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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICKEY DEAN TATE,

APPELLANT

APPELLATE CASE NO. 2019-001856

Appeal from York County

Honorable Jocelyn J. Newman, Circuit Court Judge

Opinion No. 2022-UP-228

PETITION FOR REHEARING

On May 25, 2022, this Court affirmed appellant's conviction for possession with intent to distribute (PWID) cocaine base and sentence of life imprisonment without parole where appellant argued the trial court abused its discretion by admitting testimony that he was on supervised release when he was arrested for the PWID charge. Pursuant to Rule 221(a), SCACR, appellant respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

In its opinion affirming appellant's conviction and sentence, this Court found that "[b]ecause [appellant] 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 [appellant] 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). In its opinion the Court cited *State v. Heyward*, 426 S.C. 630, 828 S.E.2d 592 (2019), in support of its finding appellant opened the door testimony that he was on supervised release when he was arrested.

In *Heyward*, our Supreme Court held that defense counsel did not open the door to testimony about defendant's alleged prior physical abuse of a cooperating codefendant, 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 codefendant was not proportional or confined to the doors counsel opened through his cross examination of codefendant'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. Counsel may have opened to the later portion of the video, but the door was not open to allow the state to use Officer Christopher Rowe's testimony to highlight to the jury that appellant 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.

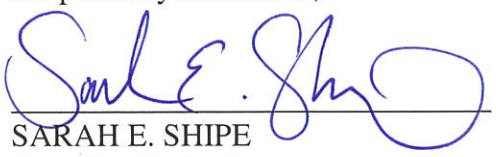
In *State v. Young*, 378 S.C. 101, 661 S.E.2d 387 (2008), our Supreme Court held that defendant's testimony did not open the door to evidence of prior convictions for criminal domestic violence and criminal sexual conduct for impeachment purposes. The error was ultimately found to be harmless. In that 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, appellant asserted his constitutional right to remain silent and did not introduce his character into evidence and it makes this error more egregious.

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

The error was not harmless. Evidence of appellant's guilt was not overwhelming. The case against appellant hinged on whether the jury believed appellant attempted to discard drugs out of the window when the police arrived to search the home. Appellant was not a resident of this "known drug house," and was simply in the wrong place at the wrong time. State's witness, Brandi Eades, readily admitted she had used and sold cocaine base out of that home. The residents of the home were the more probable culprits.

Respectfully Submitted,



SARAH E. SHIPE
Appellate Defender

This 9th day of June, 2022.

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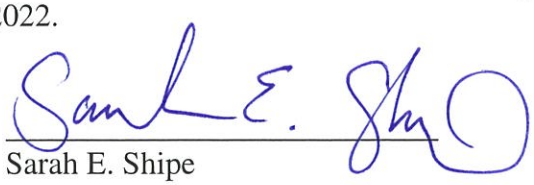
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Rickey Dean Tate, #261418, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of June, 2022.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

From: Stock, Chris
To: Josh Edwards; Leigh Ann Stone
Cc: Shipe, Sarah
Subject: Tate, Rickey - Petition for Rehearing - 2019-001856
Date: Thursday, June 9, 2022 2:21:00 PM
Attachments: Tate, Rickey - Petition for Rehearing - 2019-001856 - AG Cover Letter.pdf
Tate, Rickey - Petition for Rehearing - 2019-001856.pdf

Mr. Edwards,

Please find attached for service the petition for rehearing for Rickey Tate's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330