SUPREME COURT OF NEW YORK
BRONX COUNTY

People v. Womack[1]
(decided December 5, 2006)

In 2004, Ronald Womack was charged with murdering Carnell Harris.[2] Womack moved to redact the portions of a videotaped statement where he was asked questions concerning his involvement in the crime.[3] Womack claimed that the use of the videotaped statement violated his constitutional privilege against self-incrimination under the Fifth Amendment[4] of the United States Constitution, as applied to the states by the Fourteenth Amendment,[5] and article 1, section 6[6] of the New York Constitution.[7] The court determined that "[p]rearrest silence is not governed by the Fifth Amendment. . . . [I]nstead . . . a court must determine the admissibility of such evidence by weighing the probative value against the prejudicial effect . . . ."[8] Therefore, the court denied the

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[1] No. 3456/04, 2006 N.Y. Misc. LEXIS 3928, at *1 (Sup. Ct. Dec. 5, 2006).

[2] *Id.*, at **1-2.

[3] *Id.*, at *1.

[4] U.S. CONST. amend. V states in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[5] U.S. CONST. amend. XIV states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[6] N.Y. CONST. art. I, § 6 states in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself or herself . . . ."

[7] *Womack*, 2006 N.Y. Misc. LEXIS 3928, at *3.

[8] *Id.*, at *18 (citation omitted).

defendant's motion.[9]

On July 13, 2004, Ronald Womack was arrested for the death of his cousin Carnell Harris, which occurred on May 26, 2004.[10] After receiving *Miranda* warnings, Womack proceeded to give the police two statements: one written and the other videotaped.[11] At the beginning of both statements Womack "explicitly waived his right to remain silent and, thus, did not avail himself of the safe-harbor promise of silence" included in the warning.[12] In these post-arrest statements, Womack claimed that he had accidentally shot his cousin.[13] A *Huntley* hearing was held, where it was determined that both the written and videotaped statements would be admissible.[14]

Womack then motioned the court to have selected portions of the statements redacted, specifically the portions relating to this conduct during the period after the shooting until his arrest.[15] Those portions included questions where Womack was asked: "if he called the police after the shooting; if he called for an ambulance after the shooting; if he informed any family members about his conduct when he spoke to them during this interval; and if he ever returned to the neighborhood in which the victim lived."[16] Additionally, Womack moved to redact the portion of his post-arrest statement where he

[9] *Id.*
[10] *Id.*, at **1-2.
[11] *Id.*, at *2.
[12] *Womack*, 2006 N.Y. Misc. LEXIS 3928, at *17.
[13] *Id.*, at *2.
[14] *Id.*
[15] *Id.*
[16] *Id.*

explained that "he did not attend [his cousin's] funeral because he had to go to Housing Court," claiming the statements were "unduly prejudicial."[17] Finally, Womack motioned to redact his pre-arrest statements made that indicated he did not have any involvement in the death of his cousin.[18] The court denied the defendant's motion in its entirety.[19]

In making its decision, the *Womack* court relied on *Roberts v. United States*.[20] In *Roberts*, the United States Supreme Court held that "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing . . . . [T]he privilege may not be relied upon unless it is invoked in a timely fashion."[21] The defendant was convicted of two counts of telephone misuse, in connection with his use of a telephone to facilitate the sale of heroin, and sentenced to consecutive four-year imprisonment terms on each count.[22] In making its determination, the lower court took into consideration the defendant's refusal to cooperate by his exercise of the privilege.[23] On appeal to the Supreme Court, the defendant argued that he had the constitutional right to remain silent under the Fifth Amendment and the trial court could not draw adverse inferences from his invocation of this right.[24] In responding to the defendant's arguments, the Court announced that "[c]oncealment of crime has been condemned

[17] *Womack*, 2006 N.Y. Misc. LEXIS 3928, at **2-3.
[18] *Id.*, at *3.
[19] *Id.*, at *18.
[20] 445 U.S. 552 (1980).
[21] *Id.* at 559 (citing Garner v. United States, 424 U.S. 648, 653-55 (1976)).
[22] *Id.* at 554.
[23] *Id.*
[24] *Id.* at 559.

throughout our history."[25] Such a "deeply rooted social obligation" cannot be diminished merely because the witness participates in criminal activities, unless the silence qualifies for protection under the Fifth Amendment's self-incrimination privilege.[26] The Court, accordingly, rejected the defendant's arguments because the defendant failed to articulate his "explanations or excuses for antisocial conduct" to the trial judge.[27] Therefore, since the defendant did not invoke the privilege in a timely fashion, the Court ruled that he could not rely upon the Fifth Amendment; the privilege is not self executing.[28]

The *Womack* court also discussed *Jenkins v. Anderson*,[29] where the United States Supreme Court held that pre-arrest silence could be used to impeach a testifying criminal defendant's credibility without violating the Fifth Amendment.[30] Yet, the *Jenkins* Court explicitly noted that state courts could utilize stricter evidentiary rules to afford greater protection to criminal defendants under their state constitutions.[31] The *Womack* court also considered Justice Steven's concurring opinion in *Jenkins*, which states that "the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."[32] Justice Stevens explained that the privilege applies if the

[25] *Roberts*, 445 U.S. at 557.
[26] *Id.* at 558.
[27] *Id.*
[28] *Id.*
[29] 447 U.S. 231 (1980).
[30] *Id.* at 238.
[31] *Id.* at 240-41.
[32] *Id.* at 241 (Stevens, J., concurring).

"petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply [if] he was silent."[33] Thus, Justice Stevens distinguished between the defendant's pre-arrest silence and information protected by the Fifth Amendment.[34]

Additionally, *Womack* relied on *Doyle v. Ohio*.[35] In *Doyle*, the United States Supreme Court found that the defendant's Fifth Amendment privilege against self-incrimination was violated when the defendant, after receiving *Miranda* warnings, remained silent and had that silence used against him.[36] In *Doyle*, the defendant was charged and convicted for the sale of marijuana based on his silence.[37] The defendant was arrested for the alleged sale of marijuana, was read the *Miranda* warnings, and chose to remain silent.[38] The Court determined that since the defendant chose to exercise his Fifth Amendment privilege, and did not waive that right in any way, he was therefore protected by it and his silence could not be used against him.[39]

In *United States v. Aisabor*,[40] the Second Circuit held that the defendant explicitly waived his right to remain silent because he agreed to answer police questions after receiving *Miranda* warnings.[41] The defendant, by waiving this privilege, could not

[33] *Id.* at 244.
[34] *Jenkins*, 447 U.S. at 244.
[35] 426 U.S. 610 (1976).
[36] *Id.* at 619-20.
[37] *Id.* at 611.
[38] *Id.* at 612.
[39] *Id.* at 619-20.
[40] No. 00-1008, 2001 U.S. App. LEXIS 3381, at *1 (2d Cir. Feb. 28, 2001).
[41] *Id.*, at **2-3.

receive the Fifth Amendment's protection.[42] The court distinguished this case from *Doyle*, because in *Doyle*, the defendant received *Miranda* warnings and *chose to exercise* his right, whereas the defendant in *Aisabor* received the warnings but *chose not to exercise* his right.[43] This failure led to the waiver of the privilege, thus admitting the defendant's incriminating statements.[44]

However, New York case law also takes into consideration the evidentiary value of the statement. For instance, in *People v. Conyers*,[45] the New York Court of Appeals held that "because the potential for prejudice inherent in such evidence outweighs its marginal probative worth . . . [the] use of such evidence for impeachment purposes cannot be justified in the absence of unusual circumstances."[46] The defendant had been convicted of several criminal counts in connection with an armed robbery.[47] On appeal, the appellate division reversed the conviction, finding that the defendant's constitutional rights were violated by the use of his post-arrest silence to impeach him.[48] The Court of Appeals affirmed the appellate court based on the references to the defendant's post-arrest silence.[49] The court explained that although its findings were based on constitutional grounds, it was also heavily influenced by its

[42] *Id.*, at *2.
[43] *Id.*
[44] *Id.*
[45] 420 N.E.2d 933 (N.Y. 1981).
[46] *Id.* at 935.
[47] *Id.* at 934.
[48] *Id.*
[49] *Id.* at 935.

"conviction that evidence of an individual's pretrial failure to speak when confronted by law enforcement" is of little probative value.[50] Specifically, the court stated that individuals may exercise their constitutional privilege against self-incrimination for a number of reasons, including the defendant's: (1) awareness that he is under no obligation to speak, (2) natural caution from knowing that anything said may be used against his; (3) belief that efforts to exonerate himself may be futile under circumstances; (4) and mistrust of law enforcement.[51] Therefore, the court determined that it is improper for post-arrest silence to be used against the defendant.[52]

In *People v. Davis*,[53] the New York Court of Appeals distinguished the post-arrest silence in *Conyers* when it held that evidence of the defendant's post-arrest silence in *Davis* was admissible.[54] The police responded to a call that a man was in the caller's building carrying a revolver which led to the apprehension of the defendant.[55] A police officer testified at trial that, upon apprehension, the defendant stated, " 'I should have killed you when I had the chance.' "[56] The defendant's statement was used to prove that he satisfied the elements of attempted murder—knowledge and intent.[57] The court distinguished these facts from *Conyers*:

> This is not a case, like *Conyers*, where the prosecution

[50] *Conyers*, 420 N.E.2d at 935.
[51] *Id.*
[52] *Id.*
[53] 461 N.E.2d 283 (N.Y. 1984).
[54] *Id.* at 284.
[55] *Id.*
[56] *Id.*
[57] *Id.*

> tried to use evidence of the fact of a defendant's postarrest silence against him by contending that such silence itself renders a later exculpatory version of events incredible. Here the defendant testified as to his postarrest silence, contradicting the prosecution witnesses, and the prosecutor attacked the veracity of defendant's testimony upon summation.[58]

The *Womack* court also relied on a case with analogous facts, *People v. Economy*.[59] In *Economy*, the Appellate Division, Second Department, denied the defendant's request to redact a statement because a jury instruction concerning the pre-arrest statement was a sufficient remedy.[60] The defendant, during a videotaped interview with an Assistant District Attorney, remained silent during questions concerning his possession of a gun.[61] On appeal, the appellate division determined that defense counsel did not properly preserve the trial court's failure to redact, and for those claims that have been preserved, redaction was not necessary because the court determined the limiting instruction to be sufficient.[62]

In conclusion, the Fifth Amendment of the United States Constitution and article 1, section 6 of the New York Constitution are practically identical, and accordingly the application on the federal and state level seems to yield consistent results. The federal and state courts distinguish between pre-arrest and post-arrest silence. In both

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[58] *Davis*, 461 N.E.2d at 285. In *Davis*, unlike in *Conyers*, the defendant's silence was the key issue because it was put into question by the defendant in an effort to challenge the prosecution's evidence for attempted murder. *See id.*

[59] 548 N.Y.S.2d 750 (App. Div. 2d Dep't 1989).

[60] *Id.* at 751.

[61] *Id.*

[62] *Id.*

systems, the use of post-arrest silence offends the constitutional protections created in the federal and New York constitutions, while the use of pre-arrest silence does not offend either. Additionally, the courts agree that the constitutional protections granted by the Fifth Amendment and article 1, section 6 can be waived, enabling the admission of a defendant's incriminating statements. Further, if a defendant fails to exercise his constitutional rights in a timely manner, this too constitutes a waiver of the privilege against self-incrimination.[63] Although some of the New York case law examines statements used for impeachment purposes—not the prosecution's case-in-chief—the holdings are still consistent. In these situations, New York courts consider the prejudicial and probative value of the statement.[64] Therefore, when a defendant receives *Miranda* warnings and chooses to invoke his privilege against self-incrimination, his post-arrest silence is inadmissible. However, when a defendant, after receiving *Miranda* warnings, does not exercise his privilege against self-incrimination, the defendant waives the protections afforded by the state and federal constitutions.

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[63] *Roberts*, 445 U.S. at 559 (citing Garner v. United States 424 U.S. 648, 653-55 (1976)).
[64] *Conyers*, 420 N.E.2d at 935.