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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
General Sessions Court
Robert J. Bonds, Circuit Court Judge

Appellate Court Case No.: 2024-000432

State of South Carolina, Respondent

v.

Antwan McMillan, Appellant

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of the Facts 3

Standard of Review 5

Argument

 I THE PROSECUTION VIOLATED APPELLANT’S DUE PROCESS
 RIGHTS BY FAILING TO CORRECT FALSE TESTIMONY CONCERNING
 A PREVIOUSLY UNDISCLOSED “WINK WINK” PLEA DEAL BETWEEN
 THE STATE AND THE SOLE COOPERATING CO-DEFENDANT. 6

Conclusion 12

TABLE OF AUTHORITIES

Cases

<i>Brady v Maryland</i> , 373 US 83 (1963)	6, 11
<i>Gigolo v. United States</i> , 405 US 150 (1972)	10
<i>Mooney v. Holohan</i> , 294 US 103 (1935)	7
<i>Napue v Illinois</i> , 360 US 264 (1959)	6, 8, 11
<i>Riddle v. Ozmint</i> , 631 SE2d 70 (SC 2006)	8, 12
<i>State v Adams</i> , 763 SE2d 341 (SC 2014).....	5
<i>State v. Baccus</i> , 625 S.E.2d 216 (SC 2006)	5
<i>State v. Brewer</i> , 882 S.E.2d 156 (SC 2022)	5
<i>State v. Brown</i> , 894 S.E.2d 525, 529 (SC 2023), reh'g denied (Dec. 12, 2023).....	9
<i>State v Dean</i> , 828 SE2d 243 (SC 2019)	5 - 9
<i>State v. English</i> , 902 S.E.2d 385 (SC 2024)	5
<i>State v. Frasier</i> , 879 S.E.2d 762 (2022)	5
<i>State v Harris</i> , 706 SE2d 526 (SC Ct App 2011)	7
<i>State v King</i> , 810 SE2d 18 (SC 2017)	5
<i>State v. Miller</i> , 893 S.E.2d 306 (2023)	5
<i>State v Prince</i> , 447 SE2d 177 (SC 1993)	7, 9
<i>State v Spann</i> , 513 SE2d 98 (SC 1999)	7
<i>United States v. Mathis</i> , 932 F.3d 242 (4th Cir. 2019)	5

Court Rules

South Carolina Rules of Criminal Procedure Rule 29(b)	4
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STATEMENT OF THE ISSUE ON APPEAL

The trial court erred by not granting a new trial in light of newly discovered evidence of a previously undisclosed plea deal between the State and the sole cooperating co-defendant.

STATEMENT OF THE CASE¹

Appellant was arrested on or about June 5, 2010 and charged with seven criminal counts. He was eventually indicted, along with two co-defendants, for three counts of Attempted Murder, three counts of Attempted Armed Robbery, and one count of Possession of a Weapon During the Commission of a Violent Crime. Indictments 2010-GS-15-00501 - 00507. He and one co-defendant were tried by a jury in the Colleton County Court of General Sessions from August 29-September 1, 2011 with the Honorable Perry M. Buckner, III. presiding. *State v McMillan*, 2013-UP-317.

The jury returned a verdict convicting Appellant of three counts of Assault and Battery, First Degree, three counts of Attempted Armed Robbery, and one count of Possession of a Weapon During the Commission of a Violent Crime. *State v McMillan*, 2013-UP-317. Appellant was sentenced to 10 years for the assault convictions, 20 years for the robbery convictions, and five years for the gun charge with one assault sentence running consecutive to one of the robbery sentences. Sentencing Sheets.

Appellant filed a direct appeal arguing that the trial court should have struck a juror for cause. *State v McMillan*, 2013-UP-317. As framed on appeal, the Court of Appeals opinion “determine[d] solely whether Juror was impartial.” The Court of Appeals affirmed the trial

¹Additional information concerning the procedure of this case and the facts are contained in prior appellate opinions regarding Appellant’s convictions. See *State v McMillan*, 2013-UP-317 & 2022-UP-259.

court's refusal to dismiss Juror.

The South Carolina Supreme Court initially granted a petition of certiorari to entertain the direct appeal issue; however, the Court subsequently dismissed the petition as improvidently granted. *State v McMillan*, 2015-MO-035.

Appellant then filed an application seeking post conviction relief. PCR counsel argued that trial counsel was “ineffective for failing to request additional voir dire when juror information the clerk's office provided to trial counsel omitted a seated juror's disclosure that her husband was a reserve deputy for Colleton County Sheriff's Office, which investigated McMillan's case.” 2022-UP-259. The PCR court denied the application.

A Petition for Writ of Certiorari was filed and the Court of Appeals granted the petition and ordered briefing. 2022-UP-259. After oral argument, the Court of appeals affirmed the PCR court's denial of post conviction relief, as modified. *Id.* The Court of Appeals modified the PCR court's denial by concluding that there was no overwhelming evidence of guilt. *Id.*

However, between the briefing on the appeal and the oral argument, Appellant filed a Motion for a New Trial Based Upon After Discovered Evidence, pursuant to SCRCrimP Rule 29(b). Motion for a New Trial Based Upon After Discovered Evidence. A merits hearing was held on this Rule 29 motion on July 12, 2023. Transcript, July 12, 2023.

Testimony was received and exhibits were entered into evidence. Transcript, July 12, 2023 and Exhibits. Appellant called cooperating co-defendant Davis to the stand but he invoked his rights against self-incrimination to the question germane to this appeal. Transcript July 12, 2023, p. 22-53. Appellant moved for the trial court to compel Davis' testimony but this was denied. *Id, passim.*

Subsequently, the trial court conducted two status hearings outside the presence of Appellant. Transcripts, August 31, 2023 and October 12, 2023. The trial court then requested a proposed order denying relief. Undersigned filed an objection to this proposed order. See Objections. Ultimately, the trial court denied the Rule 29 motion. Order Denying Motion for a New Trial.

A Notice of Appeal was filed and served and this brief follows. Notice of Appeal and Proof of Service.

STATEMENT OF THE FACTS

At trial, the State presented one witness who identified Appellant as a culpable party to the shooting an attempted robbery spree which was the subject of the trial. Transcript, July 12, 2023, McMillan Ex. 1, p. 260, l. 2- 20. This witness was James Davis (Davis). Transcript, July 12, 2023, McMillan Ex. 1. Mr. Davis testified that he, co-defendant David Jakes (Jakes) and Appellant were involved in an incident on the off-ramp of Interstate 95 in which they attempted to rob what appeared to be two stranded female motorists. *Id.*, p. 260-266.

Davis testified that Jakes and a male who was the husband and son of the two females became involved in a shootout. *Id.*, p. 261-262. Jakes was injured in this shootout. *Id.*, p. 265, l. 5. Davis testified that Appellant suggested they engage in this robbery but did not leave the vehicle. *Id.*, p. 260-265.

No other witnesses placed Appellant at the scene. One other state's witness, Shaquita Bryant, testified she heard that Appellant was later seen in the car with a co-defendant who was injured in the shootout. Trial Transcript, p. 271, l. 15 - p. 25. Ms. Bryant expressly denied seeing Appellant in the car. Trial Transcript, p. 277, l. 14 - p. 278, l. 25. No forensic evidence

linked Appellant to the shooting. In fact, the Court of Appeals has previously opined that there was no overwhelming evidence of guilt presented against Appellant. 2022-UP-259 This was not appealed and should be considered the law of the case.

Davis testified at trial that he was offered a deal to stay out of prison if he cooperated but that this deal had expired. Transcript, July 12, 2023, McMillan Ex. 1, p. 285. He did not testify that the charges against him would be dismissed. *Id.* He stated at trial that his testimony was not the result of a deal between him and the state. *Id.*, p. 285-286.

Davis later provided a statement to a private detective hired by Jakes. Transcript, July 12, 2023, McMillan Ex. 4. In this statement, he indicated that he had struck a deal with the state. *Id.* After learning of this statement, undersigned² learned that Davis' charges were no longer listed on the public index. Transcript, July 12, 2023, p.18, l. 5-11.

After undersigned filed a Motion for a New Trial based upon After-Discovered evidence, a hearing was held. Transcript, July 12, 2023. At this hearing, the trial court ordered that the 14th Circuit Solicitor's Office and the Colleton County Sheriff's Office provide any evidence regarding the disposition of the charges against Davis. Objections to Proposed Order, Exhibit B. The only item produced was an expungement order. Objections to Proposed Order, Exhibit C.

This expungement order indicated that Davis' charges were dismissed within one month of his testimony. *Id.* Further, this dismissal was made without any further hearings in Davis' case. No documentation regarding the reasons the charges were dismissed has been produced.

Davis was called to the stand at the SCRCrimP Rule 29 (Rule 29) hearing. When

²Undersigned became counsel for Appellant in 2017 for the purposes of Petition for a Writ of Certiorari to challenge the denial of his PCR claims. This petition was granted and oral argument was held. Ultimately, the Court of Appeals denied relief.

questioned about the deal he had with the State, Davis repeatedly invoked his Fifth Amendment rights to not be compelled to incriminate himself. Transcript, July 12, 2023, p. 20 -53, passim. Davis was represented at this hearing by counsel who was a member of the General Assembly³. Transcript, July 12, 2023, p. 7, l. 16 - 17.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. *State v. Baccus*, 625 S.E.2d 216, 220 (2006).

Appellate courts typically review a trial court's ruling on a motion for a new trial pursuant to an abuse of discretion standard. *State v Dean*, 828 SE2d 243, 248 (SC 2019). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v King*, 810 SE2d 18, 22 (SC 2017).

Questions of law are reviewed *de novo*. *State v Adams*, 763 SE2d 341, 344 (SC 2014). This is consistent with a litany of cases applying *de novo* review to mixed questions when the conclusions require review of a constitutional issue. See *State v. English*, 902 S.E.2d 385, 388–89 (SC 2024); *State v. Brewer*, 882 S.E.2d 156, 160 (SC 2022) (citing *United States v. Mathis*, 932 F.3d 242, 255 (4th Cir. 2019)); *State v. Miller*, 893 S.E.2d 306, 313 (2023); and *State v. Frasier*, 879 S.E.2d 762, 766 (2022).

³Davis' trial counsel at the time of his trial testimony and dismissal was also a member of the General Assembly. Transcript, p. 8, l. 20-22.

ARGUMENT

The prosecution violated Appellant’s due process rights by failing to correct false testimony concerning a previously undisclosed “wink wink” plea deal between the State and the sole cooperating co-defendant.

The trial court committed a mistake of law when he misconstrued the law concerning new trials. In his order, the trial court stated that a five factors must be proven by Appellant before a new trial can be granted. However, this five factor showing is only necessary as a prima facie hurdle to obtain leave to argue for the new trial.

Further, the trial court committed a mistake of law when he relied upon the law concerning recantations instead of the law concerning due process violations involving a prosecutor’s failure to correct false testimony. Appellant’s motion was based upon the due process clause as interpreted through *Napue v Illinois*, 360 US 264 (1959), and it’s progeny. This due process doctrine is generally considered to be part of the *Brady*⁴ doctrine but the trial court’s order failed to address this doctrine at all.

Also, the trial court erred by failing to require the government’s witness to answer questions about the truthfulness of his trial court testimony during the new trial hearing. At a minimum, the trial court should have drawn an inference from this invocation of the right to remain silent if not requiring the testimony on this subject.

Law Concerning New Trials and False Statements

In South Carolina, for one to make a motion for a new trial based upon after discovered evidence, the “movant [must make] a requisite showing that the new evidence: (1) would likely change the result if a new trial were granted; (2) was discovered since trial; (3) could not have

⁴*Brady v Maryland*, 373 US 83 (1963).

been discovered prior to trial by the exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” *State v. Dean*, 828 S.E.2d 243, 249 (Ct. App. 2019)(Internal citations omitted). Once that showing is made, the decision to grant the motion or deny the motion is left to the discretion of the trial court. *Dean*.

While two appellate cases, *State v Harris*, 706 SE2d 526 (SC Ct App 2011) and *State v Spann*, 513 SE2d 98 (SC 1999), indicate that the new trial can only be granted if the five factors are proven; this is a misstatement of law. The originating case for this test, *State v Prince*, 447 SE2d 177, 184 (SC 1993) makes clear that these five factors are only required to be prima facially shown “in order to obtain leave to seek a new trial.” The *Dean* court correctly states the test as found in the *Prince* case. After this showing and a hearing is held, the decision to grant the new trial rests in the discretion of the trial judge.

The United States Supreme Court categorically condemns the utilization of false testimony. In fact, for more than three quarters of a century, the Supreme Court has unequivocally indicated that the failure to correct the knowing presentation of false testimony will result in reversal of any conviction obtained therewith. *Mooney v. Holohan*, 294 US 103 (1935). In *Mooney*, the Court refuted the argument of the state attorney general that due process is satisfied when the “state has contrived a conviction...through deliberate deception of court and jury by the presentation of testimony known to be perjured.” *Mooney*, at 112. The Court held that “[s]uch a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.” *Id*, at 112.

More than half a century ago, the United States Supreme Court reversed a murder

conviction based upon a prosecutor's failure to correct false testimony regarding a plea agreement struck between the state and a cooperating witness. *Napue v. Illinois*, 360 US 264 (1959). In *Napue*, the Court reviewed the constitutionality of a murder conviction obtained, in part, by the testimony of a cooperating co-defendant. At the trial, the co-defendant testified that he had not struck any plea bargain with the state's attorney. This was false and this false assertion went uncorrected. The Supreme Court held that the prohibition on the use of false testimony applied even when the "false testimony goes only to the credibility of the witness." *Napue*, at 269. The Court continued to note that a "lie is a lie..." and that it was "of no consequence that the falsehood bore upon the witness' credibility rather than directly..." on the question of guilt. *Id.*, at 269-270 (internal citations omitted).

Similarly, the South Carolina Supreme Court has granted relief in published opinions addressing *Napue* claims. See *Riddle v. Ozmint*, 631 SE2d 70 (SC 2006). In *Riddle*, the state Supreme Court reversed a murder conviction, in part, because the state presented a witness's testimony that proved to be false and allowed that testimony to go uncorrected. In that case, a cooperating co-defendant falsely testified regarding the number of times he met with authorities to discuss his testimony. The state Supreme Court granted relief noting that the "issue is not why [witness] failed to tell the truth: rather, it is why the solicitor, who knew [witness'] testimony to be false, failed to correct it." *Riddle*, at 75. The Court reaffirmed the notion that the "failure to correct false evidence is as reprehensible as its presentation." *Id.*

In *State v Dean*, the South Carolina Court of Appeals reversed a conviction following an after-discovered evidence motion citing an undisclosed "understanding" between the prosecution and the state's witness. *State v. Dean*, 828 S.E.2d 243, 250 (SC Ct. App. 2019). In *Dean*, the

State's witness testified there were no deals. The Court of Appeals found that the later-discovered deal was newly-discovered evidence, that the cooperating witness was the sole witness implicating Dean and that the "understanding" constituted a deal.

In *State v Corey Brown*, the South Carolina Supreme Court found that due process was violated when the prosecution failed to disclose plea negotiations even in the absence of a formal deal. *State v. Brown*, 894 S.E.2d 525, 529 (SC 2023), reh'g denied (Dec. 12, 2023). Like the facts of the present case and those in *Dean*, the non-disclosure issue was raised through an after-discovered evidence motion. The *Brown* court "conclude[d] that a formal agreement is not always necessary to warrant disclosure" and reversed the convictions and granted a new trial. *Brown*, at 529.

Application to the Facts

The trial court erred as a matter of law because he misapplied the rule concerning new trials. In his order, he cited the five factor test as the rule for his decision as to whether to grant or deny Appellant's new trial motion. The trial court's order erroneously indicates that Appellant had to prove and not just raise an issue concerning these factors before he could grant relief.

This is not the law as espoused in *Dean* or *Prince*. Both of these cases were published prior to the issuance of the trial court's order. For this reason alone, the order denying the new trial should be reversed.

Further, the trial court erred by relying upon law concerning witness recantations. This was also an error of law as Appellant's motion for a new trial relied upon the uncorrected false statement concerning the deal and not the recantation. While it is true that Davis' recantation in the statement to the private investigator revealed the otherwise undisclosed deal, the existence of

the deal is proven circumstantially.

These circumstances include the closeness in time between the trial testimony and the dismissal and expungement of the charges. The existence of the deal is also proven by the fact that an outright dismissal was a better outcome for Davis than the pre-trial offer of staying out of jail that Davis let expire. Finally, the invocation by Davis of his right to remain silent when asked about the truthfulness of his trial testimony about the deal raises an inference that the testimony was false.

This proof is separate and apart from the after provided statement of Davis. The non-disclosure is clear from Davis' trial testimony. The newly discovered statement of Davis is just additional evidence of the false trial testimony.

Appellant's new trial motion clearly cites *Giglio v United States*, 405 US 150 (1972), in support of the proposition that the evidence, including but not limited to Davis' post-trial statement, proves a "non-disclosure of a 'wink wink' deal" which violates due process. Motion, page 6. Unfortunately, the trial court's order does not even mention any of the due process line of cases cited in the motion or argued at trial. This omission occurs even though undersigned filed an objection to the proposed order pointing out this shortcoming.

Instead, had the trial court applied the due process doctrine to the facts, he would have granted Appellant relief. The evidence showed a deal, even if unspoken, between Davis and the State. The circumstances surrounding the outcome of Davis' case prove this deal.

Again, Davis's deal to avoid prison but not felony convictions was not accepted. However, his charges were dismissed outright within one month. Outright dismissal is such a difference in kind that there is no other way to construe this outcome as a benefit to Davis to

which he was not otherwise entitled.

The timing of this dismissal, within one month of his testimony, demonstrates Davis received his benefit as a result of his testimony. The closeness of time is evidence of the causal relationship between Davis' testimony and his benefit. Further, the fact no other proceedings were held demonstrates this was a wink-wink deal struck between the State and Davis before he testified.

The invocation of Davis' right against self-incrimination is also proof of this deal. Davis' trial testimony about no deal and his statement to the private investigator that there was a deal are mutually exclusive. If one is true, then the other is false.

Davis would face no criminal liability for lying to private investigator. Conversely, Davis would incriminate himself if his trial testimony was false. Thus, the Davis' invocation of his right against self-incrimination is evidence of the existence of a deal and the false nature of his trial testimony. Thus, an adverse inference is appropriately drawn from Davis' invocation of his right to remain silent. The trial court's failure to draw this inference is a compounding error of law⁵. Likewise, the trial court also should have held the absence of any records in the prosecutor's file about the reason for the dismissal of Davis' charges against the State and in favor of Appellant.

Because the State failed to correct Davis' testimony about a deal during Appellant's trial, the trial court should have found that the due process *Brady* doctrine espoused in the *Napue* and

⁵While Appellant seeks a reversal of his convictions and a new trial, he would also request an alternate remedy of remand to obtain Davis' testimony which was barred by the invocation of his right to remain silent. This would naturally involve some type of judicial immunity to protect both Appellant's and Davis' interests and produce the truth.

Riddle line of cases was violated.

CONCLUSION

Therefore, this Court should reverse the trial court's denial of the motion for a new trial, vacate Appellant's convictions and sentences and remand this matter for a new trial. As an alternate remedy, this Court should remand this matter to allow undersigned to question Davis and disallow his invocation of the right to remain silent to hide uncorrected false testimony.

Respectfully submitted by,

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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Initial Brief complies with SCACR Rule 208.

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