1957

Evidence--Effect of Comment on Refusal of Co-Indictee to Testify

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Recent Cases

Evidence—Effect of Comment on Refusal of Co-Indictee to Testify—Defendant, a physician, was indicted jointly with Grubbs, paramour of the prosecutrix, for attempted abortion. The trials, upon motion of Grubbs, were held separately. At defendant's trial Grubbs, the co-indictee, was called to testify by defendant, but refused to answer questions regarding the circumstances of the alleged crime by invoking his privilege against self-incrimination. The Commonwealth's Attorney, in his closing argument to the jury, dwelt at length upon Grubbs' refusal to testify. Defendant was convicted, and appealed. Held: Reversed, due to the erroneous comment. Dotye v. Commonwealth, 289 S.W. 2d 206 (Ky. 1956).

The Court, while declining to formulate an absolute rule against comment on the co-indictee's refusal to testify when called by defendant, did hold that elaboration on such refusal by the Commonwealth's Attorney was improper. It is well established in Kentucky, both by statute and decision, that comment on defendant's failure to testify in his own behalf is prejudicial error. It is equally certain that failure of defendant to call as a witness his co-defendant, or co-indictee, is the subject of proper comment. But the specific issue decided in this case, i.e., whether elaboration by the prosecuting attorney on the refusal of defendant's co-indictee to testify is prejudicial error, has never previously been before the Court in this jurisdiction.

The bases for the distinction between the situation where the defendant himself fails to testify and where he fails to call his co-

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1 The appeal was based on several grounds. In addition to prejudicial comment by the Commonwealth's Attorney, defendant alleged error due to insufficient proof of pregnancy, improper admission of medical records, interjection of racial prejudice and election of Commonwealth to prosecute for a lesser offense than the proof indicated. The Court disposed of each of these contentions.

2 Ky. Rev. Stat. 455.090 (1955). "(1) In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

3 Gray v. Commonwealth, 195 Ky. 307, 242 S.W. 8 (1922); Williams v. Commonwealth, 287 Ky. 659, 154 S.W. 2d 726 (1941).


5 Several cases have, however, hypothesized the situation and anticipated the result here by way of dictum. See, e.g., Thomas v. Commonwealth, 257 Ky. 605, 78 S.W. 2d 777, 781 (1934); and McElwain v. Commonwealth, 146 Ky. 104, 108, 142 S.W. 234, 237 (1912).
defendant or co-indictee are the constitutional safeguards against self-incrimination, under which the defendant is protected from compulsion to convict himself out of his own mouth. To comment on the failure of the defendant to testify, with the open implication that such failure was an indication of guilt would clearly contravene the constitutional prohibition. But comment on defendant’s failure to call a co-indictee, merely as a witness, does not violate constitutional safeguards because calling the co-indictee is considered not to involve any degree of self-incrimination.

This issue was plainly presented in *Davis v. Commonwealth*, where the defendant and one Knipper were jointly indicted for grand larceny. The defendant was granted a separate trial and the Commonwealth’s Attorney, in his argument, commented on the failure of the defendant to call his co-indictee as a witness. On appeal, the Court interpreted the statute prohibiting comment on defendant’s failure to testify in his own behalf as relating only to the defendant, and stated:

> Although Knipper and appellant were jointly indicted for the larceny, appellant had demanded a separate trial... and there seems no sound reason why the commonwealth may not on the trial of a defendant comment upon his failure to introduce a witness who was available for that purpose and who is shown by the other evidence to have knowledge of the transaction involved.

The effect of this decision seems to be that a co-defendant or co-indictee is to be treated as any other witness insofar as comment on the defendant’s failure to call is concerned. The propriety of comment on the defendant’s failure to offer other witnesses on defense matters is unquestioned.

The question presented by the instant case appears to lie between the previously-discussed situations. On the one hand, it may be argued that where the trial is by joint indictment, the refusal of a co-indictee to testify on the ground that it might tend to incriminate him is a circumstance which may be considered to indicate the guilt of the defendant, and in no manner can be said to violate the rights of the defendant against self-incrimination. On the other hand, the law is

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6 Constitution of Ky., sec. 11 (1891).
7 However, some jurisdictions do hold that the failure of defendant to call a co-defendant to testify is not the proper subject of comment. *State v. Weaver*, 165 Mo. 1, 65 S.W. 308 (1901).
8 *Davis v. Commonwealth*, note 4, supra.
9 Id. at 246.
plain that no witness may be compelled to give testimony which would tend in any degree to prove his guilt of a criminal offense. The mere exercise of this privilege by a witness should not be considered as a logical basis for legitimate inference of the guilt of the defendant and comment by the prosecuting attorney that it is evidence of the defendant's guilt is clearly prejudicial.\footnote{53 Am. Jur. sec. 479, page 385 (1945).}

As to refusal of witnesses in general to testify on the ground of self-incrimination, the rule is well settled that when a witness other than the accused refuses to testify on the ground that the answer would tend to incriminate him, the mere refusal cannot be made the basis of any comment before the jury from which an inference, either favorable to the prosecution or favorable to the defense, might be drawn.\footnote{24 A.L.R. 2d 896 (1952).}

An excellent example of the application and rationalization of this rule is the case of \textit{Powers v. State.} \footnote{75 Neb. 226, 106 N.W. 332 (1905).} In that case the defendant was charged with adultery, and his partner in crime refused to testify when called. The prosecution commented on the refusal in the closing argument, asserting such refusal was indicative of guilt. The Court held the comment to be prejudicial error and by example illustrated the possible injustices of a rule allowing such comment.

While the refusal of the co-indictee might be technically distinguished from the \textit{Powers} case, in that in the latter case the witness was not indicted and was called by the state, it seems completely logical that the rule formulated there should also be applicable to the co-indictee situation.

The defendant's guilt should be established on fact whenever possible and never on unwarranted inference from another's refusal to testify. Too, the position that refusal to testify can only imply guilt is fallacious, since humiliation, disgrace, or actual desire to see the defendant convicted might motivate the witness' invocation of the privilege.\footnote{Id. at 333-334.} The contention of a prosecuting attorney in argument that the refusal of a witness, even a co-indictee, to testify is material to the establishment of guilt of another is obviously a mere supposition. It cannot in any legitimate degree be considered as actually providing the basis for a logical inference of the guilt of the party on trial.

Thus it seems that the basic position of the Kentucky Court in the instant case is sound and in accord with the generally accepted principles of restricting comment to material matters sustained by evi-
While the Court, in refusing to lay down a specific rule against comment on refusal of a co-indictee to testify and emphasizing the elaboration of the comment in the instant case, somewhat limited its holding, it does extend protection to the accused from prejudicial comments by over-zealous prosecutors.

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CONSTITUTIONAL LAW—RIGHT TO COUNSEL IN JUVENILE COURT PROCEEDINGS—Appellant, fifteen years old, was charged with having used an automobile without the owner's consent. At a hearing before the juvenile Court, he admitted the charge and was committed to a training school. Appellant was not represented by counsel, nor was he advised that he might be so represented. Some three months after the hearing, counsel appeared for him and filed a motion to vacate the court's judgment on the ground that appellant had been deprived of his constitutional right to counsel. Denial of the motion was appealed to the Municipal Court of Appeals for the District of Columbia which affirmed the Juvenile Court's judgment. Upon appeal the United States Court of Appeals, District of Columbia, Held: Reversed and remanded. The Juvenile Court was required to inform the delinquent that he had a right to counsel. Shioutakon v. District of Columbia, 236 F. 2d 666 (D.C. Cir. 1956).

Are juvenile court proceedings of such a nature as to require the furnishing of constitutional guaranties of fair criminal procedure to offenders appearing therein? This is the basic question underlying the principal case. While the court decided only the narrow question of the right to counsel in such proceedings, the broader question would seem to be correlative to the narrow one. The court in holding that one appearing before a juvenile court has a right to counsel, specifically refused to reach consideration of the due process requirements involved, but the tenor of the opinion leads to the conclusion that had the question of the right to constitutional guaranties in general been presented, the court would have answered in the affirmative. The opinion reviewed the purpose of the District of Columbia statute