

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TOMMY MCGEE,

APPELLANT

APPELLATE CASE NO 2017-001927

INITIAL REPLY BRIEF OF APPELLANT

RECEIVED

OCT 05 2018

SC Court of Appeals

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ARGUMENT IN REPLY

The trial judge erred in refusing to grant a mistrial when an investigator testified that Appellant “already lawyer up” improperly commenting on Appellant’s constitutional right to remain silent.

The improper comment on Appellant’s constitutional right to remain silent occurred during the direct examination of State’s witness Investigator Jerry Gainey when he said, “Yes. I went up – well, I went up there but he already lawyer up so I didn’t talk with him.” (Tr. p. 173, lines 20-21). In Doyle v. Ohio, 426 U.S. 610 (1976), the Court found a due process violation when the State sought to impeach a defendant’s testimony at trial by cross examining him about post arrest, post *Miranda* warnings silence. In Fletcher v. Weir, 455 U.S. 603 (1982), the Court clarified the holding in Doyle finding that, in the absence of *Miranda* warnings, the State does not violate due process by cross examining a defendant about post arrest silence. In State v. Williams, 399 S.C. 281, 286, 731 S.E.2d 338, 340 (Ct. App. 2012), (fn#1 omitted) the South Carolina Court of Appeals wrote:

In Doyle v. Ohio, the United States Supreme Court held the due process clause of the Fourteenth Amendment is violated when the State seeks to impeach a defendant's exculpatory story, told for the first time at the trial, by cross-examining him about his post-arrest silence after receiving *Miranda* warnings. 426 U.S. at 611, 96 S.Ct. 2240. The rationale for *Doyle* is that it would be a violation of due process to allow the State to comment on the silence which *Miranda* warnings have encouraged. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006).

In the present case Respondent argues that the comment that Appellant “lawyered up” did not constitute a Doyle violation because “. . . the current record is devoid of any evidence that Appellant was *Mirandized* when he was taken into custody.” (Brief of Respondent p. 11). While there is no specific testimony that Appellant was given *Miranda* warnings when he turned

himself in to Investigator Roger Tilton¹ with the Lake City Police Department, the clear implication from the comment that he “lawyered up” is that the Appellant had been *Mirandized*. Additionally, the prosecutor did not argue that Appellant had not been *Mirandized*. Both the judge and the prosecutor stated that the comment was inappropriate. (Tr. p. 175, lines 5-12). Alternatively, it is unclear if the *Miranda* requirement set forth in Fletcher and Brecht v. Abrahamson, 507 U.S. 619 (1993), applies given the fact that the comment was made during the State’s case in chief and not used for impeachment on cross examination.

The judge cited Doyle and State v. Bell, 347 S.C. 267, 554 S.E.2d 435 (S.C. Ct.App. 2001), but he did not find an absence of *Miranda*. Instead, the judge ruled, “Officer Gainey’s testimony was that he got a call that he, being the Defendant, turned himself in, but I didn’t talk to him because he had already lawyered up. He is not referring to the Defendant refusing to talk to him, it was his decision not to go talk to the Defendant for whatever reason. That was his reason. It was not the Defendant’s exercise of his constitutional right to Gainey and Gainey commenting on his decision not to give a statement as provided or allowed under the protection of the fifth amendment.” (Tr. p. 177, line 18 – p. 178, lines 1-2). Counsel noted that the investigator testified, “I tried to go talk to him, but he had already lawyered up.” (Tr. p. 179, lines 23-24). The judge responded, “He didn’t say he went to try to talk to him. I just listened to the testimony. He said I chose not to go talk to him. He didn’t say he tried to go talk to him.” (Tr. p. 179, line 25 – p. 180, lines 1-2). Counsel then commented, “Either way, I did not talk to him because he had already lawyered up – the fact that he says because he had lawyered up, that is a direct comment on my client’s right to remain silent. Anyway, people know what lawyering

¹ Appellant testified that Investigator Tilton no longer worked with the Lake City Police Department but now worked for the Florence County Sheriff’s Department. (Tr. p. 194, lines 14-18). Investigator Tilton did not testify at trial.

up means and it means that they choose not to talk to the police. I mean, so – so, the fact that he says he had already lawyered up, it's a direct comment on my client's not wanting to talk to police." (Tr. p. 180, lines 3-10). The judge stated, "Well, you've made your record. I disagree with you. I've made my ruling." (Tr. p. 180, lines 11-12). The trial judge erred.

The record in the present case including the challenged comment that Appellant had "lawyered up," the judge and prosecutor statements that the comment was inappropriate and the judge's ruling that was not based on an absence of *Miranda* demonstrate that Appellant was advised of his *Miranda* rights. In State v. Smith, 290 S.C. 393, 394–95, 350 S.E.2d 923, 924 (1986) the South Carolina Supreme Court wrote:

An accused has the right to remain silent and the exercise of that right cannot be used against him. The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent. State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984). See also, Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Testimony that a defendant refused to comment on an accusation against him is an unconstitutional comment on his post-arrest silence. State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982).

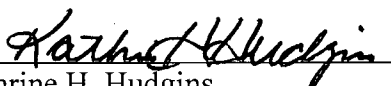
The State improperly commented on Appellant's right to remain silent by Investigator Gainey's statement, "Yes. I went up – well, I went up there but he already lawyer up so I didn't talk with him." (Tr. p. 173, lines 20-21). The improper comment required a mistrial.

The error is not harmless. When asked if his decision to testify was his decision alone, Appellant responded, Yes, sir, but I do feel like I'm – I kind of feel like something's being hiding with Jerry Gainey." (Tr. p. 187, lines 8-9). Trial counsel then explained, "Your Honor, based on the statement of Investigator Gainey, that my client lawyered up, my client feels like it leaves the jury with the only inference that he has something to hide. So, that's what he's trying to articulate to the Court that he feels like when Investigator Gainey testified that he lawyered up that it makes it look like to the jury that he has something to hide and that is why is making the

decision to testify.” (Tr. p. 187, lines 16-23). The trial judge erred in refusing to grant a mistrial based on the improper comment. The improper comment was made on page 173, lines 20-21 of the trial transcript and the objection was made on the next page, page 174, lines 6-7. The issue was preserved for appellate review and the improper comment was not harmless.

CONCLUSION

Based on the above argument, and the argument contained in the brief of Appellant, this Court should reverse the conviction and sentence and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of October, 2018.

STATE OF SOUTH CAROLINA

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Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

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THE STATE,

RESPONDENT,

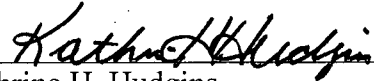
V.

TOMMY MCGEE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Samuel Bailey, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Tommy McGee, #373902, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 5th day of October, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of October, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.