

STATE OF SOUTH CAROLINA
In The Supreme Court

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On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM FLORENCE COUNTY
D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

Unpublished Opinion No. 2020-UP-026

THE STATE,.....RESPONDENT

v.

TOMMY MCGEE,.....PETITIONER

RETURN TO PETITION FOR A WRIT OF CERTIORARI
Appellate Case No. 2017-001927

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PETITIONER'S 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?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the decision of the trial court in the denial of the Petitioner's motion for mistrial due to the fact the investigator's statements regarding the Petitioner "already lawyer up" did not refer to the Petitioner right to remain silent, but he was offering an explanation as to why he decided not to question the Petitioner?

STATEMENT OF THE CASE

Petitioner was indicted by the Florence County Grand Jury for the offense of murder. The case was called to trial before the Honorable D. Craig Brown, Circuit Court Judge on September 14, 2017. Representing the Petitioner was Rose Mary Parham. The case was prosecuted by assistant solicitor John Holt, IV of the Twelfth Circuit Solicitor's office.

During this trial the State alleged that the Petitioner committed the offense of murder. The Defendant was accused of delivering a vicious blow upon the victim while he was not looking and then punching him numerous times as he lay unconscious. During the trial numerous individuals testified as to how the fight occurred, and the victim's cause of death. Lieutenant Jerry Louis Gainey of the Lake City Police Department testified regarding his part in the investigation. He testified that during his investigation he learned that the Petitioner turned himself in. As he was possibly going to interview the Petitioner, he learned that the Petitioner had, "already lawyer up," so decided not to interview him. (R. p. 133 lines 18-21)

After Lieutenant Gainey mentioned the Petitioner "lawyer up" counsel for the Petitioner objected on the grounds that the State mentioned the Petitioner's Fifth Amendment right to remain silent. She made a motion for mistrial which was denied by the trial court. (R. p. 134 line 18 – p. 135 line 3) The trial court decided that law enforcement did not comment on the Petitioner's right to remain silent but made the statement because it was his reason not to speak with the Petitioner. (R. p. 136 line 23 – p. 138 line 5)

At the conclusion of this trial a jury of his peers found the Petitioner guilty of murder. (R. p. 217 lines 1-6) Upon being found guilty, the Petitioner appeared before Judge Brown, who proceeded to sentence the Petitioner to a thirty year period of incarceration. (R. p. 225 line 25 – p. 226 line 2) After this conviction, the Petitioner filed a timely notice of appeal.

Within this appeal the Petitioner argued that the trial court erred in refusing to grant a mistrial when the investigator testified that the Petitioner “already lawyer up.” The Petitioner argued that this statement improperly commented on the Petitioner’s right to remain silent. It was the Respondent’s position that there was no implication of the Petitioner’s Fifth Amendment right to remain silent due to the fact he was not Mirandized at the time of his arrest. The Respondent further argued that any error made by the trial court is either procedurally barred or should be considered harmless.

On January 29, 2020, the Court of Appeals decided to affirm the decision of the trial court. The Court of Appeals decided that the trial court considered the statement in the context of the questioning, and the relevance of the statement to the Petitioner’s right to remain silent. The Court of Appeals decided that the statement did not infringe on the Petitioner’s right to remain silent. So the trial court did not err in denying the motion for mistrial. *State v. McGee*, 2020 WL 468912 (2020). Upon being notified as to the decision of the Court of Appeals the Petitioner filed a motion for rehearing that was denied on March 27, 2020.

The Petitioner now brings this petition for writ of certiorari before this court. Within this petition the Petitioner argues that the Court of Appeals erred in finding that the trial court did not err in not granting a mistrial when the investigator testified that the Petitioner “already lawyer up.” The Petitioner perceived this to be an improper comment as to his Constitutional right to remain silent.

The Respondent will argue that the Court of Appeals was correct in affirming the decision of the trial court. Since the investigator was making a comment as to why he did not question the Petitioner and not why he chose to remain silent. The Respondent would also argue that since there is nothing in the record that reveal *Miranda* warnings were even given prior to

the Petitioner's statement, the comment of investigator Gainey was not in violation of the Petitioner's fifth amendment rights. The decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court Rule 242. This petition should be subject to dismissal. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

Pursuant to rule 242 of the South Carolina rules of the Appellant Court, a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicates the character of reasons which will be considered.

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the decision of the Court of Appeals;
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved;
- (5) Where a federal question included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

In reviewing each of these criteria the present case does not apply. The Court of Appeals properly affirmed the decision of the trial court, which should not be subject to review.

The Petitioner argued that the trial court erred in the denial of the motion for mistrial. The Court of Appeals was correct in affirming that decision. A mistrial should only be granted when absolutely necessary. In order to receive a mistrial the Petitioner had to show error and resulting prejudice. *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626 (2000). The statement made by Investigator Gainey was not even made to reveal that the Petitioner invoked his right to remain

silent, but to state why he did not attempt to question him. There exists no prejudice because it was never mentioned again by the investigator nor the Solicitor. There was no evidence presented in the record that his *Miranda* rights were ever read. Nothing raised revealed that it was possible the Petitioner was found guilty due to these statements. The decision of the Court of Appeals was correct so this petition should be denied.

STATEMENT OF FACTS

On October 27, 2015, the victim entered a local bar in Lake City, South Carolina called “The Office.” He went there initially to pick up his girlfriend who was a bartender. (R. p. 26 lines 20-21) Her truck was not working so he needed to go there to give her a ride home. (R. p. 26 lines 19-20) When the victim arrived, his girlfriend was not yet finished with her night. He decided to stay and shoot pool with some of the patrons as he waited for his girlfriend’s shift to end. (R. p. 27 lines 5-13) The Petitioner arrived around midnight, and proceeded to the pool tables. He asked the patrons if he can shoot pool with them. (R. p. 46 lines 5-9) He then recognized the victim and accused him of owing his father money for work he did to his truck. (R. p. 46 lines 19-21) The victim denied owing his father any money and proceeded to play pool. (R. p. 46 lines 23-24)

Later the victim approached the bar, he was struck in the face by the Petitioner. The victim fell on the floor from the force of the punch. (R. p. 47 lines 15-16) The Petitioner then got on top of the unconscious victim and landed numerous punches. (R. p. 94 lines 13-15) He was finally removed by the other patrons and forced out of the bar by the victim’s girlfriend. (R. p. 31 lines 8-11) One of the patrons gave the victim paper towels due to the heavy bleeding from his nose. The victim then informed the patrons that he was okay and for them to “give me a minute.” (R. p. 47 line 21 – p. 48 line 3) They initially thought he was fine, but told him to go to the

emergency room because they believed he had a broken nose. He then collapsed on the floor unresponsive, and at that point someone called 911. Law enforcement arrived and discovered that the victim was barely breathing. (R. p. 61 lines 4-6) When EMS arrived the victim was not breathing and did not have a pulse. They performed CPR and got him into the ambulance to transport to the hospital. (R. p. 118 lines 17-22) He was later pronounced dead at the hospital.

After this incident occurred the Petitioner went home and informed his wife that he believed that he was going to jail for assault. (R. p. 154 lines 1-3) The next day he found out by watching the news that the victim had died. (R. p. 154 line 10) He then decided to turn himself in to the police. The Petitioner was then arrested and charged with the offense of murder.

The Petitioner's case was called for trial on September 12, 2017. During trial numerous individuals testified as to what they saw during that event. There was also video introduced revealing that it was clear the Petitioner attacked the victim thereby causing his death. Dr. Nicholas Batalis forensic pathologist at the Medical University of South Carolina performed the autopsy on the victim. He testified that in his determination, the victim's cause of death was an extensive skull fracture that caused brain bleeding. (R. p. 104 lines 15-16)

At the conclusion of this trial the jury determined unanimously that the Petitioner committed the offense of murder. After the verdict the Petitioner appeared before the trial court who sentenced the Petitioner to a thirty year period of incarceration.

ARGUMENT

The Court of Appeals correctly affirmed the trial court's decision to deny the Petitioner's motion for mistrial. This petition for writ of certiorari should be subject to dismissal.

The Petitioner argues that the Court of Appeals erred in affirming the decision of the trial court in the denial of a mistrial. The Petitioner requested this Court should review the decision of

the Court of Appeals. The Petitioner is of the opinion that the Court of Appeals erred in affirming the decision of the trial court. The Respondent is of the position that there exists no error so this petition should be subject to dismissal.

The Court of Appeals decided to affirm the decision of the trial court due to the fact not enough evidence was presented to grant a mistrial. To grant a mistrial there must be proof that evidence will prejudice the defendant to the point that the case cannot go forward fairly so the defendant must be awarded a new trial. Any granting of a mistrial must be in the discretion of the trial court. Here the trial court came to the conclusion that the statement made by the investigator did not warrant a new trial. Unless the Petitioner could reveal that this decision was an abuse of discretion, the Court of Appeals should not reverse. This court should not grant this petition. The decision of the Court of Appeals should allow to remain.

Standard of Review

In criminal cases, appellate court sit to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). A mistrial is an extreme measure that should not be granted unless absolutely necessary. *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998). A decision as to whether to grant or deny a motion for mistrial will not be disturbed on appeal absent a prejudicial abuse of discretion. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see, *State v. Coaxum*, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014)(“To receive a new trial, the defendant must show a prejudicial abuse of discretion.”); *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998)(“A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice.”)(citations omitted) An abuse of discretion occurs where the trial court’s

conclusions lack evidentiary support or are controlled by an error of law. *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

Analysis

The Court of Appeals did not err in affirming the decision of the trial court. There was not sufficient evidence revealed to allow the granting of a mistrial.

The Petitioner claims that the trial court and the Court of Appeals erred in determining that he should not have been granted a mistrial from a statement made by investigator Gainey. Investigator Gainey testified that the Petitioner “lawyer up” which is why he was not interviewed. The Petitioner argued that to mention this was in violation of his Fifth Amendment rights. The Court of Appeals decided that the granting or refusal of a mistrial lies within the sound discretion of the trial court, which will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. McGee*, 2020 WL 468912 (2020)

During trial after this statement was mentioned by Investigator Gainey, the Petitioner made a motion for a mistrial. He argued that the mentioning of the fact he “lawyer up” was in violation of his Fifth Amendment right to self-incrimination which infringed on his right to remain silent. This motion was ultimately dismissed by the trial court. During its decision, the trial court mentioned the United State Supreme Court case of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In *Doyle*, the United States Supreme Court determined that to use for impeachment purposes the defendant’s silence after he was given *Miranda* warnings violated due process. In *Doyle*, the court decided:

The use for impeachment purposes of Petitioner’s silence at the time of arrest and after receiving *Miranda* warnings, violated the Due Process clause of the Fourteenth Amendment.

Doyle, 426 U.S. at 620, 96 S.Ct. at 2246.

The *Doyle* decision relied on the fact that if *Miranda* warnings were read ahead of time. The United States Supreme Court was of the opinion that you cannot tell a defendant that he has the right to remain silent and then use the fact that he exercised this silence against him. This impeachment would be in violation of his Fifth Amendment rights. The court later decided that it can only be considered a Fifth Amendment violation if *Miranda* was given prior to the exercise of the right to remain silent. In *State v. Bell*, the South Carolina Court of Appeals relied on a United States Supreme Court decision subsequent to *Doyle*. In *Brecht v. Abrahamson* the United States Supreme Court decided that the *Doyle* rule:

Rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial. The “implicit assurance” upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda*. Thus the Constitution does not prohibit the use for impeachment purposes of the defendant’s silence prior to arrest, or after arrest if no *Miranda* warnings are given. Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.

State v. Bell, 347 S.C. 267, 270-271, 554 S.E.2d 435, 437 (2001), quoting, *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S.Ct. 1710 (1993).

Nothing in the record revealed the Petitioner was read his *Miranda* warnings prior to making the statement that he wanted to “lawyer up.” The fact that there was nothing in the record that revealed that he was read these warnings prior to making this statement, the mentioning of this statement cannot be considered a violation of his Constitutional rights. *Doyle*, was applicable only in situations in which government has induced, via *Miranda* warnings, the Defendant’s belief that his exercise of a constitutional right would not be used against him. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006), quoting, *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309 (1982).

The rules reveal that “The appellate court will not consider any fact which does not appear in the record on appeal.” Rule 210(h) SCACR. The only mentioning of this statement was by investigator Gainey. There is no other mentioning of this statement nor was it ever mentioned by anyone that he made this statement after being read *Miranda*. In reviewing the entire record the Court of Appeals realized that this mentioning did not warrant enough prejudice to require the granting of a mistrial.

The Petitioner argued that the trial court erred in the failure to not grant a mistrial. The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015). When the trial court considers a mistrial they must look at the entire record and if the statement made was prejudicial. 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. *State v. Howard*, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988) This statement was only given once during the entire trial and it was only given by the investigator to explain why he did not go back to headquarters to question the Petitioner. This statement was also not about the Petitioner invoking his Fifth Amendment right to remain silent. It was never repeated nor was used by the prosecution in their case in chief. Other testimony and evidence was presented that proved the Petitioner committed this crime beyond a reasonable doubt. This statement was not a factor in the determination of the Petitioner’s innocence or guilt, so it could not be determined as prejudicial. 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. *Edmond v. State*, 341 S.C. 340, 348, 534 S.E.2d 682, 687 (2000).

The Court of Appeals was correct in their decision in affirming the decision of the trial court. There was no evidence placed in the record revealing that the mentioning of the statement that the Petitioner “lawyered up” was in any way prejudicial, nor was it used by the prosecution in their case in chief. There is also no evidence in the record revealing that the Petitioner was read *Miranda* prior to making this statement, which is the only way to make it a violation of his Fifth Amendment rights. The Court of Appeals ruled that the trial court did not err in denying the motion for mistrial. The Appellant court does not sit as a trial court to receive evidence on disputed issues of fact; their function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court. *Sanders v. Sally*, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (1984). This decision should not be disturbed, this petition for writ of certiorari should be subject to dismissal.

CONCLUSION

Based on the foregoing reasons, the Respondent submits the Petitioner has failed to reveal that the question presented warrants certiorari review. This Court should deny the petition for writ of certiorari and let stand the decision of the Court of Appeals affirming the decision of the trial court.

Respectfully submitted,

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