FILED
SID J. WHITE
JUN 27 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. JAMES L. SMITH, Respondent.	CASE NO. 67,039

ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For BRoward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

STATEMENT OF CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

POINT I

There is no compelling reason to overturn the long and well-established line of holdings by this Court and the lower appellate courts of this State which decline to apply the harmless error rule where the State refers to the defendant's exercise of his right to remain silent.

POINT II

Where the Respondent had only moments before been advised of his "Miranda" rights, his refusal to answer any questions was an exercise of his right to remain silent, comment on which was reversible error.

ARGUMENT

POINT I

THIS COURT SHOULD ADHERE TO ITS WELL-SETTLED POSITION THAT COMMENT ON A DEFENDANT'S RIGHT TO REMAIN SILENT REQUIRES REVERSAL UPON TIMELY OBJECTION THERETO.

In its brief, petitioner has urged that this Court abandon the principle of stare decisis and overruled its decisions in David v. State, 369 So.2d 943 (Fla. 1979) and Trafficante v. State, 91 So.2d 811 (Fla. 1957).

The rule of stare decisis effectuates uniformity, certainty, and stability in the law. It is designed to keep the scale of justice steady, and embraces a conservative doctrine directed towards achieving the greatest stability in the law. 13 Florida Jurisprudence 2d, Courts and Judges, §136.

This Court has repeatedly held that a comment on silence renders a conviction reversible as a matter of law. Cf. Bennett v. State, 316 So.2d 41 (Fla. 1975), Shannon v. State, 335 So.2d 5 (Fla. 1979), Clark v. State, 363 So.2d 331 (Fla. 1978), and the cases cited therein. Moreover, these decisions postdate the United States Supreme Court's decision in Chapman v. California, 356 U. S. 18 (1967), refusing to reverse a conviction despite comment on the defendant's failure to testify, where the error was harmless beyond a reasonable doubt. This Court consequently had the benefit of the same federal constitutional argument now posited by petitioner when it arrived at its conclusion in

Bennett and its progeny[1], mandating reversal without regard to the harmless error rule where the State comments on the defendant's exercise of his right to remain silent.

Contrary to petitioner's implication, United States v. Hastings, _US_, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) adds nothing new to the law in this area. In Hastings, the Supreme Court ruled that Hastings' conviction was not reversible as a matter of law where the prosecutor pointed out to the jury that Hastings did not challenge various parts of the government's case. The Court concluded that the prosecutor's remark was harmless beyond a reasonable doubt. Thus Hastings is not only consistent with the prior rulings of the United States Supreme Court, it is also in agreement with rulings of this Court on these particular facts: in White v. State, 377 So.2d 1149 (Fla. 1979), this Court held that the conviction was not reversible as a matter of law where the prosecutor pointed out that there was no testimony contradicting the State's main witness.

Petitioner suggests that this Court has receded from its unambiguous holding in Bennett v. State, supra, based on the following sentence taken out of context from State v. Murray, 443 So.2d 955 (Fla. 1984): "We agree with the recent analysis of the Court in United States v. Hastings, supra, (1983)." But Murray

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1 Bennett's progeny are so numerous, and its principle is so well settled, that to overturn it would be rather like uprooting a vast old banyan tree with many roots, leaving a devastation in its place. Petitioner has asserted no particular reason why this should be done.

did not involve a comment on silence. It did not purport to overrule Bennett. In Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984) the court rejected the very argument which petitioner now advances before this Court, writing:

> Murray did not concern a prosecutorial comment on a defendant's exercise of his right to remain silent. Therefore, its expressed approval of the analysis by the Supreme Court in Hastings is not necessarily a retreat from the per se rule of Bennett and Donovan. Despite our agreement with the logic of Hasting and our reservations in regard to the justice of a per se rule, we are bound at this point in time to adhere to Bennett and Donovan. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). This conclusion is buttressed by the fact that in the recent case of State v. Strasser, No. 62,665 (Fla. Feb. 9, 1984) [9 F.L.W. 60], released a month after the opinion issued in Murray, the Florida Supreme Court relied on its prior decision in State v. Burwick, 442 So.2d 944 (Fla. 1983), which was issued a month before Murray. In Burwick, it was held to be reversible error to admit evidence at trial that a defendant had intelligently exercised his constitutional right to silence after Miranda warnings in the State's effort to rebut his insanity defense. The Florida Supreme Court recognized the per se rule in Burwick, stating: "There is no dispute that it is reversible error for the prosecution to attempt to impeach a defendant's alibi testimony by asking on cross-examination why he remained silent at the time of his arrest." 442 So.2d at 947. Two United States Supreme Court cases are cited in Burwick: Doyle v. Ohio, 426 U.S. 610. 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). Doyle is irrelevant in regard to the applicability of the harmless error rule; it expressly notes that issue was not raised. Hale did not approve a per se rule but confined its holding to the circumstances of that particular case and an express finding of prejudice. Neither Burwick nor Strasser refers to Hasting.

9 F.L.W. at 178.

Petitioner's argument based on Murray is therefore a house built on sand: it has no firm foundation which can withstand the tide of analysis.

After almost ten years during which there has been no doubt that comment on the right to remain silent are impermissible, if there is anything that our young assistant state attorneys know when they enter their first courtroom, it is that they must avoid such comments. Yet these type of comments persistently recur, in various shapes and forms and accompanied by various rationales which seek to distinguish them from a comment on the right to remain silent. See, State v. Burwick, 442 So.2d 944 (Fla. 1983) [defendant's silence at arrest as impeachment of his insanity defense]; Demick v.State , 451 So.2d 526 (Fla. 4th DCA 1984) [prosecutor argues that co-defendant, a state witness, gave statement to police, but defendant didn't]; Jones v. State, 434 So.2d 337 (Fla. 3rd DCA 1983), reversed State v. Jones 9 F.L. W. 529 (Fla. December 20, 1984) [defendant remained silent after being apprehended by retail store detective]; Torrence v. State 430 So.2d 489 (Fla. 1st DCA 1983) [defendant never told anyone about defense before trial, even though defendant had waived right to silence by talking to police after arrest]; Turner v. State, 414 So.2d 1161 (Fla. 3rd DCA 1982); Thompson v. State, 386 So.2d 264 (Fla. 3rd DCA 1980) [defendant made some statements and then refused to talk further]; Washington v. State, 388 So.2d 1042 (Fla. 5th DCA 1980) [defendant said nothing when police

asked him about robbery]; Ruiz v. State 378 So.2d 101 (Fla. 3rd DCA 1979) [defendant fled instead of telling police his story in conformity with trial testimony].

Why, knowing that such tactics court reversal, do prosecutors persist in commenting in whatever way possible on a defendant's exercise of his right to remain silent? Respondent suggests that the only logical answer is because an assertion of an accused's Fifth Amendment right is so damning in the jury's eyes that it constitutes the final nail in the coffin containing the defendant's chances for acquittal. Hardly a voir dire goes by, after all, where a juror does not candidly state that he expects an innocent person to give his story to the police, or that he will wait to decide the case until he hears the defendant's side of the story. See, Waddell v. State. 458 So.2d 1140 (Fla. 5th DCA 1984). It may well be true, that the public is vaguely aware of the existence of a Fifth Amendment right to remain silent by virtue of references thereto in television police shows and soap operas, but unfortunately, the Fifth Amendment in those forums inevitably becomes a screen behind which the guilty hide. It is precisely these subconscious but no less devastating visceral responses which the prohibition against comment on the exercise of the right to remain silent is designed to circumvent. And it is precisely because these responses are so insidious that mandatory reversal is the only appropriate prophylactic, both to remove temptation from the path of the prosecution, insofar as the Court is able, and to ensure that an accused's conviction is not impermissibly tainted.

Petitioner's argument for abandonment of Bennett and its progeny is ultimately grounded upon the disagreement of federal courts with its holding[2]. It would be terrible indeed if this Court's decisions ensuring the rights of its citizens were so sickly and weak as to fall before contrary rulings by inferior or foreign courts.

In any event, even should the harmless error rule be grafted on to Florida's long-standing and unambiguous history of finding comment on a defendant's silence reversible per se, the error in the instant case was not, in any event, harmless.

The issue of Appellant's guilt or innocence turned on the testimony of the alleged victim, Winnie Mae Harrison, who described her purportedly unwilling participation in a scheme to get a $7000 return on her investment of $500. The jury rejected Ms. Harrison's testimony insofar as it found Appellant not guilty of kidnapping and guilty only of the lesser included offenses of attempted robbery. Appellant's defense that he, rather than Ms. Harrison, was a victim of the apparent scam was not inherently incredible. By its emphasis on Appellant's entirely legitimate exercise of his right to remain silent, the State unfairly denigrated Appellant's credibility based on an "unsolubly ambiguous" action, his refusal to give a statement to police when

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2 Petitioner asserts in its brief that the federal court's rulings are especially puissant because the right to remain silent is "a federal constitutional right." Petitioner's position notwithstanding, our constitution also protects the right to remain silent. Article 1, Section 9, Florida Constitution (1968). And see, Fla.R.Crim.P. 3.250. It is hard to see why the chief legal officer of the state espouses the diminution of the protections of our state constitution.

arrested. Because this case was basically a one-on-one prosecution where the Stat's witness's credibility was highly suspect, it cannot be said that the error in unfairly bolstering the State's case by referring to Appellant's post-arrest silence was harmless beyond a reasonable doubt. Consequently, Appellant is entitled to a new trial on the charge of attempted robbery.

POINT II

THE STATE ELICITED FROM ITS WITNESS A COMMENT ON RESPONDENT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

In the present case, Officer Corbett testified, in response to the prosecutor's questioning:

> Q. Did you have occasion to speak with the defendant on that day?
>
> A. Yes.
>
> Q. Where was that at?
>
> A. At the scene.
>
> Q. And what was the conversation, if any?
>
> A. I asked him what his name was. He didn't want to tell me. I asked him what his address was. He didn't want to tell me that, either. So i didn't ask him anything else." (R 113-114).

It is a violation of the defendant's due process rights under the federal constitution for the State to refer in any way to his exercise of his Fifth Amendment right to silence. Doyle v. Ohio, 426 U.S. 610 (1976). While the "Miranda"[3] warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warning. Thus any silence on the part of the accused after being arrested is "insolubly ambiguous": it could mean that he is guilty and has nothing to say, but it could equally as likely mean that he is choosing to exercise his constitutionally

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3 Miranda v. Arizona, 384 U.S. 436 (1966).

guaranteed right to remain silent, in which case penalizing him by allowing an inference of guilt to be drawn therefrom has the effect of vitiating that right.

In the present case, Respondent had been warned of his right not to say anything to the police just minutes before the exchange with Officer Corbett (R 97-98). He was, therefore, doing no more than exercising this right when Officer Corbett tried to question him after he had been told:

> "You have the right to remain silent. Do you understand? The defendant would reply, 'Yes, I do.' 'Anything you say can and will be used against you in a court of law. Do you understand?' He would reply, 'I do.'" (R 97-98).

Respondent's literal interpretation of the warning, so that he refused to answer questions even about his name and address, is not less "insolubly ambiguous" than would his refusal to answer questions about the crime itself have been. See, Doyle v. Ohio, supra.

Since Appellant's refusal to respond to the interrogation resulted directly from the fact that he had been advised of his rights and chose to stand on them, mention at the trial of his silence was a violation of his right to due process, and constituted reversible error. Turner v. State, 414 so.2d 1161 (Fla. 3d DCA 1982). Respondent timely preserved this error for review on appeal by his specific objection thereto (R 114) which the trial court overruled (R 115). Respondent was not thereafter required to move for mistrial, since that action would have been futile in light of the court's adverse ruling on his objection. Simpson v. State, 418 So.2d 984 (Fla. 1982).

Nor does the fact that Respondent later made a statement to police serve to cure the error committed below. In Roban v. State, 384 So.2d 383 (Fla. 4th DCA 1980), the court held that the fact that, after an officer testified that the defendant refused to give a statement subsequent to being advised of his rights, the state introduced the defendant's oral inculpatory statement did not cure the error from the admission of evidence of his initial silence. See also, Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981) [reversible error where defendant said he would answer some questions but would stop when he didn't want to answer anymore; subsequent testimony that defendant answered some questions but 'would not explain...the time of day' held independently erroneous.]

In the present case, there is no question that the state impermissibly commented on Appellant's right to remain silent. This is reversible error. Consequently, Respondent must be granted a new trial.

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

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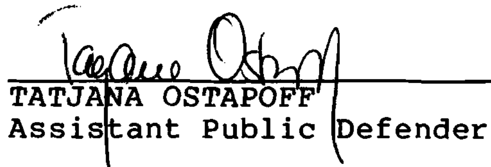

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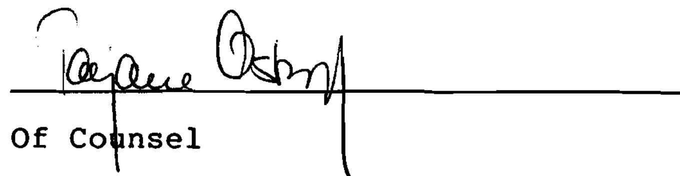
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOAN FOWLER ROSSIN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 25th day of June, 1985.



Of Counsel