STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
OCT 12 2017
SC Court of Appeals

Appeal from Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2016-001004

STATE OF SOUTH CAROLINA,

Appellant/Respondent,

vs.

EDWARD LEE DEAN,

Respondent/Appellant.

INITIAL REPLY BRIEF OF STATE

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

P. O. Box 516
Greenwood, SC 29649-0516
(864) 942-8800

ATTORNEYS FOR APPELLANT/RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT

The trial court erred as a matter of law by granting Respondent a new trial when no right of Respondent was violated and the trial court found no discovery violation occurred. 1

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Commonwealth v. Burkhardt, 833 A.2d 233 (Pa. Superior Ct. 2003) 4, 5

Juniper v. Warden, 707 S.E.2d 290 (Va. 2011) 5

Smith v. State, 407 S.C. 270, 273, 754 S.E.2d 900, 902 (Ct. App. 2014) 5

Spearman v. Commissioner, 138 A.3d 378, 408-09 (Conn. App. Ct. 2016) 5

State v. Benton, 85 S.C. 107, 67 S.E. 143 (1910) 6

State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) 3

State v. Cain, 419 S.C. 24, 795 S.E.2d 846 (2017) 2

State v. Flood, 257 S.C. 141, 146, 184 S.E.2d 549, 552 (1971) 1

State v. Gracely, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012), ... 3

ARGUMENT

The trial court erred as a matter of law by granting Respondent a new trial when no right of Respondent was violated and the trial court found no discovery violation occurred.

Respondent Dean's motion for new trial was premised upon the allegation of a discovery violation by the State. The State clearly disagreed that a discovery violation occurred and opposed the motion. Despite the State opposing Dean's motion, Judge Addy granted Dean a new trial over concerns he failed to keep his promise to retain jurisdiction over Dean's co-defendant. However, Dean has no constitutional right or legitimate interest in the punishment meted out to a co-defendant, so Judge Addy should have denied the motion. The issue is preserved, contrary to Dean's argument otherwise.

During the hearing on Dean's motion, Solicitor Stumbo addressed jurisdiction, commenting the extent of Judge Addy's prior request to retain jurisdiction was unclear.[1] He noted in hindsight he wished he advised Judge Addy in advance that he was allowing Gaston to plea to Eighth Circuit charges in Saluda.[2] He further contended that it was not improper reduce Gaston's charges a year after Dean's trial. He then discussed the plea hearing before Judge Russo. He noted the State did not in any way suggest Gaston should receive probation, and concluded, "So all that to say, Judge, I think we extended the same offer that Mr. Dean had gotten pre-trial in his case about a year or more after he testified. **And I don't know how that in any way, shape, or form was improper**." NT Tr. p. 9, line 6 – p. 10, line 14.

---

[1] Judge Addy commented that his own recollection, later corrected by the transcript, was that he simply asked to stay apprised of the situation. Tr. p. 11, lines 10-20.
[2] See State v. Flood, 257 S.C. 141, 146, 184 S.E.2d 549, 552 (1971) (The solicitor has a broad

In other words, Solicitor Stumbo explained reducing Gaston's charge and letting him plead straight-up before Judge Russo was not improper. Dean styles his explanation for Judge Addy granting a new trial as follows: "The Solicitor's Office did not provide Mr. Dean 'procedural justice.'" Br. of Resp. p. 28. This argument reflects the flip-side of Solicitor Stumbo's argument that what he did was not improper. Because Solicitor Stumbo addressed the retention of jurisdiction issue, the plea before Judge Russo, and the plea negotiations, and concluded that the State did nothing wrong, the issue is preserved for appeal. See State v. Cain, 419 S.C. 24, 795 S.E.2d 846 (2017) ("While a party may not argue one ground at trial and another ground on appeal, . . . we do not require a party to use the same language on appeal as it did at trial, ... We find Cain's argument at trial and his argument on appeal is the same: that [expert witness's] testimony was not sufficient to prove the quantity element of "ten grams or more.") (Citations omitted). In the instant case, the State's argument below and on appeal are the same: Neither the fact that the State negotiated with Gaston's attorney a year after Dean was convicted or the fact that Gaston pled in front of Judge Russo warranted granting Dean a new trial. To use Dean's own phrase, Solicitor Stumbo argued Dean received "procedural justice" (Resp. Br. p. 28) when Solicitor Stumbo argued he did not do anything improper "in any way, shape, or form." Accordingly, Dean's argument that the issue is not preserved is without merit.

Dean claims Gaston perjured himself at trial. However, there is no evidence of this. Gaston was asked if he was testifying to get out of trouble and he denied it. That proved true. Gaston did not get out of trouble. He was convicted and received a prison sentence suspended on probation. If

---

discretion deciding the order in which cases are called).

he violates probation, he could serve up to seven years imprisonment. Therefore, Gaston did not get out of trouble. Gaston was also asked if he was planning to enter into plea negotiations with the Solicitor. From the record it appears he did not negotiate a plea with the solicitor. Instead Mr. Geoly negotiated on his behalf. This is consistent with his hope that Mr. Geoly would get Gaston his freedom. Trial Tr. p. 101. Gaston's admitted hope for freedom also contradicts any misunderstanding that Gaston intended to receive a life sentence. Lastly, Dean's complaints that Gaston was lying when he said he faced a minimum fifteen year sentence on the burglary charges is preposterous. At the time of trial, Gaston was facing the minimum sentence and did not know that it would be reduced. The first degree burglary charge was reduced much later.

Dean's claim in his brief that a discovery violation occurred because of post-trial negotiations is absurd. He is alleging that his constitutional rights were violated because the State entered into negotiations with Gaston's attorney **after** Dean was tried and convicted. Dean's reliance on State v. Gracely, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012), State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) and the like, is misguided. In both of those cases, the Supreme Court found the trial court erred in limiting cross-examination on the amount of exposure the testifying co-defendant was facing. Dean cross-examined Gaston on the exposure he was facing. Trial Tr. p. 101. In neither Gracely or Brown did the Supreme Court suggest a discovery violation occurs or that the defendant's rights are violated when an agreement is entered into between a testifying co-defendant and the prosecution **subsequent** to the defendant's trial.

Shockingly, Dean claims the State should not have negotiated with Gaston after trial. This, Dean contends, constitutes a Brady violation. Dean's brief lacks any authority that suggests a post-

trial agreement with a testifying co-defendant constitutes a constitutional violation. In Commonwealth v. Burkhardt, 833 A.2d 233 (Pa. Superior Ct. 2003), the Superior Court rejected an argument similar to Dean's, finding "to decline to enter into plea agreements until after the Commonwealth is satisfied that a witness has testified truthfully represents a sound, professional policy that should not be discouraged." Id. at 243. Note the Pennsylvania court also found "for a District Attorney to indicate that truthful testimony and cooperation would be considered in future proceedings falls far short of any promise of leniency and represents nothing more than the type of general response that D.A.'s have been uttering for decades. It is the kind of general promise of which effective defense counsel is aware and for which counsel would examine a prosecution witness as a matter of course." Id. at 244. The Pennsylvania court rejected the contention that such a statement even required disclosure under Brady. Id. The court concluded, "a defendant's subjective hope and even expectation of more lenient treatment is not something the Commonwealth is required, or even able, to disclose." Id. A concurring judge wrote, "under those circumstances, the Commonwealth would not have any real way of knowing what the witness' expectations were." Id.

As in Burkhardt, whatever Gaston's conversations were with his counsel or what his private thoughts were, the State did not commit a discovery violation. This Court should decline Dean's invitation to invoke Rule 220(b), SCACR, because Judge Addy found the Solicitor's explanations credible and declined to find a discovery violation.

The Virginia Supreme Court rejected a habeas petitioner's claim of a Brady violation finding the prosecutor made no deals or promises to an informant, Smith, in exchange for testimony finding instead that the prosecutor, subsequent to the petitioner's trial, joined the informant's motion to

reconsider his sentence "because Smith testified twice at petitioner's trial and because Smith was receiving threats as a result of his cooperation." Juniper v. Warden, 707 S.E.2d 290 (Va. 2011). In the instant case, the Solicitor only reduced the first degree burglary charge after trial because Gaston testified truthfully, even in the face of harassment by Dean and his family. The Solicitor's decision to negotiate with Gaston's attorney only after Gaston testified was a wise decision, as the Burkhardt court noted. For instance, in Smith v. State, 407 S.C. 270, 273, 754 S.E.2d 900, 902 (Ct. App. 2014), the State ended up being found in breach of its agreement even after the applicant minimized his conduct and gave inconsistent statements that resulted in the prosecution being unable to use the applicant as a witness against his co-defendant due to his credibility issues. See also Spearman v. Commissioner, 138 A.3d 378, 408-09 (Conn. App. Ct. 2016) (noting "our case law has recognized that explicit agreements or understandings between a witness and the prosecutor or the police must be disclosed . . . but an unexpressed intention by the state not to prosecute a witness does not.").

Dean's motion for new trial was based on his counsel's unflappable belief the State made a secret deal for leniency with Dean's co-defendant, Adrian Gaston. However, the new trial was not granted based on Dean's baseless allegation that the State failed to disclose a plea bargain. Judge Addy clarified, "I don't see where the Court has any reason to doubt the representations that have been made by the attorneys for the State." New Trial Motion (NT) Tr. p. 10, lines 20-24. Judge Addy, expressing his concerns, explained, "[W]hat this Court is struggling with more than anything else is the integrity of the Court, not so much your integrity, Solicitor." NT Tr. p. 12, lines 10-12. He explained he was "more concerned about the promises that I made to Mr. Dean, to retain jurisdiction over the other co-defendants." NT Tr. p. 12, lines 13-16.

In State v. Benton, 85 S.C. 107, 67 S.E. 143 (1910), the trial court granted a new trial based on an irregularity, the absence of a seal for the writ of venire. The Supreme Court reversed, noting that an irregularity in a writ of venire facias is insufficient to set aside a verdict absent injury to the party from the irregularity or objection made before the verdict. Id. Accordingly, the Supreme Court reversed the trial court because the reason provided for granting a new trial was not a sufficient one. Likewise, Judge Addy granted a new trial on an insufficient basis unrelated to the issue of whether Dean received a fair trial.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court's grant of a new trial, and the judgment and conviction should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: ______________________
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT/RESPONDENT

October 12, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenwood County
Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No: 2016-001004

RECEIVED
OCT 12 2017
SC Court of Appeals

THE STATE.

Appellant-Respondent,

vs.

EDWARD LEE DEAN,

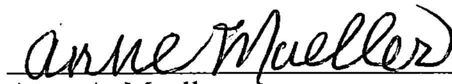
Respondent-Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the Initial Reply Brief of State on Respondent-Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, E. Charles Gross, Jr., Esquire, 404 Main St., Greenwood, South Carolina 29646.

I further certify that all parties required by Rule to be served have been served.

This 12th day of October, 2017.



Anne A. Mueller
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

October 12, 2017

RECEIVED
OCT 12 2017
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Edward Lee Dean
Appellate Case No: 2016-001004

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Initial Reply Brief Brief of State, including proof of service, in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: E. Charles Gross, Jr. (with two copies)
Victim Advocacy Division