Michigan Law Review

Volume 46 | Issue 5

1948

CRIMINAL LAW-FAILURE OF ACCUSED TO TESTIFY--EXTENT OF JUDGE'S INSTRUCTION IN FEDERAL COURTS

Carson C. Grunewald
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Criminal Law Commons

Recommended Citation

Carson C. Grunewald, *CRIMINAL LAW-FAILURE OF ACCUSED TO TESTIFY--EXTENT OF JUDGE'S INSTRUCTION IN FEDERAL COURTS*, 46 MICH. L. REV. 684 (1948).
Available at: https://repository.law.umich.edu/mlr/vol46/iss5/14

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CRIMINAL LAW—FAILURE OF ACCUSED TO TESTIFY—EXTENT OF JUDGE'S INSTRUCTION IN FEDERAL COURTS—In a prosecution against defendant for violation of the White Slave Traffic Act,[1] the trial judge instructed the jury that defendant's failure to testify should not be considered by them in determining his guilt or innocence. On appeal from conviction, *held*, there was no error in this instruction. *United States v. Fleenor*, (C.C.A. 7th, 1947) 162 F. (2d) 935.

The extent to which the court may refer to the accused's failure to testify is restricted by the constitutional and statutory limitations existing in the jurisdiction.[2] In federal criminal proceedings, the defendant's privilege from un-

[1] 18 U.S.C. (1940) § 398.

[2] Reeder, "Comment on Failure of Accused to Testify," 31 MICH. L. REV. 40 (1932); Smith, "Right to Comment on Failure of Defendant to Testify," 18 NEB. L. BUL. 204 (1939).

favorable comment arises primarily from a construction of the act of Congress[3] making him a competent witness, rather than from an interpretation of the prohibition against self-incrimination of the Fifth Amendment.[4] The statute forbids a presumption of guilt from defendant's silence, and the Federal Rules of Criminal Procedure do not alter this.[5] It is clear that both the prosecutor and the judge are restrained from commenting during the trial on any subject suggesting to the jury that defendant's failure to testify may be considered.[6] The related problem of whether or not the judge may give even a favorable instruction on defendant's silence, or whether this in itself will be prejudicial, has not been solved. Under the federal statute and similarly worded state statutes, the accused is entitled to a statement by the judge, instructing the jury that his failure to take the stand is not to be construed against him.[7] Failure to give this instruction on request is reversible error.[8] Some courts have suggested that it is better for the trial judge to say nothing about this matter unless requested by the defendant, although the determination of prejudice will still be on the instruction itself.[9] Generally, therefore, the judge may instruct on his own accord.[10] The instruction is acceptable if it is put in the words of the statute, or is not otherwise prejudicial to the defendant.[11] When the court merely repeated the four concluding lines of the statute, there was no error.[12] A charge that such failure to testify was "not to be considered by the jury in any respect whatsoever" was held not to be error.[13] A similar instruction "that no presumption of guilt or innocence arises from the mere fact that the defendant did not testify in his own behalf" was considered not objectionable.[14] Instruction that goes beyond the intended meaning of the statute will be

[3] 28 U.S.C. (1940) § 632: " . . . And his failure to make such request shall not create any presumption against him."

[4] Swope, "Constitutionality of a Comment on Defendant's Failure to Testify," 37 MICH. L. REV. 777 (1939); Bruce, "Right to Comment on Failure of Defendant to Testify," 31 MICH. L. REV. 226 (1932).

[5] Federal Rules of Criminal Procedure, Rule 26 (March 21, 1946).

[6] Wilson v. United States, 149 U.S. 60, 13 S.Ct. 765 (1893); Grantello v. United States, (C.C.A. 8th, 1924) 3 F. (2d) 117; Linden v. United States, (C.C.A. 3d, 1924) 296 F. 104; 68 A.L.R. 1108 (1930); 94 A.L.R. 701 (1935).

[7] Hanish v. United States, (C.C.A. 7th, 1915) 227 F. 584; Stout v. United States, (C.C.A. 8th, 1915) 227 F. 799; Michael v. United States, (C.C.A. 7th, 1925) 7 F. (2d) 865.

[8] Bruno v. United States, 308 U.S. 536, 60 S.Ct. 112 (1939); Hersh v. United States, (C.C.A. 9th, 1934) 68 F. (2d) 799.

[9] Becher v. United States, (C.C.A. 2d, 1924) 5 F. (2d) 45; Kahn v. United States, (C.C.A. 6th, 1927) 20 F. (2d) 782.

[10] Robilio v. United States, (C.C.A. 6th, 1919) 259 F. 101.

[11] Jenkins v. United States, (C.C.A. 4th, 1932) 58 F. (2d) 556; Smith v. United States, 72 App. D.C. 187, 112 F. (2d) 217 (1940); Chadwick v. United States, (C.C.A. 5th, 1941) 117 F. (2d) 902; Boehm v. United States, (C.C.A. 8th, 1941) 123 F. (2d) 791.

[12] United States v. Brookman, (D.C. Minn. 1924) 1 F. (2d) 528.

[13] Kreuzer v. United States, (C.C.A. 8th, 1918) 254 F. 34

[14] Affronti v. United States, (C.C.A. 8th, 1944) 145 F. (2d) 3.

error,[15] but, when no exception is taken and there is no obvious miscarriage of justice, this is not necessarily reversible error.[16] The defendant is thus given an extensive protection in his failure to take the stand and testify. While not protected to the extent that the judge may instruct only on his request, the accused is effectively shielded from all unfavorable comment to which timely exception is made at trial. Not until he voluntarily becomes a witness and testifies to the merits of the case is this aegis removed.[17]

Carson C. Grunewald

[15] Grantello v. United States, (C.C.A. 8th, 1924) 3 F. (2d) 117; Linden v. United States, (C.C.A. 3d, 1924) 296 F. 104.

[16] Nobile v. United States, (C.C.A. 3d, 1922) 284 F. 253.

[17] Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917); 36 HARV. L. REV. 207 (1923).