

FILED

July 20, 2000

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

July 21, 2000

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

This *per curiam* opinion includes a footnote (note 2) that I think could be “dangerous in the wrong hands.”

Let me illustrate my concern with two hypotheticals.

In both cases, A and B, the police find a person (the defendant) standing over a corpse with a smoking pistol.

In case A, the police arrest the defendant right after they get to the crime scene, but they take their time (a half an hour) at the scene before they put the defendant in a police car and transport him to jail.

In case B, the police are slower to decide to arrest the defendant, and only do so after a half an hour -- and then they take him immediately to jail.

In both cases, the person repeatedly refuses to answer police questions at the crime scene about what happened and how the victim was shot. And later, in both cases, at his murder trial, the defendant “explains” for the first time that he was attacked by the person whom he shot.

The question is -- in both case A and in case B -- can the prosecutor make this argument to the jury: “Why didn’t the defendant tell this ‘I was attacked’ story to the police at the crime scene? His silence at the crime scene shows that he is making this story up. Any innocent person would have explained what happened!”

Clearly, such an argument is impermissible in case A -- because such an argument would be commenting on “post-arrest” silence. But what about case B, where the person was not “under arrest” when he was silent?

Why should commenting on the person’s silence in the face of police questions be different -- and thus “constitutionally permissible” -- in case B? People generally have a constitutional right not to explain their actions to the police, whether or not they are “under arrest” -- that’s part of what makes America a (perhaps uniquely) “free country.”

When the police read people their *Miranda* rights, the police are not *conferring* “the right to remain silent.” The police are *informing* the person of a right that they *already* have -- in my judgment, both pre- *and* post- arrest.

In both hypothetical cases, a prosecutorial argument that the person “didn’t say anything to the police” would seemingly penalize the exercise of a constitutional right. So in both cases, such an argument by a prosecutor would seemingly be impermissible -- at least in this hypothetical context.

Obviously, in real life this could be a complex issue. A footnote in a *per curiam* opinion does not settle the law. I think we may need to look at this issue more carefully if it comes before us in a subsequent case.

I otherwise concur in the majority opinion.