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Recent Developments: Key-El v. State: Pre-Arrest Silence in the Presence of a Police Officer May Be Admitted into Evidence as a Tacit Admission

Anna R. Benshoof

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Key-El v. State

In a four to three decision, the Court of Appeals of Maryland held that evidence of the defendant's pre-arrest silence in the presence of police officers was properly admitted as a tacit admission. *Key-El v. State*, 349 Md. 811, 709 A.2d 1305 (1998). In so holding, the court determined that the admission of such evidence did not violate the defendant's Fifth Amendment right against self-incrimination.

On August 19, 1994, police responded to a 911 call made by Mrs. Key-El from the home she shared with her husband ("the defendant"). When the police officers arrived to question her concerning the incident, Mrs. Key-El was crying. She responded that the defendant had pulled her hair and punched her in the face, bruising her left eye during an argument. Although the defendant was only a few feet away from Mrs. Key-El and able to hear her stating these accusations to the officers, he remained silent.

In a letter to the Office of the State's Attorney following the incident, Mrs. Key-El restated the accusations against the defendant. At trial, however, Mrs. Key-El changed her story and stated that she had been struck by the defendant's girlfriend after she found the two together. Mrs. Key-El testified that the reason she initially had accused the defendant of hitting her was because she was upset and wanted him to suffer.

**PRE-ARREST
SILENCE IN THE
PRESENCE OF A
POLICE OFFICER
MAY BE
ADMITTED INTO
EVIDENCE AS A
TACIT ADMISSION**

By Anna R. Benshoof

At trial, the Circuit Court for Baltimore County allowed testimony as to the defendant's pre-arrest silence. A jury convicted the defendant of battery and sentenced him to five years imprisonment. The Court of Special Appeals of Maryland affirmed the circuit court's decision. The Court of Appeals of Maryland then granted certiorari to decide whether the circuit court had abused its discretion in admitting into evidence the defendant's pre-arrest silence.

The defendant raised the following two issues to the court of appeals: (1) whether the evidence of the defendant's pre-arrest silence in the presence of a police officer was admissible; and (2) whether this evidence, if deemed admissible, infringed upon his Fifth Amendment right against self-incrimination. *Key-El*, 349 Md. at 815, 709 A.2d at 1306. In addressing the first issue, the court noted that tacit admissions by a party-opponent in both civil and

criminal actions have long been recognized by Maryland courts as an exception to the hearsay rule under the common law. *Id.* at 816, 709 A.2d at 1307.

The three elements that must be satisfied in order for silence to be considered a tacit admission are: (1) the accused heard and understood the accusation; (2) at the time, the accused had the chance to respond; and (3) under the circumstances, a reasonable person in the position of the accused would have voiced a response. *Id.* at 817, 709 A.2d at 1307 (quoting *Henry v. State*, 324 Md. 204, 241-42, 596 A.2d 1024, 1043 (1991)). The court held that the defendant's silence met these criteria. *Id.* at 818-19, 709 A.2d at 1308.

The defendant, however, contended that his silence was too ambiguous to be considered a tacit admission and as such, was only of minimal probative value. *Id.* at 817, 709 A.2d at 1307. The defendant further contended that evidence of his silence was unduly prejudicial and violated his right to remain silent. *Id.* Therefore, the trial court erred in allowing it into evidence. *Id.* The United States Supreme Court, the Court of Appeals of Maryland, and the Court of Special Appeals of Maryland have all addressed the issue of placing limits upon the usage of a defendant's silence as evidence in distinguishing between pre-arrest and post-arrest silence.

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Id. at 817-18, 709 A.2d at 1307-08. Generally, courts have held that pre-arrest silence is admissible and does not violate a defendant's constitutional rights; whereas, post-arrest silence, specifically after a defendant has been read his Miranda rights, violates a defendant's constitutional rights and is not admissible. *Id.* (citations omitted).

The most applicable Maryland case is *Williams v. State*, 4 Md. App. 342, 242 A.2d 813 (1968), in which the court of special appeals held that a defendant's silence, in the face of an accusation by a third party in the presence of a police officer, was admissible as evidence of a tacit admission. *Key-El*, 349 Md. at 818, 709 A.2d at 1308. Therefore, the court concluded that the trial court did not abuse its discretion in allowing the defendant's silence as a tacit admission into evidence. *Id.* at 820, 709 A.2d at 1309.

The court then addressed the issue of whether the defendant's Fifth Amendment right against self-incrimination was violated by the admission of his pre-arrest silence. *Id.* at 820-21, 709 A.2d at 1309. In addressing the defendant's claim, the court turned to *Jenkins v. Anderson*, 447 U.S. 231 (1980), in which the United States Supreme Court held that the use of a defendant's pre-arrest silence to impeach his testimony at trial did not improperly burden his Fifth Amendment right to remain silent. *Key-El*, 349 Md. at 822, 709 A.2d at 1310. Justice Stevens,

in his concurring opinion in *Jenkins* wrote, "[w]hen a citizen is under no official compulsion whatever, whether to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment." *Id.* at 824, 709 A.2d at 1311 (quoting *Jenkins*, 447 U.S. at 243-44).

The court of appeals, applying Justice Stevens' logic, found that although police officers were present, the defendant had not been arrested and "was under no official compulsion to speak or remain silent." *Id.* at 825, 709 A.2d at 1311. Therefore, inferences of guilt could be made from his silence and use of those inferences as evidence did not violate his Fifth Amendment rights. *Id.*

Judge Raker, joined by Chief Judge Bell and Judge Eldridge, dissented, arguing that the defendant's tacit admission in the presence of police officers was too ambiguous. *Id.* Such evidence should not be admissible because the defendant may have believed he was exercising his "right to remain silent." *Id.* Additionally, the dissent was concerned that the admission was used as substantive evidence, not simply as evidence used to impeach the defendant. *Id.* A critical aspect of the present case that influenced the dissent's opinion was the presence of law enforcement officers during the defendant's silence. *Id.* at 828-30, 709 A.2d at 1313-14. The dissent pointed out that "the accused might well remain silent because

. . . he thinks he has the right to remain silent that the mass media have so well publicized." *Id.* at 830, 709 A.2d at 1314. Therefore, the dissent argued that pre-arrest silence in the presence of police officers should not be admitted into evidence as a tacit admission. *Id.* at 833, 709 A.2d at 1315.

In *Key-El v. State*, the Court of Appeals of Maryland held that the defendant's pre-arrest silence in the presence of police officers may be admitted into evidence as a tacit admission without violating the defendant's Fifth Amendment right against self-incrimination. Therefore, if a person is accused of a crime and has not yet been arrested, it may be in the person's best interest to respond to the accusation instead of simply remaining silent. The court's decision is sound under Maryland law and comports with the rules of evidence. However, as the dissent pointed out, it is logical to think that what you do not say cannot hurt you. A fundamental concept of the American legal system is that the burden of proving a defendant's guilt lies with the prosecution. With this ruling we are telling suspects that they are not considered innocent until proven guilty if they remain silent in the face of an accusation. Additionally, in an already heated moment, this could create a dangerous situation for police officers. It is easier for police officers to control a situation if the parties are calm and not engaging in excited exchanges. As a matter of personal liberty and public

order, a person should be encouraged to remain silent and calm. Despite this, the court chose a rigid adherence to precedent rather than a pragmatic view of such situations.

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