be contrary to the rule enunciated in Jackson v. Denno, 378 U.S. (1964) requiring a separate hearing to determine voluntariness. *Accord,* United States v. Moroney, 231 F.Supp. 154 (W.D.Pa. 1964), People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (Ct. App. 1965).

15. Commonwealth v. Kenny, 12 Met. 235, 46 Am. Dec. 672 (Mass. 1847).

16. People v. Rutigliano, 261 N.Y. 103, 184 N.E. 689 (Ct. App. 1933). *But see,* People v. Simmons, *supra* note 7, at 27 "[T]he determinative point is not whether the defendant is under arrest at the time of the accusation, but whether circumstances are such that a reply is called for and the defendant is free to speak spontaneously."

17. *E.g.,* People v. Davis, 43 Cal.2d. 661, 276 P.2d 801 (1954) *cert. denied,* 349 U.S. 905 (1955) State v. Fogg, 79 S.D. 576, 115 N.W.2d 889 (1962).

18. 378 U.S. 1 (1964).

19. 378 U.S. 478 (1964).

20. The court in the instant case noted that a new trial "would be a waste of precious judicial time" and that "[c]rime has greatly increased as a result of judicial leniency" due to recent U.S. Supreme Court decisions. The doctrine of tacit admissions by silence is viable in civil actions. O.S. Paulson Mercantile Co. v. Seaver, 8 N.D. 215, 77 N.W 1001 (1898), Annot., 70 A.L.R.2d 1099 (1960).

21. 378 U.S. at 8.

22. 378 U.S. at 492.

23. People v. Stewart, 236 Cal. App.2d 27, 45 Cal. Rptr. 712 (Dist. Ct. App. 1965).

specific accusation by the police. The Supreme Court of California interpreted the *Escobedo* and *Malloy* rulings as eliminating the use of any tacit admission.[24] Regardless of the apparent constitutional conflicts and the open possibilities for flagrant abuses,[25] the doctrine has developed deep roots in many state criminal prosecutions,[26] although never decided directly by case law in North Dakota.[27]

There is little doubt that the United State Supreme Court will abrogate the use of the tacit admissions doctrine in criminal proceedings.[28] The warning of the privilege of silence has now become an absolute prerequisite in "overcoming the inherent pressures of the interrogation atmosphere,"[29] and to assure the awareness of the accused of the consequences of waiving his privilege. The accused may waive his right, but no amount of circumstantial evidence that the person may have been aware of this right to silence will suffice to replace a clear, conscious waiver. The burden of proof of waiver is on the state. It would appear absurd to say that Staino's failure to specifically assert his right to remain silent served as a waiver and thus evidence of an admission. The *Escobedo* and *Miranda* decisions concerning confessions clearly indicate the Court's insistence on naturalness and free and reasoned choice in confessions, emphasizing primarily that the accused's trial right be protected from unfair methods during the investigatory and interrogatory processes.

In attempting to justify the tacit admissions doctrine, the comparison has often been made to the evidence of a person's flight from the scene of the crime as also showing an act inconsistent with innocence.[30] The comparison is ill-conceived and highly questionable since flight involves a positive act and silence a negative reaction,[31] in addition to relying too heavily upon the personality of the individual. Another possible parallel rationale might have been the allowing of comment on the defendant's failure to testify;[32] however, in *Griffin v California*,[33] the Supreme Court held that

24. People v. Cockrell, 63 Cal.2d 659, 47 Cal. Rptr. 788, 408 P.2d 116 (1965), People v. Ridley 63 Cal.2d 671, 47 Cal. Rptr. 796, 408 P.2d 124 (1965).

25. See, *e.g.*, Flaherty v. United States, 355 F.2d 924 (1st Cir. 1966).

26. See, *e.g.*, GA. CODE ANN. § 38-409 (expressly approving doctrine). *Compare*, CAL. EVID. CODE § 1221, and MONT. REV. CODE ANN. § 93-401-27 (3).

27. See State v. Chase, 17 N.D. 429, 117 N.W 537 (1908) (discussing doctrine but immaterial in deciding case).

28. Miranda v. Arizona, 384 U.S. 436, 468, n.37 (1966). "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

29. *Id.* at 468.

30. Commonwealth v. Vallone, 347 Pa. 419, 32 A.2d 889 (1943).

31. *Id.* at 900.

32. See State v. Wolfe, 64 S.D. 178, 266 N.W. 116 (1936).

33. 380 U.S. 609 (1965).

such comment imposed a penalty on the defendant for asserting his consititutional privilege. Similar reasoning should seemingly have been applicable to the silence in response to the accusation in the instant case. Those infrequently accused of crime may believe silence to be the safest course to follow or believe they have an unqualified right to remain silent under questioning by police. One federal court of appeals noted that the law otherwise would require a warning that: "If you say anything, it will be used against you; if you do not say anything, that will be used against you."[34] Clearly then, the tacit admissions doctrine should have been abrogated before the present dicta in the *Miranda* decision.

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34. McCarthy v. United States, 25 F.2d 298, 299 (6th Cir. 1928).