STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2021-UP-253 (S.C. Ct. App. Filed July 7, 2021)

Lower Court Case Nos. 2013-GS-24-01872;
2013-GS-24-01873; and 2014-GS-24-01262

THE STATE,

RESPONDENT,

V.

COREY JERMAINE BROWN,

PETITIONER.

APPELLATE CASE NO. 2018-001289

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

The Court of Appeals erred in reversing the trial court's grant of a new trial where the solicitors admitted that plea offers extended to the testifying co-defendant were not disclosed to the defense and ample evidence supported the court's ruling. 4

CONCLUSION 12

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 29, 2021.

QUESTION PRESENTED

Whether the Court of Appeals erred in reversing the trial court's grant of a new trial where the solicitors admitted that plea offers extended to the testifying co-defendant were not disclosed to the defense and ample evidence supported the court's ruling?

STATEMENT OF THE CASE

On August 12, 2014, Corey Jermaine Brown was tried before the Honorable Eugene C. Griffith and a Greenwood County jury for kidnapping, armed robbery, conspiracy to commit armed robbery and kidnapping, and conspiracy to commit grand larceny. R. 20, ll. 8 – 13. Aaron Taylor and Elizabeth White represented the State. R. 14. Jane Merrill represented Brown. R. 14. Brown's co-defendant who was tried in absentia, Christopher Johnson, was represented by Billy Nicholson. R. 14. The jury convicted Brown of conspiracy to commit grand larceny, armed robbery, and kidnapping and acquitted Brown of conspiracy to commit armed robbery and kidnapping. R. 472, ll. 13 – 23. Judge Griffith sentenced Brown to a total of twenty-five years' imprisonment. R. 488, ll. 1 – 4. After hearing Brown's motion for a new trial on October 6, 2014, Judge Griffith granted Brown a new trial in a written order filed June 1, 2018. R. 526.

The State appealed and on July 7, 2021, the Court of Appeals reversed the grant of a new trial and remanded to the trial court for further consideration. State v. Brown, No. 2021-UP-253 (S.C. Ct. App. July 7, 2021). The Court of Appeals denied both the State and Brown's petitions for rehearing and this petition for certiorari follows.

ARGUMENT

The Court of Appeals erred in reversing the trial court's grant of a new trial where the solicitors admitted that plea offers extended to the testifying co-defendant were not disclosed to the defense and ample evidence supported the court's ruling.

This Court should grant certiorari to correct the Court of Appeals' misapplication of the standard of review. The Court of Appeals stated the correct, highly deferential standard, but failed to properly apply it in this case. The lower court's findings—including the inferences that can be drawn from those findings—were entitled to substantial deference. The trial judge, who also took the plea from the co-defendant, was in the best position to determine that a new trial was required.

Factual and Procedural Background

The solicitor began his direct-examination of his star witness, Shadarron 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. When the solicitor next asked Evans the charges that had him in jail, Evans responded, "Armed robbery and kidnapping." R. 203, ll. 14 – 15. The solicitor confirmed he was a co-defendant of Brown. 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 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.

Evans testified that he had known Brown for a long time and that Brown took part in a group who sought to steal cars in Greenwood that resulted in the kidnapping and armed robbery of Latavious Spearman, one of the cars' owners. R. 205, l. 10 – 206, l. 21. R. 216, l. 11 – 228, l.

7. Evans minimized his involvement in the crime, claiming that he did not know that Spearman had been forced into the car at gunpoint until receiving a call from his co-defendant. R. 216, l. 11 – 228, l. 7. Spearman testified that after getting home from work, he saw a red dot from a laser sight on his chest and was confronted by a gunman. R. 117, l. 16 – 118, l. 18. Another man appeared and they robbed Spearman. R. 119, l. 2 – 120, l. 7. The men then forced Spearman into his own car and made him drive it away, following the car containing Evans. R. 120, l. 8 – 121, l. 11. The cars stopped and Evans, who Spearman identified for the jury, got in. R. 124, l. 20 – 125, l. 16. Spearman was able to escape into a gas station after fighting the gunmen and the police were called. R. 128, l. 15 – 138, l. 21.

Brown began cross-examination of Evans by asking, "if you were convicted of the charges that you've got right now, you might be looking at a lot of time in prison, is that right?" R. 249, ll. 9 – 12. Evans agreed. R. 249, l. 12. Brown then confirmed that Evans gave law enforcement different statements and had asked the police for a deal. R. 249, l. 13 – 250, l. 17. The police told Evans that if he told the truth, he might face a charge less than kidnapping or armed robbery. R. 250, ll. 14 – 17.

Ten days after the trial, Evans did receive a much less severe charge. R. 536 – 542, l. 20. Brown's trial judge, Judge Griffith, heard Evans' plea in Abbeville, not Greenwood, and Evans waived venue. R. 542, ll. 3 – 12. Evans waived indictment on a charge of false imprisonment. R. 541, ll. 12 – 24. He pled guilty to conspiracy to commit grand larceny and false imprisonment. R. 537, ll. 5 – 13. Judge Griffith sentenced Evans to four years' imprisonment for conspiracy and a consecutive eight years' imprisonment suspended to 48 months' probation. R. 549, l. 550 – 28, l. 11.

Brown received twenty-five years' imprisonment for kidnapping and armed robbery. R. 487, l. 25 – 488, l. 4. Judge Griffith granted Brown ten days to make post-trial motions. R. 176, ll. 9 – 14. Brown filed a motion asking for a new trial on multiple grounds, including the fact that after the trial, he learned that the State extended plea offers to Evans that were not disclosed. R. 512 – 513, 521. Brown stated in his motion that his counsel reviewed calls Evans made from prison discussing the offers. R. 512 – 513, 521.

Judge Griffith held a hearing on the motion and the solicitor stipulated that plea offers were not disclosed to the defense. R. 492, l. 13 – 494, l. 17. The solicitor stated that what he asked Evans on the stand was whether he had an offer to testify, which the solicitor said was true because no offer existed at the time of the testimony. R. 492, l. 13 – 494, l. 17. However, the solicitor agreed that the defense was not made aware that Evans was originally offered 18 years, which was countered with 10, which the State countered at 13, which the solicitor said had "nothing to do with testimony, just he was—Mr. Evans was gonna plead guilty." R. 492, l. 13 – 493, l. 9.

Evans declined the thirteen-year offer, but then said he had not been completely truthful and that he wanted to testify. R. 493, ll. 14 – 25. The solicitor told Evans and Evans' attorney "that there was no offer if he testifies." R. 493, ll. 16 – 24. Judge Griffith correctly seized on Evans' disclosure of his previous lack of candor after declining the thirteen-year offer. R. 503, l. 9 – 504, l. 8. Judge Griffith stated, "I mean, for her 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 solicitor's statements at the hearing were then confusing as he said Brown's counsel did not know "the

whole timeline of it" but also claimed he explained to defense counsel that Evans would be testifying against Brown. R. 503, l. 18 – 506, l. 16.

After taking the matter under advisement, Judge Griffith issued a written order finding, "The State did not disclose to Mr. Brown, or the tribunal, its offer to Evans or the discussions the solicitor had with Evans and his attorney." R. 527. The order granted Brown a new trial based on the findings in the order "and the evidence and arguments presented in the motion for a new trial and subsequent hearing." R. 527-528.

The Court of Appeals reversed, accepting the State's argument that no evidence in the record supported the conclusion that the State reached a deal with Evans. Ct. App. Op. at 2. Criticizing the trial judge's Order for lack of specificity, the Court remanded "to make specific findings on what basis the court is granting a new trial." Ct. App. Op. at 2-3.

Discussion

Judge Griffith's factual findings were entitled to substantial deference from the Court of Appeals. Judge Griffith acted within his discretion in granting Brown a new trial. "The suppression by the [state] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963). An individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the state; and (4) was material to the accused's guilt or innocence or was impeaching. 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).

Brady evidence includes both exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985); Kyles, 514 U.S. at 436-40. When assessing whether to

overturn a case because of the state's failure to disclose evidence, "[t]he question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.' " Riddle, 369 S.C. at 45, 631 S.E.2d at 73 (quoting Kyles, 514 U.S. at 434)).

The State must disclose promises made to witnesses. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). This disclosure includes evidence showing "more than a mere 'hope or expectation' of a lenient sentence. . . ." Tassin v. Cain, 517 F.3d 770, 778-79 (5th Cir. 2008). In Tassin, a witness testified that she might receive a 99 year sentence even though she expected much less. Id. Of importance to the Tassin court in reversing was the prosecutor's capitalization on the witness's false testimony in his closing argument. Id.

Here, Evans gave the impression that no deals existed and why that may have been technically true at that exact moment, the defense was unable to show the jury about the substantial negotiations between the State and Evans. 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."

The information about the plea negotiations was in the State's possession and not disclosed to the defense, satisfying two of the four prongs. The information was impeaching, material, and favorable to Brown. Evans' testimony, especially after the solicitor promised to "be real open with the jury," gave the clear impression that nothing had been offered to Evans and he was telling the truth solely to unburden his conscience.

Had the defense known that the State had offered Evans concrete reductions from the time he was potentially facing, it would have undermined the appearance that no deals of any kind were on the table. As Judge Griffith saw firsthand at 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).

Further, had the defense known the timing of Evans' supposed truthful version—after rejecting a thirteen-year offer—the defense could have argued that Evans reasonably expected much less time than thirteen years. See Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) ("Finally, we note that rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy.") Brown 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. 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. And, as found by the trial judge, Evans was right and received a deal for false imprisonment to which he waived presentment and pled guilty in a different county.

Brown requested deals made with any witnesses in his discovery motion. R. 495, ll. 10 – 17. R. 530. In a case cited at the hearing by Brown, the United States Supreme Court held, "We agree that the prosecutor's failure to respond fully to a Brady request may impair the adversary process in this manner." United States v. Bagley, 473 U.S. 667, 682-83 (1985). The Court addressed the materiality of the failure to respond as making it "more reasonable for the defense

to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decision on the basis of this assumption." Id. Here, the adverse trial decision was the inability to cross-examine Evans about his plea negotiations and his expectations.

The Court of Appeals also erred in following Eleventh and Eighth Circuit federal precedent instead of the Fourth and Fifth Circuit cases cited by respondent. The Court of Appeals favorably cited Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999) and United States v. Rushing, 388 F.3d 1153 (8th Cir. 2004). Ct. App. 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. Brown submits that Boone and Tassin are the relevant cases for analysis. Brown 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 required affirmance. Judge Griffith's findings, inferences, and conclusions were not wholly unsupported by the evidence. This Court should grant certiorari and reverse the Court of Appeals, leaving the trial judge's Order standing.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the decision of the Court of Appeals.

Respectfully Submitted,

s/David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of August, 2021.