Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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FYI: STATE v. ORR

The Georgia Supreme Court rules that the new Evidence Code abrogates the categorical rule in Mallory v. State which excludes evidence of a criminal defendant's pre-arrest silence or failure to come forward to law enforcement.

In *State v. Orr*, S18G0994 (May 6, 2019), Orr was convicted of a single count each of family violence battery and cruelty to children in the third degree. The evidence, very briefly stated, showed that Orr beat his wife, but Orr testified that he acted in self-defense and only hit his wife one time after she hit him on the head with a glass ashtray. The trial court granted Orr a new trial pursuant to *Mallory v. State*, 261 Ga. 625 (1991) after the prosecutor questioned witnesses about Orr's failure to come forward to police and in closing, argued Orr's pre-arrest silence and failure to come forward as evidence of guilt. The State appealed, arguing that the exclusionary rule in *Mallory* was no longer applicable under the new Evidence Code. The Court of Appeals, however, affirmed. The majority held that because the Supreme Court had not yet overruled *Mallory*, it was bound to apply *Mallory*'s rule to this case. See *State v. Orr*, 345 Ga. App. 74, 79 (2018). The Supreme Court granted the State's petition for writ of certiorari.

The Court first looked to the history of *Mallory*'s categorical exclusionary rule and found that it did not purport to be constitutionally required, nor to be "otherwise provided" by any Georgia (or federal) law outside the Evidence Code. Instead, it was best characterized as nothing more than "judicial lawmaking." And, regardless of whether the Court even had the authority to promulgate such an exclusionary rule, the Court concluded there is no doubt that *Mallory*'s categorical, bright-line rule excluding all "comment upon a defendant's silence or failure to come forward as far more prejudicial than probative," 261 Ga. at 630, was abrogated by the new Evidence Code. Therefore, the trial court and the Court of Appeals erred in relying on *Mallory* to set aside Orr's convictions.

But, the Court cautioned, the demise of *Mallory*'s blanket exclusionary rule will now make it much harder to determine whether evidence of a criminal defendant's pre-arrest "silence or failure to come forward" is admissible (and whether or how prosecutors may comment on such evidence). The analysis will now require careful consideration of what specific sorts of evidence that come within the broad phrase "silence or failure to come forward" may be properly offered under which particular evidence rules and theories. For example, the Court noted, such evidence could be proffered as an adoptive admission under OCGA § 24-8-801 (Rule 801). For evidence to qualify as a criminal defendant's adoptive admission under Rule 801 (d) (2) (B), the trial court must find that two criteria were met: First, that the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond; and second, that

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there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement. But, the Court found, Orr's failure to contact the police after his wife allegedly hit him in the head with an ashtray would not appear to meet this standard.

Similarly, evidence of this sort also might qualify as an "admission" excluded from the hearsay rule under Rule 801 (d) (2) (A) if it is "[t]he party's own statement" — but to be such a "statement," Rule 801 (a) (2) requires "[n]onverbal conduct" to be "intended to be an assertion." Thus, the party seeking to introduce evidence under Rule 801 (d) (2) (A) must identify the specific nonverbal conduct of the opposing party and the fact or facts that it was allegedly intended to assert. Vaguely pointing out that the defendant "failed to come forward" after a crime will not suffice.

Furthermore, certain aspects of a defendant's failure to come forward to the police might also be offered not as a particular assertive statement subject to the hearsay rules, but rather as circumstantial evidence of guilt. For example, it is universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, is admissible as evidence of consciousness of guilt, and thus of guilt itself. However, the Court cautioned against giving significant weight to certain evidence that a defendant did not come forward to the police after a crime, such as evidence of flight alone.

Finally, if the evidence is deemed properly admissible, the inquiry then turns to potential grounds for its exclusion — not automatically under *Mallory*'s defunct rule, but rather through the lens of Rules 402 and 403. The Court reiterated that the exercise of discretion under Rule 403 is *case-specific* and usually turns on the trial court's assessment of the probative value and prejudicial effect of the particular evidence at issue. In other words, this analysis cannot be done with broad strokes; it requires careful attention to the circumstances of, and arguments made in the particular case at hand. Nevertheless, the Court noted, in most circumstances, silence is so ambiguous that it is of little probative force, especially if the defendant does not later testify inconsistently.

Accordingly, the Court concluded, because the trial court and the Court of Appeals believed incorrectly that *Mallory*'s categorical exclusionary rule applied to this case, they did not conduct the analysis required by the new Evidence Code. Therefore, the Court vacated the judgment of the Court of Appeals and remanded the case for proceedings consistent with its opinion, noting that the Court of Appeals may decide that it needs to remand the case to the trial court to address some issues in the first instance.

In so holding, the Court stated that because Orr did not argue that the State's comments were prohibited by the federal or state constitution, it would not address this issue. Additionally, the Court noted that it was not deciding whether *Mallory*'s exclusionary rule should continue to be applied to cases on appeal that were tried under the old Evidence Code.