Supreme Court of Florida

No. 66,906

STATE OF FLORIDA, Petitioner,

v.

JAMES B. KEARSE, Respondent.

[JULY 17, 1986]

McDONALD, C.J.

We granted review of <u>Kearse v. State</u>, 464 So.2d 202 (Fla. 1st DCA 1985), because it presents the same issue as the questions certified in <u>Rowell v. State</u>, 450 So.2d 1226 (Fla. 5th DCA 1984), and <u>DiGuilio v. State</u>, 451 So.2d 487 (Fla. 5th DCA 1984). In <u>Kearse</u> the district court reversed Kearse's conviction and remanded for a new trial because of a comment concerning Kearse's right to remain silent. The court went on to say that the instant case is indistinguishable from <u>Rowell</u>. We recently held that the comment in <u>Rowell</u> did not constitute a comment on silence and quashed that decision. <u>State v. Rowell</u>, 476 So.2d 149 (Fla. 1985).

Our review of this record indicates that one could reasonably conclude that the witness' comment here implicated Kearse's right to remain silent. It is, therefore, more like <u>DiGuilio</u> than <u>Rowell</u>. In <u>State v. DiGuilio</u>, no. 65,490 (Fla. July 17, 1986), we held that a comment on a defendant's remaining silent should be evaluated under the harmless error doctrine. Applying that test to the instant case, we find the witness' comment to have been harmless beyond a reasonable doubt. Therefore, we quash that portion of the instant decision granting a new

trial and direct the district court to affirm his conviction. We remand for consideration of Kearse's third point on appeal, concerning sentencing errors, because that point is no longer moot.

It is so ordered.

BOYD, OVERTON and SHAW, JJ., Concur ADKINS, EHRLICH and BARKETT, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District court of Apepal - Direct Conflict of Decisions

First District - Case No. AY-216

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for Petitioner

Michael E. Allen, Public Defender and P. Douglas Brinkmeyer, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Respondent