

IN THE COURT OF APPEALS OF MARYLAND

No. 5

September Term, 1997

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PHILLIP KEY-EL

v.

STATE OF MARYLAND

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Bell, C.J.  
Eldridge  
Rodowsky  
Chasanow  
Raker  
Smith, Marvin H.  
(Retired, specially assigned)  
Karwacki, Robert L.  
(Retired, specially assigned)

JJ.

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Dissenting Opinion by Raker, J.  
in which Bell and Eldridge, JJ., join

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Filed: May 26, 1998

Raker, J., dissenting:

We granted certiorari to consider the following question:

Should a defendant's silence in the face of incriminating accusations be admissible against him as substantive evidence of guilt when those accusations were made prior to his arrest but in the presence of the police?

The Court of Special Appeals held that as a matter of Maryland evidence law, evidence of Petitioner's silence falls within an exception to the hearsay rule and was admissible as a tacit admission by silence. The majority of this Court agrees, and affirms the intermediate appellate court. Both courts concluded that Petitioner's silence was highly probative in rendering Pamela Key-El's in-court testimony unworthy of belief and would aid the jury "when reaching a conclusion as to whether or not the story that Pamela Key-El told at trial was credible." I disagree, and would reverse the judgment of the Court of Special Appeals on the ground that a tacit admission in the presence of police officers is too ambiguous to have any probative value and ordinarily should not be admissible in evidence as substantive evidence of guilt.<sup>1</sup>

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<sup>1</sup> It is important to keep in mind that the issue presented in this case involves evidence of pre-arrest silence when used as substantive evidence, i.e., when used to imply that the defendant is guilty, and not when used to impeach a defendant's testimony if he testifies in his own defense.

In this case, Petitioner did not testify. Evidence of Petitioner's pre-arrest silence was introduced in rebuttal, in apparent response to Mrs. Key-El's testimony that her husband had not caused her injuries. The majority concludes that Petitioner's silence was highly probative in rendering Mrs. Key-El's in-court testimony unworthy of belief and would aid the jury "when reaching a conclusion as to whether or not the story that Pamela Key-El told at trial was credible." In actuality, the evidence was used as substantive evidence of Petitioner's guilt. Although the prosecutor argued before the trial court that the evidence was admissible both as a tacit admission and as "critical impeachment evidence" that "bears on

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The tacit admission rule is generally accepted as an exception to the hearsay rule. If a statement is made in a party's presence, containing assertions of facts which, if untrue, the party would under the circumstances naturally be expected to deny, then the failure to speak has traditionally been admissible in evidence against the party as an admission. *Ewell v. State*, 228 Md. 615, 618, 180 A.2d 857, 859-60 (1962); *see also* MCCORMICK, ON EVIDENCE § 160, at 648-53 (J. Strong, ed., 4th ed. 1992); LYNN MCLAIN, MARYLAND EVIDENCE § 801(4).3, at 312-13 (1987); 4 WIGMORE, EVIDENCE § 1071, at 102-06 (Chadbourn rev. 1972).

In Maryland, certain prerequisites must be satisfied before this kind of evidence is admitted. The foundation for admitting a tacit admission generally requires proof of the following: (1) that the statement was actually made, (2) that the defendant must have heard and understood the accusatory statement, (3) that at that time, the defendant had an opportunity to deny the accusatory statement, and (4) that under the circumstances calling for a reply, the defendant remained silent. *Zink v. Zink*, 215 Md. 197, 202, 137 A.2d 139, 142-43 (1957). A tacit admission must be made "in an environment and in the presence of

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the credibility of the story told by Mrs. Key-El," in closing he argued to the jury that:

the reason [Key-El] remained silent is because he struck her. .

. . A person in the position of the defendant, truly innocent, who did not do these things would have been expected to protest . .

. . The defendant does not do that. He doesn't do that because he was, in fact, the person who struck her.

Since evidence of Petitioner's silence was used as substantive evidence, and that is the question in the certiorari petition, the majority should be concerned with whether the evidence was probative of Petitioner's guilt, not whether it bears on the credibility of Mrs. Key-El's testimony.

actors such that a reply might naturally have been expected.” *Ewell*, 228 Md. at 619, 180 A.2d at 860; *see also Secor v. Brown*, 221 Md. 119, 123, 156 A.2d 225, 227 (1959); *Zink*, 215 Md. at 202, 137 A.2d at 142; *Barber v. State*, 191 Md. 555, 565, 62 A.2d 616, 620 (1948). A tacit admission may be used against a defendant “only when no other explanation is equally consistent with silence.” *Zink*, 215 Md. at 202, 137 A.2d at 142; *see also MCCORMICK, supra*, § 160, at 649-50; WIGMORE, *supra*, §1071, at 103.<sup>2</sup> “If a failure to deny may be more naturally explainable on some inference other than that of belief in the truth of the statement, the testimony as to the occurrence should not be received.” *Ewell*, 228 Md. at 618, 180 A.2d at 859.

The premise underlying the tacit admission rule is that silence in the face of an accusation is probative of guilt, since an innocent individual who is falsely accused will deny the accusation. Courts and commentators have often suggested that such evidence be received with caution, “an admonition that is especially appropriate in criminal cases.”

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<sup>2</sup> Professor Wigmore observed that:

“Qui tacit consentire videtur,” “silence gives consent,” are ancient maxims, which have ever been taken to be unquestioned and have a larger scope than their application in the law of Evidence. But, like all maxims, they merely sum up a broad principle, and cannot serve, without decided qualification, as practical and precise rules. . . . The general principle of Relevancy tells us that the inference of assent may safely be made *only when no other explanation is equally consistent with silence*.

4 WIGMORE, EVIDENCE § 1071, at 102 (Chadbourn rev. 1972) (emphasis added).

MCCORMICK, ON EVIDENCE § 270, at 800 (E. Cleary, ed., 3d ed. 1984); *see also*, D. Todd McLeroy, *Tacit Admissions*, 21 CUMB. L. REV. 151, 154 (1990); *State v. Garcia*, 199 A.2d 860, 865 (N.J. Super. Ct. 1964). Criticism of the tacit admission rule is not new. *See, e.g., Garcia*, 199 A.2d at 863-65; *see also People v. Todaro*, 240 N.W. 90, 93 (Mich. 1932) (Weist, J., dissenting). Since the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), more courts are now questioning the premise of the rule and have begun to rethink and modify the tacit admission rule. *See* Charles W. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe For Abandonment*, 14 GA. L. REV. 27 (1979). Although *Miranda* addressed the constitutional aspect of silence, the decision has had an impact on courts' evidentiary approach to the tacit admission problem. Judge Wilner, then Chief Judge of the Court of Special Appeals, and now a member of this Court, commented on the impact of the *Miranda* decision in his concurring opinion below. He wrote:

[I]t seems clear to me that anyone of average intelligence who has had even the slightest exposure to popular literature or television knows that incriminating statements made by an accused suspect may, unless otherwise excludible, be used against him or her in a subsequent criminal trial. Although the Supreme Court has required that the police give such a warning directly when engaging in custodial interrogations, the public at large, I expect, assumes that incriminating statements made at any time may come to haunt the accused.

I have no problem with the tacit admission rule where there is no one else present, other than the accuser and the suspect, or even when the other witnesses who may be present are not likely to be perceived by the suspect as a threat to him. When the accusation is made in the presence of law enforcement officers, however, silence is, at best, ambiguous.

In the absence of evidence on the point, we really can do no more than speculate as to why the accused did not respond. There may be several plausible reasons for his or her silence other than acquiescence in the truth of the accusation.

The premise of the tacit admission rule has been questioned, and, in some cases, outright rejected, in part due to the recognition that silence is increasingly ambiguous now that people are aware of their right to remain silent. *See Ex parte Marek*, 556 So.2d 375, 382 (Ala. 1989) (abolishing the tacit admission rule). Some state courts have concluded that because there are several reasons an individual may remain silent, pre-arrest silence in the presence of police officers does not have sufficient probative value to be admissible. *See, e.g., State v. Kelsey*, 201 N.W.2d 921, 925 (Iowa 1972) (recognizing the ambiguity of pre-arrest silence, the court proscribed the use of tacit admissions against an accused in a criminal proceeding); *Commonwealth v. Dravec*, 227 A.2d 904, 906-09 (Pa. 1967) (proscribing the applicability of the tacit admission rule when defendant is in police custody or in the presence of a police officer); *State v. Daniels*, 556 A.2d 1040, 1046 (Conn. App. Ct. 1989) (concluding that the presence of the police and the emotional state of the victim rendered defendant's choice to remain silent ambiguous).

Other courts have concluded, on constitutional grounds, that the prosecution is precluded from introducing evidence of a defendant's pre-arrest silence in response to any question from a police officer, or to any statement made in the presence of the police, to imply guilt. *See United States v. Burson*, 952 F.2d 1196, 1200-01 (10<sup>th</sup> Cir. 1991) (concluding that defendant's non-custodial, pre-arrest silence was invocation of privilege

against self-incrimination, and as such was inadmissible, regardless of whether he was advised of his privilege against self-incrimination), *cert. denied*, 503 U.S. 997, 112 S.Ct. 1702, 118 L.Ed.2d 411 (1992); *Coppola v. Powell*, 878 F.2d 1562, 1567-68 (1<sup>st</sup> Cir.) (holding that defendant's refusal to answer questions in a pre-arrest, pre-custodial context was an invocation of his privilege against self-incrimination and was inadmissible in case-in-chief as substantive evidence of guilt), *cert. denied*, 493 U.S. 969, 110 S.Ct. 418, 107 L.Ed.2d 383 (1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 2017-18 (7<sup>th</sup> Cir. 1987) (holding that use of defendant's pre-arrest refusal to answer police questions as substantive evidence of guilt violated defendant's constitutional right to remain silent); *Commonwealth v. Cull*, 656 A.2d 476, 481, n. 5 (Pa. 1995) (noting that tacit admission rule is inapplicable in criminal cases where defendant in police custody or in the presence of police officers because contrary policy would effectively vitiate defendant's constitutional right against self-incrimination); *State v. Villarreal*, 617 P.2d 541, 542 (Ariz. App. 1980) (holding that defendant's pre-arrest, pre-Miranda "admission by silence" not admissible in state's case-in-chief when made to a police officer); *see also* Comment, *Should the Prosecution Be Allowed to Comment on a Defendant's Pre-Arrest Silence in Its Case-in-Chief*, 29 LOY. U. CHI. L.J. 181 (1997).

The underlying premise that an innocent person objects when confronted with a baseless accusation was analyzed and rejected by the Supreme Court of Alabama. *Ex Parte Marek*, 556 So.2d at 381. The court said:

That underlying premise, that an innocent person always objects when confronted with a baseless accusation, is inappropriately simple, because it does not account for the manifold motivations that an accused may have when, confronted with an accusation, he chooses to remain silent. Confronted with an accusation of a crime, the accused might well remain silent because he is angry, or frightened, or because he thinks he has the right to remain silent that the mass media have so well publicized. Furthermore, without that premise that silence in the face of an accusation means that the accused thinks he is guilty, the tacit admission rule cannot withstand scrutiny, because the observation that the accused remained silent could not necessarily lead to the inference that the accused knew that he was guilty; without the premise that silence in the face of accusation necessarily results from guilt, the tacit admission rule merely describes two concurrent events, accusation and silence, without giving the reason for the concurrence of the two events. Accordingly, neither logic nor common experience any longer supports the tacit admission rule, if, indeed, either ever supported it.

*Id.* at 381.<sup>3</sup>

The Supreme Court of Pennsylvania reasoned that the rule lacks a solid foundation, is founded on a wholly false premise, and rests on a “spongey maxim” that silence gives

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<sup>3</sup> In *Ex Parte Marek*, 556 So.2d 375 (Ala. 1989), the Alabama Supreme Court went beyond a discussion of common law evidentiary grounds, and also addressed the possible constitutional implications of the substantive use of pre-arrest, pre-*Miranda* silence. Rejecting the distinction between the use of tacit admissions occurring after a person has been given *Miranda* warnings and those cases where the individual has not been given warnings, the Alabama court concluded that “the right to remain silent is effective for both of the accuseds, and, regardless of whether the accused is advised of that right, the right nevertheless exists.” *Id.* at 381. The court recognized that although the constitutional restraints of the Fifth Amendment may not apply to the use of pre-arrest silence, “the fundamental logical problems with the rule remain.” *Id.*

consent. Justice Musmanno, writing for the court, examined the tacit admission rule and declared:

This rule, which has become known as the tacit admission rule, is too broad, wide sweeping, and elusive for precise interpretation, particularly where a man's liberty and his good name are at stake. Who determines whether a statement is one which "naturally" calls for a denial? What is natural for one person may not be natural for another. There are persons possessed of such dignity and pride that they would treat with silent contempt a dishonest accusation. Are they to be punished for refusing to dignify with a denial what they regard as wholly false and reprehensible?

*Dravec*, 227 A.2d at 906. Denouncing the rule, the court quoted Robert G. Ingersoll's funeral oration for Roscoe Conkling in which he said: "He was maligned, misrepresented and misunderstood, but he would not answer. He was as silent then as he is now—and his silence, better than any form of speech, refuted every charge." *Id.* at 906, n.1. Noting that proverbs, maxims and axioms do not necessarily represent universal truths, the court recounted vigorous opponents to the proverb *Silence is Golden*: "*Closed lips hurt no one, speaking may; Speech is of time, silence is of eternity; For words divide and rend, but silence is most noble till the end; And silence like poultice comes to heal the blows of sound; Be silent and safe, silence never betrays you.*" *Id.* at 907 (emphasis in the original). The court concluded that the tacit admission rule is "not rule by reason but by unrestrained babblement." *Id.* at 908.

New York has also decided that pre-arrest silence does not have sufficient probative value to be admissible in evidence as an admission of guilt, or, for that matter, for

impeachment purposes. In *People v. DeGeorge*, 541 N.E.2d 11, 13 (N.Y. 1989), the New York Court of Appeals held that pre-arrest silence in the presence of police officers is inadmissible because silence is the natural reaction of many people in the presence of law enforcement officers. The court observed:

Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person's awareness that he is under no obligation to speak or to the natural caution that arises from his knowledge that anything he says might later be used against him at trial, a belief that efforts at exoneration would be futile under the circumstances, or because of explicit instructions not to speak from an attorney. Moreover, there are individuals who mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because they are fearful of coming into contact with those whom they regard as antagonists. In most cases it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence.

Moreover, despite its lack of probative value the evidence undoubtedly affects a witness's credibility. Jurors, who may not be sensitive to the wide variety of alternative explanations for a defendant's pretrial silence, may assign much more weight to it than is warranted and thus the evidence may create a substantial risk of prejudice.

*Id.* (quotation marks and internal citations omitted).

In my view, silence in the presence of law enforcement is ambiguous, and its probative value minimal, because an innocent person may have many reasons for not speaking out. The chief reason is that today, following the commonly known *Miranda* decision, most people are aware that they are not required to speak, and they also know that anything they say might be used against them at a trial. As the Supreme Court recently

noted, “[a]nd as for the possibility that the person under investigation may be unaware of his right to remain silent: In the modern age of frequently dramatized ‘Miranda’ warnings, that is implausible.” *Brogan v. United States*, 522 U.S. \_\_\_, \_\_\_, 118 S.Ct. 805, 810, 139 L.Ed.2d 830 (1998). In addition, some citizens harbor a mistrust for police and may choose to avoid communication with them, even when it would be in their best interest to do so. *See Davis v. State*, 344 Md. 331, 350-53, 686 A.2d 1083, 1092-93 (1996) (Raker J., concurring); *id.* at 353-58, 686 A.2d at 1093-96 (Eldridge J., dissenting). Since an individual who is accused of a criminal act in front of a police officer may choose to remain silent based on a general awareness of the popularized right to remain silent, or even out of suspicion or mistrust of the police, silence in the presence of law enforcement officers is ambiguous. As the Alabama Supreme Court concluded, without the premise that silence in the face of an accusation necessarily results from guilt, the tacit admission rule merely describes two concurrent events, accusation and silence, without giving the reason for the concurrence of the two events. *Ex Parte Marek*, 556 So.2d at 391. Based on Maryland evidentiary grounds, the tacit admission rule should be inapplicable in the context of accusations made in the presence of law enforcement officers.<sup>4</sup>

Chief Judge Bell and Judge Eldridge have authorized me to state that they join in the views expressed in this dissenting opinion.

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<sup>4</sup> Based on the well-settled principle that courts should not decide constitutional issues unnecessarily, I would not reach the constitutional question lurking in the bushes. *See Professional Nurses v. Dimensions*, 346 Md. 132, 139, 695 A.2d 158, 161 (1997); *Middleman v. Md.-Nat. Comm.*, 232 Md. 285, 289, 192 A.2d 782, 782 (1963).

