IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

ANGELO JOHN DiGUILIO,

Respondent.

CASE NO. 65,490

RESPONDENT'S BRIEF ON THE MERITS

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CITATION OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement Of The Case And Facts recited in Petitioner's Brief, except that the proof of guilt was based entirely upon circumstantial evidence and the inadmissible testimony was clearly prejudicial, tipping the balance against Respondent.

ISSUES

ISSUE I — WAS THIS COURT'S DECISION IN STATE V. MURRAY, 443 So. 2d 955 (FLA., 1984), INTENDED TO GIVE THE APPELLATE COURTS THE OPPORTUNITY TO APPLY THE "HARMLESS ERROR DOCTRINE" TO CASES WHERE A PROSECUTOR DELIBERATELY ELICITS IMPROPER COMMENT FROM A WITNESS CONCERNING A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT IN THE FACE OF ACCUSATION AND ALLOW QUESTIONS AND ANSWERS INTENDED TO INFORM THE JURY THAT A DEFENDANT REFUSED TO ANSWER QUESTIONS?

ISSUE II — IS IT STILL REVERSIBLE ERROR PER SE FOR THE TRIAL JUDGE TO ANNOUNCE TO THE JURY THAT A CO-DEFENDANT, FROM WHOM A DEFENDANT HAD SOUGHT A SEVERANCE, HAD PLED GUILTY TO THE CHARGE AFTER THE SELECTION OF THE JURY WAS COMPLETED?

ARGUMENT

ISSUE I — WAS THIS COURT'S DECISION IN STATE V. MURRAY, 443 So. 2d 955 (FLA., 1984), INTENDED TO GIVE THE APPELLATE COURTS THE OPPORTUNITY TO APPLY THE "HARMLESS ERROR DOCTRINE" TO CASES WHERE A PROSECUTOR DELIBERATELY ELICITS IMPROPER COMMENT FROM A WITNESS CONCERNING A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT IN THE FACE OF ACCUSATION AND ALLOW QUESTIONS AND ANSWERS INTENDED TO INFORM THE JURY THAT A DEFENDANT REFUSED TO ANSWER QUESTIONS?

In 1982, this Court held:

> * * *"Any comment on an accused's exercise of his right to remain silent is reversible error, without regard to the harmless error doctrine. Bennett v. State, 316 So. 2d 41 (Fla., 1975) We reaffirmed that position in Shannon v. State, 335 So. 2d 5 (Fla., 1976),"* * *

That nine year precedence was preceded by a Third District Court of Appeal case that stood for seventeen years, Jones v. State, 200 So. 2d 574 (Fla. 3rd DCA, 1967).

In the words of Judge Orfinger, writing for the Fifth District Court of Appeal in the instant case:

> * * *"The law is clear that if an individual, after being given Miranda warnings, indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease because the fifth amendment privilege has been exercised"* * * "Reversible error occurs in a jury trial when a prosecutor improperly comments upon or elicits an improper comment from a witness concerning the defendant's exercise of his right to remain silent in the face of accusation, without consideration of the harmful effect of such comment or testimony."* * * (Emphasis supplied)

> * * *"When the prosecutor asked the officer if defendant indicated whether or not he would answer any questions, he should have known what the answer would be, and the answer given: 'At that point, he didn't say', is a direct comment on defendant's right to remain silent. The effect of that reply was further exacerbated by the questions and answers which followed, which advised the jury that defendant refused to give his address or to identify the driver of the car he was in and that he then indicated his desire to talk to his attorney. A defendant should not have his silence or his desire to confer with an attorney used as evidence against him when he has been told, as he must be, that he has those rights."
>
> Angelo John DiGuilio v. State, _____ So. 2d _____, 9 FLW 736 (Fla. 5th DCA, Case No. 82-1235, 3/29/84)

The Attorney General has convinced the Fifth District Court of Appeal that this Court's Opinion in State v. Murray, 443 So. 2d 955, might be construed as an invitation by this Court to inject the harmless error doctrine into cases wherein the prosecutor deliberately elicits an improper comment from a witness concerning an accused defendant's exercise of his right to remain silent.

The Murray case, (supra), does not remotely deal with a situation such as the instant case. In Murray, this Court termed the prosecutor's inflamatory comments as "excessively pungent" but, after proper admonition by the court, determined that the remarks did not rise to the level of harmful error. In the instant case, the prosecutor deliberately asked the officer constitutionally prohibitive questions in blatant disregard for the law.

On June 14, 1984, the Fifth District Court of Appeal, on the State's Motion For Rehearing, certified to this Court the question of whether or not this Court has determined to permit application of the "harmless error rule" in cases wherein a prosecutor knowingly elicits an improper comment from a witness concerning a defendant's exercise of his right to remain silent and uses the defendant's election to remain silent and confer with his attorney as evidence against him. DiGuilio v. State, (supra, 6/14/84)

The Fifth District Court of Appeal went on to rule that if the harmless error rule could be applied to this case, the judgment of conviction should be affirmed because the error was "harmless beyond any reasonable doubt". DiGuilio v. State, (supra, 6/14/84)

The first Opinion of the Appellate Court clearly shows that the violation of Respondent's Fifth Amendment right was much greater than a mere mention of the fact that Respondent wanted to speak to his attorney prior to answering questions. DiGuilio v. State, (supra, 3/29/84)

The "per se rule" established in Bennett v. State, 316 So. 2d 41, and reaffirmed in Shannon v. State, 335 So. 2d 5 (Fla., 1976), and Donovan v. State, 417 So. 2d 674 (Fla., 1982), was neither withdrawn or modified by the Murray, (supra), decision.

Murray, (supra), merely cautioned the appellate courts not to perceive every instance of prosecutorial misconduct as

grounds to reverse an otherwise proper conviction. The Murray decision did not deal with error of constitutional magnitude and clearly established case precedence well known and respected by ethical and competent prosecutors.

In Bennett v. State, 316 So. 2d 41 (Fla., 1975), this Court held that impermissible testimony by a witness concerning a defendant's exercise of his Fifth Amendment privilege required reversal, notwithstanding that the trial judge instructed the jury to disregard the testimony and this Court found that the testimony was not the deliberate product of the prosecutor, but was the result of an over zealous attempt by a witness to be helpful in securing a conviction. In Shannon, (supra), the reversible error was committed by a legal intern during his closing remarks to the jury. In Donovan, (supra), this Court affirmed the conviction, but took the opportunity to reaffirm the inapplicability of the harmless error doctrine.

The harmless error doctrine invites prosecutors to elicit impermissible testimony hoping the appellate courts will construe the error "harmless". That rule should never be applied in cases of intentional misconduct by the government.

In the instant case, the prosecutor intentionally elicited testimony this Court has repeatedly held to be inadmissible. There was an unreported bench conference immediately after the first improper question and answer, at which the defense attorney presumably tried to prevent the prejudicial

colloquy. The prosecutor continued and the witness then informed the jury that the Respondent had refused to answer several questions and wanted to consult with his attorney. (Appendix, Exhibit 2)

This Court should not permit the appellate courts to balance the weight of prosecutorial misconduct violating a defendant's Fifth Amendment protection against the amount of other evidence presented against a defendant at trial. Any comment upon a defendant's assertion of his Fifth Amendment privilege has been and should remain reversible error per se as this Court must recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt.

ISSUE II IS IT STILL REVERSIBLE ERROR PER SE FOR THE TRIAL JUDGE TO ANNOUNCE TO THE JURY THAT A CO-DEFENDANT, FROM WHOM A DEFENDANT HAD SOUGHT A SEVERANCE, HAD PLED GUILTY TO THE CHARGE AFTER THE SELECTION OF THE JURY WAS COMPLETED?

This Court may consider any error in the Record properly before it on certiorari, Lawrence v. Florida East Coast Railway Company, 346 So. 2d 1012.

The trial judge advised the trial jury that Respondent's Co-Defendant, Rosa, entered a plea of guilty after having participated with the Respondent in selecting the trial jury. (Appendix, Exhibit 1) The trial judge's conduct constituted fundamental error which, from the outset of the trial, denied Respondent the right to a fair trial as guaranteed him under

Article 1, Sections 9 and 16 of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America. Thomas v. State, 202 So. 2d 883 (3rd DCA, 1967)

It is improper for a prosecuting attorney or judge to disclose during trial that another defendant has pled guilty. This is because competent and satisfactory evidence against one person charged with an offense is not necessarily so against another person charged with the same offense. Each person charged with the commission of an offense must be tried upon evidence legally tending to show his guilt or innocence. Thomas v. State, 202 So. 2d 883 (3rd DCA, 1967)

In a case strikingly similar to the instant one, the court announced to the jury, as an explanation for a recess during the trial, that the co-defendant had entered his plea of guilty. The appellate court reversed, holding that the announcement by the trial court to the jury that a co-defendant had pled guilty to the charge prejudiced the remaining defendant's right to a fair and impartial trial. Moore v. State, 186 So. 2d 56 (3rd DCA, 1966)

The trial judge's announcement in this case was not only unnecessary, but was highly prejudicial and deprived Respondent of a fair trial and due process of law as guaranteed him under Article 1, Sections 9 and 16 of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

CONCLUSION

Based upon the foregoing cases, authorities and the rights assured every citizen of the state, Respondent requests that this Honorable Court answer the certified question in the negative, affirm the decision of the Fifth District Court of Appeal and again reaffirm this Court's position that:

> * * *"Any comment on an accused's exercise of his right to remain silent is reversible error, without regard for the harmless error doctrine"* * *
>
> Donovan v. State, (supra)

Further, in view of the age of authorities on the matter, this Court should take the opportunity to reaffirm the established rule that neither the trial judge, nor the prosecutor may advise a trial jury that a co-defendant, who is not on trial, has previously pled guilty to the offense for which a defendant is being tried.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the HONORABLE JIM SMITH, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, this 23rd day of July, A. D., 1984.

JOHN W. TANNER, P.A.