STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

REGINALD PATRIC HILL,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 231387
Genesee Circuit Court
LC No. 00-005972-FH

Before: Neff, P.J., and Griffin and Talbot, JJ.

GRIFFIN, J. (*concurring*).

I concur in the affirmance of defendant's conviction. In doing so, I would hold that the prosecution's use of defendant's pre-*Miranda*[1] silence as substantive evidence of guilt violated his Fifth Amendment guarantee against self-incrimination.[2] However, recognizing that this is an issue of first impression in Michigan and in view of the split of authority in the federal circuit courts, I would also hold that the forfeited constitutional error was not plain error and defendant has not sustained his highly demanding burden of proving ineffective assistance of counsel.

I

On appeal, defendant's main claim of error is that his Fifth Amendment privilege against self-incrimination was violated by the introduction of his custodial, pre-*Miranda*, silence as substantive evidence of his guilt. Initially, I note *Miranda* warnings are required only for custodial *interrogation*, *Rhode Island v Innis*, 446 US 291, 302; 100 S Ct 1682; 64 L Ed 2d 297 (1980), and that the simple asking of a defendant's name is not interrogation, *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1991); *People v Cuellar*, 107 Mich App 491, 493; 310 NW2d 12 (1981). Further, although a defendant's prearrest and postarrest silence are admissible for impeachment purposes, *Fletcher v Weir*, 455 US 603; 102 S Ct 1309; 71 L Ed

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Our Michigan Constitution also contains a guarantee against self-incrimination. Const 1963, art 1, § 17. The federal and state constitutional guarantees are co-extensive. *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 726; 344 NW2d 788 (1984); *People v Mayes (After Remand)*, 202 Mich App 181, 189-190; 508 NW2d 161 (1993).

2d 490 (1982); *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999); *People v Alexander*, 188 Mich App 96, 102; 469 NW2d 10 (1991), in the present case defendant did not testify and was not subject to impeachment.

The present issue whether pre-*Miranda* silence may be used as substantive evidence of guilt has never been decided in Michigan and has divided the federal circuit courts of appeal. The Ninth, Fifth, and Eleventh Circuit Courts of Appeal have held that the prosecution may comment on the defendant's silence if it occurred before the time he was given his *Miranda* warnings. See *US v Oplinger*, 150 F3d 1061, 1066-1067 (CA 9, 1998);[3] *US v Zanabria*, 74 F3d 590, 593; (CA 5, 1996); *US v Rivera*, 944 F2d 1563, 1568 (CA 11, 1991). However, the Sixth, Tenth, First, and Seventh Circuits have held that it is a violation of the defendant's Fifth Amendment right against self-incrimination for the prosecution to comment on a defendant's pre-*Miranda* silence as substantive evidence of guilt. See *Combs v Coyle*, 205 F3d 269 (CA 6, 2000); *US v Burson*, 952 F2d 1196, 1201 (CA 10, 1991); *Coppola v Powell*, 878 F2d 1562, 1568 (CA 1, 1989); *US ex rel Savory v Lane*, 832 F2d 1011, 1017 (CA 7, 1987).

Because the United States Supreme Court has not ruled on the question and the federal circuit courts of appeals are divided, we are not bound by either line of authority. *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960); *Young v Young*, 211 Mich App 446, 450; 536 NW2d 254 (1995). Nevertheless, I agree with the Fifth Amendment analysis of *Combs v Coyle*, *supra*.[4] In holding that defendant's silence was improperly used against him in violation of his Fifth Amendment right, the Sixth Circuit explained, *id.* at 285-286:

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[3] The argument made by the assistant U.S. attorney in *Oplinger*, *supra* at 1066, n 4, is substantially similar to the comments at issue in the present case:

> In its closing argument, the government attorney commented on the May 18 meeting as follows:
>
> "It was explained to him, it would have to be reported to the FBI and the bank's regulators. Did he give a response or an explanation? No. Did he ask for time to put together a response? No. Did he rant and rave and scream about being charged unjustly with stealing? No. Did he ask them to contact people at Costco about defective merchandise that he was supposedly returning? No. Did he call Costco and scream about them lying to the bank about merchandise he was returning? No. *Does this sound like the conduct of an innocent person? Of course it doesn't.*" [Emphasis added.]

In *US v Whitehead*, 200 F3d 634, 639 (CA 9, 2000), the Ninth Circuit "strictly limited our ruling in *Oplinger* to the period prior to custody." See also *US v Velarde-Gomez (En Banc)*, 269 F3d 1023 (CA 9, 2000).

[4] I disagree with the *Combs* panel's resolution of the issue of ineffective assistance of counsel and note that the grant of habeas corpus relief was contrary to their limited habeas corpus review. See *O'Dell v Netherland*, 521 US 151; 117 S Ct 1969; 138 L Ed 2d 351 (1997); *Lambrix v Singletary*, 520 US 518; 117 S Ct 1517; 137 L Ed 2d 771 (1997); *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989).

> If, on the other hand, prearrest silence may be used as substantive evidence of guilty regardless of whether or not the defendant testifies at trial, then the defendant is cast into the very trilemma outlined by the *Murphy* [*v Waterfront Comm*, 378 US 52; 84 S Ct 1594; 12 L Ed 2d 678 (1964)] Court. Because in the case of substantive use a defendant cannot avoid the introduction of his past silence by refusing to testify, the defendant is under substantial pressure to waive the privilege against self-incrimination either upon first contact with police or later at trial in order to explain the prior silence. Perhaps most importantly, use of a defendant's prearrest silence as substantive evidence of guilt substantially impairs the "sense of fair play" underlying the privilege. Unlike in the case of impeachment use, the use of a defendant's prior silence as substantive evidence of guilt actually lessens the prosecution's burden of proving each element of the crime.
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> We also conclude that the government's use of a defendant's prearrest silence in its case in chief is not a legitimate governmental practice. Unlike the use of silence for impeachment purposes, the use of silence as substantive evidence of guilt does not enhance the reliability of the criminal process. Just as "every postarrest silence is insolubly ambiguous," *Doyle* [*v Ohio*] 426 US at [610] 617, 96 S Ct 2240 [49 L Ed 2d 91 (1976)], there are many reasons why a defendant may remain silent before arrest, such as a knowledge of his *Miranda* rights or a fear that his story may not be believed. The probative value of such silence is therefore minimal. Furthermore, the use of prearrest silence may even subvert the truthfinding process; because it pressures the defendant to explain himself or to suffer a court-sanctioned inference of guilt, the likelihood of perjury is increased. In sum, permitting the use of a defendant's prearrest silence as substantive evidence of guilt would greatly undermine the policies behind the privilege against self-incrimination while adding virtually nothing to the reliability of the criminal process.
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> In the instant case, Combs clearly invoked the privilege against self-incrimination by telling the officer to talk to his lawyer, thus conveying his desire to remain silent without a lawyer present. Combs never waived this privilege and did not testify at his trial. Therefore, the prosecutor's comment on Combs' prearrest silence in its case in chief and the trial court's instruction permitting the jury to use Combs' silence as substantive evidence of guilt violated Combs' Fifth Amendment rights.

I agree with the above reasoning and would adopt and apply it regarding defendant's postarrest silence. See also *US v Whitehead, supra*.

In a related context dealing with the Fourth Amendment, the United States Supreme Court has stated:

> Since *Terry* [*v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)], we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion), for example, we explained that "law enforcement officers do not violate

> the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him *if he is willing to answer some questions*, by putting questions to him if *the person is willing to listen*, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id.* at 497; 103 S Ct 1324; see *id*. at 523, n 3; 103 S Ct at 1338, n 3 (Rehnquist, J., dissenting).
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> . . . We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, see *INS v Delgado,* 466 US 210, 216; 104 S Ct 1758, 1762; 80 L Ed 2d 247 (1984); *Rodriquez, supra* 469 US at 5-6; 105 S Ct at 310-311; ask to examine the individual's identification, see *Delgado, supra* 466 US at 216; 104 S Ct at 1762; *Royer, supra* 460 US at 501; 103 S Ct at 1326 (plurality opinion); *United States v Mendenhall,* 446 US 544, 557-558; 100 S Ct 1870, 1878-1879; 64 L Ed 2d 497 (1980); and request consent to search his or her luggage, see *Royer, supra* 460 US at 501; 103 S Ct at 1326 (plurality opinion) – *as long as the police do not convey a message that compliance with their requests is required.* [*Florida v Bostick,* 501 US 429, 434-435; 111 S Ct 2382; 115 L Ed 2d 389 (1991) (emphasis added).]

See also *United States v Drayton*, 536 US 194; 122 S Ct 2105; 153 L Ed 2d 242, 251 (2002).

The Fifth Amendment guarantee against self-incrimination provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . ."[5] As the Supreme Court stated in *Miranda, supra* at 460, quoting *Malloy, supra* at 8, "[i]n sum, the [Fifth Amendment] privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"

In the view of my colleagues, a defendant's refusal to "voluntarily" answer questions posed by the police is evidence of guilt. I respectfully disagree. A defendant's choice is obviously not voluntary if there is a penalty for not agreeing to cooperate.

Furthermore, the majority erroneously places an evidentiary burden on defendant to prove that he knew of his Fifth Amendment rights and intended to exercise them. In the context of post-*Miranda* silence, our Supreme Court in *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990), rejected such an approach as unworkable:

> The relevant inquiry is first whether the defendant has remained silent. If so, there is an irrebuttable presumption of irrelevancy, and such silence may not be used substantively or for impeachment purposes since there is no way to know after the fact whether it was due to the exercise of constitutional rights or to guilty knowledge.

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[5] The federal guarantee against self-incrimination is applicable to the states through the Fourteenth Amendment. *Malloy v Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964); *Griffin v California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

More importantly, the rights guaranteed individuals against their government by the Bill of Rights should not rise or fall depending on the individual's knowledge of the constitution. In my view, defendant's Fifth Amendment privilege not to answer questions was clearly invoked by defendant's decision to remain silent, irrespective of his familiarity with the constitution.[6]

Although the question in the present case regarding defendant's identity appeared to be innocuous, defendant invoked his right to remain silent by choosing not to talk to the police. Under such circumstances, it was error for the prosecutor to comment on defendant's exercise of his Fifth Amendment right because "[i]t cuts down on the privilege by making its assertion costly." *Griffin v California, supra* at 614.

In particular, the prosecutor commented on defendant's invocation of his right to remain silent during the prosecutor's opening argument:

> *Mr. Berkman (Assistant Prosecuting Attorney)*: And they take him and they arrest him and take him down to the station.
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> One of the common things a police officer is going to do is say what is your name. The defendant's [sic] not giving his name. He's not giving that information. But find out his name.

Later, the prosecutor in his closing and rebuttal arguments to the jury argued that defendant's decision not to talk when asked to give his identity was evidence of defendant's guilty state of mind as well as his attempt to "conceal his culpability in the crime."

> *Mr. Berkman*: When the police arrest him does he sit there and cooperate? What's your name, sir. Uniformed police officers, Officer Murphree, Officer Burnett, Officer Achey, all uniformed, all three of them police officers, uniformed officers. What's your name, sir. I'm a police officer. I need your identification. What does this person say when asked for the identification. He refuses to identify himself. He won't give his name.
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> Even after they later learn his name from a traffic ticket that he had from a previous occasion, which by the way, as we know, he was driving that same vehicle on a previous occasion, even when he had the identification, are you Reginald Hill. This says Reginald Hill. Are your Reginald Hill. The defendant still won't answer.
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> * * *
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> She's vague on the times in that she happens to do that and the defendant happens to walk along the way when he sees the police and for some innocent reason happens to go the long way indirectly to Barth, and when he's arrested

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[6] The majority's focus on defendant's state of mind would be appropriate if it were claimed that defendant "waived" his Fifth Amendment rights. See, generally, *People v Eaton,* 184 Mich App 649, 650; 459 NW2d 86 (1990). However, the prosecutor has not raised the issue of waiver.

> doesn't identify himself. Mr. Grant said well, maybe he didn't want to identify himself. Well, use your own common sense and logic, and I think the testify from the officer, from a police officer in a uniform saying who are you, what's your name, you gotta tell them. You gotta tell them. He's not telling. He's not telling, because he doesn't want to be identified.
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> * * *
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> . . . He's not going to walk on Barth. He walks down trying to go down and around. He's caught by the police, and of course, when he's caught by the police he's not talking. He's not saying anything. He's still trying to avoid them figuring out who he is.
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> But they can't figure out why is the jewelry – can't explain why there's jewelry in his pocket, and he can't – he does not identify himself. He's trying to avoid his detection. . . .
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> * * *
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> Then the defendant is taken back to the station, and at the station he is still trying to conceal who he is and conceal his culpability in the crime.

Because defense counsel did not object to the prosecutor's use of defendant's silence, this constitutional error has been forfeited. Pursuant to *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), we review forfeited constitutional errors for plain error under the test of *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993):

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." . . . Finally, *once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." . . . [*Carines, supra* at 763 (emphasis added and citations omitted).]

In light of the substantial direct and circumstantial evidence linking defendant to the crime, I conclude that defendant was not actually innocent. Further, because of the split of authority in the federal circuit courts of appeal on the issue, the error was not clear or obvious and did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. At the present time, such evidence would be admissible in nearly half of the federal circuits that have addressed the issue. For these reasons, I would hold that plain error warranting reversal did not occur.

II

Next, defendant argues that in violation of his Sixth Amendment right to counsel, his trial counsel was ineffective in failing to object to the prosecutor's use of his silence as substantive evidence of guilt:

> To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. [*Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984)] *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).]

It is well established that counsel is not required to make futile objections, *People v Sabin (On Second Remand)*, 242 Mich App 656, 660; 620 NW2d 19 (2000); *People v Meadows*, 175 Mich App 355, 366; 437 NW2d 405 (1989), and the objection defendant now asserts on appeal would have been futile in many courts. Because the issue had not been decided in Michigan and divides the federal circuit courts of appeal, I do not conclude that counsel's performance was objectively unreasonable as a matter of law.

As our Supreme Court noted in *People v Davidovich*, 463 Mich 446, 453, n 7; 618 NW2d 579 (2000), "The phrase 'ineffective assistance of counsel' does not refer merely to lawyering that is not optimal. Rather it refers to representation that has sunk to a level at which it is a problem of constitutional dimension." In this regard, the United States Supreme Court in *Kimmelman v Morrison*, 477 US 365, 386; 106 S Ct 2574; 91 L Ed 2d 305 (1986), explained:

> In order to establish ineffective representation, the defendant must prove both incompetence and prejudice. . . . There is a strong presumption that counsel's performance falls within the "wide range of [reasonable] professional assistance," . . . the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. . . . The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. . . .
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> Since "[t]here are countless ways to provide effective assistance in any given case," . . . unless consideration is given to counsel's overall performance, before and at trial, it will be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.". . .

See also *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995)(opinion by Boyle, J.) ("Counsel is not ineffective for taking a position that, while objectively reasonable at the time, is later ruled incorrect. *McMann v Richardson*, 397 US 759, 770-771; 90 S Ct 1441; 25 L Ed 2d 763 [1970]").

Defendant has not sustained his heavy burden of overcoming the presumption that he received reasonable professional assistance and has not established that his counsel's performance deprived him of a fair trial. The trial transcript reveals that, overall, defense counsel's performance was skilled and vigorous. Further, in view of the substantial direct and circumstantial evidence linking defendant to the crime, I conclude there is not a reasonable probability that but for trial counsel's performance the result of the proceedings would have been different. *Strickland*, supra. For these reasons, I would hold that defendant has not sustained his "highly demanding" burden, *Reed, supra* at 390, of establishing ineffective assistance of counsel under either the United States or Michigan Constitutions.[7]

I join the majority's opinion in regard to the additional issues raised by defendant.

/s/ Richard Allen Griffin

[7] Again, the Michigan and United States constitutional guarantees are co-extensive and the Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Pickens, supra*.