W00 A

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
v.) CASE NO.: 66,906
JAMES B. KEARSE,)
Respondent.)

PETITIONER'S REPLY BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL
Tallahassee, Florida

Barbara Ann Butler
Assistant Attorney General
Suite 521
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Counsel for Petitioner

TOPICAL INDEX

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

The Court has recently declared, in a case held "factually indistinguishable" by the district court, a police officer's remark was not fairly susceptible of interpretation as a comment on the defendant's constitutional right to remain silent. State v. Rowell, No. 65,417 (Fla. August 30, 1985) [10 FLW 488]. Under the same rationale, the instant comment should be held in the same regard and the judgment and sentence should be affirmed. If not, the harmless error doctrine should be applied in keeping with recent holdings of this Court discussed herein.

TOPICAL INDEX

POINT ON APPEAL

BASED ON THE TOTALITY OF THE RECORD THE INSTANT COMMENT IS NOT FAIRLY SUSCEPTIBLE AS A COMMENT UPON THE RIGHT TO SILENCE, AND IF IT IS, SUCH A COMMENT MAY BE HARMLESS ERROR WHERE IT IS CLEAR BEYOND A REASONABLE DOUBT THAT THE JURY WOULD HAVE RETURNED A VERDICT OF GUILTY IN THE ABSENCE OF THE COMMENT.

ARGUMENT

Since the filing of Respondent's brief on the merit, this Court has applied the harmless error doctrine to cases involving comment on the silence of a defendant. State v. DiGuilio, No. 65,490 (Fla August 29, 1985) [10 FLW 430]; State v. Kinchen, No. 64, 043 (Fla August 30, 1985) [10 FLW 446]; State v. Marshall, No. 66,374 (Fla August 30, 1985) [10 FLW 445]. In addition in the case which the First District found "factually indistinguishable", Rowell v. State, 450 So.2d 1226 (Fla 5th DCA 1984), the officer's testimony, when examined in its totality, was not fairly susceptible of interpretation as a comment on silence. State v. Rowell, No. 65, 417 (Fla August 30, 1985) [10 FLW 488]. Thus this Court determined Rowell an improper case to discuss the harmless error doctrine. The Fifth District's opinion in Rowell v. State was quashed and remanded with directions to affirm the original conviction and sentence. See, State v. Rowell at 488.

In reaching this conclusion, this Court stated:

> A fragmented statement, a phrase taken out of context, or the failure to answer a specific question while answering others is inadequate to sustain the claim that one exercised his right to remain silent. The totality of the circumstances surrounding an officer's interviews with a suspect as well as the full context of the officer's testimony must be considered in determining whether one's fifth amendment right against self-incrimination was involved. Donovan v. State, 417 So. 2d 674 (Fla 1982). On the other hand, the fact that a suspect ceased answering all further questions after answering some is a circumstance not subject to comment.

Id. Similarly in the instant case, the arresting officer's comment, describing the defendant's behavior after being taken into custody,[1] was neither directed toward the initial exercise of the right to remain silent nor the cease of answering questions.

Examination of the totality of the officer's testimony does not reflect comment on an interview with the defendant. The totality of the circumstances does not reflect the fifth amendment right against self-incrimination was involved or that Officer Davis commented on that fifth amendment right.

---

1 "[H]e was very uncooperative and wouldn't talk." T 183.

Therefore the district court's opinion should be quashed thereby affirming Appellant's conviction. Id.

Should this Court fail to accept the district court's comparison of the instant comment to that in Rowell and decide the instant comment is fairly susceptible [2] as a comment on the right to silence, the harmless error doctrine should be applied. State v. DiGuilio; State v. Kinchen; State v. Marshall. In State v. DiGuilio, there was a straightforward reference to the defendant's desire to no longer answer questions.[3] This Court stated:

> The concept of harmless error is not new to this state. Florida has had a harmless error statute for some time now in both civil and criminal proceedings. §§49.041, 924.33, Fla. Stat. (1983). We did not apply this standard to comments on silence previously because we believed, under Miranda, that the federal constitution required automatic reversal. In addition, prior to Jones, it was not error in Florida to admit evidence of the defendant's silence when faced with an accusation of guilt. Jones, 200 So.2d at 576 (cases cited).
>
> . . .
>
> We emphasize that any comment, direct or indirect, by anyone at trial on the right of a

---

2 State v. Kinchen at 446-447

3 The prosecutor elicited responses from the arresting officer concerning statements made by the defendant. The officer repeated the statements and added: "After that, he advised me he felt like he should speak to his attorney. And there was no further questioning." State v. DiGuilio at 430

> defendant to be silent is error and should be avoided. The burden to demonstrate that error is harmless rests on the state, but, if the state can demonstrate that the error was harmless beyond a reasonable doubt, a new trial is not mandated.
>
> In summation the federal predicate for our application of the per se reversal rule to comments on silence no longer exists. Therefore, we are no longer bound to adhere to it. We believe that the harmless error rule, now used in the federal courts, is the more reasonable approach, and we adopt it.

Id. at 431-432[4] Inasmuch as reversal in this case was predicted upon the binding precedent of Donovan v. State, 417 So.2d 674 (Fla. 1982)[5] which has now been modified so that there is no longer a per se rule of reversal, the harmless error doctrine may be applied where it is clear beyond a reasonable doubt that absent the comment on silence, the jury would have returned a verdict of guilty. State v. DiGuilio at 432; State v. Marshall at 446.

The State has previously set forth the overwhelming evidence against Respondent introduced at trial: two eyewitnesses who made on-scene as well as in-court identifications of Respondent; and physical and

---

4 Citing Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967) and Miranda v. Arizona, 384 U.S. 436 (1966)

5 See, Kearse v. State, 464 So.2d 202, 204 (Fla. 1st DCA 1985)

circumstantial evidence. The recent opinions of this Court remove the district court's predicate for reversal. Respondent's conviction should be affirmed pursuant State v. Rowell or the case should be remanded to the district court with instructions that the harmless error doctrine may be applied if deemed applicable. State v. DiGuilio; State v. Marshall; State v. Kinchen.

If applicable the test set forth in Chapman v. California, 386 U.S. 18 (1967) should be followed. State v. DiGuilio; State v. Kinchen at 447; State v. Marshall at 446. The district court's failure to apply the harmless error rule is now improper as comments on silence are no longer considered fundamental error, the United States Supreme Court has declared the harmless error doctrine consistent with the federal constitution, and the doctrine is the preferred method of promoting the administration of justice. State v. Marshall at 446.

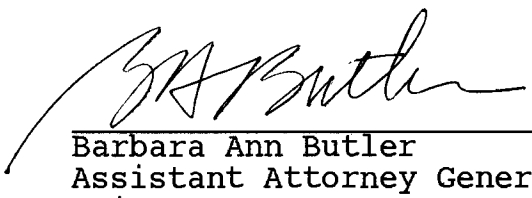
Based on the direct applicability of the recent opinions of this Court, the specific allegations raised in Respondent's brief on the merit need not be rebutted. The caselaw cited herein is controlling.

CONCLUSION

The record contains substantial competent evidence to support the trial court's findings and Petitioner, the State of Florida, respectfully requests that this Honorable Court quash the district court's reversal thereby affirming the conviction and sentence Alternatively, this Court should remand this case to the district court with instructions that the harmless error doctrine may be considered in the instant circumstances; the per se rule of reversibility set forth in Donovan v. State no longer controls.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



Barbara Ann Butler
Assistant Attorney General
Suite 521
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 20 day of September, 1985.

Barbara Ann Butler
Assistant Attorney General

AGSB89.19851