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Trials & TRIBULATIONS

The danger of pre-trial silence

As attorneys we are likely the most familiar with what many consider the fundamental rights of the criminally accused. Those rights include, for example, the right to a speedy trial in front of a jury of your peers and the right to be treated equally under the law regardless of your race, color, or creed. Many also view the Miranda warnings as fundamental principles at the bedrock of our criminal justice system. Indeed, to a lay person, one of those warnings, the right to remain silent, heard so often in the ubiquitous crime dramas that clog our Netflix queues, may seem applicable to all pre-trial situations in which an accused chooses not to speak. The Court of Appeals in *People v. Vining*, 2017 NY Slip Op. 01144 (February 14, 2017), reminds us that a defendant's right to remain silent is not sacrosanct. The *Vining* opinion should prompt defense attorneys to carefully counsel clients regarding their rights and, perhaps more importantly, when those "rights" may not apply.

In *Vining*, the Court of Appeals was asked to review whether the trial court properly permitted the introduction by the prosecution of the defendant's recorded conversation with his ex-girlfriend while he was incarcerated at Rikers Island awaiting trial. Slip Op. at p. 2. The defendant was accused of assault and other crimes related to incidents involving his ex-girlfriend. While at Rikers, he contacted her by telephone "in violation of an order of protection in an attempt to influence her to drop the charges against him." Id. at 6-7.

During the conversation, which was tape recorded, the ex-girlfriend/victim "re-



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peatedly accused the defendant of breaking her ribs. Defendant never denied the allegations and instead gave non-responsive and evasive answers." Id. at p. 3. Some of his non-responsive or evasive answers included stating, "so I'm a threat to you?" in response to her accusation that he did not show sympathy toward her after he had allegedly broken her ribs. Id.

The prosecution sought to introduce this phone call, in part because the victim was an unreliable witness who was "forcibly brought to the court in handcuffs" to testify against the defendant and there was little other evidence of guilt. Slip Op. at p. 2-3, Dissent at p. 10-11. The trial court allowed the testimony as an "adoptive admission," but gave the jury a limiting instruction requested by defense counsel. The jury ultimately found the defendant guilty of assault, attempted assault, criminal mischief, and criminal trespass.

On appeal, the Appellate Division, First Department held that the trial court properly exercised its discretion in admitting the jail house phone call. The Court of Appeals affirmed, with Judge Rivera dissenting and Judge DiFiore concurring in the dissent.

The doctrine of "adoptive admissions" is an exception to the rule prohibiting the admission of hearsay. As the Court of Appeals explained, "[a]n adoptive admission occurs when a party acknowledges and as-

sents to something already uttered by another person, which thus becomes effectively the party's own admission. Assent can be manifested by silence, because a party's silence in the face of an accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission." Slip Op. at p. 4 (internal quotations, citations and alterations omitted).

The Court of Appeals recognized the potential prejudice to a criminal defendant caused by the introduction of evidence of silence; however, under the circumstances in *Vining*, it found that the jury was equipped to weigh the significance of the recorded conversation in light of the surrounding circumstances. The Court cited the defendant's initiation of the call to the victim and the fact that his responses, instead of mere silence, were "equivocal or evasive" and even "manipulative." Slip Op. at 4-7.

The Dissent strongly opposed the use of the doctrine of adoptive admissions against an accused, particularly where the accused was incarcerated and was aware that his conversations were being recorded. Dissent at p. 1-2, 5. The Dissent cited the long-standing principle that pre-trial silence is typically "of extremely limited probative worth" and that the "potential for prejudice ... outweighs any probative worth of the evidence." Id. at p. 2-3.

The Dissent noted numerous reasons why a defendant may remain silent in the face of an accusation, most notably that "a defendant may simply choose to invoke the constitutional right to remain

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silent.” *Id.* at p. 3. The Dissent argued that “the fear of self-incrimination” was affirmed under the circumstances of this case where the defendant was incarcerated and knew his conversations were being recorded and could be used by the prosecution against him. Slip Op. at 3, 5-6. The Dissent concluded, “it is inherently unfair to inform a Rikers Island detainee that telephone calls are being monitored by the government and may be used as evidence against the detainee by the prosecution, only to penalize the detainee who elects not to speak during a recorded tele-

phone call.” Dissent at p. 12.

Yet the majority was not swayed by the Dissent’s (and the defendant’s) contention that the defendant’s incarceration weighed in favor of preclusion. The Court reasoned that the “defendant was not induced by any promise, or coerced by [law enforcement], to call the victim and make statements detrimental to his defense and the mere act of recording is no different from an informer sitting mute, not provoking or prompting conversation but merely listening to a statement freely made.” Slip Op. at 8 (internal quotations and alterations omitted).

This case warrants reading, particularly

by criminal defense attorneys concerned with properly advising their clients as to when they should or should not speak when confronted with accusations of criminal wrongdoing. For the defendant in *Vining*, and likely others, perhaps the best advice was to refrain from using jailhouse phones except to speak to an attorney, and even better, to refrain from discussing a pending case with anyone except your attorney.

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