

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : ON APPEAL FROM THE
 : ELEVENTH DISTRICT
 PLAINTIFF-APPELLEE : COURT OF APPEALS
 :
 -vs- :
 : COURT OF APPEALS
 ANNABELL B. POOLE : CASE NO. 2009-A-0010
 :
 DEFENDANT-APPELLANT :

09-2110

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ANNABELL B. POOLE

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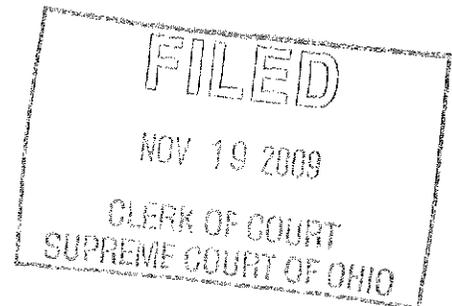


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STATEMENT OF THE CASE AND FACTS

Appellant was initially indicted in the Ashtabula County Common Pleas Court in Case Number 08 CR 64 on count two, Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, a felony of the third degree; counts three, four and five, Possession of Drugs, felonies of the fifth degree; and count six, Possessing Criminal Tools, a felony of the fifth degree. A co-defendant, Robert Coffman (“Mr. Coffman”), was indicted in Case Number 08 CR 65 on a single count of Possession of Methamphetamine. A plea agreement was reached with the State wherein Appellant would plead guilty to count two, Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, and the remaining counts would be dismissed. The agreement was accepted and Appellant was sentenced to a prison term of two years. The State, by and through Assistant Prosecutor Bennett (“Mr. Bennett”), asked Appellant’s counsel if Appellant would be willing to testify against Mr. Coffman, and she said “no.”

The case with Mr. Coffman then proceeded to trial. His attorney, (“Mr. Per Due”) called Appellant as a witness. She testified, without any Fifth Amendment warnings from the trial court in Mr. Coffman’s case. The following exchange, as relied upon by the trial court below and the court of appeals, indicates the following:

“Q (by Mr. Per Due): What did you hear him (Mr. Coffman) say?

A (by Appellant): He said, go ahead and search me, I don’t have nothing.

Q: Okay. Now, what did Bobby (Mr. Coffman) have on as far as clothing that day, if you remember?

A: He had on my coat, pants, shirt.

Q: Okay. What kind of a coat was it?

A: It was a winter coat. It was a blue winter coat.

Q: Blue? It wasn’t black?

A: No.

Q: What kind—could you describe it any better? Was it a certain type of coat?

A: I know it was a thicker coat, like a skiing coat.

Q: Okay. Would there be anything that would tell you that this was a woman's coat versus a man's coat?

A: No.

Q: And you're sure it was your coat?

A: I'm positive.

Q: How do you know it was your coat?

A: Because he's the one that got it for me. He bought it for me.

Q: All right. You had a coat on?

A: Yes, sir.

Q: All right. Now, at some point you let--he let the police officer search his clothing, correct, you said?

A: Yes, sir.

Q: You know that they found a trace amount--a residue amount, excuse me, in his left coat pocket of meth? You knew that, correct? You do know that?

A: Yes, sir.

Q: Whose was that?

A: Mine.

Based on the above exchange, Mr. Coffman was acquitted.

Appellant was then subsequently indicted on the charge of which Mr. Coffman was acquitted. Appellant filed, inter alia, a motion to suppress her statements made at Mr. Coffman's trial for failure to give Fifth Amendment rights to her at any point during her testimony. A suppression hearing was held on December 15, 2008. On January 26, 2009, the trial court granted the motion to suppress.

The State then filed a timely notice of appeal. The Eleventh District Court of Appeals reversed the trial court's judgment, stating that the judge in Coffman's trial did not abuse his discretion in not advising Appellant of her Fifth Amendment rights.

Appellant asserts that the court of appeals erred in reversing the trial court's judgment granting the motion to suppress her testimony in the trial of Mr. Coffman. In support of this issue, Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

A TRIAL COURT ABUSES IT'S DISCRETION IN NOT INFORMING A WITNESS OF HER FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN TESTIFYING AT A CO-DEFENDANT'S TRIAL.

The Fifth Amendment provides, in pertinent part, "No person...shall be compelled in any criminal case to be a witness against himself..." The Ohio Constitution provides the equivalent guarantee in Section 10 of Article I, which provides, in pertinent part, "No person shall be compelled, in any criminal case, to be a witness against himself..."

In Ex Parte Frye (1951), 155 Ohio St. 345, 349, this Honorable Court stated: "The general rule is that a witness, especially when not a party to the controversy, may be required to testify upon any subject concerning which judicial inquiry is made and upon which he possesses specific personal information. To this general rule, there are certain well recognized exceptions. A witness may always claim as privileged that which tends to incriminate him. Article V, Amendments, U.S. Constitution, and Section 10, Article I, Constitution of Ohio."

A plea to certain charges during a criminal transaction is not a blanket waiver as to all charges that arise in that transaction. In United States v. Arnott (6th Cir. 1983), 704 F.2d 322, the Sixth Circuit Court of Appeals held that no fundamental rights were affected by a lower court's ruling that a co-defendant could refuse to answer all questions as predicated upon some abstract possibility of exposure to a tax prosecution. Further, the court stated that whether such testimony would be privileged could not be ascertained until particular questions were posed and the privilege asserted. Id. In United States v. Seavers (6th Cir. 1973), 472 F. 2d 607, the Sixth Circuit Court of Appeals held, inter alia, that the guilty plea entered in the case was not a blanket waiver as to other offenses that might form the basis of later charges. The court, citing Rogers v.

United States (1951), 340 U.S. 367, stated the privilege against self-incrimination presupposes the existence of real danger that the testimony will lead to further crimination. Id. at 610.

In State v. Schaub (1976), 46 Ohio St.2d 25, this Honorable Court held that the trial court properly informed a witness of his rights when the prosecutor informed the court that the defense witness' testimony might involve the witness in acts of unlawfulness. Here, a witness was called by the defense and answered several questions, revealing he knew defendant and had been with him on the evening prior to the shooting at issue. Id. at 26. The state's counsel then interrupted and indicated he had discussed with the witness his participation in the events of the preceding night, and those the morning of the shooting, and felt that the court should advise him of his rights, as his testimony could involve him in some acts of unlawfulness. Id. The lower court discovered from defense counsel that it was possible that some of the questions to be asked would engender answers which might jeopardize the witness's rights. Id. After the lower court appointed counsel to represent the witness, testimony resumed and the witness was advised of his rights. Id. At this point, the witness refused to answer further questioning relating to a possible offer of immunity by the state. Id. The court reasoned that the lower court had a duty to protect the constitutional rights of the witness and could not compel the witness to testify, and to have done so or in any way coerce him would have been reprehensible. Id. at 28.

In State v. Oden (July 21, 1977), Cuyahoga App. No. 36241, the Eighth District Court of Appeals held that a trial court did not violate a defendant's Due Process rights by informing a co-defendant witness of their Fifth Amendment rights. The Court reasoned that the trial court had a duty to safeguard the witness' constitutional rights. The court noted that the witness, even after having been informed of the privilege against self-incrimination, did not understand when he

could assert the privilege. The court concluded that this is why the trial court interposed and sustained objections to some questions since it was apparent that the witness was not knowingly and intelligently waiving his constitutional right not to be a witness against himself. See also State v. Carter, 4th Dist. No. 07CA1, 2007-Ohio-2532.

While seeming to concede that Appellant did have a Fifth Amendment privilege, the Eleventh District Court of Appeals reversed the trial court's decision granting Appellant's motion to suppress. The court ruled that Appellant failed to assert her Fifth Amendment privilege during her testimony in Mr. Coffman's trial, that the judge in Mr. Coffman's case had discretion in deciding whether to inform her of her Fifth Amendment rights because she was only a witness at that time, and that the judge in Mr. Coffman's case did not abuse his discretion in not advising her of her Fifth Amendment rights. The court of appeals also questioned how the trial judge could have anticipated what Appellant's testimony would be, since Appellant never made any statement to Mr. Bennett beforehand that the drugs found in Mr. Coffman's pocket were hers.

Appellant asserts, however, that the court of appeals erred in ruling that the trial court did not abuse its discretion. Appellant would point to the exchange between Appellant and Mr. Per Due, *supra*, as evidence that the judge in Mr. Coffman trial should have known that Appellant was about to incriminate herself in response to the ultimate question asked by Mr. Per Due, "Whose was that?" The court of appeals failed to consider this exchange in rendering its decision. To the best of Appellant's knowledge, none of the cases cited herein or by the court of appeals indicate that a trial court must know *before* testimony begins, whether a witness will incriminate herself. Therefore, Appellant asserts that a trial court must advise a witness of her

Fifth Amendment privilege once it appears that they are about to incriminate herself. Although a trial court has discretion in deciding whether to advise a witness of the privilege, it does not necessarily follow that a trial judge never has a need to exercise such discretion. In the instant case, the trial court abused its discretion under the circumstances described above.

Appellant pled to charges arising out of the same criminal transaction as Mr. Coffman. If he had been charged with the same offenses that Appellant had pled to, then certainly Appellant's pleas on those charges would act as a waiver of any Fifth Amendment privilege against testifying with respect to them. However, she did not waive any Fifth Amendment privilege as to Mr. Coffman's charge. As the trial court below noted, Mr. Per Due's question, "Whose was that?", in reference to the drugs found in the coat Mr. Coffman was wearing and which Appellant admitted was hers, should have prompted the trial court that her testimony on that point would be incriminating. Either the drugs belonged to Mr. Coffman or to Appellant, especially since she admitted the coat was hers. At that point, she would have had the privilege against incriminating herself of the drug possession, requiring the trial court to advise her of her privilege.

The court of appeals indicated in its opinion that Appellant conceded in her brief before them that she could have testified that the drugs belonged either to Mr. Coffman or her. They reasoned that, "...her testimony that the coat belonged to her did not, by her own admission, necessarily mean she was going to say the drugs were hers (Opinion at Appx. Page 13)." However, Appellant never made such a concession and the court's reliance on such is misplaced. *From the standpoint of the trial court in Mr. Coffman's case*, the drugs belonged to either Appellant or Mr. Coffman. However, once Appellant described the coat and the events surrounding it, the trial court should have advised Appellant of her privilege. The questions put

forth by Mr. Per Due could arguably lead to only one conclusion, the drugs in the coat belonged to Appellant.

Mr. Per Due had Appellant conveyed from prison specifically to testify for Mr. Coffman. Further, since the trial court had Appellant's own criminal case, the trial court had knowledge that Appellant and Mr. Coffman were co-defendants, and knowledge that, if Appellant testified, it would be in regard to the same criminal transaction involving that of Mr. Coffman. It is also reasonable to believe on the part of the trial court, that since Mr. Per Due was the one who had Appellant conveyed to testify, it would not be to testify in favor of the State.

Even with all these considerations in mind, if at that point, the trial court did not believe Appellant would incriminate herself, the questioning by Mr. Per Due should have placed the trial court on notice. Mr. Per Due began by questioning Appellant about her plea agreement in order to establish her role and culpability in this transaction. Next, he asked her about the events leading up to the traffic stop, in order to establish knowledge. Then, Mr. Per Due asked about the clothing Mr. Coffman was wearing and Appellant indicated that he was wearing *her coat*, pants and shirt. Since testimony would have already been received at that point that the drugs were found inside this coat, the trial court was placed on notice that a very real possibility existed that Appellant was about to incriminate herself.

Appellant was then asked to describe the coat, further establishing her knowledge of the coat and making it more likely than not that anything found in the coat *would be hers, not Mr. Coffman's*, thus increasing the likelihood she would incriminate herself. Finally, Mr. Per Due asked Appellant, "You know they found a trace amount-a residue amount, excuse me, in his left coat pocket of Meth? You knew that, correct? You do know that?" Appellant responded "Yes,

sir.” At that point, Mr. Per Due had established that Appellant not only knew what the drugs were, but that she even knew the amount. That was before even asking her to whom the drugs belonged. Based on the foregoing, the trial court should have recognized that Appellant was not merely going to testify as to how cooperative Mr. Coffman was, as Mr. Bennett suggested, but rather that she was about to incriminate herself. Accordingly, the trial court abused its discretion in not informing Appellant of her Fifth Amendment rights.

EXPLANATION OF WHY THIS CASE IS A CASE WHICH INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC OR
GREAT GENERAL INTEREST

As stated in Schaub, supra, this Honorable Court held that the trial court properly informed a witness of his rights when the prosecutor informed the court that the defense witness' testimony might involve the witness in acts of unlawfulness. Later appellate courts have also been called upon to determine the extent of a witness' Fifth Amendment privilege. See Oden and Carter, supra. In the matter at hand, the court of appeals noted that the trial court did not abuse his discretion in not advising Appellant of her privilege. However, under the circumstances of this case, Appellant asserts that the trial court did abuse his discretion in not doing so. Based on the above arguments, the trial court was well aware of Appellant's involvement with Mr. Coffman and that she was a co-defendant. Even assuming, arguendo, that Appellant had a privilege only as a witness, and not as a co-defendant, the trial court still was required to advise Appellant of her privilege.

The court of appeals suggested that Appellant should have raised her privilege on her own, and cited some authority for that proposition. However, the witness in Schaub was not apparently required to raise his privilege on his own, and he was not a co-defendant, but a defense witness. Further, it was only known by the prosecution that he *might* incriminate himself. He also *might not* have. Yet, the trial court in that case advised him of his privilege anyway.

The court of appeals also noted two cases standing for the proposition that once a co-defendant pleads and is sentenced, their privilege against self-incrimination terminates, one case being Mitchell v. United States (1999), 526 U.S. 314. However, the holding in that case was limited to the federal criminal system and the waiver of any Fifth Amendment privilege at

sentencing. The court of appeals seemed to rely on dicta in the majority opinion of that case for the proposition that once a co-defendant pleads and is sentenced, her privilege against self-incrimination terminates. But, to the best of Appellant's knowledge, the United States Supreme Court has never made such a specific declaration in any opinion in Mitchell, supra, or any other case for that matter. Appellant is not aware of any other court decision to that effect. The court of appeals cited no such authority and neither has the State in any stage of proceedings in this case. Accordingly, it seems that this issue is a matter of first impression for this Honorable Court. This view is buttressed by the fact that the court of appeals noted that Appellant retained a privilege as a witness. However, to the best of Appellant's knowledge, this Honorable Court has ever addressed the question of whether a trial court *abuses its discretion* in not advising a person testifying as a *witness* of their Fifth Amendment rights when testifying at a co-defendant's trial.

Appellant respectfully asserts that this issue involves a substantial constitutional issue that has never been addressed with an opinion by this Honorable Court. A bare assertion that a trial court does not abuse its discretion in not informing a witness of her Fifth Amendment rights does not provide any framework whatsoever in determining whether a person should be advised of it at all. Without such a framework, or any guidance, trial courts would not seem to be under any obligation to advise a witness of their privilege. Appellant contends that a witness' Fifth Amendment privilege would be rendered a nullity at that point. The State could use the testimony against a witness, unfettered by any Fifth Amendment concerns.

Further, without such a framework, witnesses would be left at the mercy of the trial court regarding their rights. The court of appeals indicated that Appellant failed to assert her Fifth Amendment privilege. However, the court in Oden, supra, noted that the witness in that case did

not understand *when* he could assert the privilege, and was therefore not knowingly and intelligently waiving his right to be a witness against himself. In the instant case, Appellant was not even advised that she even *had* a privilege at all, even only as an ordinary witness. Appellant was also not advised that she could even assert it in such a proceeding. Without knowing these answers beforehand, Appellant fails to see how she would have known if and when she could assert the privilege in Mr. Coffinan's trial. The court of appeals provided no such answer, and Appellant respectfully suggests that only this Honorable Court can do so.

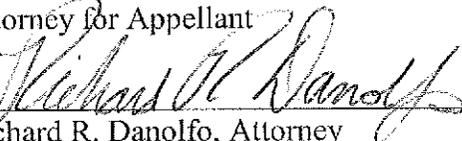
Further, Appellant respectfully observes that the authority cited herein, and by the court of appeals, are reflections of the great general and public interest involved in this issue. Appellant argues that the rationale in these opinions reflect the importance in determining when and in what manner the Fifth Amendment privilege attaches to a witness' testimony in a case. Appellant respectfully contends that the one instance not previously determined is in regards to an abuse of discretion by a trial judge in not informing a witness of the privilege where they were a co-defendant. As stated, this is a case of first impression for this Honorable Court.

Thus, Appellant states that this matter constitutes an important constitutional question in that it determines whether a trial court even has a duty to advise a witness of her Fifth Amendment privilege when testifying at a co-defendant's trial. The importance of this constitutional issue, as well as the great general and public interest of this issue, is demonstrated by the opinions of the various courts in Ohio, and in the disparate treatment that would ensue if this Honorable Court did not delineate a framework for when a trial court abuses its discretion in not advising a witness of her Fifth Amendment privilege when testifying as a witness.

Accordingly, for all the above reasons, Appellant asserts that the matter at hand involves a substantial constitutional question and is of public or great general interest.

Respectfully submitted,

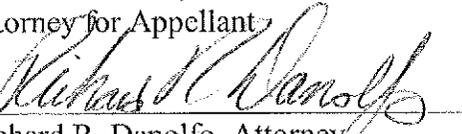
Ashtabula County Public Defender, Inc.
Attorney for Appellant

by 
Richard R. Danolfo, Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered personally to the office of Thomas L. Sartini, Ashtabula County Prosecutor, 25 W. Jefferson Street, Jefferson, Ohio, 44047, on this the 17 day of November 2009.

Ashtabula County Public Defender, Inc.
Attorney for Appellant

by 
Richard R. Danolfo, Attorney

APPENDIX

STATE OF OHIO

FILED

IN THE COURT OF APPEALS

COUNTY OF ASHTABULA)

ELEVENTH DISTRICT

2009 OCT 26 P 1:25

DECEMBER
OCT 28 2009
BY

STATE OF OHIO,

CAROL A. MEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO, OH

Plaintiff-Appellant

JUDGMENT ENTRY

- vs -

CASE NO. 2009-A-0010

ANNABELL B. POOLE,

Defendant-Appellee.

For the reasons stated in the Opinion of this court, it is the judgment and the order of this court that the judgment of the Ashtabula County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with this Opinion.

Costs to be taxed against appellee.

Cynthia Westcott Rice
JUDGE CYNTHIA WESTCOTT RICE

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

FILED

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

2009 OCT 26 P 1:25

ASHTABULA COUNTY, OHIO

CAROL A. MEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

STATE OF OHIO,	:	OPINION
	:	
Plaintiff-Appellant,	:	CASE NO. 2009-A-0010
	:	
- vs -	:	
	:	
ANNABELL B. POOLE,	:	
	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CR 365.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellant).

Richard R. Danolfo, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, State of Ohio, appeals the judgment of the Ashtabula County Court of Common Pleas granting appellee, Annabell B. Poole's, motion to suppress her statement. The statement at issue is Poole's testimony offered on behalf of her former co-defendant in his separate trial. For the reasons that follow, we reverse and remand.

{¶2} On September 19, 2008, Poole was indicted in the instant case on one count of possession of methamphetamine in an amount less than bulk, a felony of the

fifth degree, in violation of R.C. 2925.11. This charge stemmed from an incident which occurred on December 15, 2007, during which Poole and her boyfriend Robert Coffman were stopped by police while in a car driven by Coffman. In the course of that stop, police located various controlled substances and other contraband on Poole and on Coffman.

{¶3} Poole was indicted in Case No. 2008 CR 64, and charged with possession of controlled substances and other contraband found on her person. Specifically, she was charged with illegal assembly and possession of chemicals for the manufacture of methamphetamine; two counts of possession of methamphetamine in an amount less than bulk; one count of possession of methamphetamine in an amount greater than bulk; possession of hydrocodone; and possession of criminal tools. Coffman was indicted in Case No. 2008 CR 65 for possession of methamphetamine found in his coat pocket.

{¶4} Poole pled guilty to the illegal assembly or possession of chemicals for the manufacture of methamphetamine, and in exchange, the state dismissed the remaining counts in Case No. 2008 CR 64. On April 4, 2008, she was sentenced to two years in prison.

{¶5} Meanwhile, Coffman proceeded to jury trial in Case No. 2008 CR 65. In the course of that trial, his attorney David W. Per Due subpoenaed Poole to testify for Coffman as a defense witness.

{¶6} During Coffman's trial, on July 7, 2008, Attorney Per Due called Poole to testify on behalf of Coffman. She testified she was presently in prison pursuant to her conviction. She testified that on December 15, 2007, while she was a passenger in a

truck driven by Coffman, they were stopped by Geneva police for speeding. She said that when the officer approached Coffman, the officer asked him if he had any narcotics, and Coffman said he did not and told the officer he could search him. She testified Coffman was wearing her coat. During his search of Coffman's person, the officer found an envelope containing a small amount of methamphetamine in his coat pocket. Coffman's attorney asked Poole, "Whose was that?" and she said it was hers. At no time during her testimony did Poole assert her privilege against self incrimination. Poole testified she also had various controlled substances and chemicals to make methamphetamine on her person, for which she was indicted in Case No. 2008 CR 64 and pled guilty. The next day, July 8, 2008, Coffman was acquitted by the jury.

{¶7} Two months after her testimony, Poole was indicted in the instant matter for possession of methamphetamine. After entering her plea of not guilty, she filed a motion to dismiss the indictment on the grounds of double jeopardy and a motion to suppress her testimony at Coffman's trial.

{¶8} At the suppression hearing on Poole's motions, her counsel advised the court that in the instant case Poole was indicted for possession of the same drugs concerning which Coffman had been acquitted. Poole's attorney conceded that Poole was not originally charged with possession of the methamphetamine found in Coffman's pocket. He argued the trial court should have advised Poole of her privilege against self-incrimination while she was testifying because the court should have known Poole was about to incriminate herself.

{¶9} The prosecutor, who was also the prosecutor in Coffman's case, represented to the court that prior to Poole's testimony, the state had no idea as to how

she was going to testify. He told the court the first time he ever heard that the drugs found in Coffman's coat belonged to Poole was when he heard her testify to this effect at Coffman's trial. She had not previously provided this information to the police when they stopped her and Coffman, at the time Poole entered her plea bargain, or when the prosecutor interviewed her prior to her trial testimony.

{¶10} The prosecutor also told the court that until he heard Poole's testimony, it was his understanding that Coffman's coat and the methamphetamine found in his pocket belonged to him. The prosecutor said:

{¶11} "There's nothing at all that would have tipped the State off, not even the slightest thing that would suggest that Ms. Poole was going to sit up there and admit to any criminal activity. The State of Ohio firmly believed that she was going to simply state *** how cooperative Mr. Coffman was and how surprised he was to find this in his coat pocket."

{¶12} For all these reasons, the prosecutor argued that prior to Poole's testimony, the state had no reason to stop the proceedings during her testimony in Coffman's trial and ask the court to advise her of her privilege against self incrimination.

{¶13} Following the suppression hearing, the trial court in its January 26, 2009 judgment entry denied Poole's motion to dismiss, finding no double jeopardy violation because the state had no reason to believe the drugs found on Coffman's person belonged to Poole. She has not appealed that ruling. In fact, Poole concedes in her appellate brief that "[n]one of the charges [she] initially faced, nor the plea agreement, had anything to do with the drugs found in this coat."

{¶14} With respect to Poole's motion to suppress, the trial court found that when Mr. Per Due asked Poole to whom the methamphetamine found in Coffman's coat belonged, after she had previously testified the coat belonged to her, the trial judge should have cautioned Poole concerning her privilege against self-incrimination. Because she was not advised of her rights, the court found her Fifth Amendment rights had been violated and granted her motion to suppress.

{¶15} The State of Ohio appeals the trial court's judgment, asserting the following as its sole assignment of error:

{¶16} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO SUPPRESS."

{¶17} The State of Ohio argues the trial court erred in suppressing Poole's testimony because the court in Coffman's case did not have sufficient cause to believe Poole was about to incriminate herself. Poole argues the trial judge in Coffman's case violated his duty to advise her of her privilege against self incrimination during her testimony on behalf of Coffman. We address three issues in this case: (1) whether the trial court erred in not ruling on the privilege when Poole failed to assert it during her trial testimony; (2) whether the trial court erred in not advising Poole of the privilege in light of her status as a co-defendant who had pled guilty; and (3) whether the court abused its discretion in not informing her of the privilege.

{¶18} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions

and assess the credibility of witnesses. *Id.* at 154-155; *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by some competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations *de novo*. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19. In the instant case, no witnesses testified at the suppression hearing. Instead, the court made its determination based solely on counsel's argument and submittals.

¶19} We first consider whether the trial court erred in not advising Poole of her Fifth Amendment privilege against self incrimination when she failed to assert the privilege during her testimony in Coffman's trial. "We review the assertion of a Fifth Amendment privilege against self-incrimination and its grant or denial for abuse of discretion." *United States v. Boothe* (C.A. 6, 2003), 335 F.3d 522, 525, cert. denied at (2004), 541 U.S. 975.

¶20} "The Fifth Amendment privilege against self-incrimination protects a witness from answering a question which might incriminate him if it is determined *in the sound discretion of the trial court* that there is a reasonable basis for the witness [to] apprehend that a direct answer would incriminate him." (Emphasis added.) *State v. Cummings* (Nov. 5, 1990), 5th Dist. Nos. 89-CA-45, 89-CA-46, 1990 Ohio App. LEXIS 5126, *4, citing *Maston v. U.S.* (1917), 244 U.S. 362.

¶21} "It is within the discretion of the court to warn a witness about the possibility of incriminating herself, *United States v. Silverstein* (C.A. 7, 1984), 732 F.2d 1338, 1344, just so long as the court does not abuse that discretion by so actively

encouraging a witness' silence that advice becomes intimidation." *State v. Abdelhaq* (Nov. 24, 1999), 8th Dist. No. 74534, 1999 Ohio App. LEXIS 5573, *16, citing *United States v. Arthur* (C.A. 6, 1991), 949 F.2d 211, 216. Badgering a witness is a violation of due process. *Id.* at 216; *Webb v. Texas* (1972), 409 U.S. 95. This is because "[t]he Supreme Court has expressly recognized that a party's right to present his own witnesses in order to establish a defense is a fundamental element of due process." *United States v. Foster* (C.A. 6, 1997), 128 F.3d 949, 953.

{¶22} Courts have consistently held that in order for the trial court to rule on whether it is reasonable for a witness to claim the privilege, the witness must first invoke the privilege in response to a particular question. In *United States v. Arnott* (C.A. 6, 1983), 704 F.2d 322, cert. denied at (1983), 464 U.S. 948, the Sixth Circuit held:

{¶23} "[I]f it is well-established that a district court may not rule on the validity of a witness' invocation of the fifth amendment privilege against compulsory self-incrimination *until the witness has asserted the privilege in response to a particular question.* *United States v. Stephens*, 492 F.2d 1367 (6th Cir.), cert. denied, 419 U.S. 852, 42 L. Ed. 2d 83, 95 S. Ct. 93 (1974); *United States v. Harmon*, 339 F.2d 354, 359 (6th Cir. 1964), cert. denied, 380 U.S. 944, 13 L. Ed. 2d 963, 85 S. Ct. 1025 (1965). Arnott's counsel failed to pose any particular questions to [the witness], and therefore the district court was not confronted with any obligation to rule upon an asserted privilege." (Emphasis added.) *Arnott* at 324-325.

{¶24} "This rule in substantially the same form was announced by Chief Justice Marshall, as early as 1807, in the trial of Aaron Burr, in the Circuit Court for the District of Virginia. **** *In such a case the witness must himself judge what his answer will be;*

and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer.' In the course of his opinion the Chief Justice said: '*The court[s] cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be ***.*' Case No. 14692 e, *United States v. Burr, In re Willie*, 25 Fed.Cas. 38, 40." (Emphasis added and internal quotation marks sic.) *In re Atterbury* (C.A. 6, 1963), 316 F.2d 106, 109.

{¶25} Based on the foregoing authority, in order for a trial court to rule on a claim of privilege against self incrimination, the witness must first assert it in response to a particular question. The trial court then exercises its discretion in determining whether it is reasonable for the witness to assert it. Since Poole never asserted a Fifth Amendment privilege during her testimony in Coffman's trial, the judge did not err in not ruling on the privilege.

{¶26} We turn now to the question of whether the trial court in Coffman's trial erred in not advising Poole of the privilege in light of her status as a co-defendant who had pled guilty.

{¶27} First, we note the trial court erred in its judgment entry in holding that a trial court has a duty to inform every witness of his right not to incriminate himself. The cases cited by the trial court do not stand for this proposition. In *State v. Schaub* (1976), 46 Ohio St.2d 25, the prosecutor interrupted the witness' questioning and asked the court to advise the witness of his rights because he believed the witness' testimony could involve him in criminal conduct. Thus, the trial court admonished the witness only after the prosecutor asked the court to do so; the Supreme Court did not hold that the trial court had a duty to advise the witness on its own initiative. Further, in *State v.*

Carter, 4th Dist. No. 07CA1, 2007-Ohio-2532, at ¶15 and *State v. Oden* (July 21, 1977), 8th Dist. No. 36241, 1977 Ohio App. LEXIS 9374, *16, the witnesses advised by the court of their rights were indicted co-defendants who had not entered a plea. As explained below, a trial court has a duty to so inform a co-defendant who has not pled guilty. However, as to all other witnesses, it is within the trial court's discretion to advise a witness of his or her privilege against self incrimination. *Abdelhaq*, *supra*; *Arthur*, *supra*.

{¶28} Thus, Poole's reliance on *Schaub*, *supra*, in support of her contention that the trial court had a duty to inform her of her privilege against self incrimination is misplaced.

{¶29} We also observe the state is incorrect in arguing that the duty to inform a witness of his privilege against self incrimination is dependent on whether the witness is a "putative defendant." "A witness is a putative defendant if, *at the time he appears before the grand jury*, the witness is potentially the focus of the investigation and is thus subject to possible indictment." (Emphasis added.) *State v. Cook* (1983), 11 Ohio App.3d 237, 241. Accord *State v. Huggins*, 8th Dist. No. 88068, 2007-Ohio-1289, at ¶12. The "putative defendant" concept applies only in the context of grand jury proceedings. See *Cook*, *supra*. Since Poole testified in Coffman's trial rather than in grand jury proceedings, the test referenced by the state has no application here.

{¶30} Poole suggests that because she was Coffman's co-defendant, the trial court should have advised her of her privilege against self incrimination. She argues it makes no difference that she had pled guilty before she testified because, she claims, the case law does not distinguish co-defendants who have pled guilty from those who

have not. Poole presents no authority in support of this argument, which, based on our review of the applicable case law, is incorrect.

{¶31} While Ohio Appellate Districts have held that a trial court has a duty to inform a co-defendant of his privilege against self incrimination, *Carter*, *supra*; *Oden*, *supra*, courts hold that once a co-defendant pleads guilty, it is within the trial court's discretion to inform the witness of the privilege. In *Boothe*, *supra*, the defendant called his co-defendant as a witness in his defense. The co-defendant had already pled guilty, but had not yet been sentenced. In these circumstances, the Sixth Circuit held, "[t]he district court ha[d] the discretion to warn [the] witness about the possibility of incriminating himself." (Emphasis added.) *Id.* at 525.

{¶32} Further, courts hold that once a co-defendant pleads guilty and is sentenced, his privilege against self incrimination in that case terminates. *Bank One of Cleveland, N.A. v. Abbe* (C.A. 6, 1990), 916 F.2d 1067, 1076; *Mitchell v. United States* (1999), 526 U.S. 314, 325. As a result, when Poole testified for Coffman, she was no longer a co-defendant in a pending criminal case with Coffman. While she retained a privilege against self-incrimination as to other potential criminal charges, she did so as a witness and not as a co-defendant. The trial court therefore had discretion in deciding whether to inform her of her Fifth Amendment privilege as it would concerning any other witness. *Boothe*, *supra*. Because Poole had already pled guilty and was sentenced and further because she failed to assert the privilege at any time during Coffman's trial, we hold the judge in Coffman's trial did not err in not advising her of her rights.

{¶33} Finally, we turn to the issue that ultimately determines this case, i.e., whether the court abused its discretion in not informing Poole of the privilege. The

United States Supreme Court in the seminal case of *Hoffman v. United States* (1951), 341 U.S. 479, held:

{¶34} “The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *** But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *** The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified ***.” (Internal citations omitted.) *Hoffman* at 486. The rule set forth in *Hoffman* has been expressly adopted by several of our sister districts. See, e.g., *State v. Jeffries* (July 25, 1984), 1st Dist. No. C-830684, 1984 Ohio App. LEXIS 10418, *4-*6; *State v. Eddy* (Jan. 27, 1983), 8th Dist. No. 44748, 1983 Ohio App. LEXIS 13874, *3-*4; *State v. Sharpnack* (Apr. 9, 1986), 9th Dist. No. 3924, 1986 Ohio App. LEXIS 6366, *3-*4.

{¶35} In *United States v. Moreno* (C.A. 5, 1976), 536 F.2d 1042, the court held that when a witness invokes the privilege against self-incrimination, the trial court cannot accept the witness' claims at face value but must conduct a searching inquiry into the validity and extent of the witness' claim with respect to each challenged question, and that a blanket refusal to answer will not lie. *Id.* at 1046-1049.

{¶36} As noted supra, an abuse of discretion standard applies to the granting or denial of the privilege against self incrimination. *Boothe*, supra. Thus, the abuse of discretion standard applied to the actions of the trial judge in Coffman's trial. As to the

trial court's ruling granting Poole's motion to suppress, since the trial court ruled only on issues of law, we review its judgment under a de novo standard of appellate review. *Djisheff*, supra.

{¶37} Poole argues that because she testified the coat Coffman was wearing was hers, the trial court in Coffman's case should have known she would thereafter admit the drugs found in his pocket were hers. She argues the trial court "should" therefore have advised her of her rights.

{¶38} At the suppression hearing, Poole had the burden to prove the trial judge in Coffman's case abused his discretion by not advising her of her rights. However, the prosecutor stated at the suppression hearing that he had no idea what Poole was going to say at trial. Although he interviewed her prior to her testimony in Coffman's trial, she never told him she was going to say the methamphetamine found in Coffman's pocket was hers. He thought she was going to testify that Coffman was cooperative and was surprised when the officer found the drugs in his pocket. If the prosecutor did not know what Poole's testimony would be, we fail to see how the judge in Coffman's trial can be required to have anticipated it. This is particularly true since Poole never asserted her Fifth Amendment privilege.

{¶39} Poole concedes in her appellate brief that once she testified the coat was hers, she could have testified the drugs belonged to Coffman or her. Therefore, her testimony that the coat belonged to her did not, by her own admission, necessarily mean she was going to say the drugs were hers. Of course, Poole could also have said the drugs belonged to some third person who accidentally or otherwise left the drugs in her coat. Thus, when Poole testified the coat Coffman was wearing was hers, it did not

necessarily follow that she was going to incriminate herself. Poole therefore failed to sustain her burden to prove the trial judge in Coffman's case abused his discretion in not stopping her testimony to advise her of the privilege against self incrimination.

{¶40} In view of the foregoing analysis, we hold the trial court in Coffman's case did not abuse its discretion in not advising Poole of her Fifth Amendment rights.

{¶41} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶42} I respectfully dissent.

{¶43} I would affirm the trial court in that I believe the current indictment is banned by collateral estoppel and is prohibited under the Fifth Amendment, and the State and Federal prohibitions against double jeopardy.

{¶44} The state cannot now come forward and prosecute appellee for the same incident based upon a new admission. It is presumed that when appellee was charged in the original offense, all five counts included jeopardy for complicity on all drugs found in the car and on co-defendant, Robert Coffman.

{¶45} The state had the opportunity to go to trial. It forfeited that opportunity and decided to enter into a plea agreement. It cannot bootstrap that evidence into a new charge arising from that same set of circumstances, pursuant to *State v. Tolbert* (1991), 60 Ohio St.3d 89.

{¶46} I would affirm the trial court's decision.

RECEIVED
JAN 28 2009

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

STATE OF OHIO)
)
 vs. Plaintiff,)
)
 ANNABELL POOLE,,)
)
 Defendant.)

CASE NO. 2008 CR 365
JUDGE ALFRED W. MACKKEY

JUDGMENT ENTRY

2009 JAN 26 P 3:07
CLERK OF COURTS
ASHTABULA COUNTY

The Defendant is charged with one count of Possession of Drugs, a felony of the fifth degree, pursuant to R.C. 2925.11. On October 24, 2008, the Defendant filed a Motion to Dismiss and Motion to Suppress. The State of Ohio filed its opposition to the Defendant's motions on December 8, 2008. A hearing was held on December 15, 2008. Appearing on behalf of the State of Ohio was Ashtabula County Assistant Prosecutor Bruce Bennett and on behalf of the Defendant was Attorney Richard Danolfo.

The parties informed the Court that they wished to present oral arguments and have the Court make a ruling based upon their respective briefs and attached exhibits. The Defendant withdrew Part A of his motion titled "Enforcement of Plea Agreement."

The Defendant is requesting that the case against her be dismissed, or in the alternative, her testimony given in Case No. 2008 CR 65 be suppressed. The basis for the Defendant's request is twofold. First, the Defendant argues that the current indictment is barred by collateral estoppel and res judicata under the Fifth Amendment's Double Jeopardy Clause and should be dismissed. Secondly, the Defendant argues that her Fifth Amendment right against self-incrimination was violated in Case No. 2008 CR 65 and; therefore, her testimony from that case should be suppressed.

Defendant was initially indicted in Case No. 2008 CR 64 on five different drug counts and her co-defendant, Robert Coffman, was indicted in Case No. 2008 CR 65 on one count of possession of drugs. These cases were assigned to Judge Gary L. Yost of the Ashtabula County Court of Common Pleas. The Defendant and the State of Ohio reached a plea agreement wherein the Defendant pled guilty to Count Two of the Indictment, Illegal Assembly or Possession of Chemicals

1. To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment, a court must first apply the *Blockburger* test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, the subsequent prosecution is barred. (*Grady v. Corbin* [1990], 495 U.S. 508, ----, 110 S.Ct. 2084, 2090, 109 L.Ed.2d 548, 561; *Brown v. Ohio* [1977], 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 applied and followed; *State v. Thomas* [1980], 61 Ohio St.2d 254, 261, 15 O.O.3d 262, 266, 400 N.E.2d 897, 903, explained and followed.)

State v. Tolbert (1991), 60 Ohio St.3d 89, 89, 573 N.E.2d 617, 618. Under *Blockburger*, “a court must compare the statutory elements of the offenses charged to determine whether there has been a double jeopardy violation. If each offense contains an element which the other does not, then the accused is not being prosecuted twice for the same offense. The *Blockburger* test focuses on the elements of the relevant statutes, not on the conduct of the defendant. *State v. Moore* (1996), 110 Ohio App.3d 649, 652, 675 N.E.2d 13.” *State v. Hayes*, 1999 WL 959831 at *8 (Ohio App. 11 Dist., Sept. 30, 1999). In the instant matter, the Defendant was charged with one count of Possession of Drugs/Methamphetamine in an amount less than bulk, a felony of the fifth degree, in violation of R.C. 2925.11. In Case No. 2008 CR 64, the Defendant was also charged with one count of Possession of Drugs/Methamphetamine in an amount less than bulk, a felony of the fifth degree, in violation of R.C. 2925.11. These charges arise out of the same incident and each offense contains the same elements. Therefore, at first blush, it would appear that this second prosecution is barred due to double jeopardy issues. However,

2. An exception to the *Blockburger* test exists where the state is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. (*Grady v. Corbin* [1990], 495 U.S. 508, ----, 110 S.Ct. 2084, 2090, fn. 7, 109 L.Ed.2d 548, 561; *Brown v. Ohio* [1977], 432 U.S. 161, 169, fn. 7, 97 S.Ct. 2221, 2227, fn. 7, 53 L.Ed.2d 187; *Ashe v. Swenson* [1970], 397 U.S. 436, 453, fn. 7, 90 S.Ct. 1189, 1194, fn. 7, 25 L.Ed.2d 469 [Brennan, J., concurring]; *Diaz v. United States* [1912], 223 U.S. 442, 448-449, 32 S.Ct. 250, 251, 56 L.Ed.2d 500, applied and followed; *State v. Thomas* [1980], 61 Ohio St.2d 254, 15 O.O.3d 262, 400 N.E.2d 897, paragraph five of the syllabus, explained and followed.)

State v. Tolbert (1991), 60 Ohio St.3d 89, 89, 573 N.E.2d 617, 618

In the instant matter, no evidence was presented that the Defendant made any statements or disclosures that would lead the State of Ohio to believe that the drugs found on Coffman belonged to the Defendant. Prior to the Defendant’s testimony in Case No. 2008 CR 65, the State of Ohio,

despite the exercise of due diligence, was not able to obtain the information needed to charge the Defendant as set forth in this matter. Based upon this fact, the Court finds that the State of Ohio, despite the exercise of due diligence, was unable to proceed on the charge in this matter at the time of the plea and sentencing in Case No. 2008 CR 64 as facts necessary to sustain the charge in the instant matter had not been discovered and; therefore, this prosecution is not barred by double jeopardy claim. Therefore, the Court finds the Defendant's Motion to Dismiss is meritless and is hereby DENIED.

The Defendant has also filed a motion to suppress her testimony given in Case No. 2008 CR 65 based upon her Fifth Amendment right against self-incrimination.

The general rule is that a witness, especially when not a party to the controversy, may be required to testify upon any subject concerning which judicial inquiry is made and upon which he possesses specific personal information. To this general rule, there are certain well recognized exceptions. A witness may always claim as privileged that which tends to incriminate him. Article V, Amendments, U. S. Constitution, and Section 10, Article I, Constitution of Ohio.

Ex parte Frye (1951), 155 Ohio St. 345, 349, 98 N.E.2d 798, 801. Although the Defendant pled guilty and was sentenced under Case No. 2008 CR 64, this plea did not constitute a blanket waiver of her Fifth Amendment privilege against self-incrimination. *United States v. Arnott* (1983), 704 F.2d 322, 325; *United States v. Seavers* (1973), 472 F.2d 607, 609.

In order to assert the privilege, a witness must be aware that such a privilege exists. A judge has a duty to safeguard a witness' constitutional rights by informing the witness of the right not to incriminate herself. *State v. Schaub* (1976), 46 Ohio St.2d 25, 28, 346 N.E.2d 295, 297, *State v. Carter*, No. 07CA1, 2007 WL 1518614 (Ohio App. 4th Dist., May 21, 9007); *State v. Oden*, Cuyahoga App. No. 36241, 1977 WL 201460 (Ohio App. 8th Dist., July 21, 2977). It is then up to the witness to determine whether or not to invoke the privilege.

At a minimum, when the Defendant was asked by Attorney Per Due "Whose was that?" in reference to the methamphetamine found in the coat Coffman was wearing, which the defendant had previously admitted was her coat, the Defendant should have been cautioned and advised of her Fifth Amendment right against self-incrimination. Neither the trial judge, nor the prosecutor, so cautioned

the witness. The Court finds that the Defendant's testimony was given in violation of her Fifth Amendment and should be suppressed. Therefore, the Court finds the Defendant's Motion to Suppress has merit and is hereby GRANTED.

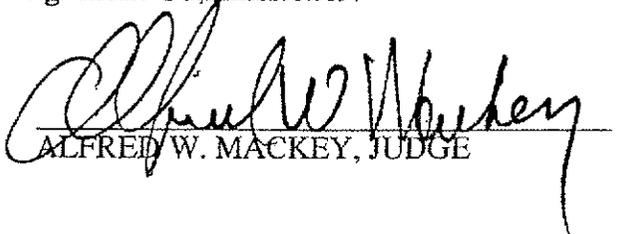
IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss is **DENIED**.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Suppress the Defendant's testimony given in Case No. 2008 CR 65 is **GRANTED**.

This case has been previously set for **JURY TRIAL** on **MARCH 10, 2009, at 9:00 A.M.**

IT IS SO ORDERED.

Pursuant to Civil Rule 58(B), the Clerk of Courts is directed to serve notice of this judgment and its date of entry upon the journal upon **Ashtabula County Prosecuting Attorney; Richard Danolfo, Attorney for the Defendant; and the Assignment Commissioner.**


ALFRED W. MACKAY, JUDGE