Denver Law Review

Volume 29 | Issue 7 Article 5

June 2021

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THE DEFENDANT AS A WITNESS

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In the ordinary case, the defendant will take the stand as a matter of course. After all he stands charged with crime. He has plead not guilty. The State has presented its evidence. The motion for directed verdict has been overruled. And the jury properly wants to hear his story.

If the defendant does not testify, there must be the most compelling of reasons. Obviously, no lawyer will assume that the presumption of innocence and the instruction upon failure to testify will satisfy the natural feeling of the jury and of us all that an innocent man will be anxious to present his defense in person on the stand. And unfavorable inferences likely will be drawn when he elects not to do so.

Occasionally, however, serious questions arise in our minds whether more harm than good will be done by offering our client as a witness. Unfortunately, there are no books to guide us; there are no precedents to be examined. We must trust alone to whatever inate ability we have to gauge the situation at hand and to appraise the overall picture and pray for a large measure of good luck.

This question generally grows out of one or more of the following situations which may confront us at the end of the State's case.

First: Will the defendant's testimony supply some proof missing from the State's case, and which we believe to be vital before conviction can be had?

Second: Will our client's cross-examination probably reveal guilt of other offenses? These may be offenses of which he presently stands charged or which will result in the bringing of additional charges.

Third: Is the personality of our client such that he will make a very unimpressive witness who may convict himself?

Fourth: Has he a criminal record?

As to the first, unless we are satisfied in our own minds that the State has actually failed to prove its case and that an appellate court will so hold, it is submitted the defendant better take the stand. For experience cautions us not to rely too heavily in the reviewing court upon technicalities. As one former Judge used to say: What he was interested in was doing substantial justice. And if the appellate court feels substantial justice has been done, it will not look for technical reasons to reverse.

As to the second, certainly we do not want to find ourselves in a position where a careful and thorough cross-examination of our client will prove that he is guilty of other offenses as well as the one presently on trial. Perhaps here it would be better to rely upon the weakness of the State's case, presumption of in-

nocence and the court's instruction that the failure to testify is no evidence of guilt.

As to the third, the fact that our client does not appear to us as a man of impressive personality, or that he will make a "good" witness should not keep us from remembering at all times that this is his day in court and it is he who may have to serve many years upon conviction. It seems reasonable to believe that if he is convicted there will be many nights and days in the penitentiary when he will wonder why he did not testify. It is well to remember that an acquitted man generally believes it was because of his own sagacity; a convicted one knows it was the fault of his lawyer.

Perhaps it is the fourth of the situations outlined, our client's former criminal record, that causes us the most trouble in determining whether he should testify. We realize, of course, that unless he takes the stand, the jury will not be advised of his former record. If he does testify, that fact will be known. What shall we do about it? There is no answer which will apply to all cases. There is no formula by which we can resolve the question. We must sense the state of the case and the feeling in the court room, which is probably reflected in the jury box, to determine whether it is necessary to risk the development of this information.

One or two considerations may help us in trying to decide. What was the nature of the former conviction? How long ago was it? Does our client's record contain other convictions as well, or is it only one? If his record, shall we say, is that of involuntary manslaughter some years ago and he is now on trial for some business offense, embezzlement, falsification of records, et cetera, and the State's case against him is strong, it would seem probably the part of wisdom to put him on the witness stand. If, however, our client once before has served a term for embezzlement, and is again on trial for embezzlement, and we have other evidence apart from his testimony which can be produced to counteract the State's case at least in part, perhaps it is well not to put the defendant on the stand, but to rely on the inherent weakness of the State's case plus such evidence apart from the defendant's testimony as we can muster.

If he does testify, you will, of course, want to bring out his former convictions yourself. You will not want to wait for cross-examination to develop this. I am sure we are all in agreement from the standpoint of trial tactics that if there is something damaging, and you know it will be brought out from the witness, it is best to bring it out yourself in the course of your own examination.

There is no easy solution. It has always seemed, however, in the last analysis the defendant should take the witness stand and should testify unless, as noted, there are overwhelming reasons why he should not. If, after careful consideration, you still are in doubt, it is recommended that the defendant take the stand.

And if he does not take the stand, by all means have him give you a note in his own handwriting, stating it is his view, as well as yours, that he should not testify and requesting you not to call him as a witness. If he has a wife, she should approve in writing this note. The advisability of such precaution was impressed upon me as a prosecutor in the '20's. In a serious case, involving the failure of a bank in Denver,* the defendant on trial did not take the stand. After his conviction, he charged his lawyers with many derelictions, among them, their refusal to let him testify. They were able and experienced trial lawyers. These lawyers presented to the District Court a letter signed by the defendant stating that his position was that he should not take the witness stand. Without that letter it might have been very embarrassing.

Frankly, I am afraid this last suggestion, always to take a letter from the defendant if he does not testify, is about all that may have been contributed by this discussion.

Whatever your decision, you never can be satisfied you were right or just lucky.

CASE COMMENTS

CONSTITUTIONAL LAW—THE SANCTITY OF A LEGISLATIVE ACT IS SUPERIOR TO THAT OF THE LEGISLATURE ITSELF—WHAT AMOUNTS TO AN EFFECTIVE REPEAL?—Plaintiffs brought action to recover a judgment for treble damages allegedly due them by reason of the defendant's having collected interest on a loan in excess of that allowed under chapter 108 Session Laws of Colorado, 1913. The defendant demonstrated that chapter 157, Session Laws of Colorado, 1935, stated that the 1913 Act was repealed; that the compilers of the 1935 Colorado Statutes Annotated thereafter omitted the 1913 Act from their compilation; that the State Banking Commissioner discontinued enforcing the provisions of the 1913 Act in reliance of the 1935 Act; and that loan companies generally considered the 1913 Act repealed. On defendant's motion the case was dismissed with prejudice, and the plaintiffs appealed. On May 12, 1952, the Supreme Court of Colorado reversed the decision of the trial court, declaring that the 1913 Act had not been effectively repealed by the 1935 Act insofar as loans over $300 were concerned since the 1935 Act by its title was confined to loans of $300 or less. This despite the fact that the body of the 1935 Act "repealed" the former Act. (*Sullivan v. Siegal,* ..... Colo. ....., ... P. .....) (1952.)

Speaking through Mr. Justice Alter, the court held that the

* Mandell v. People, 76 Colo. 296.