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Recent Developments: Weitzel v. State: Pre-Arrest Silence in the Presence of a Law Enforcement Officer Is Inadmissible as Direct Evidence of a Defendant's Guilt

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WEITZEL v. STATE:

Pre-Arrest Silence in the Presence of a Law Enforcement Officer Is Inadmissible as Direct Evidence of a Defendant's Guilt

By: McEvan H. Baum

The Court of Appeals of Maryland held that a defendant's pre-arrest silence in the presence of a law enforcement officer is inadmissible as direct evidence of guilt. *Weitzel v. State*, 384 Md. 451, 863 A.2d 999 (2004). In so holding, the court overruled its decision in *Key-El v. State*, 349 Md. 811, 709 A.2d 1305 (1998), which held that pre-arrest silence was admissible against a defendant if it satisfied tacit admission prerequisites. Furthermore, the court held the trial court's error in admitting evidence of the defendant's pre-arrest silence was not harmless.

On March 17, 2002, police responded to a 911 call in Baltimore County. At the scene, they found Mark Weitzel ("Weitzel") and Thomas Crabtree ("Crabtree") near a severely injured woman positioned at the bottom of a public stairwell. Weitzel was arrested after Officer Frederick Johnson ("Johnson") conducted a brief on-scene investigation.

Prior to trial in the Circuit Court for Baltimore County, the State gave notice that it planned to introduce Weitzel's silence after Crabtree told Johnson that Weitzel threw the victim down the stairs, as a "tacit admission." Weitzel subsequently filed a motion *in limine* to preclude the tacit admission.

During a hearing on Weitzel's motion, Crabtree testified regarding the events preceding Weitzel's arrest. He stated that earlier in the afternoon, he observed Weitzel smoking cocaine and drinking vodka within two hours prior to Johnson's arrival. Crabtree also testified that he punched Weitzel several times shortly before the police arrived.

Officer Johnson testified he interviewed Crabtree in Weitzel's presence, and Weitzel appeared to be conscious and cognizant. According to Johnson, Weitzel remained silent while Crabtree accused Weitzel of throwing the woman down the stairs. After Johnson informed Weitzel that he was under arrest for pushing the victim down the stairs, Weitzel remained silent but complied with Johnson's order

to submit to handcuffing. He also maintained his silence when asked if he understood his *Miranda* rights, and wanted to make a statement, though he did provide oral responses to routine booking questions.

At trial, the Circuit Court for Baltimore County allowed Weitzel's silence to be used against him as tacit admission evidence. The court found Weitzel was alert and coherent at the time he was questioned. After trial, Weitzel was convicted of second-degree assault and received a ten-year sentence. The Court of Special Appeals affirmed the lower court's decision. The Court of Appeals of Maryland granted certiorari to consider whether the court erred in allowing the State to admit Weitzel's silence during the police investigation as substantive evidence of his guilt.

The Court of Appeals of Maryland first addressed whether police presence, combined with a defendant's participation in recent illegal activity separate from the investigated offense, rendered his pre-arrest silence "too ambiguous to be admissible." *Weitzel*, 384 Md. at 454, 863 A.2d at 1001. Weitzel argued that his silence was "inherently ambiguous" because a jury's determination that it was an admission of guilt could only be speculative since it could have been a means to hide his recent drug use or the result of head trauma. *Id.* at 455, 863 A.2d at 1001. Moreover, he contended, even if his silence were admissible, the circuit court abused its discretion by concluding that a reasonable person would have responded to Crabtree's accusations. *Id.*

The court began its analysis of the issue by discussing its earlier holding in *Key-El v. State*. *Id.* at 456, 863 A.2d at 1001 (citing *Key-El*, 349 Md. 811, 709 A.2d 1305 (1998)). In *Key-El*, the court held that pre-arrest silence is admissible if it satisfies the prerequisites for a tacit admission. *Id.* Since *Key-El*, many courts have held such evidence to be inadmissible because it either violates the Fifth Amendment or is too ambiguous to be probative. *Id.* at 456, 863 A.2d at 1002. The court further examined *United States v. Hale*, 422 U.S. 171 (1975), in which the United States Supreme Court held that a defendant's silence during an initial police interrogation is inadmissible as a tacit admission because the ambiguity of such silence outweighs the probative value in most circumstances. *Weitzel*, 384 Md. at 457, 863 A.2d at 1002.

In examining the reasoning of other state courts which had held similarly, the court looked to *Ex Parte Marek*, 556 So.2d 375, 382 (Ala.1989). *Id.* at 458-59, 863 A.2d at 1003. In *Marek*, the Alabama Supreme Court rejected the notion that an accused individual who

considers himself innocent will deny an accusation. *Id* at 459, 863 A.2d at 1003. In rejecting such logic, the *Marek* court abolished the tacit admission rule in pre-arrest and post-arrest situations, reasoning that the accused may have many motives for remaining silent other than guilt. *Id.* at 459, 863 A.2d at 1003-04.

Continuing its analysis, the Court of Appeals next looked to *People of N.Y. v. DeGeorge*, 73 N.Y.2d 614 (1989), wherein the New York Court of Appeals held that "pre-arrest silence in the presence of police officers is inadmissible at trial because silence is the natural reaction of many people in the presence of law enforcement officers." *Id.* at 460, 863 A.2d at 1004. There, the New York Court of Appeals stated not only does silence lack probative value, but its admission may also create a substantial risk of prejudice by jurors who are not sensitive to the myriad of alternative explanations for a defendant's pretrial silence. *Id.* Finally, the court looked to *Combs v. Coyle*, 205 F.3d 269, 283 (2000), wherein the United States Court of Appeals for the Sixth Circuit held the use of pre-arrest silence as substantive guilt was "an impermissible burden upon the exercise of the privilege against self-incrimination." *Id.* at 460-61, 863 A.2d at 1004.

The Court of Appeals concluded its analysis by that holding pre-arrest silence while in the presence of police is not admissible as substantive evidence of guilt. *Id.* 461, 863 A.2d at 1005. The court reasoned that popular entertainment has given the average American citizen the perception that any statement made in the presence of police can be used against one in a court of law. *Id.* at 461, 863 A.2d at 1004-05. Therefore, the meaning of one's silence in the presence of police is ambiguous at best. *Id.* at 461, 863 A.2d at 1005.

In conclusion, the court discussed the State's claim that the error was harmless beyond a reasonable doubt. *Id.* The court explained, in order for an error to be harmless, the court must be convinced beyond a reasonable doubt that the error did not influence the verdict. *Id.* The court reasoned that because both the victim and Weitzel had no memory of the incident, and the only direct evidence presented was Crabtree's testimony, the circumstantial indication of guilt implied by Weitzel's silence was the only evidence to corroborate Crabtree's account. *Id.* at 461-62, 863 A.2d at 1005. The court broached the possibility that because Crabtree was the only other individual present at the scene, he would clearly have a motive for fabricating his testimony. *Id.* Based on its inability to conclude that the evidence did not influence the verdict, the court reversed and remanded the case for a new trial. *Id.*

In this case, the court establishes that pre-arrest silence in the presence of a police officer cannot be admitted as substantive evidence of guilt. In so holding, the court recognizes that suspects may have a multitude of reasons for remaining silent. Prosecutors should be forewarned that introducing evidence of a defendant's pre-arrest silence could be grounds for reversal, even where such evidence is not initially precluded by the defendant's motion *in limine*.