ORIGINAL

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO,	)	OHIO SUPREME COURT
	)	CASE NO. 2009-2110
Plaintiff-Appellee,	)	
	)	On Appeal from the Ashtabula County
-vs-	)	Court of Appeals, Eleventh Appellate
	)	District
ANNABELL B. POOLE,	)	
	)	Ashtabula County Court of Appeals
Defendant-Appellant.	)	Case No. 2009-A-0010

MERIT BRIEF OF APPELLEE, STATE OF OHIO

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STATEMENT OF THE CASE

The Ashtabula County Grand Jury returned an indictment on September 19, 2008, charging Annabell Poole, appellant herein, with Possession of Drugs, in violation of R.C. 2925.11(A) & (C)(1)(a), a felony of the fifth degree. (T.d. 1.) Upon arraignment, appellant pled not guilty to the charge. (T.d. 9.)

Appellant filed a Motion to Dismiss/ Suppress on October 24, 2008, alleging, among other things, that appellant's Fifth Amendment right against self incrimination was violated. (T.d. 17.) A hearing was held on this motion and the trial court granted the suppression portion of the motion finding that appellant's Fifth Amendment rights had been violated. (T.d. 30.)

The State of Ohio filed a notice of appeal. (T.d. 31.) The Eleventh District Court of Appeals reversed the decision of the trial court and remanded the case for further proceedings. *State v. Poole*, 11th Dist. App. No. 2009-A-0010 at §41, 2009-Ohio-5634. Appellant filed a notice of appeal with this Honorable Court. This court accepted jurisdiction to hear appellant's discretionary appeal.

STATEMENT OF THE FACTS

The present case stems from a traffic stop of appellant and Robert Coffman which took place on December 15, 2007. (T.p. 2008CR65 5-6.) While returning from a trip to the bank Coffman and appellant were pulled over for speeding. (T.p. 2008CR65 6.) Appellant was a passenger in the vehicle. (T.p. 2008CR65 7.) According to appellant, Mr. Coffman was wearing her winter coat when subject to a search by police after the traffic stop. (T.p. 2008CR65 9.) During the search,

methamphetamine was discovered in the pocket of the coat Mr. Coffman was wearing. (T.p. 2008CR65 10.)

At Coffman's trial appellant was questioned about the methamphetamine discovered in the coat pocket. (T.p. 2008CR65 10.) She indicated that it belonged to her and that she had left it in the pocket. (T.p. 2008CR65 10.) She further indicated that she did not tell Coffman about the drugs in the coat pocket and that she had forgotten they were there. (T.p. 2008CR65 10.) She testified that she was sure they were her drugs and not Coffman's. (T.p. 2008CR65 10.)

As a result of the traffic stop and subsequent search, appellant was arrested in addition to Mr. Coffman. (T.p. 2008CR65 10.) Appellant eventually pled guilty to possession of chemicals for the manufacture of drugs and was sent to prison. (T.p. 2008CR65 11.) At the time of her testimony at Mr. Coffman's trial, appellant was incarcerated. (T.p. 2008CR65 1.)

Prior to her testimony, the State of Ohio had no specific idea as to what appellant was going to testify to. (T.p. 2008CR365 20.) The discovery that the methamphetamine in Mr. Coffman's coat pocket actually belonged to appellant occurred at this time and not at the time of the traffic stop. (T.p. 2008CR365 21.) At the time appellant pled guilty to the manufacturing charge she did not indicate that the methamphetamine found in Mr. Coffman's coat belonged to her. (T.p. 2008CR365 21.) The police report did not offer any information that would have led the State to believe that appellant was going to claim ownership of the methamphetamine in Mr. Coffman's pocket. (T.p. 2008CR365 26.) The State of Ohio believed that the purpose of appellant's testimony was merely to show Mr. Coffman's cooperation with police officers or his surprise at having methamphetamine in his pocket . (T.p. 2008CR365 27.)

ARGUMENT

PROPOSITION OF LAW

> ONCE A CO-DEFENDANT PLEADS GUILTY AND IS SENTENCED, THE PRIVILEGE AGAINST SELF INCRIMINATION IN THAT CASE TERMINATES AND A TRIAL COURT HAS DISCRETION IN DECIDING WHETHER OR NOT TO INFORM HER OF HER FIFTH AMENDMENT PRIVILEGE.

"'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.'" *State v. Poole*, 11th Dist. App. No. 2009-A-0010 at ¶20, 2009-Ohio-5634 quoting *State v. Cummings* (Nov. 5, 1990), 5th Dist. Nos. 89-CA-45, 89-CA-46, 1990 Ohio App. LEXIS 5126, *4, citing *Matson v. U.S.* (1917), 244 U.S. 362. "'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.'" *Id.* at ¶21 quoting *State v. Abdelhaq* (Nov. 24, 1999), 8th Dist. No. 74534, 1999 Ohio App. LEXIS 5573, *16, citing *United States v. Arthur* (C.A. 1991), 949 F.2d 211, 216.

In order for a trial court to rule on whether it is reasonable for a witness to claim Fifth Amendment privilege, the witness must first invoke the privilege in response to a particular question. *Id.* at ¶22. "'[I]t 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.'" *Id.* at ¶23 quoting *United States v. Stephens,* 492 F.2d 1367 (6th Cir.), cert. denied, 419 U.S. 852, 95 S.Ct. 93(1974); *United States v.*

Harmon, 339 F.2d 354, 359 (6th Cir. 1964), cert. denied, 380 U.S. 944, 85 S.Ct. 1025 (1965).

"[I]n 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." *Id.* at ¶25.

Appellant argues that she was a co-defendant in Coffman's case, therefore, the trial court was required to advise her of her privilege against self incrimination. Ohio Appellate Courts have held that a trial court has a duty to inform a co-defendant of his privilege against self incrimination, however, once that co-defendant pleads guilty, it is within the discretion of the trial court to inform the witness of the privilege. *Id.* at ¶31 citing *State v. Carter*, 4th Dist. App. No. 07CA1, 2007-Ohio-2532; *State v. Oden* (July 21, 1977), 8th Dist. No. 36241, 1977 Ohio App. LEXIS 9374.

In *United States v. Boothe* (C.A. 6, 2003), 335 F.3d 522, Calvin Boothe was a co-defendant in a conspiracy who had pled guilty to the offense, but had not yet been sentenced. *Id.* at 524-525. He was asked to testify at his co-defendant's trial. *Id.* at 524. When Calvin arrived at court to testify his counsel expressed to the court her concern that during his testimony he would say something to the court that would effect his sentencing. *Id.* Calvin was examined by the court and advised of his right to refuse to testify. *Id.* at 525. Calvin then took the stand and refused to testify. In determining whether the court behaved inappropriately in questioning Calvin about the privilege not to incriminate himself the *Boothe* court held that "[t]he district court has the discretion to warn a witness about the possibility of incriminating himself." *Id.*

Moreover, "courts hold that once a co-defendant pleads guilty and is sentenced, his privilege

against self incrimination in that case terminates." *Id.* at ¶32 citing *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. "When that liability is removed, criminality ceases; and with the criminality the privilege." *Mitchell* at 326 citing 8 J. Wigmore, Evidence § 2279, p. 481.

In the present case, "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." *Id.* citing *United States v. Boothe* (C.A. 6, 2003), 335 F.3d 522, 525, cert. denied at (2004), 541 U.S. 975.

Because appellant failed to assert her Fifth Amendment Privilege and because she was no longer a co-defendant it was within the discretion of the trial court to inform appellant of the privilege. In *Hoffman v. United States* (1951), 341 U.S. 479, the Supreme Court of the United States held that [t]he 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." *Id.* at 486 citing *Blau v. United States* (1950), 340 U.S. 159. "But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Id.* citing *Mason v. United States* (1917), 244 U.S. 362. "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." *Id.* citing *Rogers v. United States* (1951), 340 U.S. 367.

In *United States v. Moreno* (C.A. 5, 1976), 536 F.2d 1042, the court held that a judge's "method of deciding the privilege claim must be evaluated within the context of the broad approach outlined by the Supreme Court in *Hoffman*." *Id.* at 1046. The *Moreno* court further 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." *Poole* at ¶35 citing *Moreno* at 1046-1049.

"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." *Id.* at ¶37.

"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." *Id.* at ¶38.

Poole's testimony that the coat belonged to her did not necessarily mean she was going to say the drugs were hers. *Id.* at ¶39. She could have said the drugs belonged to a third party who for some reason left them in the coat. *Id.* "Thus, when Poole testified the coat Coffman was wearing

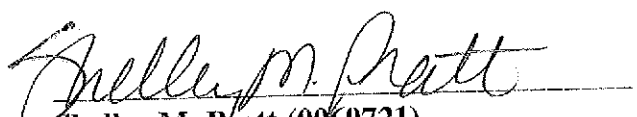
was hers, it did not necessarily follow that she was going to incriminate herself. Poole therefore failed to sustain her burden to prove the trial judge in Coffman's case abused his discretion in not stopping her testimony to advise her of the privilege against self incrimination." *Id.* Accordingly, the trial court did not abuse its discretion in not advising appellant of her Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to affirm the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

THOMAS L. SARTINI (0001937)
PROSECUTING ATTORNEY



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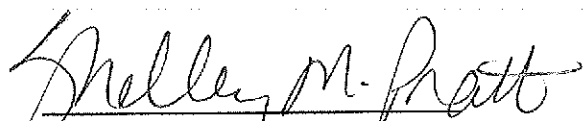
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Merit Brief of Appellant, State of Ohio has been served via ordinary U.S. Mail, postage prepaid, this 30th day of April, 2010 upon Richard R. Danolfo, Assistant Public Defender, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, Ohio 44004.



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