STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2020-UP-026 (S.C. Ct. App. Filed January 29, 2020)

2016-GS-21-01134

THE STATE,

RESPONDENT,

V.

TOMMY MCGEE,

APPELLANT

APPELLATE CASE NO 2017-001927

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 27, 2020.

QUESTION PRESENTED

Did the Court of Appeals err in finding no error in the trial judge refusing to grant a mistrial when an investigator testified that Petitioner "already lawyer up" improperly commenting on Petitioner's constitutional right to remain silent?

STATEMENT OF THE CASE

In August of 2016, the Florence County Grand Jury indicted Petitioner, Tommy McGee, for murder, indictment #2016-GS-21-1134. On September 12, 2017, Petitioner proceeded to jury trial before the Honorable D. Craig Brown. Rose Mary Parham represented Petitioner at trial. John Woodrow Holt, IV, prosecuted the case. The jury returned a verdict of guilty. Judge Brown sentenced Petitioner to thirty (30) years in prison. A timely notice of intent to appeal was served on September 18, 2017, and the direct appeal perfected. On January 29, 2020, the South Carolina Court of Appeals affirmed the convictions. State v. McGee, Op. No. 2020-UP-026 (S.C.Ct.App. filed January 29, 2020). A timely petition for rehearing was filed and then denied on March 27, 2020. This petition for writ of certiorari follows.

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari because the question presents a substantial constitutional issue dealing with the State commenting on Petitioner's exercise of the right to remain silent.

ARGUMENT

The Court of Appeals erred in finding no error in the trial judge refusing to grant a mistrial when an investigator testified that Petitioner "already lawyer up" improperly commenting on Petitioner's constitutional right to remain silent.

In the early morning hours of Wednesday October 28, 2015, the Petitioner, 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.

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. Petitioner was not cross examined about his post-arrest silence, as in Doyle. Instead, in the present case, the officer commented on Petitioner's post-arrest silence. In State v. Smith, 290 S.C. 393, 394–95, 350 S.E.2d 923, 924 (1986) this 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 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 Petitioner McGee had already 'lawyer[ed] up" so he didn't talk with him is an improper comment on Petitioner's right to remain silent. Contrary to the apparent reasoning of the trial judge, the fact that Petitioner 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), this 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 Petitioner 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 Petitioner's right to remain silent. The error was not harmless. As in McFadden, the comment requires reversal.

In affirming the conviction the Court of Appeals wrote, "On appeal, McGee argues the circuit court erred by denying his motion for a mistrial when Investigator Jerry Gainey stated McGee had 'lawyered up.' Because Investigator Gainey's statement was in reference to the reason he did not speak to McGee and not a specific statement on McGee's constitutional right to remain silent, we affirm the circuit court's denial of the motion for a mistrial." State v. Tommy McGee, Op. No. 2020-UP-026 (S.C. Ct.App., filed January 29, 2020). The fact that the purported reason for the question was to explain why the investigator did not speak with Petitioner does not render the question proper. Instead, this is a factor the Court may consider when applying the harmless error analysis. The question, regardless of any purported

explanation for the question, is an improper comment on Petitioner's constitutional right to remain silent.

In McFadden, this Court wrote:

> In his closing argument to the jury, the solicitor stated, "In this particular case, the state only has one opportunity in which to argue their case, *because there is no defense presented.* And the only reason I mentioned it is *because no defense has been presented because this defendant based no [sic] the evidence is guilty.*" (emphasis added). The PCR judge found these remarks were "simply an explanation of how closing arguments would proceed and why." The solicitor's comments were more than an explanation of closing arguments, they were an indirect comment on the defendant's constitutional right to remain silent. See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (an accused has the right to remain silent and the exercise of that right cannot be used against him).

342 S.C.at 640, 539 S.E.2d at 393.

As the solicitor's comments in McFadden were more than an explanation of closing argument, the detective's testimony was more than an explanation of why he did not speak with Petitioner. The detective's testimony that Petitioner "lawyered up" is an improper comment on Petitioner's constitutional right to remain silent. "It is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Such comments may not be made either directly or indirectly. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Rouse, 262 S.C. 581, 206 S.E.2d 873 (1974)." Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000).

The error was not harmless. In the opinion in the present case the Court of Appeals wrote:

> Here, the circuit court considered the statement in the context of the questioning, the relevance of the statement to McGee's right to remain silent, and the influence the statement could have on the jury's determination, and found the statement did

> not infringe on McGee's right to remain silent. See State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988) ("Among the factors to be considered in ordering a mistrial are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case."); Edmond v. State, 341 S.C. 340, 348, 534 S.E.2d 682, 687 (2000) ("Such an error will not be deemed prejudicial when the record shows the reference to the defendant's right to silence or to an attorney was a single reference, which was not repeated or alluded to; the prosecutor did not tie the defendant's exercise of his right directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. A court's confidence in the outcome of the trial likely would not be undermined if those factors are met.") (citation omitted). Accordingly, the circuit court did not err in denying the motion for a mistrial.

State v. Tommy McGee, Op. No. 2020-UP-026 (S.C. Ct.App., filed January 29, 2020).

While the detective's testimony that Petitioner "lawyered up" was the single reference to Petitioner exercising his constitutional right to remain silent, the comment also touched on Petitioner's constitutional right to an attorney, making the comment more prejudicial. Petitioner admitted to the bar fight and hitting the deceased. (R. p. 153, lines 8-16). The jury was asked to determine if the State proved that Petitioner's actions constituted murder. While there was evidence of a bar fight, there was not overwhelming evidence of malice required for murder. The error was not harmless.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

s/Kathrine H. Hudgins

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Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2020.