THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Opinion No. 2021-UP-278 (S.C. Ct. App. Filed July 21, 2021
Court of Appeals Appellate Case No.: 2017-002011

State of South Carolina, Respondent,

v.

Jason Franklin Carver, Appellant.

APPELLATE CASE NO. 2021-001505

REPLY BRIEF OF APPELLANT

Respectfully submitted by:
s/Donald L. Smith
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Appellant makes the instant submission in response to Respondents' Brief. Appellant adopts and incorporates by reference the Statement of the Case and Facts presented in his Brief and takes exception to Respondent's Statement of Case as follows:

With regard to the gun, the State failed to account for Curry's inconsistent statements on whether Appellant had a gun with him when he went to Cameron's house. Initially, Curry mentioned Appellant had his own gun (R., p. 547, 15.25 & p. 548, 1.7), but he later recanted this by denying his knowledge of the same. (R., p. 549, 2.10).

The pertinent citation in the Record, with which the State draws its conclusion that Appellant admitted having a gun is as follows:

> 02. A. Ma'am, I had the gun on me at that
> 03. time. And I did not have no phone.

(R., p. 691, 2.3).

What the State conveniently omitted is the discussion preceding this testimony by the Appellant. On page 690 of the Record, Appellant detailed how he was afraid of Curry because the latter had just recently fired a gun (R., p. 690, 6-9), that he did not actually see Curry shoot the gun as he (Carver) tried to escape (R., p. 690, 13.17) and that Curry pointed the gun at him (R., p. 690, 18.24). I had a gun on me meant he had a gun pointed at him.

Furthermore, Gambrell confirmed Appellant had no gun on the day of the shooting. (R., p. 280). Gambrell stated he only saw Appellant with a gun in 2015, a year prior to the shooting. *Id.* At that time, Appellant was showing his brother's gun to Gambrell. *Id.*

More importantly, in the second trial in which he was the only witness, Curry testified that upon returning to Gambrell's house from Cameron's place, he and Appellant went in to return the guns to Gambrell. (R. p. 810, 16.25). This was clearly an attempt to incorporate Gambrell in the shooting by mentioning the return of *his* guns. Curry failed to see the absurdity in his claim. If

it were true Appellant brought his own gun, then there was no need to go back to Gambrell to return his own gun. Curry also offered he called Gambrell on the way home from Cameron's home in the second trial. In the first trial, it was a silent ride.

With regards to the fired shot, the State claims "Curry then fired several shots with one round hitting the house, and two others hitting Cameron-one in the neck and one in the chest killing him". (Respondent's Brief, p. 5). Nothing in the cited Record indicates Curry fired "several" shots. (R., p. 453-456). The cited pages were that of Dr. Brett Woodard, the medical examiner who explained the trajectory of the bullets in the deceased's body, the cause of death (gunshot wound and resultant bleeding; and the length of time it would have taken for Cameron to bleed to death. (R., p. 454-456). The medical examiner could not have been expected to testify on how many shots were fired as it would have been hearsay.

By alleging Curry fired several shots, the State attempts to present a scenario of a ruthless, determined assassin, instead of a man who arguably used unnecessary force in defending himself. This was made to strengthen the State's theory of accomplice liability.

Appellant believes these deviations from the facts of the case are not merely incidental or a product of oversight, but proof of the conscious effort to draw Appellant as a willing and knowing participant in the crime of murder.

Appellant responds to Respondents' allegations as follows:

I.

APPELLANT HAS PROPERLY RAISED THE ISSUE OF RESPONDENT'S FAILURE TO DISCLOSE THE TERMS OF THE PLEA BARGAINING.

Appellant maintains he has properly raised the issue of Respondents' failure to disclose the terms of the plea bargaining in the lower court. In his Amended Motion for New Trial, Appellant avers:

> First, according to the prosecution's star witness, Curry met with the prosecution team, three times. Marzolf was in at least one of these meetings. The prosecution provided no recording, or failed to make one, of the time they visited Curry to speak to him on his manslaughter deal. Appellant's counsel received two video interviews, but the Solicitor withheld (or conveniently did not make) the third. Appellant was not shown the video, or any other evidence, of what exactly the prosecution offered Curry.

(R. p. 310).

This issue is also a part of Appellant's arguments against the prosecutor's failure to provide discovery in a timely manner in his Motion for New Trial, and thereafter, was raised as part of the arguments against prosecutorial misconduct in Appellant's Amended Motion for New Trial. (R., p. 16 & R., p. 310).

Appellant raised this issue in the Appeal, as part of his arguments for the Court of Appeals error in denying his Motion for New Trial. (App., p. 97 & 103). Thus, while it was not specifically spelled out as an independent issue, the failure to disclose the terms of the plea of Respondents' star witness was discussed and argued upon by Appellant in the lower court, and in Appellant's Brief. This issue is therefore properly preserved and raised for review.

Respondent avers Appellant did not raise the issue during trial and claims, not only did he not know the terms of the plea, but he made use of the same during his cross-examination of Curry. Appellant used innuendo and logic to attempt to illustrate to the jury Curry had been rewarded for his willingness to help prosecute him.

The prosecution failed to inform Appellant and/or his counsel of the meetings that transpired between the team and Curry. Appellant could not have known the terms of the plea during the trial because he was not provided nor shown all the recordings of the prosecution and Marzolf's (3) visits to Curry. Aside for the fact that Curry entered a plea deal and the deferment of his sentence, Appellant was not provided with any information, written or otherwise, regarding the

plea deal and its terms prior to or during the trial. In fact, Curry's plea hearing was conducted during Appellant's trial.

Respondent also contends Appellant had not offered any evidence indicating any agreement for testimony or promise of a certain sentence for Curry. This would be illogical since there is no reason for Curry to divulge his agreement with the prosecutor when he was focused on reducing his charges or, more importantly, his ultimate sentence. However, his Sworn Affidavit was his first act where he had freedom to say what he wanted without being weighed down by any pressure or influence from any entity. His Sworn Affidavit expressly stated:

> After Jason Carver's conviction, Greenville dropped drug charges, and I was moved to Anderson. Marzolf and Chelsea said they would suggest voluntary manslaughter if I pled guilty. **They also said it would look better if I testified against Carver.** For Gambrell, I was offered the fact that Chelsea would have no problem suggesting 15 years provided Gambrell was convicted. However, neither of them spoke up when sentenced to 28 years.

(R., p. 278), Emphasis provided.

Taking into consideration Curry's situation at the time, his sworn statement could not be interpreted any way other than the prosecution urging and/or influencing him to testify in the way that would be detrimental to Appellant.

While he had the chance to cross-examine Curry about his plea, Appellant could not have exercised proper and effective cross-examination with the limited information he had about the plea agreement. This is made more evident more by Curry and the prosecution withholding information such as the extension of Curry's deferred sentence for a year to allow him to testify against Gambrell.

It has long been established that cross-examination of the witnesses regarding inducements to testify does not substitute for adequate disclosure. *See Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir.1989); *Sutton*,542 F.2d at 1243; *Boone*, 541 F.2d at 451 (noting that "no matter

how good defense counsel's argument may have been, it was apparent to the jury that it rested upon conjecture — a conjecture which the prosecutor disputed"); *Commonwealth v. Collins,* 386 Mass. 1, 434 N.E.2d 964, 971 (1982), as cited in Wilson v. State, 363 Md 333 (MD2001), 768 A.2d 675 (Mar. 9, 2001).

Wilson citing the case of Campbell v. Reed, states:

> The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment. . . [A] tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try to make his testimony pleasing to the prosecutor. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor renegotiated a more favorable plea agreement with [the witness] after [the defendant] was convicted. *Id*. at 7-8 (internal citations omitted). *See Boone v.* 351 *Paderick,* 541 F.2d 447, 451 (4th Cir.1976). *351.

Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979), cited in *Wilson, supra*.

Respondent insists Appellant failed to establish "improper suppression" of evidence. Appellant argues the totality of Respondent withholding information about the plea deal, delaying the submission of discovery materials, presenting an unreliable star witness who changes his testimony to fit its theory, and concealing the extension of Curry's deferred sentencing, evinced a deliberate attempt to deny Appellant his due process.

In the case of *Giglio v. U.S.*, the U.S. Supreme Court declared "when the government depends almost entirely on the testimony of a key witness to establish its prima facie case and the witness' credibility, therefore it is an important issue, 'evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility." Giglio v. U.S., 405 U.S. at 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104.

II.

THE COURT OF APPEALS ERRED IN NOT FINDING ABUSE OF DISCRETION IN THE TRIAL JUDGE'S DENIAL OF APPELLANT'S MOTION FOR A NEW TRIAL.

Respondent emphasized the standard of review for denial of the Motion for New Trial is abuse of discretion, and "(W)here there is competent evidence to sustain a jury's verdict, the trial judge may not substitute his judgment for that of the jury and overturn that verdict." State v. Miller, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985).

However, Appellant posits the trial judge abused his discretion in denying the Motion for New Trial because the evidence presented during the trial was incompetent, and knowing the same was questionable, the trial judge upheld the jury's decision.

Appellant maintains he has satisfied the requirements for the granting of new trial on this case based on after-discovered evidence and due process violation.

The Non-Disclosed Neighbor

The information about Cameron's neighbor, overhearing a discussion between Cameron and an unidentified person wherein the word "dirt bike" was mentioned, is material and exculpatory. First, because it proves lack of motive of herein Appellant. This information has the effect of corroborating Appellant's testimony that he only knew of the transaction involving the bike, negating Respondent's theory he drove to Cameron's with intent to steal, kidnap or rob the latter.

Second, the neighbor's identity was not provided to Appellant. Neither was he presented as a witness during Appellant's trial. His existence was only mentioned during Gambrell's trial. (R., p. 804, 20.25 & p. 805, 1.21). This information shows the State's tendency to conceal evidence.

Gambrell's Affidavit

Gambrell's Sworn Affidavit is material and not merely cumulative or impeaching.

Gambrell categorically denying Curry's claim that Appellant brought his own gun, was designed not only to impeach Curry's previous testimony, but to show Curry manufactured his testimony. Thus, it is not just the credibility of Curry that was placed in issue but the truth/veracity of the facts of the record as presented by Respondent.

Curry's additional testimonies

During his testimony in Gambrell's trial, Curry added information that he did not disclose in Appellant's trial (i.e. Curry calling Gambrell to 'report' about the shooting). Curry's testimony was offered not as an exercise of a truth-seeking function, but to be the mouthpiece of the State, to sink the defendant, he was supposed to testify against, and an attempt to make his testimony pleasing to the prosecutor. This proves Appellant's belief Curry's testimony was contingent on the terms of his plea deal, or what he perceived to be his obligation in the arrangement with the Respondents.

Curry's Affidavit

Curry's Affidavit is material because it revealed what Curry did and the reason behind it. Curry disclosed about his drug charges, how the prosecution suggested it would look better if he testified against Appellant, and how after the trial, Curry's drug charges were dropped. Curry also disclosed how the prosecution hinted at giving him a lesser sentence provided Gambrell was found guilty. (R., p. 397). All of these prove Curry provided testimonies that ensured his co-defendants, Appellant and Gambrell, were convicted and sentenced. This evidence showed Curry would be willing to say anything to aid in his sentence reduction.

Evidence shows the trial court, the jury as well as Appellant were also misled as to his sentencing. It was clear during Curry's plea bargain hearing that his sentence was to be addressed after his participation in Appellant's trial. (R., p. 791, 12.17). This was not the case. The idea

Curry had not been sentenced for his charge can only mean the outstanding sentence was the manner in which to mold his testimony for Gambrell's trial, as it had in Appellant's trial. The State did not sentence Curry so he would be compelled to testify in favor of Respondent. Curry's Affidavit stated the prosecution team let him plead to Voluntary Manslaughter despite shooting Cameron for no reason.

This evidence is sufficient to change the result if a new trial is conducted. The jury did not have all of the evidence related to Appellant's case. Had the jury been made aware Curry, the shooter, received a reduction in his sentence for the murder and the dismissal of separate drug charges, some, if not all, of the jurors would have a different perspective of his testimony, while some might treat his testimony questionable or useless. The jury did not know he testified at two trials, modifying his testimony for that defendant's prosecution; and receiving the dismissal of unrelated felony drug charges (from another jurisdiction), along with the reduction of a murder charge and the dismissal of the charge of possession of a gun in the commission of a violent crime.

Finally, Appellant believes this Court should take note of jurisprudence that applied a strict standard of materiality for perjured testimony. In the case of United States v. Augurs, the Court declared a reversal of a conviction is warranted if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". United States v. Augurs, 427 U.S. 97, at 103, 96 S.Ct. at 2397, 49 L.E.2d 342. In Jimenez *v.* State, the Supreme Court applied the strict standard of materiality, where the witness denied having received benefits from the State in exchange for his testimony on the stand when in fact, he was a police informant and his criminal charges were dismissed by the police for his testimony. Jimenez v. State, 918 P.2d 687 (Nev. 1996) as cited in ***Wilson, supra.*** The Supreme Court adjudged witness' testimony as "at best inaccurate and at worst perjury" and set aside the conviction of therein Appellant.

Jimenez, at 694.

CONCLUSION

For these reasons, as well as those addressed in his Brief to this Court, Appellant respectfully prays for a reversal of the decision of the Court of Appeals; and set aside the trial court's ruling for violation of Appellant's due process, and/or remand the case for new trial. Allowing a man to be sentenced to thirty (30) years when it is undeniable his co-defendant Curry worked in conjunction with the State to prevent a fair trial would be catastrophic.

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