

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL)
CASE NO.: 05-08 AC A02

STATE OF FLORIDA,

Appellant,

v.

KELLI PEDIGO,

Appellee.

Amended
Opinion filed: Jan 23, 2006

Appeal from the County Court of the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida; Honorable Paul DaMico.

For Appellant: Gregory Schiller, A.S.A., 401 North Dixie Highway, West Palm Beach, FL
33401.

For Appellee: Mike Braxton, 1041 Ives Dairy Road, Suite 137, Miami, FL 33179.

On February 8, 2004, Appellee was stopped for running a red light and failing to maintain a single lane and subsequently arrested by Officer Grindey for Driving Under the Influence ("DUI"). Appellee was transported to the Palm Beach County Jail Breath Testing Facility where she was observed for twenty minutes. Following this, Appellee was placed on video and asked a series of "booking questions." Appellee did not respond to these questions. Appellee was asked to take a breath test and again did not respond, so it was taken as a refusal.

On January 25, 2005, a jury trial was conducted and the jury found Appellee guilty of DUI. After the verdict was read, defense counsel renewed their motion for mistrial which the court had previously reserved ruling. Upon reconsideration, the lower court granted the motion

for mistrial and the State appealed.

The motion for mistrial originated from Officer Grindey's testimony regarding Appellee's silence at the breath testing facility. Officer Grindey testified that Appellee was "not answering any of my questions." (T. 43). Any comment on, or which is fairly susceptible of being interpreted as referring to a defendant's failure to testify is error. Kiner v. State, 824 So.2d 271 (Fla. 4th DCA 2002); Thompson v. State, 634 So.2d 169, 170 (Fla. 1st DCA 1994).

The motion for mistrial was properly granted. Officer Grindey's testimony as to Appellee's behavior went beyond what was depicted in the video. There is nothing in the officer's testimony to establish that he was referring only to the booking questions that were reflected on the video. Furthermore, the subsequent introduction of the video did not clear up the officer's testimony that Appellee just refused to answer any questions.

AFFIRMED.

LABARGA and McSORLEY, JJ., concur.

BROWN, J. respectfully dissents.

I agree that Officer Grindey's comments on the appellee's silence were improper. I do not agree however, that the mistrial was properly granted, because the defense counsel stipulated to the introduction of the videotape made at the Breath Testing Facility. This stipulated exhibit placed before the jury direct evidence of the appellee's refusal to answer the officer's questions and also contained Officer Grindey's comment on the appellee's refusal to answer questions. The videotape was played during the State's case, and was played again during jury deliberation, on request from the jury. The tape, admitted as State's Exhibit #1 pursuant to Stipulation, was transcribed as follows:

BREATH TECHNICIAN: Okay Deputy, you conducted a 20 minute observation?

DEPUTY GRINDEY: Yes, I did.

BREATH TECHNICIAN: As an authorized technician, (unintelligible) - -

DEPUTY GRINDEY: 20 minutes.

BREATH TECHNICIAN: The time now is 4:29 a.m. You may begin, sir.

DEPUTY GRINDEY: Today is Sunday, February 8th, 2004, this is Deputy Grindey with the Palm Beach County Sheriff's Office. I have arrested and charged Kelli Pedigo with DUI Chapter 316.183 of Florida State Statute advised. (*sic.*)

Ma'am, would you please state your full name.

THE DEFENDANT: (no verbal response) (long silence)

DEPUTY GRINDEY: Will you please state your full name.

THE DEFENDANT: (no verbal response) (silence)

DEPUTY GRINDEY: Are you going to answer any of my questions or?

THE DEFENDANT: (no verbal response) (silence)

DEPUTY GRINDEY: I am now requesting that you submit to an approved test of your breath for the purposes of determining the alcohol content.

Will you submit?

THE DEFENDANT: (no verbal response) (silence)

DEPUTY GRINDEY: Yes or no?

THE DEFENDANT: (no verbal response)

DEPUTY GRINDEY: Is that a yes or a no?

THE DEFENDANT: It's a no.

DEPUTY GRINDEY: I am now requesting that you submit to a lawful test of your breath to determine the alcohol content. I am Deputy Grindey of the Palm Beach County Sheriff's Office. If you fail to submit to this test that I've requested of you, your privilege to operate a motor vehicle will be suspended for a period of 1 year for first refusal, or 18 months if your privilege has been previously suspended as a result of a refusal to submit to a lawful test of your breath, urine or blood.

Additionally, if you refuse to submit to the test I've requested of you, and if your driving privilege has been previously suspended for a prior refusal to submit a lawful test of your breath, urine or blood, you will be committing a misdemeanor.

Refusal to submit to the test I've requested of you is admissible into evidence of any criminal proceeding. Do you understand?

THE DEFENDANT: (silence)

DEPUTY GRINDEY: Will you submit to a breath test?

THE DEFENDANT: No.

DEPUTY GRINDEY: Okay. A refusal, the time is 4:31 a.m.

On granting the Motion for Mistrial, the trial judge stated "I find the deputy sheriff

certainly commented on your client's 'right to remain silent.' It's pretty clear on the record after

hearing it back twice.” The trial judge’s reference to “hearing it back twice” points to the videotape which was “heard back” twice by the jury. The video was edited to exclude any mention of appellee being given her right to remain silent; however, the video depicts defendant refusing to answer any questions by way of her silence when questions were directed to her by Officer Grindey. After announcing on the video portion which was played before the jury, “I have arrested and charged Kelli Pedigo with DUI,” Officer Grindey asks questions which are responded to by silence from the defendant. He then comments, “Are you going to answer any of my questions, or?” Thus, the tape itself is clear and direct evidence of the defendant’s refusal to answer questions after her arrest.

Had defense not agreed to show the videotape to the jury, a Motion for Mistrial would certainly have been properly granted. However, a criminal defendant may not take advantage on appeal of an error which he himself induced at trial. *Castle v. State*, 305 So. 2d 794, 797 (Fla. 4th DCA 1974). Because defense counsel agreed the tape could be shown to the jury, defense put before the jury both defendant’s silence and the comment by Officer Grindey on defendant’s failure to answer his questions, which amounted to a comment on defendant’s right to remain silent. Defense invited this error and is therefore precluded from pleading mistrial based on the error. *See, Shingledecker v. State*, 734 So. 2d 483, 484 (Fla. 4th DCA 1999). (In DUI trial defense counsel invited error by stating that appellant had no objection to the publication of a videotape to the jury which contained appellant’s statement that amounted to a comment on his right to remain silent.)

Furthermore, in Defendant’s own case, defense counsel again brought up the fact that the Defendant refused to answer any questions during direct examination of the Defendant.

MR. BRAXTON: Okay. At some point when they took you

downtown, they asked you to take a breath test?

MS. PEDIGO: Correct.

Q. Okay. And you were crying, you wouldn't say anything on the video tape?

A: Correct.

Q. How come you wouldn't say anything to them like when they asked you "your name," you wouldn't say your name?

A. I was just so scared by then, I was arrested, I mean I didn't understand what more could have happened.

Moreover, the appellee refused the trial court's offer to give a curative instruction. In *Shustak v. State*, Fla. L. Weekly Suppl. 207 a (Fla. 15th Jud. Cir. 2004). The appellate court found that an improper comment on a defendant's constitutional right to remain silent is curable by a judicial curative instruction.

Accordingly, I would find that appellee is precluded from using the Officer's erroneous comment on appellee's right to remain silent as a basis for its Motion for Mistrial, given the fact that appellee invited the error and refused the trial court's attempt to cure the error. I therefore respectfully dissent. I would reverse, and remand for reinstatement of the conviction, without prejudice for defendant to file a Motion for Post Conviction Relief.