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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

ALQI DHIMO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000525

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel erred in failing to enter a specific Doyle² objection and move for a mistrial after the solicitor's initial comment on petitioner's post-arrest silence in the case.

² Doyle v. Ohio, 426 U.S. 610 (1976).

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¹ Doyle v. Ohio, 426 U.S. 610 (1976).

STATEMENT

Petitioner Alqui Dhimo was convicted of attempted third degree criminal sexual conduct during the January 2018 term of the Horry County General Sessions Court before Judge Steven H. John. Petitioner was sentenced to imprisonment for a period of eight years. Supp. App. 1-419. John Reuben Long, Esquire, represented petitioner at trial, and Assistant Solicitors Mary Ellen Walter and Leigh Andrew appeared on behalf of the state. Petitioner appealed, but his conviction and sentence were affirmed by the South Carolina Court of Appeals. See State v. Alqui Dhimo, Unpublished Opinion No. 2020-UP-031 (February 5, 2020). On November 25, 2020, the South Carolina Supreme Court denied the Petition for Writ of Certiorari filed appealing the decision of the South Carolina Court of Appeals in the case. App. 107.

On March 9, 2021, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 99-105. The respondent filed a Return dated April 26, 2021. App. 106-116. A PCR hearing in the case was convened on November 30, 2022, at the Horry County Courthouse before Judge H. Steven DeBerry, IV. App. 117-171. Petitioner was present at the PCR hearing and represented by Attorney Christopher Geel, and Assistant Attorney General Chelsey F. Marto appeared at the hearing on behalf of the state.

On March 6, 2023, Judge DeBerry issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 174-186.

Petitioner appealed Judge DeBerry's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to enter a specific Doyle³ objection and move for a mistrial after the solicitor's initial comment on petitioner's post-arrest silence in the case. On June 21, 2015, petitioner, who was a cab driver in Horry County at the time, responded to a call from Jessica Kessler for taxi service on that night. Kessler was intoxicated when she entered the cab. At some point later, the taxi cab was seen parked near a hotel at the beach, which was noticed by two hotel security guards who began to investigate into the matter. The guards saw a male, later identified as petitioner, in a questionable and compromising position near another body, which was discovered to be the body of Kessler. Police were called to the scene immediately thereafter. Petitioner was arrested, and later tried and convicted on the offense of attempted criminal sexual conduct in the third degree. Kessler was deceased at the time of petitioner's trial. App. 72, l. 2 – p. 76, l. 18; Supp. App. 43, l. 2 – p. 49, l. 10. After petitioner's arrest, he was interviewed by Officer Carol Ann Allen, who advised him of his rights under Miranda v. Arizona.⁴ The colloquy that gave rise to the Doyle violation follows:

Solicitor: So you asked him where he go to bite marks....what did he say to you?

Officer: Not from her.

Solicitor: Did you ask him again

Officer: I believe I asked him three times and he gave me the same answer every...all three times—not from her.

Solicitor: And that...it's at that point that you decided to end the interview correct?

Officer: Yes, ma'am. Supp. App. 280, lines 17-25.

³ Doyle v. Ohio, 426 U.S. 610 (1976).

⁴ Miranda v. Arizona 384 U.S. 436 (1966).

Thereafter, defense counsel presented the following objection:

Defense Counsel: That's a misstatement of the facts, your Honor. Detective Allen did not choose to end the interview at that time. [Petitioner] asked for an attorney...[the solicitor] didn't stop; [petitioner] stopped. Supp. App. 281, lines 10-15.

The trial judge ruled as follows:

Court: Alright, well, there's nothing wrong with saying that at that point—in time, the defendant asked for an attorney and I was obligated to stop interviewing if that's what occurred.. Supp App. 282, lines 3-6.

Court: Then you need to clear that up...because it's clear from your question and [the detective's] answer that it was [the detective's] decision to stop this interview...[rather than]... a result of the defendant asking for an attorney. Supp. App. 282, lines 18-21.

The mistrial motion, which was not based on a Doyle violation, follows:

Defense counsel: I make the motion for a mistrial, because the jury has been told knowingly a misstatement of the facts. Supp. App. 284, lines 1-2.

The Court: There's no reason for a mistrial. It can be clarified by a simple question and answer... question from the state and answer from the defendant requested an attorney, and it was her duty and obligation to end the interview at that point in time...there's no problem. Supp. App. 284, lines 3-9.

During the PCR hearing held in the case, trial counsel stated that he objected at trial when the solicitor commented on petitioner's right to remain silent at the pre-trial stage. App. 142, l. 23 – p. 144, l. 2; App. 154, l. 19 – p. 157, l. 20. However, trial counsel failed to object on the specific ground that the solicitor's comment constituted a Doyle violation. Rather, trial counsel chose to object to the solicitor's improper comments on the ground that a misstatement was made regarding the reason that the pre-trial interview of petitioner ended.

In Doyle v. Ohio, 426 U.S. 610 (1976), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment prohibits a prosecutor from questioning a witness regarding his post-arrest silence after Miranda v. Arizona, 384 U.S. 436 (1966), rights have been issued. The reason being that a defendant is assured via Miranda that his silence will carry no penalty and that it is fundamentally unfair to then later use one's silence to impeach his explanation offered at trial. See State v. McIntosh, 358 S.C. 432, 585 S.E.2d 484 (2004) citing to Doyle. Also, this prohibition is designed to prevent jurors from believing that a defendant is guilty because he exercised a constitutional right and from believing that a defendant's post-arrest silence is substantive evidence of guilt when it is the burden of the state to prove beyond a reasonable doubt every element of the crime charged. State v. McIntosh, supra, State v. Smith, 290 SC 393, 350 S.E.2d 923 (1986), citing to Doyle v. Ohio, supra. A breach of the assurance that one's silence will not be used against one would violate the fundamental fairness found in the Due Process Clause. Brown v. State, 375 SC 464, 652 S.E.2d 765 (2007).

Our Courts have reversed in cases where Doyle violations occurred. In McIntosh, supra, the Court reversed where the solicitor questioned the defendant regarding his failure to give a post-Miranda exculpatory statement to police. In Smith, the Court reversed where the prosecutor asked the psychiatrist (defendant pleaded insanity) if he knew that the defendant refused to give a statement to police. In State v. Hill, 360 S.C. 13, 598 S.E.2d (2004), the Court reversed where the solicitor asked the defendant why he remained silent instead of claiming self-defense after he was arrested and given his Miranda warnings. Also, see the following cases where the Courts reversed when the solicitors asked questions that constituted Doyle errors. State v. Gray, 304 SC 482, 405 S.E.2d 420 (Ct. App. 1991); State v. Hill, 360 SC 13, 598 S.E.2d 732 (2004); State v. Woods, 282

SC 18, 316 S.E.2d 673 (1984); State v. Reid, 324 SC 74, 476 S.E.2d 695 (1996); State v. Holliday, 333 SC 332, 509 S.E.2d (1998).

Therefore, the case law is clear that the accused has a right to remain silent and that the exercise of that right cannot be used against him. Doyle v. Ohio, supra. In the case at bar, it was error for the solicitor to expose appellant's post-arrest silence to the jury by stating that the pre-trial interview of petitioner ended as this was an impermissible comment on petitioner's post-arrest silence that is prohibited under Doyle. Furthermore, it was error for trial counsel to object to this error **based on the ground that a misstatement regarding the reason the interview ended was given to the jury**. Instead, trial counsel should have objected to the impermissible comment in question on the basis that a Dole violation occurred and moved for a mistrial thereafter. Trial counsel's lack of specificity in reference to a proper objection per Doyle was not only ineffective representation at trial, but deficient assistance that affected the appeal as well, since the omission denied appellate review of the issue by the South Carolina Court of Appeals. As a rule, a party must enter a contemporaneous and specific objection to preserve an issue for appellate review. State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16 (2011).

Indeed, trial counsel was specific with his objection to the **second** post-arrest reference made at trial; however, this untimely Doyle objection later at trial was of no consequence as it was tardy and did not erase the prejudice of the initial post-arrest comment wherein no specific Doyle violation objection was raised. In addition, the subsequent curative instruction in the matter did not cure the error as the prejudice remained nonetheless. The colloquy on the **second** post-arrest reference follows:

Solicitor: And counsel asked if the defendant was fully cooperative; would you consider terminating the interview being fully cooperative?

Defense Counsel: Objection, Your Honor.

The Court: Sustained. That goes into—no and that is an improper question, ladies and gentlemen, that goes into the Miranda warnings and constitutional rights. That's an improper question by the state. Thank you very much. You may continue.

Defense Counsel: I have a motion to be made outside the presence of the jury. Supp. App. 301, lines 3-12.

Solicitor: Based on the earlier ruling, where I was told to make clear that the defendant had in fact invoked his right to an attorney, no, I did not think it was improper.

The Court: All right. Thank you, ma'am. Let me hear from you, Mr. Long?

Defense Counsel: A motion for a mistrial, your Honor. The solicitor knew that question is improper. That is evidence 101, Constitutional law 101 in law school. My client is protected from the Fifth Amendment to have such a question even being posed in front of a jury, that jury has been tainted, knowingly, purposely by the solicitor's office, a clear violation of his constitutional right. To continue with this trial would be injustice on his part and a violation of the constitutional rights and I make a motion for a mistrial.

The Court: I decline your request for a mistrial in this matter. Supp. App. 302, lines 1-16.

The Court (Curative instruction): All right, ladies and gentlemen, the question last asked by the state is hereby struck from the record. I'm further instructing you that that question was improper. It was an improper attempt by the state to influence your decision in this matter. You heard at the very beginning, the defendant had Miranda rights, they were read to him. One of those, part of that is you can stop an interview at any point in time. The state may not comment on the exercising of the constitutional rights in any manner. Again, that goes back to the defendant has nothing to prove to you. The defendant has nothing to show to you. Again, that's stricken from the record. You may not consider it in any shape, manner or form, either discussing it in your deliberations or using it mentally to decide this case. Thank you very much. You may continue Solicitor.

Solicitor: I have no further questions for Detective Allen.

The Court: Anything else Mr. Long?

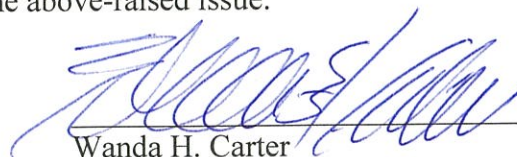
Defense Counsel: No, your Honor. Supp. App. 303, 1 .9- p. 304, 1.2.

Note that trial counsel did not object to the sufficiency of the curative instruction because despite the same, the prejudice remained in the case. Trial counsel's failure to object to the insufficient and ineffective curative instruction barred the Doyle violation from review on appeal. The rule is that no issue is preserved for appellate review if the objecting party accepts the judge's curative instruction and fails to object to the sufficiency of the curative charge or move for a mistrial. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).

In the instant case, trial counsel erred in failing to enter a specific Doyle violation objection when the initial post-arrest silence comment occurred and to move for a mistrial immediately thereafter. Trial counsel's error at trial regarding the handling of the Doyle error constituted ineffective assistance of counsel in violation of the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984), such that but for counsel's deficient representation in this regard, a reasonable probability exists that the outcome of petitioner's trial and/or appeal might have been different.

CONCLUSION

Based on the argument above, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of July, 2023.