STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TOMMY MCGEE,

APPELLANT

APPELLATE CASE NO 2017-001927

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err 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?

STATEMENT OF THE CASE

In August of 2016, the Florence County Grand Jury indicted Appellant, Tommy McGee, for murder, indictment #2016-GS-21-1134. On September 12, 2017, Appellant proceeded to jury trial before the Honorable D. Craig Brown. Rose Mary Parham represented Appellant at trial. John Woodrow Holt, IV, prosecuted the case. The jury returned a verdict of guilty. Judge Brown sentenced Appellant to thirty (30) years in prison. A timely notice of intent to appeal was served on September 18, 2017. This appeal follows.

STANDARD OF REVIEW

Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

ARGUMENT

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.

In the early morning hours of Wednesday October 28, 2015, the Appellant, Tommy McGee, and the deceased, Jimmy Welch, among others, were at The Office, a bar in Lake City, playing pool and drinking. McGee and Welch began to argue about whether Welch owed money to McGee's father for repairs the Dad made to Welch's truck. (R. p. 46, lines 16-25). Welch told McGee that he did not owe "no sorry mechanic no money." (R. p. 159, lines 18-21). McGee admitted hitting Welch. (R. p. 153, lines 8-16). The bar had surveillance cameras that recorded the incident. A video of the incident was admitted, over objection, at trial. (R. p. 18, lines 19-23, State's Exhibit #2). After the incident McGee left the bar and went to his wife's house where he told her he might be going to jail for simple assault and battery. (R. p. 154, lines 1-4). McGee turned himself in to the Lake City Police Department the next morning when he learned that Welch died. (R. p. 154, lines 5-18).

Investigator Jerry Gainey with the Lake City Police Department testified that early on the morning of October 28, 2015, he was called to The Office Bar in regard to an assault. (R. p. 128, lines 13-25). The investigator took photos at the scene, viewed the video from the surveillance camera and then tried to locate McGee. (R. pp. 129-132). While the investigator and other officers were trying to find McGee, they received a call that McGee had turned himself in to Investigator Roger Tilton with the Lake City Police Department. (R. p. 133, lines 1-19). Investigator Gainey testified, "Yes. I went up – well, I went up there but he already lawyer up so I didn't talk with him." (R. p. 133, lines 20-21).

Counsel for McGee moved for a mistrial outside of the presence of the jury. Counsel stated:

> Thank you, Judge. I would move for a mistrial because of what this officer just testified to that my client, that they went around to talk to him, but he had, quote, lawyered up. It's a comment on my client's right to remain silent and not incriminate himself. In fact he had not hired me until November 2nd; I just looked at my contract. But, it's highly prejudicial, it's highly inappropriate, and it's a comment on the Defendant's right to remain silent and it's an inappropriate – it's a serious case and it's, it's just completely inappropriate, and I believe it's grounds for a mistrial.
>
> (R. p. 134, line 18 – p. 135, lines 1-3).

The judge denied the motion for a mistrial stating, "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." (R. p. 137, line 18 – p. 138, lines 1-2). Counsel noted that the investigator testified, "I tried to go talk to him, but he had already lawyered up." (R. p. 139, 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." (R. p. 139, line 25 – p. 140, 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 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." (R.

p. 140, lines 3-10). The judge stated, "Well, you've made your record. I disagree with you. I've made my ruling." (R. p. 140, lines 11-12). The trial judge erred.

The Urban Dictionary defines "lawyer up" as, "To plead the Fifth Amendment; to refuse to answer questions." http://www.urbandictionary.com/define.php?term=lawyer+up. Wiktionary defines "lawyer up" as, "To exercise one's right to legal representation, especially on the occasion of refusing to answer law-enforcement officials' questions without the presence of such legal representation." https://en.wiktionary.org/wiki/lawyer_up.

The comment by the investigator that Appellant McGee had already 'lawyer[ed] up" so he didn't talk with him is an improper comment on Appellant's right to remain silent. Contrary to the apparent reasoning of the trial judge, the fact that Appellant exercised his right to remain silent when he turned himself in to Investigator Roger Tilton does not allow Investigator Gainey to comment on the exercise of that right. In McFadden v. State, 342 S.C. 637, 640–41, 539 S.E.2d 391, 393 (2000), the South Carolina Supreme Court wrote:

> The State may not comment on a defendant's exercise of a constitutional right. Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997); see also Doyle v. Ohio, supra (right to remain silent); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (Fifth and Fourteenth Amendments forbids comment by the prosecution on the accused's silence).

In McFadden the Court granted post-conviction relief based on trial counsel's failure to object to the prosecutor's indirect comment in closing argument on the Petitioner's right to remain silent. In McFadden the comment was on the right to remain silent at trial. In the present case Appellant testified at trial. The comment in the present case was on the right to post arrest silence. The trial judge abused his discretion in refusing to grant the mistrial motion based on

the improper comment on Appellant's right to remain silent. The error was not harmless. As in McFadden, the comment requires reversal.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and sentence and remand for a new trial.

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Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of November, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 26, 2018

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