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People v. Tom; 331 P.3d 303 (C al. 2014)

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People v. Tom

331 P.3d 303 (Cal. 2014)

Opinion by Baxter, J.

OVERARCHING ISSUE

Whether admission of evidence of a criminal defendant's lack of concern for the well-being of other people involved in a collision during the period after arrest and before *Miranda* warnings violates the defendant's Fifth Amendment privilege against self-incrimination.¹

STATEMENT OF FACTS

On February 2007 Defendant, Richard Tom ("Defendant"), broadsided at high speed a vehicle making a left-turn at an intersection, killing an eight-year-old child and seriously injuring a ten-year-old child.² Defendant had been drinking and was speeding.³ The evidence showed Defendant failed to brake prior to the collision.⁴

Defendant spent the day entertaining a friend, Peter Gamino, a retired San Francisco Police Officer, and Defendant had made two rounds of vodka tonics before the two decided to pick up a vehicle from the Defendant's son's home a short distance away.⁵ Gamino testified that Defendant did not exhibit signs of intoxication but he had trouble finding his son's house.⁶

Loraine Wong, the driver of the car hit by Defendant and the mother of the two children, was driving her daughters to an overnight visit at her sister's house to meet her newborn niece.⁷ Ms. Wong testified to stopping at a stop sign, looking left, right, and left again without seeing any headlights, and as she began to turn left, she was struck without seeing headlights or hearing any sound of braking.⁸

Loraine's eight-year-old daughter was killed in the crash as a result of blunt force trauma.⁹ Her ten-year-old daughter suffered a deep gash on her forehead, which required thirty to forty stitches as well as a broken arm.¹⁰ Loraine suffered a broken rib, a broken finger, internal injuries, and abrasions on her face, arms, knees and feet from broken glass.¹¹

1. People v. Tom, 331 P.3d 303, 305 (Cal. 2014), reh'g denied (Oct. 1, 2014).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 306.

6. *Id.*

7. *Tom*, 331 P.3d at 306.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

Based on the relative position of the cars and the location and extent of damage, Sergeant Alan Bailey of the Redwood City Police Department, concluded that Defendant's car struck Loraine's car in a broadside collision while travelling " '[e]xtremely fast,' '[n]ot even close' to the speed limit. . ."¹² Another officer concluded there was no evidence Defendant had applied the brakes of his car and that Defendant was driving recklessly.¹³ A traffic accident investigator with the San Jose Police Department calculated Defendant was travelling at least sixty-seven miles per hour and struck Loraine's car when Loraine had the right of way.¹⁴

Gamino testified Loraine's car pulled out fairly fast and failed to stop however, he failed to mention this to the officers at the scene of the crash.¹⁵

Following the crash, investigating officers did not detect alcohol on Defendant's breath.¹⁶ Defendant complained of an ankle injury but signed a form declaring he refused to seek medical treatment against medical advice and requested to be allowed to walk home.¹⁷ Officers informed Defendant that he could not leave as the investigation was ongoing, however, Defendant was not handcuffed and his girlfriend, who arrived on the scene was allowed to sit in a squad car with the Defendant.¹⁸

After being transported to the police station, a number of officers noticed the smell of alcohol on Defendant's breath as well as his glassy, bloodshot eyes.¹⁹ Officers then administered field sobriety tests and concluded Defendant was driving under the influence of alcohol.²⁰ Defendant never asked about the welfare of the other people involved in the collision.²¹

Defendant's blood was drawn three hours after the crash.²² An expert opined, based upon his blood alcohol level of .04, calculated with a .02 burnoff rate per hour and taking into account his steak dinner that Defendant must have consumed six drinks and his blood alcohol at the time of the crash was .098 rendering him too impaired to drive safely.²³

Gamino testified originally that Defendant had not been drinking but eventually stated he may have had two drinks.²⁴ The paramedic at the scene of the crash testified that Defendant had a perfect score on an alertness test and did not smell of alcohol.²⁵

12. *Id.* at 307.

13. *Tom*, 331 P.3d at 307.

14. *Id.*

15. *Id.*

16. *Id.* at 308

17. *Id.*

18. *Id.*

19. *Tom*, 331 P.3d at 308.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Tom*, 331 P.3d at 309.

At trial, the district attorney argued that the fact Defendant never asked how the people in the other car were doing was evidence of Defendant's consciousness of guilt or that he was " 'too drunk to care.' "26

The court of appeal reversed Defendant's conviction, holding that Defendant was under de facto arrest when he was transported to the police station and his right to pretrial silence under *Miranda* was triggered.²⁷ Defendant's failure to inquire about the welfare of the occupants of the other car was inadmissible post arrest, pre-*Miranda* silence.²⁸

ANALYSIS

The right to remain silent under the Fifth Amendment depends on governmental coercion and is not a categorical bar to the admission of evidence of pretrial silence because pretrial silence may be used as impeachment, provided Defendant has not been Mirandized.²⁹ Additionally, prearrest silence in response to officer questioning is admissible as substantive evidence of guilt if the defendant fails to invoke the Fifth Amendment.³⁰

The court acknowledged a split in federal authority regarding the admissibility of post-arrest, pre-*Miranda* silence in the face of government compulsion purports to be an assertion of the right to remain silent and declined to resolve the split because Defendant had the burden of proving he had clearly invoked his right to remain silent.³¹

The court analyzed the objective invocation rule stating that, during custodial interrogation, a defendant must unambiguously invoke the Fifth Amendment such that a reasonable officer would understand that he or she must cease questioning.³² The court also observed that the objective invocation rule applies during noncustodial interviews.³³

The court extended the objective invocation rule to apply to a defendant's postarrest, pre-*Miranda* silence, noting that there is " 'no distinction between the invocation requirements before and after custody and *Miranda* warnings.' "34 The court reasoned that the objective invocation rule provides guidance to officers, resolves ambiguity, and helps officers scrupulously honor the right to remain silent.³⁵

The court then observed the general rule and two exceptions to objective invocation.³⁶ First the court noted that a criminal defendant does not need to invoke

26. *Id.*

27. *Id.* at 1222.

28. *Id.* at 310.

29. *Id.* at 311 (citing *Fletcher v. Weir*, 455 U.S. 603 (1982)).

30. *Tom*, 331 P.3d at 311 (citing *Salinas v. Texas*, 133 S.Ct. 2174, 2178 (2013)).

31. *Tom*, 331 P.3d at 311-312.

32. *Id.* at 312.

33. *Id.* at 312-313 (citing *Salinas, supra*, 133 S.Ct. at 2179).

34. *Tom*, 331 P.3d at 314 (quoting *U.S. v. Graves*, 551 Fed. Appx. 680, 685 (4th Cir. 2014)).

35. *Tom*, 331 P.3d at 314.

36. *Id.*

the right to remain silent on the witness stand at trial.³⁷ Second the court observed that a defendant need not invoke his right to remain silent if he or she was coerced by the government to the point where forfeiture of the right is made involuntary.³⁸

The court noted that an arrest in and of itself is insufficient to qualify as coercion, however, an interrogation is sufficient.³⁹

The court then addressed the dissent's view that all postarrest, pre-Miranda silence should be inadmissible by relying on the requirement that the privilege requires silence to avoid self-incrimination not for other reasons.⁴⁰

The court then distinguished a number of pre-Miranda decisions relied upon by Defendant on the fact that Defendant was not subjected to custodial interrogation and ultimately holding that the cases are inapplicable where a defendant fails to invoke the right to remain silent.⁴¹

The court addressed the appellate court's concern that a holding admitting postarrest, pre-Miranda silence would encourage police to intentionally delay interrogation and thus delay Miranda warnings, holding that this type of delay was not a concern for the United States Supreme Court.⁴²

The court found that the Appellate court erred by not considering whether or when Defendant invoked his right to remain silent.⁴³ The record demonstrated Defendant answered police questions, expressed reluctance to go to the police station, asked if he could refuse to have blood drawn, and asked to use the bathroom and for aspirin.⁴⁴ The court did not address whether these circumstances constituted an objective invocation of Defendant's right to remain silent.⁴⁵

The decision of the court of appeal was reversed and remanded for further proceedings.⁴⁶

DISSENTING OPINIONS

DISSENT BY JUSTICE WERDEGAR:

Justice Werdegar's dissent agreed with Justice Liu's dissent on the merits of the constitutional issue but relied on the fact that Defendant failed to preserve the issue of the admissibility of his postarrest, pre-Miranda silence because Defendant did not object at trial.⁴⁷

37. *Id.* (citing *Salinas, supra*, 570 U.S. at 2179).

38. *Tom*, 331 P.3d at 314-315 (citing *Salinas, supra*, 570 U.S. at 2180).

39. *Tom*, 331 P.3d at 315.

40. *Id.*

41. *Id.* at 317-318.

42. *Id.* at 319 (Citing *Fletcher v. Weir*, 455 U.S. 603 (1982)).

43. *Tom*, 331 P.3d at 319.

44. *Id.*

45. *Id.* at 319-320.

46. *Id.* at 1237.

47. *Id.* at 320-321.

DISSENT BY JUSTICE LIU, JOINED BY JUSTICE RYLAARSDAM:

Justice Liu's dissent turns on "common sense expectations" and the practical application of requiring a defendant to seek out and notify an officer of his or her intent to invoke the right to remain silent when he or she is not being questioned.⁴⁸

The dissent relied on Ninth Circuit precedent stating that the prosecution may not rely on postarrest, pre-*Miranda* silence in its case-in-chief to avoid penalizing the exercise of the right to remain silent.⁴⁹

The dissent also observed that Defendant's counsel did object to the prosecution's question about whether Defendant ever inquired as to the wellbeing of the occupants of the other vehicle.⁵⁰

The dissent then argued that admission of a refusal to testify is inquisitorial in nature, barred by the Fifth Amendment, and puts pressure on a Defendant to take the witness stand, possibly causing him or her to be the " 'instrument of his or her own condemnation.' " ⁵¹

The dissent observed the accusatory nature of an arrest by referencing the practice of searches incident to arrest and California Law providing that drivers of motor vehicles are deemed to have consented to chemical sobriety tests.⁵² Further, the nature of the prosecution's claims during trial, placing pressure on Defendant for remaining silent and thereby subjecting him to the "cruel trilemma" of "incriminating himself, lying, or demonstrating his guilt by silence."⁵³

The dissent then addressed the objective invocation rule stating the rule does not apply in the absence of police interrogation.⁵⁴ The dissent instead framed the issue as the prosecution's use of Defendant's postarrest, pre-*Miranda* silence.⁵⁵

The dissent first addressed the rationale behind the objective invocation test by observing that witnesses asked incriminating questions are required to assert the privilege against self-incrimination but would not be in a position to make the decision to assert the privilege absent questioning.⁵⁶

Second, the rationale in giving clear guidance to police officers is not required because in the absence of questioning, there is no need for such guidance.⁵⁷

Third, objective invocation puts the government on notice that a witness intends to rely on the Fifth Amendment so the prosecution can cure potential self-

48. *Id.* at 323.

49. *Tom*, 331 P.3d at 324 (citing *United States v. Velarde-Gomez* 269 F.3d 1023 (9th Cir. 2001)(en banc)).

50. *Id.* at 324-325.

51. *Id.* at 327 (quoting *Mitchell v. United States*, 526 U.S. 314, 329 (1999)).

52. *Tom*, 331 P.3d at 327.

53. *Id.* at 328 (citing *Mitchell*, *supra*, 526 U.S. at p. 329).

54. *Tom*, 331 P.3d at 328.

55. *Id.*

56. *Id.* at 328-329.

57. *Id.* at 329.

incrimination by using immunity to acquire other non-incriminating evidence to which it is entitled.⁵⁸

The dissent also noted that the rationale of *Salinas* was not applicable in this case because *Salinas* involved police questioning and involved a defendant's voluntary agreement to answer noncustodial questions whereas the Defendant in this case was not questioned and was under de facto arrest.⁵⁹

Next the dissent observed two additional concerns, first, the issue of incentivizing law enforcement to delay *Miranda* warnings, and second, the unrealistic scenario of requiring a defendant to "take the initiative" in finding a police officer to invoke his or her right to remain silent when he or she is not being questioned.⁶⁰

The dissent ultimately would have affirmed the judgment of the court of appeal.⁶¹

LEGAL SIGNIFICANCE

The effect of this opinion is that it clarifies the protection of the Fifth Amendment's self-incrimination clause. Postarrest, pre-*Miranda* silence is admissible over a Fifth Amendment objection. The more onerous effect of this opinion is that it provides authority contrary to common perception about the right to remain silent. Additionally, people attempting to exercise their right will not be able to do so without seeking out an officer and informing him or her of the person's intent to invoke their right to remain silent. Overall, the opinion heavily favors the police and prosecution granting further leeway to prosecute offenders.⁶²

58. *Id.* at 330.

59. *Id.* at 331-332

60. *Tom*, 331 P.3d at 332.

61. *Id.* at 333.

62. The author of this summary, Brandon Powell, is a Juris Doctor candidate, May 2015, at Western State College of Law.