

# Supreme Court of Florida

No. 66,906

STATE OF FLORIDA, Petitioner,

v.

JAMES B. KEARSE, Respondent.

[JULY 17, 1986]

McDONALD, C.J.

We granted review of Kearse v. State, 464 So.2d 202 (Fla. 1st DCA 1985), because it presents the same issue as the questions certified in Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984), and DiGuilio v. State, 451 So.2d 487 (Fla. 5th DCA 1984). In Kearse the district court reversed Kearse's conviction and remanded for a new trial because of a comment concerning Kearse's right to remain silent. The court went on to say that the instant case is indistinguishable from Rowell. We recently held that the comment in Rowell did not constitute a comment on silence and quashed that decision. State v. Rowell, 476 So.2d 149 (Fla. 1985).

Our review of this record indicates that one could reasonably conclude that the witness' comment here implicated Kearse's right to remain silent. It is, therefore, more like DiGuilio than Rowell. In State v. DiGuilio, no. 65,490 (Fla. July 17, 1986), we held that a comment on a defendant's remaining silent should be evaluated under the harmless error doctrine. Applying that test to the instant case, we find the witness' comment to have been harmless beyond a reasonable doubt. Therefore, we quash that portion of the instant decision granting a new

trial and direct the district court to affirm his conviction. We remand for consideration of Kearsse's third point on appeal, concerning sentencing errors, because that point is no longer moot.

It is so ordered.

BOYD, OVERTON and SHAW, JJ., Concur  
ADKINS, EHRLICH and BARKETT, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District court of  
Appeal - Direct Conflict of Decisions

First District - Case No. AY-216

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