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Jul 18 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Mutekis Jamar Williams, Appellant

Appellate Case № 2018-001147

Appeal from Charleston County
R. Markley Dennis, Jr. Circuit Judge

Unpublished Opinion № 2022-UP-114
Submitted November 1, 2021 - Filed March 16, 2022
Withdrawn, Substituted, and Refiled June 8, 2022

Return to Petition for Rehearing

In the Second Petition for Rehearing, the State continues to allege that counsel opened the door by asking the simple question of the drugs not being found on the person of Mutekis Jamar Williams. The position of the state is not correct.

The State against has failed to explain how a simple "yes" or "no" questions could open the door to the opinion of the officer as to the guilt or innocence of Mr. Williams. Under the state's theory, if the officer had said he did not contact the sister of Mr. Williams, "because I believe the defendant to be guilty," the defendant could not complain as he had "opened the door." Obviously such a statement is not proper under virtually any circumstances. Under the

facts of this case, the statement of the officer is the equivalent of saying the same thing.

A review of the cases cited by the state also does not support proposition that Mr. Williams opened the door. None of the cases cited involved a comment made as to the ultimate issue. Most involved cases of the defendant opening the door to as to character of the defendant. *See, State v. Young*, 364 S.C. 476, 488, 613 S.E.2d 386, 392 (Ct. App. 2005), aff'd as modified, 378 S.C. 101, 661 S.E.2d 387 (2008) and case cited therein. One case not involving character simply involved the use to which a product could be made. "This question opened the door for Powell's response that it was used inside the aircraft to set bales of marijuana on." *State v. Sullivan*, 277 S.C. 35, 45, 282 S.E.2d 838, 844 (1981). In *State v. Beam*, 336 S.C. 45, 48, 518 S.E.2d 297, 299 (Ct. App. 1999) the court held allowing the expert to perform a switch point test in the courtroom as proper. The Court stated, "During cross-examination, Beam's counsel asked Beasley about a switch point test." *Id.* The door was obviously opened in *Beam*,

The state argues, "Deputy Brown then provided a logical, contextually-appropriate, and responsive reply to that follow-up query by indicating he believed the cocaine was in Williams's constructive possession." As response by any officer under virtually any circumstance as to the ultimate issue is neither "contextually-appropriate" nor "responsive." The state apparently would claim officer Brown saying "I believed Mr. Williams to be guilty" would, under the circumstances, be "contextually-appropriate, and responsive."

In a footnote the state appears to attempt to justify the response by pointing out that the question by defense counsel simply was stating a well established fact of the case. All experienced trial lawyer will always repeat a well established fact that tends to prove their client not guilty. That is their obligation.

Nor is *State v. White,* 361 S.C. 407, 605 S.E.2d 540 (2004) helpful to the state. In *White*, defense counsel obviously opened the door to the opinion of the expert when the expert was asked on cross-examination as to whether the expert believed all the alleged victims. Apparently on re-direct the expert was asked if they believed the victim in the case. Those facts as to opening the door are very different from these.

Contrary to the assertion of the state in its petition for re-hearing, Officer Brown was not testifying as a lay witness under Rule 701. Whether or not drugs are in the constructive possession of a person is never the subject of lay opinion testimony. First, such a statement is not helpful to the jury to understand the testimony of the officer. Thus, subsection b would exclude the testimony. Secondly, the determination of Mr. Williams being in the constructive possession of the drugs is based upon the officer's training and experience and is, therefore, an expert opinion under Rule 702. Having not been qualified as an expert, the testimony was not proper. If the state's position is correct, every drug enforcement officer would testify that they believed the defendant was in constructive possession of the drugs as part of their direct testimony. No court would sustain that position. "In sum, defendant suffered undue prejudice from the evidence in the form of expert testimony opining, in effect, that he constructively possessed the drugs found in the vehicle he was driving. This ultimate-issue testimony usurped the jury's singular role in the determination of defendant's guilt and irredeemably tainted the remaining trial proofs." *State v. Reeds*, 197 N.J. 280, 300, 962 A.2d 1087, 1099 (2009)

The state continues to argue that the answer by Officer Brown was in response to the question asked. What such a position would do is to open the door in every drug possession trial to a comment of the officer that the defendant was in constructive possession. Every time a

defense counsel asked the proper question, "The drugs were not found on the defendant, were they?" the officer could response by saying, "They were in the defendant's constructive possession." No such practice should be sanctioned by this or any other court.

In determining if the statement is prejudicial to Mr. Williams, this court should be guided by this view of our supreme court noted in Mr. Williams petition for rehearing, "Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). This court nor any other court, could say beyond a reasonable doubt the improper statement of Officer Brown did not contribute to the verdict. When the South Carolina Supreme Court in *Ellis* stated that a police officers statement on the ultimate issue is prejudicial, this Court should heed their advice.

CONCLUSION

For the foregoing reasons and for the reason in the Petition for Rehearing, this Court should deny the Petition for Rehearing requested by the state, grant the Petition for Rehearing of Mutekis Jamar Williams and reverse the conviction and remand the case for a new trial.

July 17, 2022

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Mutekis Jamar Williams ..... **Appellant.**

CERTIFICATE OF SERVICE

I, Sandy Traynham hereby Certify that I am the Secretary for C. Rauch Wise, attorney for the Appellant in the above entitled case. That on July 18, 2022, I did send via US Mail and e-mail a copy of the Return to Petition for Rehearing in the above case addressed to Mark Reynolds Farthing at mfarthing@scag.gov, Office of the Attorney General, PO Box 11549, Columbia SC 29211

July 18, 2022

Sandy Traynham
Secretary

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July 18, 2022

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State vs. Mutekis Jamar Williams, Appellate Case No. 2018-001147

Dear Ms. Kitchings:

I am enclosing herewith for filing the Return to Petition for Rehearing together with the Certificate of Service regarding the above matter. Your help is greatly appreciated

With kindest regards, I am

Very truly yours,

C Rauch Wise

C. Rauch Wise

CRW/slt
Enclosure

cc Mark R. Farthing