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CRIMINAL LAW AND PROCEDURE – PRIVILEGE AGAINST SELF-INCRIMINATION -- DUTY TO GIVE REQUESTED INSTRUCTION THAT NO SIGNIFICANCE SHOULD BE ATTACHED TO DEFENDANT'S FAILURE TO TESTIFY

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CRIMINAL LAW AND PROCEDURE — PRIVILEGE AGAINST SELF-INCRIMINATION — DUTY TO GIVE REQUESTED INSTRUCTION THAT NO SIGNIFICANCE SHOULD BE ATTACHED TO DEFENDANT'S FAILURE TO TESTIFY — Defendant, charged with conspiracy to import and sell narcotics, requested a special instruction that failure of defendant to take the witness stand does not create any presumption against him. A federal statute specifically provides that no such presumption shall arise.[1] The trial court refused the instruction, and after the circuit court of appeals affirmed the conviction,[2] the case was taken to the United States Supreme Court. *Held*, the statute gave defendant a right upon request to have such an instruction given. The error committed by its refusal was not mere "technical error," but one affecting defendant's substantial rights.[3] *Bruno v. United States*, 308 U. S. 287, 60 S. Ct. 198 (1939).

Statutes removing the common-law disability, and making the accused a competent witness to testify, if he so desire, generally provide further that failure to take the stand shall not create any presumption against him. The federal enactment in question is typical, and although slight variations in language

[1] 28 U. S. C. (1934), § 632.

[2] (C. C. A. 2d, 1939) 105 F. (2d) 921.

[3] "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions, which do not affect the substantial rights of the parties." Judicial Code, § 269, 28 U. S. C. (1934), § 391. It is of interest to note that the Alabama court in a case decided only a few months prior to the decision in the principal case held the refusal of a similar instruction to be harmless error. Turner v. State, (Ala. App. 1939) 191 So. 392, cert. denied (Ala. 1939) 191 So. 396.

are to be found among the state statutes, they are, with but few exceptions, substantially the same.[4] The principal case is in accord with what may be called the weight of authority, in so far as it imposes a duty on the trial judge to instruct when properly requested that, from the failure of defendant to testify, the jury shall draw no inference prejudicial to defendant.[5] The Supreme Court had ample precedent not only in state decisions but in decisions of lower federal courts.[6] Under the usual statute, it is not error to fail to give such an instruction where defendant has not asked that it be given; [7] but two state legislatures—Indiana and Washington—have expressly provided that it shall be the duty of the court to so instruct.[8] However, the Indiana court construed "duty" to mean duty only when requested,[9] and although in Washington it was construed to impose an absolute duty on the judge irrespective of request, this requirement has been abrogated by the Washington Supreme Court under its rule-making power, and at present the duty is conditioned on a proper request by the accused.[10] Objections have often been raised to the court's charging on its own motion that the jury is not to draw any unfavorable inferences from defendant's silence. Under the typical statute these objections are without merit and have been quite readily and almost summarily overruled.[11] A lower federal court has

[4] Courts do not distinguish between statutes as to whether they use the word "presumption" or "inference." The federal statute involved in the instant case states: "And his failure to make such request *shall not create any presumption against him.*" 28 U. S. C. (1934), § 632 (italics added). Several state statutes use these identical italicized words: Mass. Laws Ann. (1933), c. 233, § 20 (3); Ark. Stat. Dig. (Pope, 1937), § 3957. Slight variations may be found in other statutes: "Nor shall any reference be made to, nor any comment upon, such neglect or refusal," Neb. Comp. Stat. (1929), c. 29-2011; "cannot an any manner prejudice him, nor be used against him on the trial or proceedings," Ariz. Rev. Code (Struckmeyer 1928), § 5179; "shall not be taken as evidence of his guilt," Me. Rev. Stat. (1930), c. 146, § 19. Also see infra, note 13.

[5] State v. Wells, 53 S. D. 446, 221 N. W. 56 (1928); Cox v. State, 173 Ark. 1115, 295 S. W. 29 (1927); People v. Greben, 352 Ill. 582, 186 N. E. 162 (1933); State v. McLung, 104 W. Va. 330, 140 S. E. 55 (1927). Contra: Kinney v. State, 36 Wyo. 466, 256 P. 1040 (1927), under a statute providing that no reference shall be made to, nor shall any comment be made on, refusal to testify. In State v. Long, 324 Mo. 205, 22 S. W. (2d) 809 (1929), the Missouri Court held refusal proper because of a statute providing that no instruction shall be given commenting on testimony.

[6] Hersch v. United States, (C. C. A. 9th, 1934) 68 F. (2d) 799; Stout v. United States, (C. C. A. 8th, 1915) 227 F. 799. But see statement contra in Swenzel v. United States, (C. C. A. 2d, 1927) 22 F. (2d) 280, decided in the same circuit as the principal case.

[7] People v. Flynn, 73 Cal. 511, 15 P. 102 (1887); Matthews v. People, 6 Colo. App. 456, 41 P. 839 (1895); People v. Warner, 104 Mich. 337, 62 N. W. 405 (1895).

[8] Ind. Stat. Ann. (Burns, 1933), § 9-1603; Wash. Rev. Stat. (Remington, 1932), § 2148.

[9] Grubb v. State, 117 Ind. 277, 20 N. E. 257, 725 (1889).

[10] State v. Mayer, 154 Wash. 667, 283 P. 195 (1929); State v. Comer, 176 Wash. 257, 28 P. (2d) 1027 (1934).

[11] State v. Comer, 176 Wash. 257, 28 P. (2d) 1027 (1934), the court saying, 176 Wash. at 270: "It being necessary for the court to give such instruction when

indicated that it is better practice not to give an unrequested instruction on defendant's failure to testify, but that if given it will not be reversible error unless, under the circumstances of that particular case, defendant was prejudiced thereby.[12] Under some peculiarly worded statutes, the trial court is prohibited from in any manner instructing the jury concerning defendant's failure to testify, and it is, therefore, quite proper to refuse the proffered instruction.[13] In California, because of a specific constitutional provision allowing comment on failure to take the witness stand, it is no longer error to refuse to give such an instruction.[14] The privilege against self-incrimination has been at times so meticulously scutinized, in favor of defendant, that for a judge to give an instruction deviating from the language chosen by the legislature may be erroneous.[15] Much criticism has been levelled at the approach taken by the courts towards securing the accused's rights at the expense of effective crime enforcement.[16] But whatever be the policy for limiting the privilege granted, while a statute such as the one in the principal case is on the statute books, the one for whose benefit it was enacted is clearly entitled to invoke it. To be given a right or privilege is to be able to exercise that right or privilege; otherwise the statute granting it is but a meaningless and empty gesture.

requested by the accused, it is difficult to see how it is error for the court to give it when not requested." Eubank v. State, 104 Tex. Cr. 628, 286 S. W. 234 (1926); Helms v. State, 112 Tex. Cr. 203, 17 S. W. (2d) 813 (1929); People v. Russo, 85 Cal. App. 672, 259 P. 1020 (1927).

[12] Kahn v. United States, (C. C. A. 6th, 1927) 20 F. (2d) 782.

[13] Kinney v. State, 36 Wyo. 466, 256 P. 1040 (1927), statute providing that no reference shall be made to, nor shall any comment be made upon such neglect or refusal; Mason v. State, 53 Okla. Cr. 76, 7 P. (2d) 492 (1932), statute saying that failure to testify shall not "be mentioned on the trial."

[14] Following the earlier example of an Ohio amendment (Ohio Constitution, Bill of Rights, art. I, § 10), the amendment to the California Constitution (Bill of Rights, art. I, § 13) authorized comment on defendant's failure to testify. The California court has held that to give the instruction would nullify this amendment. People v. Dukes, 16 Cal. App. (2d) 105, 60 P. (2d) 197 (1936).

[15] State v. Shannon, 135 Me. 325, 196 A. 636 (1938); People v. Manning, 278 N. Y. 40, 15 N. E. (2d) 181 (1938); People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846 (1898), the court saying 156 N. Y. at 266: "it can never be necessary to add anything to the plain and simple language of the statute on this subject. . . . and the force of the proposition should not be weakened and destroyed with the jury by qualifying words."

[16] Bruce, "The Right to Comment on the Failure of the Defendant to Testify," 31 MICH. L. REV. 226 (1932); Carman, "A Plea for Withdrawal of Constitutional Privilege from the Criminal," 22 MINN. L. REV. 200 (1938); Rapacz, "Limiting the Plea of Self-Incrimination," 20 GEORGETOWN L. REV. 329 (1932).