

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANNABELL B. POOLE,

Defendant-Appellant.

Case No. 2009-2110

On appeal from the
Ashtabula County Court of Appeals,
Eleventh Appellate District,
Case No. 2009-A-0010

**Reply Brief of Amicus Curiae Ohio Association of Criminal Defense Lawyers
in Support of Appellant Annabell B. Poole**

Thomas L Sartini (0001937)
Ashtabula County Prosecutor
Shelly M. Pratt (0069721)
Assistant Prosecuting Attorney
(Counsel of Record)

25 W. Jefferson St.
Jefferson, Ohio 44047
(440) 576-3670
(440) 576-3692 - Fax

Counsel for Plaintiff-Appellee

Office of the Ashtabula County Public
Defender, Inc.
Richard R. Danolfo (0075895)
Assistant Public Defender
(Counsel of Record)

4817 State Rd., Suite 202
Ashtabula, Ohio 44004
(440) 998-2628
(440) 998-2972 - Fax

Counsel for Defendant-Appellant

Jon W. Oebker (0064255)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
(216) 592-5000
(216) 592-5009 - Fax

*Counsel for Amicus - Ohio Association of
Criminal Defense Lawyers*

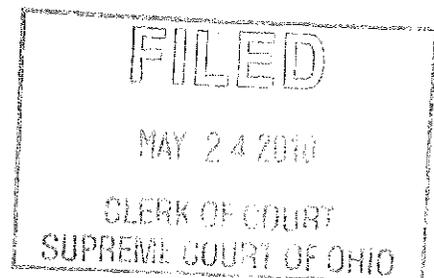


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I. Introduction and Statement of Amici.

A. Ms. Poole Was Compelled To Provide Incriminating Testimony.

In her *first* prosecution for these methamphetamine-related charges, Annabell Poole pleaded guilty and, to some extent, waived her Fifth Amendment Rights.

Subsequently, pursuant to a court order in her co-defendant's trial, a deputy sheriff picked up Ms. Poole in prison and brought her into a courtroom. After taking an oath administered by a court official, the trial court compelled Ms. Poole to answer questions from counsel for her co-defendant as well as the State. The trial court, prosecutor and co-defendant's counsel all knew that Ms. Poole had a lawyer, but apparently none had actually spoken with that lawyer before the hearing.

On the witness stand during her co-defendant's trial, Ms. Poole was asked questions about the same set of facts for which she had earlier pleaded guilty. During these testimony, Ms. Poole failed to appreciate that (1) she still retained her Fifth Amendment Privilege not to answer these questions and (2) she could be subject to further prosecution based on her testimony. The reason she did not know that she did not have to answer these questions is because the trial judge did not explain her rights to her and she was not afforded the opportunity to talk to her lawyer. Not knowing that she did not have to answer the questions posed to her at her co-defendant's trial, Ms. Poole proceeded to directly incriminate herself and thus subjected herself to a *second* prosecution based on these same facts.

Forcing a citizen to testify in a criminal case despite the fact that everyone in the courtroom knows she has an attorney for that matter strikes at the heart of the Fifth and Sixth Amendments to the United States Constitution.

B. A Ruling For The State In This Case Will Help Some Defendants And Hurt Others.

Amicus the Ohio Association of Criminal Defense Lawyers has had members on both sides of cases like this one. Sometimes, as this case demonstrates, criminal defense lawyers call witnesses who have their own criminal defense lawyers. One defense lawyer may seek to elicit testimony to exonerate her client but inculpate another lawyer's client. As a result, a ruling for the State in this case will help some criminal defendants, but hurt others.

But your amicus, the OACDL, stands for the proposition that courts must protect the constitutional rights of the accused, even on the witness stand. Here, a criminal defendant, represented by counsel, was forced into court and compelled to testify without any actual notice to her lawyer, without any notice to the witness of her right to consult with her lawyer, and without any notice of her right to not incriminate herself.

This case presents this Court with the opportunity to emphasize the importance of the Sixth Amendment Right to Counsel and to remind trial judges¹ in this state of their "duty to protect the constitutional rights of [the witness] as well as to ensure defendant a fair trial." *State v. Schaub* (1976), 46 Ohio St.2d 25.

Here, Ms. Poole was represented by counsel in connection with the charges stemming from the arrest of Ms. Poole and co-defendant Robert Coffman on methamphetamine-related charges. However, when Ms. Poole (who had pleaded guilty and been sentenced to a single count of illegal assembly or possession of chemicals for the manufacture of drugs) was forced from her prison cell to the witness stand to testify

¹ It is of little relevance that a lawyer representing another criminal defendant requested the witnesses' presence because the trial court and the sheriff compelled her attendance and testimony. That lawyer's duty was to zealously represent Mr. Coffman's interest. The Court had a larger duty.

about these same facts, the trial judge made no effort to either inform Ms. Poole of her Fifth Amendment Privilege Against Self-Incrimination or provide her access to her lawyer, a local public defender, so he could advise her of her constitutional rights.

Your Amicus respectfully submits that when a trial court is presented with a witness who could face further jeopardy based on her trial testimony but is not afforded the benefit of consulting with their attorney, Ohio law should require judges to be more than mere passive, disinterested observers. Rather, with this case, this Court should uphold the principle that the judges are, in the words of the Fifth Circuit, “the embodiment of the Constitution, charged with the firm duty to see that the rights of all are upheld—the defendants, the witnesses and the public. Whether and to whatever extent it may be the duty of the trial judge to caution a witness about his Fifth Amendment rights, a careful one never hesitates.” *United States v. Wilcox*, 450 F.2d 1131 (5th Cir. 1971), cert. denied, 405 U.S. 917, 92 S.Ct. 944, 30 L.Ed.2d 787 (1972). Thus, the OACDL suggests the following proposition of law for this case.

When a witness who has counsel for the matter at issue places herself in jeopardy with her testimony, a trial court has a duty to protect the witness’ constitutional rights by informing her of her Fifth Amendment Privilege Against Self-Incrimination, allowing her to consult with her attorney, or, at a minimum, notifying her attorney. *State v. Schaub* (1976), 46 Ohio St.2d 25 reaffirmed and applied.

II. Statement of the Case and the Facts.

A. The Sheriff And The Court Force Ms. Poole To Testify.

While in prison for one count of illegal assembly or possession of chemicals for the manufacture of drugs a deputy sheriff, acting on an order from a common pleas court judge, took Ms. Poole in handcuffs, put her in an official police vehicle, and drove her to the Ashtabula County Jail, much, if not all, of the time in handcuffs. When it was

time for her to testify, Sheriff deputies escorted her to the courtroom, a court official swore her in, and an officer of the court began to ask her questions related to her co-defendant's case. No one told her she didn't have to answer. To the contrary, witnesses are expected to answer questions posed to them under penalty of perjury. No one gave actual notice to her attorney for the drug charges.

The State acknowledges that Ms. Poole was testifying about the same transaction to which she pleaded guilty and for which she had counsel:

The present case stems from a traffic stop of appellant and Robert Coffman which took place on December 15, 2007. While returning from a trip to the bank Coffman and appellant were pulled over for speeding. Appellant was a passenger in the vehicle. According to appellant, Mr. Coffman was wearing her winter coat when subject to a search by police after the traffic stop. During the search, methamphetamine was discovered in the pocket of the coat Mr. Coffman was wearing. At Coffman's trial appellant was questioned about the methamphetamine discovered in the coat pocket. She indicated that it belonged to her and that she had left it in the pocket. She further indicated that she did not tell Coffman about the drugs the coat pocket and that she had forgotten they were there. She testified that she was sure they were her drugs and not Coffman's. As result of the traffic stop and subsequent search, appellant was arrested in addition to Mr. Coffman. Appellant eventually pled guilty to possession of chemicals for the manufacture of drugs and was sent to prison. At the time of her testimony at Mr. Coffman's trial, appellant was incarcerated.

State's Brief at 1-2 (citations omitted).

At the time of her testimony, Ms. Poole was not given the opportunity to consult with her attorney. Nobody, including the judge, prosecutor, or Mr. Coffman's attorney bothered to actually notify Ms. Poole's attorney that she would be testifying and potentially incriminating herself. To make matters worse, when Ms. Poole directly admitted possession of the same methamphetamine that Mr. Coffman was accused of possessing, the trial judge sat silent while Ms. Poole directly implicated herself in the possession of this illegal substance. The trial judge never attempted to explain to Ms.

Poole her Fifth Amendment Privilege Against Self-Incrimination or, at the very least, summon Ms. Poole's attorney so that he could inform and explain her constitutional rights to her. Recognizing the importance of Ms. Poole's testimony, the jury acquitted Coffman on the single methamphetamine possession charge.

B. Old Facts, New Charge.

Thereafter, even though Ms. Poole was already serving jail time for this incident, the State of Ohio sought to add more time to the sentence Ms. Poole was already serving. The State charged Ms. Poole with one count of Possession of Drugs in violation of R.C. 2925.11(A), a felony of the fifth degree. These new charges were based solely on her self-incriminating testimony from the Coffman trial.

C. It Is Understandable Why Ms. Poole May Have Had The Mistaken Belief That She Had Waived Her Fifth Amendment Rights.

It is undisputed that Ms. Poole did still retain her Fifth Amendment Rights when she testified in the Coffman trial; however, it would be understandable if, in the absence of any explanation from her attorney or the judge, she mistakenly believed that she had previously waived this crucial right. When Ms. Poole pleaded guilty (before the same trial judge who presided over the Coffman trial) to her original charges, she specifically waived her right to not be forced to testify against herself. "I know at trial I would not have to take the witness stand and could not be forced to testify against myself. . . ." (Guilty Plea Form, Case No. 2008-CR-64 at p. 3, Exh. 2. To Motion to Suppress, Oct. 24, 2008). The fact that Ms. Poole had waived her Fifth Amendment Rights in an earlier prosecution for these facts, but still retained her Fifth Amendment Rights for the second prosecution for these same facts, is all the more reason why either (1) the trial

judge should have explained her rights to her or (2) allowed Ms. Poole to consult with her appointed public defender any at least any attorney from that office.

D. The Trial Court Suppresses The Compelled Testimony.

After the State charged her with this new crime based on her compelled testimony as a witness, Ms. Poole, now with the benefit of legal representation, filed a Motion to Dismiss/Motion to Suppress and argued that the new charge violated her Double Jeopardy Rights and that the testimony from Coffman trial was obtained in violation of Ms. Poole's Fifth Amendment Privilege Against Self-Incrimination. The trial judge that presided over Ms. Poole's new charges determined that Ms. Poole's testimony was obtained in violation of her Fifth Amendment Rights and suppressed this testimony. The trial court explained in its judgment entry:

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 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 his hereby GRANTED.

Judgment Entry, January 28, 2009 at page 19-20.

E. The Court Of Appeals Rules That A Trial Court Need Only Notify A Witness About Her Fifth Amendment Rights If She Asserts Her Fifth Amendment Rights.

Over a dissent, the Eleventh District Court of Appeals reversed the trial judge's suppression decision and absolved the trial judge in Mr. Coffman's case of any responsibility to inform Ms. Poole of her Fifth Amendment Rights. *Poole, supra*. The appellate court held that, regardless of whether this unrepresented witness even knew of her Fifth Amendment Rights when she testified at Coffman's trial, it was incumbent on

Ms. Poole to assert her Fifth Amendment privilege against self-incrimination during the Coffman trial. The manner in which the appellate court framed the issue explained how the appellate court found fault, not with the trial judge for failing to inform Ms. Poole of her constitutional rights or even notifying her attorney, but rather with Ms. Poole for failing to assert her rights. The appellate court stated:

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.

Poole at ¶ 19. Thus, under logic of the Eleventh District, a trial court has a duty to inform a witness of a constitutional right only after the witness first asserts that right.

III. Argument

Proposition of Law:

When a witness who has counsel for the matter at issue places herself in jeopardy with her testimony, a trial court has a duty to protect the witness' constitutional rights by informing her of her Fifth Amendment Privilege Against Self-Incrimination, allowing her to consult with her attorney, or, at a minimum, notifying her attorney. *State v. Schaub* (1976), 46 Ohio St.2d 25 reaffirmed and applied.

A. The State Asserts That Ms. Poole's Guilty Plea Waives Her Fifth Amendment Rights, But Does Not Bar Additional Charges.

The State asserts—and the court of appeals holds—that Ms. Poole's guilty plea was sufficiently related to Mr. Coffman's trial to waive her right to be notified of her right to counsel. Yet that same guilty plea also is, in the view of the State, not sufficient to block new charges relating to the underlying facts, nor sufficient to require that her lawyer from that case be notified of the proceedings. Essentially, the two cases are related when it suits the State, but unrelated when they do not. That's not right.

B. Ohio Law Requires A Trial Judge To Take An Active Role In Protecting The Constitutional Rights Of Witnesses.

The holding of the Eleventh District is not and should not be the law in Ohio. In *State v. Schaub* (1976), 46 Ohio St.2d 25, this Court stated in no uncertain terms that, “The trial court [has] a **duty** to protect the constitutional rights of [a witness] as well as to ensure defendant a fair trial.” *Schaub, supra* at 27-28 (emphasis added.). In *Schaub*, it was clear that the questions asked by defense counsel to the witness “would engender answers which might jeopardize the witness's rights.” *Schaub* at 26. To protect the rights of this witness, the trial court in *Schaub* appointed counsel to represent the witness and advised the witness of her rights. *Id.*

The duty to protect the constitutional rights of witnesses as described by this Court in *Schaub* is consistent with other jurisdictions that place a “duty” or “obligation” on the trial court to take an active role in protecting the constitutional rights of witnesses. See, e.g., *Hester v. State*, 219 Ga.App. 256, 465 S.E.2d 288 (Ga.App. 1995) (“[The trial court] was obligated to advise [the witness] of his right to not testify and warn him about the possibility of perjury charges, and it did not err in doing so.”); *People v. Lee*, 58 N.Y.2d 773, 445 N.E.2d 195 (N.Y. 1982.) (“there is an obligation to warn a witness though not in terms so intimidating as to interfere with his choice whether to testify.”); *U.S. v. Pierce*, 62 F.3d 818 (C.A. 6, 1995) (“In fact, the government has an obligation to warn unrepresented witnesses of the risk that the testimony they are going to give can be used against them. *United States v. Jackson*, 935 F.2d 832, 847 (7th Cir. 1991).”); *U.S. v. Agee*, 597 F.2d 350, 371 (C.A. 3 1979) (“It is true that a trial judge may, and sometimes even should, warn a witness of his fifth amendment rights and of the dangers of perjury.”). *People v. Berry*, 230 Cal.App.3d 1449, 281 Cal.Rptr.

543 (Cal.App. 4 Dist. 1991) (“Admittedly, there are times where a trial judge would be aware from the circumstances of the case of the potential for self-incrimination on the part of a witness. In such cases the trial court has a duty to protect the witness by either informing that person of his or her constitutional rights or by the appointment of counsel for that purpose”).

C. Trial Courts Have Duty To Protect Those Who Face Jeopardy Without The Benefit Of Legal Representation.

This Court’s holding from *Schaub* is consistent with other situations where Ohio law imposes a duty on a trial judge to take an active role in protecting the constitutional rights of parties that appear in their courtroom without legal representation. For example, when a criminal defendant is charged with a serious offense and “elects to proceed *pro se*, the trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel.” *State v. Martin*, 103 Ohio St.3d 385, 816 N.E.2d 227, 2004-Ohio-5471, citing *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399. “To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.” *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723-724, 68 S.Ct. 316, 92 L.Ed.2d 309. See, also, *Martin*, 103 Ohio St.3d 385, at ¶ 40, 816 N.E.2d 227.

Moreover, the right that should have been explained to Ms. Poole was her Fifth Amendment Privilege against self-incrimination, the first instruction given to a defendant as part of the accusatorial process. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Indeed, the centerpiece of the any *Miranda* analysis

is whether the witness was compelled to provide testimony and whether the witness was free to leave. Here, Ms. Poole was not free to leave as she was taken from her jail cell to the witness stand pursuant to a court order. Had she managed to leave the courtroom or the sheriff's custody, she would have been subject to escape charges. R.C. 2921.34. Moreover, she had no choice but to answer questions while on the stand. In fact, the testimonial oath is specifically intended to "impress [the witness' mind with [her] duty to" "testify truthfully[.]" *State v. Frazier* (1991), 61 Ohio St.3d 247, 251.

By comparison, if Ms. Poole had been taken from her jail cell to the interrogation room of the local police station, the investigating officers would have been required to advise Ms. Poole of her constitutional rights before asking her any questions. If a police officer would be required to inform Ms. Poole of her Fifth Amendment Privilege Against Self-Incrimination, it makes no sense to expect less from a court after an officer has delivered a witness to a courtroom from custody.

D. A Trial Judge Need Not Advise All Witnesses Of Their Fifth Amendment Rights Or Badger A Witness Off The Stand.

It is impractical, and the OACDL is in no way suggesting, that a trial judge must inform all witnesses of their Fifth Amendments Rights. But the law does require judges to take an active role "to protect the constitutional rights of [the witness] as well as to ensure defendant a fair trial." *State v. Schaub* (1976), 46 Ohio St. 2d 25. Nor is the OACDL advocating that a trial court should warn a witness in a manner that effectively drives the witness of the witness stand. *Webb v. Texas* (1972), 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (the judge's threatening admonishment effectively drove the defendant's only witness off the stand and violated the defendant's due process right to present his own witnesses).

E. The Trial Judge In The Coffman Trial Failed To Fulfill His Duty To Protect The Constitutional Rights Of Ms. Poole.

Rather, as this Court stated almost thirty-five years ago, a trial judge has duty “to protect the constitutional rights of [a witness] as well as to ensure defendant a fair trial.” *Schaub, supra* at 27-28 (emphasis added.). This case provides a good, illustrative example of the active role a judge a judge must play to protect the constitutional rights of a witness.

Everyone who participated in the Coffman trial was aware of the significance of the Ms. Poole’s testimony stating that the coat Coffman wore and the drugs in that coat pocket belonged to Ms. Poole. The jury realized the importance of this testimony as they acquitted Coffman upon hearing this testimony. The prosecutor realized the importance of this testimony by bringing new possession based on this testimony. Because the importance of the testimony was so clear, and because Ms. Poole had counsel in this matter, the trial court should have followed its duty under *Schaub* and advised Ms. Poole of her right to consult her counsel and her right to remain silent.

The trial court in the Coffman trial did not take the required steps to protect Ms. Poole’s Fifth Amendment Privilege Against Self-Incrimination. Ms. Poole had legal representation for these methamphetamine-related charges stemming from the arrest of herself and Mr. Coffman on December 15, 2007. The trial court in the Coffman trial, however, failed to ensure that her attorney was notified before the hearing, an error that was compounded when Ms. Poole’s compelled testimony began to directly implicate herself.

F. The Trial Judge In Ms. Poole's New Case Correctly Exercised His Discretion To Suppress Her Testimony.

Judge Alfred Mackey, the trial judge for Ms. Poole's second prosecution for these methamphetamine charges, was the only trial judge to carefully consider the evidence in all of the proceedings, is the trial judge whose decision the Eleventh District reversed. Judge Mackey was in the best position to weigh the evidence from all three cases—Ms. Poole's original case, her co-defendant's case, and the case below. That trial judge is also in the best position to weigh how his ruling in this case would affect future cases. In suppressing Ms. Poole testimony because it was obtained in violation of her Fifth Amendment Rights, Judge Mackey explained as follows:

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 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 his hereby GRANTED.

Judgment Entry dated January 28, 2009 at page 19-20.

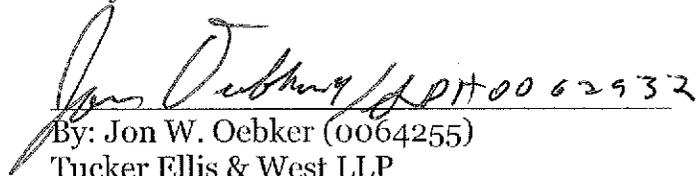
Thus, the trial court in this case truly appreciated the unfair circumstances in which Ms. Poole was placed in Coffman's trial. In suppressing Ms. Poole's testimony from the Coffman trial, Judge Mackey understood that simple steps should have been taken to either explain Ms. Poole's rights to her or allow her to consult with her public defender or at least another attorney from that office. Judge Mackey's discretion should be upheld by this Court.

IV. Conclusion.

At times, Ohio law requires a judge to take an active role to protect the constitutional rights of those who appear in their courtroom. This case, where a witness was compelled to incriminate herself on the witness stand but no one stepped in to either inform her that she did not have to answer these questions or allow her to consult with her attorney, is one of those cases. Accordingly, the OACDL respectfully asks that this Court reverse the judgment of the Eleventh District and reinstate the judgment of Judge Mackey suppressing Ms. Poole's testimony from the Coffman trial.

Respectfully submitted,

Ohio Association of Criminal Defense
Lawyers

 DP110062932
By: Jon W. Oebker (0064255)

Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: jon.oebker@tuckerellis.com

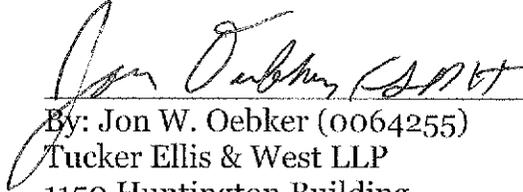
*Counsel The Ohio Association Of Criminal
Defense Lawyers*

Certificate of Service

I certify a copy of the foregoing **Amicus Brief of the Ohio Association of Criminal Defense Lawyers** has been sent by regular U.S. mail, postage-prepaid, to Counsel for Appellant: Richard R. Danolfo, 4817 State Rd., Suite 202, Ashtabula, Ohio 44004 and Counsel for Appellee: Shelly M. Pratt, 25 W. Jefferson St., Jefferson, Ohio 44047 this 24th day of May, 2010.

Respectfully submitted,

Ohio Association of Criminal Defense
Lawyers



By: Jon W. Oebker (0064255)

Tucker Ellis & West LLP

1150 Huntington Building

925 Euclid Avenue

Cleveland, Ohio 44115-1414

Tel: (216) 592-5000

Fax: (216) 592-5009

E-mail: jon.oebker@tuckerellis.com

*Counsel The Ohio Association Of Criminal
Defense Lawyers*