

Commonwealth of Kentucky
Supreme Court
No. 2012-SC-000219-D



PAMELA BARTLEY

APPELLANT

On Discretionary Review from the Court of Appeals
Case No. 2010-CA-001640-MR

Appeal from Rowan Circuit Court
Hon. Janet Coleman, Special Judge
Indictment No. 09 – CR – 00117

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

Reply Brief for Appellant

Submitted by,

W. Robert Lotz (44210)
Attorney for Appellant
120 West 5th Street
Covington, KY 41011
859.441.2206 phone
859.491.2234 fax

CERTIFICATE OF SERVICE

I hereby CERTIFY that a copy of the foregoing Brief for Appellant has been mailed, postage prepaid, to Hon. Keen Johnson, Commonwealth's Attorney, 21st Judicial Circuit, 44 West Main Street, Mount Sterling, KY 40353; Hon. Janet Coleman, Special Judge, Kentucky Administrative Office of the Courts, Senior Status Program Administrator, 100 Millcreek Park, Frankfort, KY 40601; and to Hon. Jack Conway, Attorney General, Criminal Appeals Division, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601.



W. Robert Lotz

Pursuant to CR 76.12(4)(e), the purpose of this reply brief is to refute the Commonwealth's argument that Pamela Bartley waived her invoked right to remain silent; and, if so, whether such silence was permitted to be introduced to the jury.

Appellant cites one (1) unreported case, however, which is attached to the back of this Reply Brief.

STATEMENT OF AUTHORITIES

I. The Trial Court abused its discretion in admitting the audio recording.

A. Pamela did not waive her validly-asserted right to silence.

Miranda v. Arizona,
384 U.S. 436 (1966).....3

Combs v. Coyle,
205 F.3d 269 (6th Cir. 2000)3

Fifth Amendment, United States Constitution).....3

Baumia v. Commonwealth,
--- S.W.3d ---, 2012 WL 5877581 (Ky. 2012).....3.

Berghuis v. Thompkins,
130 S.Ct. 2250 (2010).....4

North Carolina v. Butler,
441 U.S. 369, 99 S.Ct. 1755 (1979).....4

Pelegri-Vidal v. Commonwealth,
2010 WL 1006277 (Ky. March 18, 2010).....4

B. Even assuming there was a waiver, Ms. Bartley’s silence cannot be used as substantive evidence against her.

United States v. Williams,
665 F.2d 107 (6th Cir. 1981).....6

Marshall v. Commonwealth,
60 S.W.3d 513 (2001).....6

Merriweather v. Commonwealth,
118 KY. 870, 82 S.W. 592 (1904).6

II. The Court erred in allowing the prosecutor to elicit testimony regarding Pamela’s silence and by mentioning such in her closing.

III. The Court erred in allowing for the introduction of the firearms that were irrelevant.

I. The Trial Court abused its discretion in admitting the audio recording.

A. Pamela did not waive her validly-asserted right to silence.

The Commonwealth errs in its assertion that the audio recording was admissible due to “selective silence.” It is undisputed that Pamela spoke to her attorney and stated that she only wanted to talk about the events of that day. Appellee’s Brief at 9; VR 12/14/09 Disc 1, 9:35:20. Ms. Bartley was very clearly advised of her rights by her attorney before the interview, was given *Miranda* warnings, and invoked her right to remain silent as to questions surrounding the homicide investigation.

The Commonwealth acknowledges that Kentucky has now acknowledged the premise of Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000) that the use of pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment. Appellee’s Brief at 9, citing Baumia v. Commonwealth, --- S.W.3d ---, 2012 WL 5877581 (Ky. 2012). Further, the Commonwealth acknowledges that Ms. Bartley sufficiently invoked her right to remain silent in regard to the homicide of Carl Bartley. Appellee’s Brief at 13. Lastly, the Commonwealth acknowledges that the prosecution is barred from introducing evidence of or commenting upon a defendant’s silence once the defendant has invoked that right. Appellee’s Brief at 12. However, the Commonwealth errs in its assertions that 1) Pamela waived her right to remain silent, and that 2) “selective silence” could be used as substantive evidence against her.

In Thompkins, the United States Supreme Court addressed two issues: (1) the method by which a defendant must invoke his right to remain silent; and (2) whether the defendant had waived such a right. Since the Commonwealth has acknowledged the invocation of Ms. Bartley’s right, the issue addressed is whether Ms. Bartley had waived that right. The record and the tape do not support the conclusion that she did.

In its analysis, the Thompkins Court addresses history of Miranda-waivers, and specifically utilizes the language in North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979). The Thompkins Court cites that case for the proposition that an explicit waiver is not required, and even that “silence, coupled with an understanding of his rights and a course of conduct indicating waiver” may act as a waiver. Thompkins, 130 S.Ct. at 2261.

However, Butler goes further to say, in the next sentence – which the Supreme Court omits - that “courts must presume that a defendant did not waive his rights; the prosecution’s burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.” Butler, 441 U.S. at 372. The Kentucky Supreme Court, following Butler, has stated that a defendant may waive his Miranda rights *implicitly* by “voluntarily respond[ing] to police questioning.” Pelegrin-Vidal v. Commonwealth, 2010 WL 1006277 (Ky. March 18, 2010).

In determining whether Ms. Bartley waived her right to remain silent, this Court may certainly look at her statements, but must *also* consider the other facts and circumstances. It is clear that Ms. Bartley’s silence in response to the Detective’s directed questioning show that she never waived her rights. In Thompkins, the defendant responded to a direct question regarding his involvement in a shooting by stating that he had prayed to God for forgiveness. In Butler, the defendant made inculpatory statements following his refusal to sign a waiver form. In Pelegrin-Vidal, the defendant voluntarily answered police questions. This case does not fit with those precedents.

In the case at bar, there was completely insufficient evidence to support a legal finding that Ms. Bartley had waived her Miranda rights which she had validly invoked. The taped interview makes clear that Ms. Bartley was hysterical and very upset during the entirety of the

interrogation. Ms. Bartley did express fear and consternation regarding the acts of Thomas Lee, but such statements did not act as any sort of waiver. She expressed concern – nothing more.

Further, when specifically asked about the homicide of her husband, Ms. Bartley - acting under advice of counsel *and* after receiving her Miranda warnings - remained completely silent. When looking at the circumstances as a whole, it is inconceivable that Ms. Bartley had waived her right to remain silent when she very clearly utilizes that right. Further, under Baumia, Pamela's silence was clearly the result of official compulsion. The Commonwealth focuses on her expressions of fear as a waiver. But those expressions, when analyzed in association with her very obvious silence at the detective's *direct* questioning, do not support the inference that she had waived her right to remain silent.

In the current case, Ms. Bartley did not even “start down an exculpatory path,” as the Commonwealth alleges. Though she did express fear of another individual, and that she was scared that he would do the same to her as he did to her husband, Ms. Bartley's statement would form no more than a “belief,” and certainly not an exculpatory statement of any substance. She offered no eye witness testimony, she offered no indication that she had found proof. She offered her fear and her belief to the detective, and she remained – rightfully so – silent when the detective had asked her direct questions. Her silence was not “selective,” as the Commonwealth alleges, and *even if it was* the introduction of Ms. Bartley's silence violated her rights under the 5th and 14th Amendments.

The Trial Court erred in admitting the audio-recording of her silence in response to police questioning.

B. Even assuming there was a waiver, Ms. Bartley's silence cannot be used as substantive evidence against her.

The Commonwealth errs in its proposition that Pamela's silence can be used as evidence against her as it was "selective silence." Appellee's Brief at 14. The Commonwealth properly acknowledges that this is a matter of first impression in Kentucky. Further, the Commonwealth properly acknowledges United States v. Williams, 665 F.2d 107 (6th Cir. 1981), where the Court of Appeals held that selective silence is protected. As noted in the initial brief, both the 1st and 9th Circuits agree that selective silence is *protected* silence.

The argument of the Commonwealth, by implication, is that Pamela's silence was an adoptive admission. However, for an adoptive admission to be effective, the hearer must have the ability to refute the allegation made. Marshall v. Commonwealth, 60 S.W.3d 513 (2001); Merriweather v. Commonwealth, 118 KY. 870, 82 S.W. 592 (1904). In this case, Pamela remained silent based upon the advice of her counsel, and thus did not have the capability to refute any of the allegations against her. Because of this advice, Pamela's silence should not be used substantively against her.

Further, the Commonwealth cites a multitude of case law from the 7th and 8th Federal Circuits and from Connecticut for its proposition that "selective silence" is admissible. However, the Circuit in which lies Kentucky, the 6th Federal, has explicitly found that the introduction of silence, even if "selective," is in violation of a person's 5th and 14th Amendment rights. United States v. Williams, 665 F.2d 107 (6th Cir. 1981). In Williams, the government elicited testimony from an FBI agent that the defendant, during an interrogation, had answered some questions but remained silent in response to other questions. Not only did the 6th Circuit find that there existed error, the Court found that there was plain error, as it was "obvious and substantial." Williams, 665 F.2d at 109. The 6th Circuit explicitly held that the introduction of

such “clearly violated [the Defendant’s] Fifth Amendment privilege against self-incrimination....” Id.

This Court is encouraged to find that – assuming there was a waiver – that a person’s silence cannot be used against them substantively. Even if an individual makes some exculpatory statements and then remains silent, there should be a presumption that the person is selectively invoking his/her right to silence, based upon their understanding of their rights. Silence allows for far too many inferences and guesses.

II. The Court erred in allowing the prosecutor to elicit testimony regarding Pamela’s silence and by mentioning such in her closing.

The arguments above fully support and address this concern.

III. The Court erred in allowing for the introduction of the firearms that were irrelevant.

The Commonwealth alleges that the Appellant is confusing palpable error and harmless error. Appellee’s Brief at 26. This is not true. The Court of Appeals correctly held that the testimony surrounding the non-relevant weapons was clearly error. However, the Court of Appeals determined that the error was merely harmless.

The case law set forth in Appellant’s Brief in Chief adequately addresses the admissibility of non-relevant firearms. The Commonwealth’s attempt to justify the testimony and publication of these firearms fails in light of the very clear case law to the contrary.

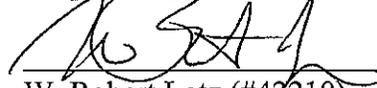
As such, the issue is whether the error was harmless. It was not harmless. Though the Commonwealth mentions the testimony from witnesses to support its motive argument, the fact remains that the investigation in this case was horrendously scant, as demonstrated in the Brief in Chief.

As such, the Appellant urges the Court to determine, first, that there was clear error, and second that the error was **not** harmless.

CONCLUSION

WHEREFORE, Ms. Bartley asks that this Court issue an ORDER directing the Trial Court dismiss the indictment against her, or for other appropriate relief.

Respectfully Submitted,



W. Robert Lotz (#42210)

120 West Fifth Street

Covington, KY 41011

859.491.2206 phone

859.491.2234 fax