STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2021-UP-253

THE STATE,

APPELLANT,

V.

COREY JERMAINE BROWN,

RESPONDENT.

APPELLATE CASE NO. 2018-001289

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, respondent, Corey Jermaine Brown requests that this Court grant rehearing because the lower court properly granted respondent a new trial. The Court's opinion errs in its application of the highly deferential standard of review. The Court stated the correct standards, but misapplied them in this case.

As this Court correctly stated, Judge Griffith's Order cannot be disturbed on appeal unless his findings are "wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Op. at 2, citing Brinkley v. S.C. Dep't of Corr., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). The lower court's findings—including the inferences that can be drawn from those findings—are entitled to substantial deference.

Trial judges' findings are entitled to deference from appellate courts because they have the opportunity to observe the witnesses and pass on their credibility. Judge Griffith's ability to observe all of the evidence and witnesses during the trial put him in the best position to determine the materiality of the State's failure to disclose its negotiations with Evans. Brady v. Maryland, 373 U.S. 83, 87 (1963); Kyles v. Whitley, 514 U.S. 419, 432-42 (1995); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010); Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). This Court also did not adequately consider the testimony of Evans during the trial, the solicitor's questions, and closing argument. The inferences Judge Griffith drew from the totality of these circumstances supported the grant of the new trial.

Judge Griffith watched the solicitor begin his direct-examination of Evans by stating, "All right. And let's just, we're going to be **real open with the jury**, so let's just get it, get out there. You're in a jumpsuit and cuffs?" R. 203, ll. 10 – 12 (emphasis added). When the solicitor next asked Evans what charges had him in jail, Evans responded, "Armed robbery and kidnapping." R. 203, ll. 14 – 15. The solicitor confirmed he was a co-defendant of respondent. R. 203, ll. 16 – 18. The solicitor then asked Evans whether he had promised him anything to testify, to which Evans responded he was there to tell the truth. R. 203, l. 19 – 204, l. 6. The solicitor then began his elicitation of Evans' prior convictions by saying, "Well, let's talk **also, again, we're being open with everybody**." R. 204, ll. 7 – 10 (emphasis added).

The solicitor told the jury in closing argument that Evans had changed his story, but "eventually, he told the truth." R. 411, ll. 6 – 12. He further said of Evans, "He came up here and both him and Mr. Nicholson, for lack of a better term, stuck their head in the noose." R. 411, ll. 12 – 14. A four-year sentence is a far cry from a "noose."

Judge Griffith took Evans' plea, which was held in a different county. His familiarity with all aspects of the case led to his shock when he discovered the deals offered to Evans. Judge Griffith stated, "I mean, for [respondent's counsel] to know he turned down thirteen and

decided to start speaking to you to me is a fact that would be important. Because I didn't—and this is the first I'm hearing of it today and so I'm kind of like wow." R. 504, ll. 4 – 8. The inference that was obvious to the trial judge—and is entitled to deference here—is that by turning down the thirteen year offer, which had no compensation for testimony and then testifying, Evans knew his deal would improve. As Judge Griffith saw firsthand at the Evans' plea, Evans avoided a potential life sentence for kidnapping and a mandatory minimum sentence on the armed robbery charge, all of which would have been important fodder for cross-examination. See State v. Williams, 432 S.C. 515, 524, 854 S.E.2d 166, 170 (Ct. App. 2021) (finding trial court erred in refusing to allow appellant to cross-examine witness about potential sentencing exposure for pending charges); State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012).

This Court also erred in following Eleventh and Eighth Circuit federal precedent instead of the Fourth and Fifth Circuit cases cited by respondent. This Court favorably cited Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999) and United States v. Rushing, 388 F.3d 1153 (8th Cir. 2004). Op. at 3-4. The Court cited these cases for the propositions that agreements that are too ambiguous or rejected do not have to be disclosed to the defense. Op. at 3-4. However, the evidence before Judge Griffith was that the experienced criminal Evans knew that he would receive something significantly better than the State's thirteen-year offer.

Again, the standard of review bears on which cases are relevant precedent. In the Fourth Circuit case of Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976), the court wrote, "Finally, we note that rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy." The solicitor agreed that defense counsel did not know "the whole timeline" of the negotiations which would have shown Evans' tentativeness in testifying until he got the deal he wanted. In Tassin v. Cain, 517 F.3d 770, 778-79 (5th Cir. 2008), the Fifth Circuit emphasized the prosecutor's capitalization on the witness's

false testimony. Respondent could have argued that because Evans had previously served time for robbery and knew how to bargain, he knew that he could do better than the thirteen years he rejected. Evans knew he was not sticking his head in "the noose" as the solicitor argued to the jury. R. 411, ll. 12 – 14. This argument would have been true because, as the trial judge found from the tapes, Evans expected a more favorable plea offer to nonviolent offenses.

The trial court's position to judge Evans' testimony and the potential impact on a jury of the negotiations was entitled to deference and requires affirmance. Judge Griffith's findings, inferences, and conclusions are not wholly unsupported by the evidence. For these reasons and those in respondent's brief, this Court should grant rehearing and uphold the lower court's order of a new trial.

s/David Alexander
David Alexander
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ATTORNEY FOR RESPONDENT

This 21st day of July, 2021.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon William M. Blitch, Jr., Esquire at the primary e-mail address listed in the Attorney Information System (AIS); and on Corey Jermaine Brown, #361112, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 21st day of July, 2021.

s/David Alexander
David Alexander
Appellate Defender

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ATTORNEY FOR RESPONDENT