IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff	:	
v.	:	No. 01-11087
WILLIAM C. ROSE, Defendant	:	

OPINION

This opinion addresses the defendant's motion for a new trial. The defendant argues that his attorney was ineffective for not objecting to the prosecutor's closing remarks. In his closing statement, the prosecutor argued that the defendant's failure to talk to the police about the alleged offense is evidence of the defendant's guilt. These comments blatantly violated the defendant's constitutional right to remain silent, and defense counsel's failure to object to them resulted in an unfair trial. Therefore, a new trial must be granted.

In the scope of constitutional guarantees, the right against self-incrimination has been and still is one of the most cherished in America's history. At the founding of this country, the right was already well established in English common law, as a reaction to the inquisitorial practices of sixteenth-century English church and royal courts—especially the infamous Court of Star Chamber, which not only required accused persons to give evidence against themselves but also resorted to torture to ensure the accused would speak.

Today, the right against self-incrimination still acts as an important safeguard against police practices involving physical and psychological coercion. But it also serves another important function: it preserves the integrity of our legal system by requiring the state to prove its entire case against an accused—without any help from

the accused. It therefore lies at the very heart of our legal system, for it places the burden of prosecution squarely and solely upon the state.

But if the right to remain silent is to have any meaning, we must also guarantee that no individual will be penalized by exercising that right. That is, the jury will not know when an accused person declined to speak to the police. The concern here is, of course, that the jury will use such silence as evidence of the defendant's guilt. The Commonwealth violated this basic and fundamental principle at the trial of the defendant, William Rose. In his closing argument, the prosecuting attorney told the jury the defendant never talked to the police about the alleged crime. The prosecutor went on to argue that this silence should be considered evidence of the defendant's guilt. This was a blatantly improper remark, and one which should cause the Commonwealth embarrassment and shame. Were the court to allow the conviction to stand in the face of this egregious violation of the defendant's constitutional rights, we would reduce the Constitution to a meaningless piece of paper.

DISCUSSION

A. Procedural Issues

Since defense counsel did not object to the prosecutor's closing remarks, the issue was not preserved and can be raised only through a claim of ineffectiveness of counsel. Defense counsel, to his credit, recognized his error and raised the issue in post-verdict motions, asserting his own ineffectiveness for not raising the claim at trial.[1]

The Commonwealth contends the claim of ineffectiveness has not been properly raised at this stage in the proceedings. Ordinarily, ineffectiveness of counsel is addressed on direct appeal or in a post-conviction proceeding, and it is ordinarily raised by an attorney different from the trial attorney. When an attorney raises his own

[1] The defendant was sentenced on October 28, 2002.

ineffectiveness on appeal, the matter should be remanded for appointment of new counsel unless it is clear from the record that counsel was ineffective or unless it is clear that the claim of ineffectiveness has no merit. Commonwealth v. DiNicola, 751 A.2d 197 (Pa. Super. 2000.).

Certainly it would be more convenient and less procedurally problematic to wait and address the issue on direct appeal. However, that is far from the most direct route. In the court's opinion, the prosecutor's remarks constitute a clear error, which will entitle the defendant to a new trial sooner or later. Should the court deny the motion for a new trial, the defendant will almost certainly appeal the conviction and obtain a new trial eventually. In the meantime, over a year would have elapsed, and such a delay would not serve the interest of the people of this Commonwealth. Alternatively, if the court grants the motion for a new trial, the new trial takes place immediately—assuming, of course, the Commonwealth does not appeal the decision. The court believes justice is better served by holding the new trial now. If the defendant committed the alleged offenses, an immediate trial is more likely to prove him guilty than a delayed trial.

The trial court has a responsibility to ensure that each defendant receives a fair trial. Courts have broad discretion to grant or deny a motion for a new trial when the original trial, because of taint, unfairness, or error, produces something other than a just and fair result. Commonwealth v. Holder, 765 A.2d 1156 (2001). That occurred in this case.

We believe this judicial discretion includes the authority to grant a new trial even when the trial attorney asserts his own ineffectiveness in post-sentence motions. Naturally, this authority should be used sparingly, and only when it is absolutely clear from the record that the attorney was ineffective at trial. The court has no doubt justice will be better served by granting a new trial immediately, rather than waiting for an appeal.

B. The Ineffectiveness Claim

To establish an attorney's ineffectiveness, the defendant must prove: (1) The underlying issue is of arguable merit, (2) the course of action chosen by counsel had no reasonable basis designed to effectuate the client's interests, and (3) The ineffectiveness prejudiced the defendant's right to a fair trial. Commonwealth v. Costa, 742 A.2d 1076 (Pa. 1999). The ineffectiveness of trial counsel in this case is clear from the record.

Arguable Merit

A claim has arguable merit if counsel's act or omission conflicts with a constitutional guarantee. Commonwealth v. Drass, 718 A.2d 816 (Pa. Super. 1998). It is well settled that a defendant enjoys a constitutional right to remain silent and that it is a violation of that right to make reference at trial to such silence. Id. This includes pre-arrest silence as well as post-arrest silence. Commonwealth v. DiNicola, 751 A.2d 197 (Pa. Super. 2000).

In his closing argument, the prosecuting attorney stated,

> But then tell me, wouldn't a reasonable person that night, wouldn't they have gone to the police station, banged on his door, like Michael Wright did and said, I got a situation here, I got a girl claiming about this. He didn't do that. Instead, in light of tires squealing, police, the stop sign and then, finally, it's only until he gets – he pulls into the backyard that he, in fact, that's when he makes contact with them. He didn't go to the police station. He didn't try to say what happened – to say I've got a 13-year old girls [sic] that's kind of, you know, out of it. She's claiming that I did this. But he didn't do that. He, in fact, went around for whatever time limit was but long enough for the police to arrive. *He never tried to make contact with the police, to tell them what happened during that incident. . . .*
>
> He got out of that area. And that's exactly what he did. And – but he didn't go to the police and he didn't tell them what happened. . . .
>
> He didn't say he didn't keep up and go to the police and talked about exactly what happened. . . .

Transcript of closing argument, pp. 6-7, p. 8, and p. 9. (Emphasis added.)

These statements, and especially the statement in italics, inform the jury that the defendant did not talk to the police about the incident—not just on the night of the incident, but *ever*. Moreover, the prosecutor's obvious intent was to invite the jury to use the defendant's silence as evidence of his guilt. That is a blatant violation of the defendant's right to remain silent.

In defense of his statements, the prosecutor contends he was merely commenting on the defendant's flight from the scene. Certainly the prosecutor did discuss the defendant's flight, and the court has no problem with that discussion. However, the quotations set forth above clearly show that the prosecutor went well beyond discussing flight from the scene. He repeatedly stated that the defendant did not *talk* to the police about the incident. Mr. Rose had absolutely no obligation to talk to the police, and he should not have to suffer for exercising his right to remain silent.

The Commonwealth has also argued defense counsel opened the door to comments about the defendant's silence to the police when he argued to the jury that at the time of the incident, before police arrived, the defendant indicated to onlookers that he did not do anything. The court fails to understand the logic of this argument. The fact that the defendant may have made statements to onlookers before police involvement does not strip him of his Fifth Amendment right to remain silent to the police. Moreover, the prosecution may use a defendant's silence for impeachment purposes only after a defendant has testified that he gave a statement to the police. Commonwealth v. Turner, 454 A.2d 537 (1982). Mr. Rose did not even testify at the trial.

Recent appellate cases strongly support this court's conclusion that the prosecutor's remarks violated the defendant's constitutional right to remain silent. In Costa, supra, the Pennsylvania Supreme Court ordered a new trial after the defense attorney failed to object when the prosecutor elicited testimony from a police officer indicating the defendant did not say anything to the officer when the charges were filed.

In Commonwealth v. DiNicola, supra, the Superior Court granted a new trial after defense counsel failed to object to questions that revealed the defendant told the investigating police officer he wished to speak with his attorney. Certainly the prosecutor's remarks in this case are far more serious than the fleeting references to the defendant's silence in either Costa or DiNicola. Here, the prosecutor repeatedly mentioned the defendant's failure to speak to the police, and directly insinuated that this silence is evidence of his guilt.

In Commonwealth v. Turner, 454 A.2d 537 (1982), the defendant testified that someone was shooting at him. That was apparently the first time the defendant had offered exculpatory version of the events. On cross-examination, the prosecutor asked the defendant, "Did you ever tell the police that somebody was shooting at you?" The defense attorney immediately objected and requested a mistrial. The trial judge sustained the objection but denied the motion for mistrial, instead giving cautionary instructions to the jury. The Supreme Court remanded for a new trial, holding that that the only time the prosecution could refer to the defendant's silence for impeachment purposes is where the defendant testified he had related a particular version to the police at the time of the arrest, when he had in fact remained silent. Absent such an assertion, reference by a prosecutor to previous silence is impermissible and reversible error.

Finally, and most recently, the Superior Court granted a new trial in Commonwealth v. Clark, 802 A.2d 658 (Pa. Super. 2002), where the defendant's silence to the police officer was brought out at trial merely to support the Commonwealth's theory that the defendant was hiding a bag of crack cocaine in his mouth. The Superior Court found the Commonwealth's line of questioning impermissible, and stated that the Commonwealth's point could have been brought out without reference to the defendant's silence. Similarly, in the case before this court the Commonwealth could have, and should have, commented on defendant's flight from the scene without making reference to his silence to the police.

Reasonable Basis for Counsel's Action or Inaction

An evidentiary hearing is necessary when the record is inadequate to determine whether an attorney's failure is the result of a reasonable trial strategy, designed to effectuate the defendant's interest. DiNicola, supra, at 202. The court believes an error of this magnitude is not the result of reasonable trial strategy. *See* Costa, supra at 1077, where the court simply stated, "Trial counsel failed to object to this impermissible reference to appellant's post-arrest silence. No reasonable basis exists for that failure."

Nonetheless, the court took the precaution of holding a hearing to inquire about possible trial strategy. At that hearing, defense counsel, a highly experienced criminal defense attorney, was questioned by this court as well as the Commonwealth's attorney about his failure to object to the prosecutor's remarks. Defense counsel explained that when the remarks were made, he was talking to his client. He therefore did not hear exactly what was being said, and felt unable to make a specific objection. It was only after the trial, and after a discussion with other attorneys in his office, that he realized his mistake. In short, the attorney for the defendant testified that his failure to object was a result of his inattentiveness and indecision. He maintained that had he been paying attention, he certainly would have made the objection.

The Commonwealth's attorney has asserted that defense counsel did not object to the remarks because he did not want the court to issue a cautionary instruction, which would have reduced the possibility of finding the remarks prejudiced the defendant. Defense counsel adamantly denied that was his motive, and the court finds him to be credible. Moreover, we note that even if a cautionary instruction had been issued, it probably would not have been sufficient to cure the prejudice. *See* Turner, supra.

The court posed the possibility that defense counsel, knowing a serious constitutional violation had occurred, preferred a new trial rather than a mistrial, as the grant of a new trial can be appealed—and probably would be appealed—and that his

client had less chance of being convicted if the new trial were delayed until after the appellate courts had ruled on the matter. Again, defense counsel adamantly denied this as his motive, and the court finds him credible. We also note that this choice of conduct would have been precarious for his client, as there was certainly no guarantee his client would be permitted to remain out on bail during the appeal.

It is also possible that defense counsel, knowing the trial had gone well for his client, did not want a mistrial and preferred to wait for the verdict and file an appeal if the verdict was not to his liking. Defense counsel, however, strenuously maintained that he had never failed to ask for a mistrial in such a case, and that if he had realized the error, he would have objected.

All of these theories are remote at best, especially as the decision to object or not to object had to be made in a flash. The court does not believe defense counsel engaged in such sophisticated reasoning when he failed to object. It is apparent to us that defense counsel's failure to object was not a trial strategy, but a plain, old, ordinary mistake. Moreover, putting defense counsel's testimony aside and viewing the matter objectively, the court can find no reasonable basis for such failure. Reference to a defendant's silence is considered by the courts to be highly prejudicial, because of the likelihood members of the jury will associate such silence with guilt. Even where, as here, the case had gone well for the defendant, failure to object to such remarks would be highly unreasonable, especially as the prosecutor's closing argument was the last thing the jury members heard from either of the attorneys.

Prejudice

The Pennsylvania Supreme Court stated in Costa, supra, at 1077, "We have consistently regarded testimony about a defendant's silence as having an extremely high potential for prejudice." The Supreme Court also stated that "an impermissible reference to an accused's post-arrest silence constitutes reversible error unless shown to

be harmless." Clark, supra at 157. An error is harmless only where it is clear that such error could not possibly have contributed to the verdict. Commonwealth v. Story, 383 A.2d 155 (1978).

Clearly, the error in this trial was not harmless. The evidence presented by the Commonwealth was far from overwhelming, especially on the crime of Criminal Intent, Aggravated Indecent Assault. Therefore, it is extremely likely the prosecutor's remarks unfairly prejudiced the jury. It is interesting to note the Supreme Court found prejudice in Turner even when the prosecutor merely *asked* the defendant whether he ever told the police the account of the events he had testified to. That question was never answered, due to defense counsel's objection. In Mr. Rose's case the prosecutor actually *told* the jury Mr. Rose never talked to the police about the incident. Moreover, in Turner the court issued a cautionary instruction informing the jury not to consider the question. In Mr. Rose's case, there was no cautionary instruction. If the defendant in Turner received a new trial, Mr. Rose is certainly entitled to one as well.

Conclusion

In America, each person is presumed innocent until proven guilty by the prosecution. The prosecution must shoulder the entire burden of proving a defendant committed a crime. No person, including the defendant in this case, has an obligation to talk to the police about criminal accusations against himself, and no person should be considered guilty for refusing to speak to the police. The prosecutor in this case was wrong for insinuating otherwise. The prosecutor's remarks, and the defense attorney's failure to object to those remarks, resulted in an unfair trial. Therefore, this court has no choice but to grant a new trial.

O R D E R

AND NOW, this _____ day of December, 2002, for the reasons stated in the above opinion, the Post Sentence Motion filed by the defendant on November 5, 2002 is granted and it is ordered that the defendant shall receive a new trial.

BY THE COURT,

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Clinton W. Smith, P.J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Clinton W. Smith
George Lepley, Esq.
William Simmers, Esq.
Gary Weber, Esq., Lycoming Reporter