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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from York County
Honorable Jocelyn J. Newman, Circuit Court Judge

Opinion No. 2022-UP-228 (S.C. Ct. App. Filed May 25, 2022)

Lower Court Case No. 2018-GS-46-03992

THE STATE,

RESPONDENT,

V.

RICKEY DEAN TATE,

PETITIONER

APPELLATE CASE NO. 2019-001856

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 June 23, 2022.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that the trial court did not abuse its discretion when it allowed the state to highlight to the jury that petitioner was on supervised release when he was arrested for these charges?

STATEMENT OF THE CASE

On February 7, 2019, a York County grand jury indicted petitioner for possession with the intent to distribute (PWID) cocaine base, PWID cocaine base within the proximity of a school, PWID heroin, and PWID heroin within the proximity of a school. R. 387. Petitioner was tried on October 21, 2019, before the Honorable Jocelyn J. Newman and a jury. Montrio Belton and Jim Morton represented petitioner, and Marina Hamilton and Amber Holt represented the state. R. 1.

On October 24, 2019, the jury found petitioner not guilty of PWID cocaine base within the proximity of a school, PWID heroin, and PWID heroin within the proximity of a school but guilty of PWID cocaine base. R. 359, ll. 3-14. Judge Newman sentenced petitioner to life without the possibility of parole for PWID cocaine base. R. 382, ll. 5-7.

The Court of Appeals affirmed petitioner's conviction in *State v. Tate*, 2022-UP-228 (S.C. Ct. App. filed May 25, 2022). Petitioner sought rehearing which was denied on June 23, 2022.

This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in finding the trial court did not abuse its discretion when it allowed the state to highlight to the jury that petitioner was on supervised release when he was arrested for these charges.

Relevant facts

On May 16, 2018, officers with the York County Drug Enforcement Unit went to a known "drug house" for the purpose of executing a search warrant. R. 89, ll. 12-17. The search was captured on Officer Christopher Rowe's body worn camera. R. 98, l. 11-99, l. 1. Inside the home were residents Tyrequs Tolbert, Brandi Eades, and Herman Leach, as well as five other individuals including petitioner.

When Rowe entered the home, he saw petitioner turn and go towards the back of the house. Rowe followed and discovered petitioner, Eades, Tolbert, and another woman in the back bedroom of the home and proceeded to handcuff all of them. At trial, Rowe testified that when he entered the bedroom, petitioner was turned away and appeared to be trying to throw something out of the window of the bedroom. When petitioner turned towards Rowe a bag of marijuana fell from one of his hands, and he immediately told officers the marijuana belonged to him. R. 93, l. 13-95, l. 16.

After searching, Rowe found no drug evidence outside of the window. R. 97, l. 24-98, l. 7. Rowe testified that later, after he left the room, another officer, Matthew Earls, found a clear bag on the floor near the window containing cocaine base. Although he did not notice the drugs when he entered the room, Rowe claimed that upon review of his body camera video he saw the bag of cocaine base that he believed petitioner was trying to throw out of the window. R. 117, ll. 11-17. In addition, a bag of what appeared to be oxycodone was found in the hallway petitioner

had been seen going down. R. 111, ll. 3-5. The bag of suspected oxycodone was analyzed and found to be heroin. R. 119, ll. 8-9.

That day petitioner was arrested and charged with possession of marijuana. Petitioner was later charged with PWID cocaine base, PWID cocaine base within proximity of a school, PWID heroin, and PWID heroin with proximity of a school. Resident of the home Tyrequs Tolbert was charged with possession of cocaine base for a small amount of cocaine base that was found with a pipe on a dresser. None of the other six individuals were charged in relation to the drugs found that day. R. 204, l. 15-205, l. 15.

During pre-trial motions, defense counsel asked how much of the body worn camera video, state's exhibit 3, the state intended to show at trial. R. 53, l. 15-55, l. 2. The state responded it only intended to introduce the beginning of the video as evidence. R. 55, ll. 3-7. Defense counsel also requested the state address any other prior bad act evidence that it intended to introduce at trial. The solicitor responded the state did not intend to introduce any evidence of prior bad acts unless petitioner testified. R. 55, ll. 8-22.

During Rowe's testimony, state's exhibit 3, video from his body worn camera, was admitted. R. 100, ll. 2-6. The video was played for the jury so while Rowe narrated what he saw petitioner doing when Rowe entered the bedroom. Several times the video was paused so that Rowe could point out what, he alleged, was the later discovered bag of cocaine base. R. 101-03.

On cross-examination, defense counsel replayed state's exhibit 3, video from Rowe's body worn camera. Rowe was questioned extensively about what exactly he saw when he entered the bedroom where petitioner and the other individuals were located. Rowe admitted he did not see the bag of cocaine base when he entered the bedroom. R. 175, ll. 2-19. Defense counsel played a later portion of the video for the jury that showed Officer Earls telling Rowe that he found a bag

of cocaine base underneath a dresser in the bedroom. R. 173, ll. 7-16.

On re-direct, the solicitor stated, "I do want to highlight one other thing that was not highlighted." The solicitor then played another portion of state's exhibit 3, video from Rowe's body worn camera, and asked Rowe what he heard on the video. Over defense counsel's objection, Rowe replied that it was dispatch radioing back that petitioner "was on supervised release status." R. 211, ll. 2-25.

Later, outside the presence of the jury, defense counsel argued that Rowe's testimony was objectionable because it needlessly referenced petitioner's character and that the prejudicial effect of this testimony far outweighed any probative value the testimony might have. Without any response from the state, the court found defense counsel waived any argument regarding the objectionable nature of this portion of the video because the defense introduced this later portion of the video during its cross-examination of Rowe. The court also stated the objection was previously overruled because what the jury saw was an accurate depiction of what occurred on the video, and the solicitor was instructed not to ask the witness to editorialize regarding what supervised release was or ask any questions regarding supervised release. R. 219, l. 7-220, l. 1.

The state called Brandi Eades, a resident of the home, as a witness. She claimed that while she and Tyrequs Tolbert had previously used and sold cocaine base, the drugs found in her home that day belonged to petitioner. R. 238, ll. 15-25; 240, ll. 15-23; 255, ll. 14-20

Discussion

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; *State v. Schimidt,* 288 S.C. 301, 342 S.E.2d 401 (1986); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). All relevant evidence is admissible,

unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

The trial court erred in allowing the state to "highlight" the fact that petitioner was on supervised release when he was arrested for these charges. At trial, petitioner asserted his constitutional right to remain silent and did not introduce his character into evidence. No argument was presented by the state regarding the probative value of petitioner's supervised release status. Moreover, the trial court failed to conduct the required analysis for admitting evidence of petitioner's prior bad acts. The trial court simply concluded defense counsel had waived any argument about this portion of the body camera video because the defense had played additional portions of the body camera video during its cross-examination of Rowe. However, defense counsel was not objecting to the body camera video but to Rowe's testimony, which improperly emphasized to the jury what could be heard on the video.

The testimony of Rowe, specifically in reference to petitioner being on supervised release status was objectionable because it was an improper comment on petitioner's character. *See German v. State,* 325 S.C. 25, 27,478 S.E.2d 687, 688 (1996) (Holding that an officer's testimony regarding tips that petitioner was distributing or selling drugs and description he had received of petitioner were objectionable as improper comments on petitioner's character). Evidence that

petitioner was previously convicted of a crime and was under supervised released when he was arrested on these charges was a violation of the evidentiary rule against presenting evidence of other crimes, wrongs, or acts. *See* Rule 404(b), SCRE.

Moreover, Rowe's testimony was introduced, by the state, solely to demonstrate petitioner's poor character. Evidence that petitioner was on supervised release had no probative value in this case and instead was used by the state to prejudice petitioner. Rowe's testimony improperly signaled to the jury that it should consider that petitioner had already been convicted of a crime and had only recently been released, instead of focusing on the state's lack of evidence tying petitioner to the drugs found in this case. The jury, according to their verdict, declined to believe the other drugs found at the house belonged to petitioner. The state slipping in the fact that petitioner had previously been convicted right at the end of Rowe's testimony was extremely prejudicial to petitioner.

The error was not harmless where there was little evidence of petitioner's guilt. The case against petitioner hinged on whether the jury believed he had attempted to throw the drugs out of the window when the police arrived to search the home. Petitioner was not a resident of this "known drug house" and was simply in the wrong place at the wrong time. Brandi Eades readily admitted she had used and sold cocaine base out of her home. The residents of the home were the more probable culprits.

In its opinion affirming petitioner's conviction and sentence, the Court of Appeals found that "[b]ecause [petitioner] opened the door by introducing the entire body camera footage to the jury, the trial court did not abuse its discretion by allowing limited testimony through repetition of a statement disclosed in the footage that [petitioner] was on supervised release at the time of his arrest." *State v. Tate*, No. 2022-UP-228 (S.C. Ct. App. filed May 25, 2022). The court cited *State*

v. Heyward, 426 S.C. 630, 828 S.E.2d 592 (2019), in support of its finding petitioner opened the door testimony that he was on supervised release when he was arrested.

In *Heyward*, this Court held that defense counsel did not open the door to testimony about defendant's alleged prior physical abuse of a cooperating co-defendant, and that trial court's error in allowing the state to use that doctrine to allow propensity evidence was not harmless. 426 S.C. 630, 828 S.E.2d 592 (2019). In that case the Court found testimony about defendant's alleged prior physical abuse of cooperating co-defendant was not proportional or confined to the doors counsel opened through his cross examination of co-defendant's mother regarding her suicide attempts, mental health, or sexual abuse. *Id.* at 637-38, 828 S.E.2d at 595.

Here, as in *Heyward*, the state used the "open-door doctrine" to introduce propensity evidence. Defense counsel likely opened the door to the later portion of the video, but the door was not open to allow the state to use Rowe's testimony to highlight to the jury that petitioner was on supervised release when he was arrested for these charges. Defense counsel's objection at trial was to Rowe's testimony and not to the video. Rowe's testimony improperly emphasized to the jury what could be heard on the video. Rowe's testimony was not "proportional or confined" to the door defense counsel opened during cross-examination. *See Heyward*, at 637, 828 S.E.2d at 595.

In *State v. Young*, 378 S.C. 101, 661 S.E.2d 387 (2008), this Court held that defendant's testimony did not open the door to evidence of prior convictions for criminal domestic violence and criminal sexual conduct for impeachment purposes. Ultimately, the error was found to be harmless. In that case, the defendant testified opening himself up to impeachment evidence. While the Court found he did not put his character in evidence he certainly came very close when he testified that he "hated to see a female cry." Here, petitioner asserted his constitutional right to

remain silent and did not introduce his character into evidence, which makes this error more egregious.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully Submitted,

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of July, 2022.